RENDERED: August 27, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000091-MR

LESLIE W. WEBB — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN D. MINTON, JR., JUDGE
ACTION NO. 95-CI-00725

CARL R. ROOP; FIRST CLASS SERVICES, INC. — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BUCKINGHAM, EMBERTON, AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Leslie W. Webb (Webb) has appealed from the judgment of the Warren Circuit Court entered on October 29, 1997, which summarily dismissed his complaint against Carl R. Roop (Roop), and First Class Services, Inc. (First Class Services)(collectively, the appellees), as time-barred. We affirm.

The facts underlying the issues in this appeal are not in dispute; however, the procedural history is somewhat convoluted. Webb was involved in an automobile accident in Warren County on July 19, 1993, allegedly caused by Roop, a

resident of Indiana, who, at the time of the collision, was acting within the scope of his employment with First Class Services, a Kentucky corporation, whose principal place of business was located in Hancock County. On July 17, 1995, within the two-year period permitted by the statute of limitations for the bringing of an action to recover damages for injury caused by motor vehicle mishaps,[1] Webb's attorney, whose office is located in Bardstown, Kentucky, mailed a complaint, which named Roop and First Class Services as defendants, to the Warren Circuit Court Clerk requesting that the complaint be filed. The letter accompanying the complaint provided as follows:

> I am enclosing our check payable to the Warren Circuit Court in the amount of $111.00 for the filing fee. We are also enclosing our check in the amount of $20.00 payable to the Warren County Sheriff for payment of his fees for the service of the two summonses, which we have also enclosed.
>
> We are asking that you file this no later than July 18, 1995, and also have the summonses issued and dated on that date.
>
> Please advise immediately if there is any question or problem concerning this transmittal.

The complaint was filed on July 18, 1995. Because Roop did not reside in Warren County, and because First Class Services did not have an agent or business located in Warren County, the clerk returned the summonses to Webb's attorney with an explanation that service of the summonses could not be accomplished by the Warren County Sheriff.

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[1]Kentucky Revised Statutes (KRS) 304.39-230(6).

Eighteen months passed before Webb's attorney forwarded the summonses to the appropriate authority for service. On January 10, 1997, he mailed one of the summonses to the Warren Circuit Court Clerk with the following request:

> Please find enclosed an original and one copy of a summons, along with an attested copy of the plaintiff's complaint, issued by your office on July 18, 1995, to be served on the defendant Carl R. Roop in the above-styled action. . . .
>
> I am returning it to you with the request that the summons b[e] executed pursuant to KRS 454.210 (3)(b) by your sending to the Kentucky Secretary of State by certified mail two (2) true copies of the summons issued by you on July 18, 1995, and two (2) attested copies of the complaint which we filed on behalf of the plaintiff.
>
> I am asking that a new summons **not be issued**, because I wish the original summons with the original filing date forwarded to the Secretary of State (emphasis in original).
>
> If there is any additional charge for this service, please contact me and we will forward you the amount owed immediately.

The clerk mailed the summons to the Secretary of State on January 15, 1997.

On January 24, 1997, the Warren Circuit Court gave Webb notice of its intent to dismiss the case pursuant to Kentucky Rules of Civil Procedure (CR) 77.02(2)[2], the "housekeeping" rule.

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[2]This rule provides, in part, as follows:

> At least once each year trial courts shall review all pending actions on their dockets. Notice shall be given to each attorney of record of every case in which no pretrial step has been taken within the last year, that the case will be dismissed in thirty days for want of prosecution except for good cause shown. . . .

(continued...)

A hearing was scheduled for February 27, 1997, for Webb to show cause why no pretrial steps had been taken in the past year. Webb's counsel did not respond to the court's notice, or attend the show cause hearing. Roop, who was served on February 8, 1997, and First Class Services, which had not yet been served, filed a joint response to the trial court's CR 77.02(2) notice. In addition to the trial court's sua sponte motion to dismiss for want of prosecution, they argued an alternate ground for dismissal--Webb's failure to cause them to be served within the limitations period. On March 3, 1997, the trial court dismissed the complaint under the housekeeping rule.

Webb, pursuant to CR 59, moved the trial court to reconsider its order of dismissal. The motion stated that Webb's attorney was ill on the date of the hearing. A doctor's note was attached to the motion indicating counsel had been too ill to work from February 25, to February 27, 1997. On June 11, 1997, the trial court set aside its order dismissing the action.

On July 22, 1997, First Class Services was finally served by the Hancock County Sheriff's Department.[3] On July 30, 1997, Roop and First Class Services moved the trial court to dismiss Webb's complaint pursuant to CR 12.02, in lieu of filing an answer. On August 21, 1997, the appellees amended their

[2](...continued)

[3]The record does not reveal when Webb's attorney sent the summons to the Hancock County Sheriff, but admittedly, that event did not occur prior to January 10, 1997.

motion to a motion for summary judgment so as to allow the trial court to consider matters outside of the pleadings.

In his response, Webb argued that the motion for summary judgment was premature as the appellees had not yet filed an answer asserting the affirmative defense of limitations pursuant to CR 8.03. Webb insisted that a CR 12.02 dismissal could not be based on a statute of limitations defense. On the merits of the motion to dismiss, Webb argued that his letter to the Warren Circuit Court of July 17, 1995, transmitting the complaint, the summonses, and the necessary fee for the service of the summonses, conclusively established that the action was commenced in "good faith" as contemplated by KRS 413.250[4] and that statute's counterpart in the rules, CR 3[5].

In granting the appellees' motion and dismissing the complaint, the trial court determined that Webb "did not exert a good faith effort to serve Defendants, thus failing to satisfy the requirements of KRS 413.250 and CR 3." Furthermore, the trial court rejected Webb's argument that the issue should not be resolved by way of motion for summary judgment, concluding as follows:

> First, CR 12.02 specifies that the defense of "insufficiency of process" need not be made in the responsive pleading and <u>may be made by motion</u>. Second, CR 12.02 also states that a

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[4]KRS 413.250 reads as follows: "An action shall be deemed to commence on the date of the first summons or process issued in good faith from the court having jurisdiction of the cause of action."

[5]CR 3 provides as follows: "A civil action is commenced by the filing of a complaint with the court and the issuance of a summons or warning order thereon in good faith."

> motion for failure to state a claim upon which relief can be granted, commonly referred to as a motion to dismiss, need not be raised in the answer and may also be raised in a motion before the responsive pleading (emphasis in original).

Webb timely moved the trial court to alter, amend or vacate the summary judgment. This motion was denied on December 10, 1997. This appeal followed.

Webb continues to insist in this appeal, that the trial court erred in entertaining the appellees' motion for summary judgment when they had not yet filed an answer asserting the affirmative defense of limitations. He argues the following:

> Since the affirmative defense of limitation is not listed as a Rule 12 defense, it may not be asserted on a motion to dismiss without it having been affirmatively pled. And since appellees did not affirmatively plead anything (they did not file any answer at all), their motion for summary judgment should have been denied.

Other than citing CR 8.03[6] and CR 12.02, Webb has not cited any

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[6]This rule pertaining to affirmative defenses reads as follows:

> In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counter-claim or a counterclaim as a defense, the court of terms, if justice so requires, shall treat the pleadings as if there had been a proper designation (emphasis added).

authority.[7]

The appellees, on the other hand, insist that CR 12.02(f) authorizes a motion to dismiss for failure to state a claim predicated on a statute of limitations defense. Their argument in this regard is not novel, as recognized in 6 Phillips, Kentucky Practice, CR 8.03, cmt.3 (5th ed. 1995), as follows:

> The defenses governed by this Rule should be raised by pleading, not by motion. However, it is possible that such an

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[7]CR 12.02 provides as follows:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third-party claim shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (a) lack of jurisdiction over the subject matter, (b) lack of jurisdiction over the person, (c) improper venue, (d) insufficiency of process, (e) insufficiency of service of process, (f) failure to state a claim upon which relief can be granted, and (g) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense that the pleading fails to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

> affirmative defense could be considered on a motion for judgment on the pleadings under CR 12.03, motion to dismiss, or summary judgment under CR 56. An affirmative defense may be taken advantage of on a motion to dismiss for failure to state a claim under CR 12.02 if the defense is shown on the face of the complaint, or if the motion to dismiss is treated as one for summary judgment and the matter is presented by affidavit. This is particularly true with respect to the statute of limitations (footnote omitted).

See also, Tomlinson v. Siehl, Ky., 459 S.W.2d 166 (1970); Rather v. Allen County War Memorial Hospital, Ky., 429 S.W.2d 860 (1968); and Old Mason's Home of Kentucky, Inc. v. Mitchell, Ky.App., 892 S.W.2d 304 (1995). CR 12.02 explicitly contemplates that such a motion might require "matters outside the pleadings" to be presented to the court, converting the motion to one governed by CR 56. This was the procedure used by the trial court in the case sub judice. Clearly, Webb was given an opportunity to respond to the motion and does not argue that he was denied due process by the trial court's resolution of the threshold issue of statute of limitations via the motion to dismiss. See Hoke v. Cullinan, Ky., 914 S.W.2d 335 (1995). Accordingly, the motion was appropriately treated, and is now reviewable, as one for summary judgment.

The standard of review of a summary dismissal is well settled. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991). Only where it is shown that a plaintiff has no chance of succeeding at trial should a case be summarily dismissed. Id. at 483. However, it is necessary that the respondent demonstrate that there is "some affirmative evidence" to create a genuine issue of material fact. Id. at 482. When

the statute of limitations is put in issue, "the burden falls on the complainant to prove such facts as would toll the statute[.]" Southeastern Kentucky Baptist Hospital, Inc. v. Gaylor, Ky., 756 S.W.2d 467, 469 (1988).

Webb insists that the statute of limitations was forever tolled when on July 17, 1995, he mailed the complaint and summonses to the Warren Circuit Court Clerk with directions that the clerk issue the summonses and forward them to the Warren County Sheriff for service upon the appellees.[8] Webb contends that "[t]he fact that the clerk did not grant counsel's request does not negate the good faith shown to institute the action." Clearly, the actions of Webb's counsel on July 17, 1995, of mailing the complaint, the summonses and the appropriate fees to the Warren Circuit Court are evidence of his good faith that the summonses be issued. Even assuming that counsel was negligent in directing the clerk to transmit the summons and complaint to the Warren County Sheriff, such negligence would not overcome the presumption that he had a good faith intention that they be issued. See Jones v. Baptist Healthcare System, Inc., Ky.App., 964 S.W.2d 805, 807 (1997) (the rule "that negligence, rather

[8]At the hearing before the trial court, Webb's attorney, explained that, despite the inability of the Warren County Sheriff to accomplish service, his request was in keeping with the practice in Nelson County. He stated that the Nelson County Sheriff "actually handles the transmittals to whoever they need to go" and that he was "unfamiliar" with the procedure used in Warren County. Regardless of the practice in Nelson County, CR 4.01 clearly puts the duty on the court clerk, not the sheriff of a county, to forward process to a proper officer in another county to be served. Thus, since Webb's request would not have resulted in service on the appellees, the return of the summonses to Webb's attorney, with an explanation, was the appropriate action to take.

than bad faith, in the execution and issuance of a summons will not bar a cause of action" determined to apply where plaintiff gave the clerk the wrong name of agent for service of process for defendant/hospital and had incorrectly named the hospital in the complaint). However, because the summonses were returned to Webb's counsel, a fact that Webb's counsel admits, and counsel retained the documents for 18 months before attempting service, again, a fact that is not in dispute, the trial court's refusal to accord a presumption of good faith to counsel's inaction and unexplained delay in causing the appellees to be served was required as a matter of law. It is settled in this jurisdiction that when a summons is returned or retained by counsel for the plaintiff, any presumption that it was originally issued in good faith, that is, with an intention that it be served "presently or in due course or without abandonment," Roehrig v. Merchants & Businessmen's Mutual Insurance Co.,Ky., 391 S.W.2d 369, 371 (1965), may be rebutted by subsequent events evincing an intent to withhold service. Whittinghill v. Smith, Ky.App., 562 S.W.2d 649, 650 (1978).

In Whittinghill, the plaintiff's counsel deliberately directed the clerk not to deliver the summons to the sheriff for service, ostensibly because settlement negotiations were taking place. In affirming the summary dismissal of the complaint, this Court, citing Louisville and N.R. Co. v. Little, 264 Ky. 579, 583, 95 S.W.2d 253, 255 (1936), held as follows:

> The taking out of summons is presumptive evidence of an intention to have it served in due course, but that presumption may be rebutted by the facts. It may have been

> issued to be used or not, as circumstances thereafter required. Service may have been intentionally withheld by direction of the plaintiff until the occurrence of an event upon which his decision as to effecting the process depended. In other words, causing a summons to be issued by the clerk conditionally is not causing it to be issued in good faith. An intention to postpone starting the litigation is thereby evidenced. All the authorities are to the effect that the cause of action is not commenced until there is a bona fide intention to have the summons filled out and signed by the clerk, accompanied by bona fide, unequivocal intention to have it served or proceeded on presently or in due course or without abandonment. Action and intention combined constitutes the commencement of the suit, because a summons filled out and signed with no intention of having it served is altogether inoperative (citations omitted).
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> . . . .
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> Of course, though it has been postponed, when a summons is actually served or put in line of service, the mere intention to have it issued is translated into a good-faith intentional action. But if the suspension is not closed before the right to sue ends, it must be regarded that the plaintiff slumbered through the time prescribed. So it is in the instant case. The plaintiff either deliberately withheld the actual legal issuance of the summons, or through oversight postponed the starting of the litigation until after the bell had rung out the hour barring his right of action.

Id. See also Wooten v. Begley, Ky., 305 S.W.2d 270, 271 (1957) ("in the absence of a showing of a valid excuse for the delay, a summons issued by the clerk and delivered to the plaintiff or his attorney is not deemed to have been issued in good faith until it is given to the sheriff or other proper officer to be served"); E.L.Allen v. O.K. Mobile Home Sales, Inc., Ky.App., 570 S.W.2d 660, 661 (1978) ("taking out of summons is presumptive evidence

of an intention to have it served in due course," but the evidence is "rebutted" if delivered to plaintiff's attorney and "service of the summons is made after the right to sue ends"); Gibson v. EPI Corp., Ky.App., 940 S.W.2d 912 (1997) (dismissal affirmed where summons was issued to plaintiff's counsel on December 9, 1994, and served on May 3, 1995, after the expiration of the limitations period).

Webb attempts to distinguish his situation from that in Whittinghill, by pointing out that in that case the plaintiff's counsel "directed the clerk to hold the summons and not deliver it to the sheriff for service," supra at 650, whereas in the case sub judice the attorney requested the clerk to place the summonses "in line for service." Granted, Webb's attorney did not ask that the summonses be returned to him. However, the failure of the clerk to perform a request that would not have accomplished service and the clerk's action of returning the summonses to Webb's attorney did not relieve counsel of the duty to promptly take steps necessary to insure service. It is clear that the intent of both KRS 413.250 and CR 3 is to protect the plaintiff from the risk that the statute of limitations may bar his action if the clerk fails to act.

> It may be conceded that under the authorities relied on by plaintiff, if the summons be actually issued, though a clerical mistake be made by the clerk, the action will be deemed to have commenced as against the defendant against whom summons was issued. But the cases relied on do not sustain the contention that the mere direction to the clerk to issue summons is a commencement of the action against a defendant who, as a matter of fact, is not summoned at all. Indeed, there is a wide difference between directing a summons

> to be issued and actually causing it to be issued.

Casey v. Newport Rolling Mill Co., 156 Ky. 623, 627, 161 S.W.2d 528, 530 (1913). See also, Blue Grass Mining Co. v, Stamper, 267 Ky. 643, 103 S.W.2d 112 (1937) (statute of limitations defense failed where neither "[plaintiff][n]or his attorney had taken charge of the summons and failed to deliver it to the sheriff until after the period of limitation had expired," but instead, where failure of process to reach the out-of-county sheriff was attributable to the "fault" of the clerk or the sheriff). Clearly, despite Webb's assertions to the contrary, a plaintiff may not keep his action alive by an initial good faith attempt to accomplish service prior to the expiration of the limitations period, where service is ultimately frustrated by the plaintiff's inattention and unexplained delay, whether deliberate or caused by "oversight." Whittinghill, 562 S.W.2d at 650.

With the exception of a vague reference to his "personal situation," Webb's attorney made no attempt to explain the eighteen-month delay in attempting service on the appellees. Thus, there was no genuine issue of material fact bearing on the issue of his intent to have the summonses issued in good faith as contemplated by KRS 413.250 and CR 3. Accordingly, the judgment of the Warren Circuit Court is affirmed.

ALL CONCUR.

BRIEFSFOR APPELLANT:

Hon. John David Seay
Bardstown, KY

BRIEF FOR APPELLEE:

Hon. Timothy L. Edelen
Hon. David T. Sparks
Bowling Green, KY