

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000694-MR

DON HOWARD

APPELLANT

v. APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE STEPHEN FRAZIER, JUDGE
ACTION NO. 98-CI-00175

SHAWN JASON STURGILL

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: BARBER, GUIDUGLI AND HUDDLESTON, JUDGES.

GUIDUGLI, JUDGE. Don Howard (Howard) appeals from an order of the Lawrence Circuit Court entered February 17, 2000, which dismissed his complaint against Shawn Jason Sturgill (Sturgill) with prejudice. We affirm.

On September 14, 1997, two boats operated respectively by Howard and Sturgill collided on Yatesville Lake in Lawrence County, Kentucky. Howard resides in Lawrence County, Sturgill is a resident of West Virginia.

Howard filed a complaint in Lawrence County against Sturgill on September 14, 1998, this being the last day Howard could file his complaint within the applicable statute of

limitations. Howard paid all of the required filing fees and instructed the Clerk of the Court to serve the summons by certified mail pursuant to CR 4.01. The clerk properly addressed the letter but failed to check the "restricted delivery" box on the return receipt as required by CR 4.01(1)(a). The return receipt shows that a Denise Meade signed for receipt of the summons on September 17, 1998.

On October 9, 1998, Sturgill filed a motion seeking to quash "the attempted serviced of summons upon him[.]" Sturgill argued that service of the summons was improper because Meade had no power or authority to accept service of the summons on his behalf. Howard filed no written response to Sturgill's motion. Following a hearing,¹ the trial court entered an order on November 12, 1998, giving Howard ten additional days to correct service of the summons, after which time the trial court would treat Sturgill's motion as submitted for determination.

For reasons not apparent from the record, Howard failed to correct service of the summons in accordance with the trial court's order. On December 10, 1998, the trial court entered an order quashing the summons itself as opposed to merely quashing service of the summons as originally requested by Sturgill.

No further action was taken by Howard until February 3, 1999, when a second summons was personally served on Sturgill by Constable Banner Castle. Sturgill responded by filing an answer on February 24, 1999, requesting dismissal of the complaint due

¹Our review of this matter is somewhat hampered by the fact that there is no videotape in the record of any hearing held in this case.

to insufficiency of (1) the summons itself; and (2) service of the summons. Sturgill also argued that the second summons was issued and served in violation of the trial court's prior orders. The record reflects no further action under July 22, 1999, when Sturgill filed a motion to dismiss. Aside from raising the same arguments set forth in his answer, Sturgill maintained that because the original summons had been quashed, there was no timely good faith issuance of the summons as required by CR 3.01. Howard filed no written response to Sturgill's motion.

Although Sturgill's motion indicated that a hearing was to be held on August 12, 1999, there is some dispute as to whether a hearing was actually held on that date. The case history contained in the record shows that a hearing was scheduled for August 12, 1999, but does not reflect whether the hearing actually occurred. In his brief on appeal, Howard alleges that the hearing was postponed because his attorney was not present and that the hearing was never re-noticed. Sturgill maintains that Howard was present on the date of the hearing but his attorney called and said he was running late. According to Sturgill, the hearing was moved to the end of the docket, but Howard's attorney never arrived. At that time, Sturgill alleges that "the hearing was held with plaintiff/appellant present and the Court heard both plaintiff/appellant and counsel for appellee. There was no direction by the Court to reschedule a hearing and no request was made by plaintiff/appellant or his counsel for any additional hearing. The Court took the matter under "advisement." Regardless of whether a hearing was held,

the matter lapsed once again into inactivity until November 6, 1999, when Howard's new attorney filed an entry of appearance.

The record reflects no further activity until February 17, 2000, when the trial court entered an order dismissing Howard's complaint with prejudice. In the order, the trial court indicated that an insufficiency of summons existed and summarized the events occurring up to the issuance of the December 1998 order quashing the original summons. The order then stated:

Since that time, the plaintiff has, without further Order of this Court had a summons issued by the Clerk of this Court. This summons was made without any further Order of this Court and is not in good faith. This Court granted the defendant [sic] ample time to correct the summons error, but [he] failed to take advantage of this opportunity, therefore the motion to dismiss with prejudice is granted.

This appeal followed.

Howard contends that the trial court erred in finding his issuance of the second summons to be violative of the November 1998 order and in bad faith. Having reviewed the record on appeal in light of the applicable law, we disagree.

Pursuant to CR 3.01, a civil action is instigated by "the filing of a complaint . . . and the issuance of a summons . . . in good faith." Issuance of the summons alone "does not commence an action unless accompanied by an intent that the summons be served in due course." Whittinghill v. Smith, Ky.App., 562 S.W.2d 649, 650 (1977). "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." Louisville & N.R. Co. v. Little, Ky., 95 S.W.2d 253, 255 (1936).

In this case, there is no doubt that the summons was issued before the statute of limitations expired but improperly served due to an error on behalf of the court clerk. When the error was brought to the attention of Howard and the trial court through Sturgill's motion to quash, the trial court gave Howard an additional ten days to correct service of process. Not only did Howard fail to correct the service of the summons during the ten day period, but there has been no explanation as to why there was a failure to comply with the trial court's order of November 12, 1998. In fact, Howard took no steps to comply with the trial court's order until the second summons was served in February 1999. Although we can presume that Howard may have had a good faith intent to have the original summons served upon Sturgill in due course at the time the complaint was filed, any presumption of good faith on Howard's behalf is rebutted by his failure to correct the improper service of the summons once it was brought to his attention. Thus, we agree with the trial court that the issuance of the second summons was not carried out in good faith.

Having considered the parties' arguments on appeal, the order of the Lawrence Circuit Court is affirmed.

BARBER, JUDGE, CONCURS.

HUDDLESTON, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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