IN THE COURT OF APPEALS OF IOWA

No. 9-907 / 08-2038
Filed December 30, 2009

DONNA JEAN DUWA,
Plaintiff-Appellant,

vs.

LUCINDA BROOKS,
Defendant-Appellee.

Appeal from the Iowa District Court for Johnson County, Denver D. Dillard, Judge.

Plaintiff Donna Jean Duwa appeals the district court's grant of defendant Lucinda Brooks's pre-answer motion to dismiss Duwa's personal injury petition. **REVERSED AND REMANDED.**

Eric D. Tindal of Nidey, Peterson, Erdahl & Tindal, P.L.C., Williamsburg, for appellant.

James Craig of Lederer, Weston, Craig, P.L.C., Cedar Rapids, for appellee.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ.

DOYLE, J.

Plaintiff Donna Jean Duwa appeals the district court's grant of defendant Lucinda Brooks's pre-answer motion to dismiss Duwa's personal injury petition. The district court found service of process was not completed within ninety days after the petition was filed. On our review for errors at law, *see* Iowa R. App. P. 6.4; *Crall v. Davis*, 714 N.W.2d 616, 619 (Iowa 2006), we reverse.

The facts are undisputed. Following a motor vehicle collision on June 16, 2006, allegedly caused by Brooks, Duwa filed a petition on June 6, 2008, seeking damages for injuries. On August 11, Duwa sent the petition and original notice to the Johnson County Sheriff with a letter requesting the petition be served on Brooks. The record shows that service was accomplished on September 15. On October 1, Brooks filed a pre-answer motion to dismiss, asserting the untimely service of process. Duwa resisted; Brooks replied to the resistance. The matter was decided by the district court after a review of the file and considering the written arguments of counsel.

The district court set forth the appropriate Iowa Rule of Civil Procedure governing service of original notice, rule 1.302(5). That rule provides:

> If service of the original notice is not made upon the defendant, respondent, or other party to be served within [ninety] days after filing the petition, the court, upon motion or its own initiative after notice to the party filing the petition, shall dismiss the action without prejudice as to that defendant, respondent, or other party to be served or direct an alternate time or manner of service. If the party filing the papers shows good cause for the failure of service, the court shall extend the time for service for an appropriate period.

Iowa R. Civ. P. 1.302(5). The rule required service by September 4, 2008. When, as here, there is no service within ninety days and no order extending

time for service, the only issue is whether the plaintiff has "shown justification for the delay." *See Crall*, 714 N.W.2d at 620. "The standard we employ in determining such justification is 'good cause.'" *Id*. The Iowa Supreme Court has instructed good cause means:

> [T]he plaintiff must have taken some affirmative action to effectuate service of process upon the defendant . . . . Inadvertence, neglect, misunderstanding, ignorance of the rule or its burden . . . [are] insufficient to show good cause. Moreover, intentional nonservice in order to . . . allow time for additional information to be gathered prior to "activating" the lawsuit . . . fall[s] short of . . . good cause . . . .

Henry v. Shober, 566 N.W.2d 190, 192-93 (Iowa 1997) (citations omitted). Additionally, good cause is generally found when the plaintiff has acted diligently and service is delayed as "a result of the conduct of a third person, typically the process server," or the defendant has evaded service or engaged in misleading conduct. *Wilson v. Ribbens*, 678 N.W.2d 417, 421 (Iowa 2004) (citation omitted). A plaintiff is required to act diligently in trying to effect service. *See Crall*, 714 N.W.2d at 621 (discussing that a plaintiff must be diligent in attempting to serve the defendants and a court may consider a lapse of time between service attempts with no explanation for the delay within the ninety-day time period).

We believe the plaintiff acted with the required diligence here. In her resistance to defendant's motion to dismiss, Duwa stated that after filing the petition her attorney "sought to obtain more information about the [d]efendant to avoid having her served at her place of employment." Additionally, she stated her attorney "made efforts to communicate with the [d]efendant's insurance company about the petition being filed and requested whether they would communicate with their insured about accepting service." That effort apparently

failed, and twenty-five days before the service deadline, Duwa's attorney sent the petition and original notice to the Johnson County Sheriff to be served upon the defendant. The defendant's work address and her mobile, direct line, and office phone numbers were provided. Duwa's resistance implies the Johnson County Sheriff's office did not notify her attorney that it could not locate the defendant. The record from the sheriff's office shows the defendant was served at an address other than her work address on September 15, 2008, eleven days after the ninety-day service deadline expired, or 101 days after filing the petition.

Duwa did take affirmative action to serve defendant within the ninety-day requirement. Her request to the Johnson County Sheriff's office to serve the suit papers was made sufficiently in advance to allow the sheriff to effect timely service. Ordinarily, one would not expect the sheriff's office to take over a month from the time of receiving the paperwork and instructions to effectuate service of process.[1]

Duwa explained the delay between filing and attempting to serve. The delay in service was short, unlike the more than 90-day delay in *Meier v. Senecaut*, 641 N.W.2d 532, 542 (Iowa 2002), and the 184-day delay in *Palmer v. Hofman*, 745 N.W.2d 745, 747 (Iowa Ct. App. 2008) (plaintiff's sole attempt to complete service was the initial delivery of the petition and original notices to the sheriff right after filing and no other action was taken until eight months had passed). Whether or not good cause for delay in service exists must be

[1] Early in Iowa's legal history, delivery to the sheriff of an original notice established a presumption that service was to be made immediately. Miller's Code § 2532 (1880); *see also Snyder v. Ives*, 42 Iowa 157, 163 (1875). There is no reason to believe this presumption has been discarded. In any event, there is nothing in Duwa's request to the sheriff to suggest any intent other than a request for immediate service.

examined on a case-by-case basis. *See generally Mokhtarian v. GTE Midwest Inc.*, 578 N.W.2d 666, 668 (Iowa 1998) (applying the applicable delay in service principles and comparing the facts in that case with those in other delay-in-service cases). The length of delay in service must be taken into account, as well as the explanation for the delay. *See Turnbull v. Horan*, 522 N.W.2d 860, 861 (Iowa Ct. App. 1994). We conclude, under the circumstances presented, that Duwa has shown good cause for the short delay in service beyond the ninety-day deadline.[2] The district court erred in finding otherwise.

While these cases are decided on an individual basis, we find support for our ruling today in the supreme court's decision in *Falada v. Trinity Industries, Inc*., 642 N.W.2d 247 (Iowa 2002). There the plaintiff waited until the eighty-ninth day to effectuate service and did so on the wrong "Trinity Industries," *i.e*., a company other than the one she intended to sue. *Falada*, 642 N.W.2d at 249. Nonetheless, the supreme court upheld the district court's decision not to dismiss the case for failure to serve a timely original notice. *Id*. at 249-50. The supreme court did so despite the defendant's arguments that the plaintiff "could have been

[2] It would have been preferable for plaintiff's counsel to apply to the court for an extension of time for service before the deadline if there were any question as to whether service could be accomplished within the deadline. In view of the short delay here and the considerably greater diligence of the plaintiff, this case is unlike *Crall*, 714 N.W.2d at 616. In *Crall*, service was not attempted until fifty days after filing, and *no* explanation for the delay was offered. *Crall*, 714 N.W.2d at 617, 621. The defendant moved to dismiss for improper service, explaining that she did not reside at that address, and disclosed the proper address at which service could be made. *Id*. at 617. At that point, over two weeks remained in the ninety-day period provided by rule 1.302. *See id*. at 617-18. Even then, no attempt was made to serve the defendant at her home until four days before the expiration of the ninety-day deadline. *See id*. at 618. At that point, plaintiff learned the defendant was temporarily visiting her daughter in California, where service had originally been attempted, but made no attempt to serve her personally there. *Id*. In view of those circumstances, the supreme court concluded a request for an extension of time for service was not merely preferable, but required. *See id*. at 621-22.

more diligent within the ninety-day window for service," and that if an attempt to serve had been made before the eighty-ninth day, a proper and timely service would have occurred. *Id*. Here, too, one can argue the plaintiff could have been "more diligent" (although the plaintiff was far more diligent than the plaintiff in *Falada*), but the bottom line is the plaintiff here pursued a reasonable course of action to effectuate service within ninety days. We do not believe the plaintiff should suffer a total loss of her claim where the sheriff's office inexplicably took over a month to serve the original notice.

We therefore reverse the ruling of the district court and remand for an order reinstating plaintiff's petition.

REVERSED AND REMANDED.

Mansfield, J., concurs; Vogel, P.J., dissents.

VOGEL, P.J. (dissenting)

I respectfully dissent. This is a very close case, and I agree with the majority that the plaintiff should not be punished for any delay within the sheriff's office in failing to carry out service of process. Nonetheless, in her resistance to defendant's motion to dismiss, plaintiff merely stated, "For reasons that the undersigned cannot explain, service was not rendered on the Defendant until September 15, 2008." The district court then found, "Plaintiff has not provided the Court with any indication that service was delayed because of any action or inaction by the Johnson County Sheriff, and Plaintiff made no effort to extend the time for service when service had not been completed on or before September 4, 2008." This was plaintiff's burden: to demonstrate "good cause" for the delay. *See Wilson v Ribbens*, 678 N.W.2d 417, 420 (Iowa 2004) (stating that the court cannot ignore a requirement to achieve what appears to be the best result in a particular case; the rules pertaining to service of process serve a definite purpose to establish an orderly process, essential in court proceedings so that those involved may know what may and may not be done, and confusion may be avoided.)

Following the mailing of request for service on August 11, 2008, plaintiff made no effort to ensure timely service would be made. *See Meier v. Senecaut*, 641 N.W.2d 532, 542 (Iowa 2002) (stating that in order to show good cause justifying delay, the plaintiff must have taken some affirmative action to accomplish service of process upon the defendant, or through no fault of her own, have been prohibited from doing so. Inadvertence, neglect, misunderstanding, ignorance of the rule or its burden, or half-hearted attempts at

service are generally not considered good cause). Nor did plaintiff apply to the court for an extension of time to serve, when it appeared to plaintiff service would not be timely made. *See Wilson*, 678 N.W.2d at 420 (explaining that the court shall extend the time for service for an appropriate period if the plaintiff shows good cause for the failure of service). As the record is devoid of substantial evidence of good cause, I would affirm the district court.