STATE OF MICHIGAN

COURT OF APPEALS

SHARON B. FRALEY and RONALD LEE FRALEY,

Plaintiff-Appellants,

v

JACQUELINE LAVELLE and ANTHONY GREGG LAVELLE,

Defendants-Appellees,

and

HARRY LAVELLE,

Defendant.

UNPUBLISHED
September 15, 1998

No. 195415
Genesee Circuit Court
LC No. 95-034306 NI

Before: Hoekstra, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the circuit court orders granting summary disposition to defendants Jacqueline Lavelle and Anthony Lavelle and denying plaintiffs' motion for reconsideration.

Defendant Anthony Lavelle and plaintiff Sharon Fraley were involved in an automobile accident on April 21, 1992. According to the police report, Lavelle indicated that American States Insurance Company insured the 1974 Chevrolet pickup truck he was driving. On February 6, 1995, plaintiffs filed this action, alleging that defendants Harry and Jacqueline Lavelle owned the pickup truck Anthony was driving when the accident occurred.

The circuit court issued a summons (hereinafter "original summons"), which was to expire on May 8, 1995. On April 7, 1995, plaintiffs filed an ex parte motion for substituted service. In their motion, plaintiffs alleged that they submitted a copy of the original summons and complaint to a process server, who returned the documents to plaintiffs along with an affidavit stating that he went to the

address given for Anthony Lavelle on the police report and found that it was an empty lot.[1] On April 7, 1995, the circuit court signed an order allowing substituted service on defendants through American States by effectuating personal service on Vida Chaddah, a claims adjuster. Although the court order did not provide for an extension of time on the original summons, the court clerk nonetheless entered a summons (hereinafter "second summons") for an additional ninety-one days from April 6, 1995, to July 7, 1995.

On April 20, 1995, plaintiffs served the original summons on American States via certified mail. On May 11, 1995, three days after the original summons expired, American States entered a special appearance and filed a motion to quash service. American States argued generally that plaintiffs had failed to make a diligent inquiry to ascertain the whereabouts of any defendant, and therefore the circuit court erred in allowing substitute service through American States pursuant to MCR 2.105(I). American States also denied insuring the vehicle driven by Anthony Lavelle and submitted a certificate of title showing that Anthony was the truck's sole owner. At the motion hearing, American States' attorney stated that he contacted Jacqueline Lavelle and verified that she resided at the address on the police report. Jacqueline had divorced Harry Lavelle, and she did not know where he lived. Jacqueline also stated that she did not know the whereabouts of Anthony Lavelle, her son. The circuit court agreed that there had been no diligent inquiry and allowing substituted service was therefore an error, noted that the original summons had expired, ascertained that it had not entered an order allowing a second summons to issue or extending the expiration date of the original summons, and granted American States' motion to quash in an order dated June 12, 1995.

Plaintiffs next filed an ex parte motion to reinstate the summons and extend its expiration date. The court held a hearing on plaintiffs' motion, but neither American States nor defendants were represented. The circuit court determined that plaintiffs were "probably right" in arguing that American States' filing of its special appearance had tolled the expiration date of the original summons. Therefore, plaintiffs were timely in requesting a thirty-day extension of the summons at the June 12, 1995, hearing. In light of the fact that the statute of limitations on plaintiffs' claims would have otherwise expired on April 21, 1995, the circuit court agreed to plaintiffs' request for a ninety-day extension of the summons. On July 10, 1995, the circuit court entered an order reinstating "the Summons heretofore entered in this matter" and extended its expiration date for an additional ninety days from July 10 to allow personal service on all defendants. Pursuant to the order, the court clerk issued another summons that was to remain effective from July 10, 1995, to October 10, 1995 (hereinafter "reinstated summons").

Meanwhile, plaintiffs had served Jacqueline Lavelle on June 10, 1995, pursuant to the second summons. On July 18, 1995, the court clerk entered an order of default against Jacqueline for failure to plead or defend within twenty-one days of receiving service pursuant to the second summons. Plaintiffs again served Jacqueline Lavelle on August 19, 1995, and served Anthony Lavelle on September 7, 1995, both pursuant to the reinstated summons.

On August 3, 1995, Jacqueline Lavelle moved to set aside the default order, to grant summary disposition in her favor, and to dismiss plaintiffs' action. Jacqueline generally alleged that she was not the owner of the 1974 Chevrolet pickup Anthony Lavelle drove when the accident occurred, and that

she was served well after the first summons expired. On September 27, 1995, Anthony Lavelle filed a motion for summary disposition and dismissal "based upon the fact[s] that the statute of limitations has expired, the extensions of summons was inappropriate, [and] there was no appropriate service on Anthony Greg Lavelle." In these matters, both Jacqueline and Anthony were represented by the American States' attorney.

At the hearing on Jacqueline and Anthony Lavelle's motions for summary disposition, the circuit court reiterated that the court clerk was not empowered to extend the life of the first summons in the absence of a court order mandating extension. Therefore, the original summons had expired at the time the circuit court entertained plaintiffs' motion for reinstatement and extension. The circuit court granted Jacqueline and Anthony Lavelle's motions for summary disposition and denied plaintiffs' subsequent motion for reconsideration of this issue.

On appeal, plaintiffs first argue that the circuit court erred when it entered the June 12, 1995 order that quashed service, made through certified mail to American States, and dismissed the complaint. Because the issue of propriety of service ultimately embraces the issue whether the circuit court has personal jurisdiction over a party, we review the issue de novo. See *Jodway v Kennametal, Inc*, 207 Mich App 622, 632; 525 NW2d 883 (1994).

Under MCR 2.105(A)(1)-(2), a party may obtain service on a defendant by personally delivering a summons and complaint to a defendant, or by sending a summons and a copy of the complaint by registered or certified mail, return receipt requested, delivery restricted to the addressee. When service of process "cannot reasonably be made as provided by this rule, the court may by order permit service of process to be made in any other manner reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard." MCR 2.105(I)(1). However, the party seeking to make substituted service under this rule must "set forth sufficient facts to show that process cannot be served under this rule." If the defendant's present address is not known, "the moving party must set forth facts showing diligent inquiry to ascertain it." MCR 2.105(I)(2). Substituted service is appropriate as long as the means chosen can be reasonably expected to give notice of the action and "it can be shown to the court that other, more traditional, modes are unavailable." *Krueger v Williams*, 410 Mich 144, 156-157; 300 NW2d 910 (1981) (interpreting former GCR 1963, 105.8, the precursor of MCR 2.102). The circuit court is given discretion to allow substituted service "when it is shown that in the context of a given situation other methods are not reasonable." *Id.* at 158.

In the present case, plaintiffs motioned the circuit court to allow substitute service on American States pursuant to MCR 2.105(I)(1) after the process server mistakenly informed them that the address on the police report was fictitious. At the hearing on American States' motion to quash, American States apprised the circuit court of the results of its investigation into the matter of defendants' whereabouts, noting that a legal assistant had encountered no difficulty in finding the address given in the police report. Indeed, the insurer's attorney informed the circuit court that he had actually spoken with Jacqueline Lavelle, who resided at the address, and informed her of plaintiffs' action. Plaintiffs conceded that the process server had mistakenly gone to the wrong address, but they denied being

aware of the mistake when they motioned the circuit court for substituted service. Because it appeared that plaintiffs could actually serve at least Jacqueline and Anthony Lavelle at the address recorded in the police report, the circuit court granted American States' motion to quash on the basis that plaintiffs had failed to demonstrate that they reasonably could not serve defendants by means provided in the court rules.

We hold that the circuit court did not abuse its discretion when it granted American States' motion to quash substituted service. Plaintiffs simply did not make a sufficient showing of diligent effort to locate and personally serve defendants in accordance with the methods of service as set forth in MCR 2.105(A)(1)-(2). In fact, plaintiffs' effort was minimal at best and certainly not sufficient to comply with existing case law regarding this matter. For example, in *Prosoli v Mullins*, 111 Mich App 8; 314 NW2d 508 (1981), the circuit court granted the plaintiffs' motion for substituted service on the basis of a private detective's affidavit stating the measures that he had taken to attempt to personally serve defendant. However, the circuit court granted the defendant's motion to quash substituted service, concluding "that in retrospect the order allowing substituted service was not reasonably calculated to inform [the] defendant of the pendency of the litigation and that there had been no proper showing that personal service of process could not reasonably have been made in accordance with the court rules." *Id.* This Court affirmed the circuit court's decision. The *Prosoli* panel specifically adopted that portion of the circuit court's opinion that faulted the plaintiffs' efforts to locate the defendant:

> "While the [investigator's] affidavit states in very general terms that he 'visited other possible addresses of said defendant,' he does not describe specifically any of the 'other possible addresses.'
>
> "While [the investigator] makes broad general averments about inquiring through the post office, Michigan Secretary of State, and the telephone company 'for a current address on said defendant,' [the investigator] gives no particulars. He does not say whether the inquiry through the post office was made in person, by mail, or by telephone. He doesn't identify the post office personnel with whom he communicated. He doesn't state the date or dates of his communication with the post office. He does not say whether his inquiry 'through the Michigan Secretary of State' was made in person, by mail, or by telephone. He doesn't identify personnel of the Secretary of State's office with whom he communicated. He doesn't state the date or dates of communication. He does not say whether his inquiry 'through . . . the telephone company' was made in person, by mail, or by telephone. He doesn't identify telephone company personnel with whom he communicated. He doesn't state the date or dates of communication with the telephone company." [*Id.* at 12-13.]

If the plaintiffs' efforts to locate the defendant in *Prosoli* were deficient, then plainly the efforts of plaintiffs in the instant matter were inadequate. Other than sending the summons and complaint to the process server and providing him with the address for Anthony Lavelle garnered from the police report, there is no indication from the lower court record that plaintiffs made any meaningful attempt to ascertain

defendants' whereabouts before moving for substituted service. Such inaction does not amount to the "diligence" required by the court rule. The circuit court therefore erred in permitting plaintiffs to make substitute service on American States without requiring that plaintiffs make a showing of diligent effort to locate defendants.

Although substitute service on American States was improper when plaintiffs had failed to engage in a diligent inquiry to locate defendants, defendants were not entitled to dismissal of plaintiffs' complaint if, as a result of the improper substitute service, they had notice of plaintiffs' action prior to May 8, 1995, the date the original summons expired. According to MCR 2.105(J)(3), "[a]n action shall not be dismissed for improper service of process unless the service failed to inform the defendant of the action within the time provided in these rules for service." See also *MEA v North Dearborn Heights School Dist*, 169 Mich App 39, 45; 425 NW2d 503 (1988); *Hill v Frawley*, 155 Mich App 611, 613-614; 400 NW2d 328 (1986). The instant record reflects that the attorney for American States, who has acted as defendants' trial and appellate attorney, located and spoke with Jacqueline some time after plaintiffs executed substitute service on American States. The lower court record does not clearly establish whether this communication occurred within the time frame provided for plaintiffs' original service, to what extent the attorney notified Jacqueline of plaintiffs' complaint against her, or whether Anthony had notice of the complaint. Therefore, we must remand this case so that the trial court may make a finding regarding these dispositive facts. If the trial court finds that defendants by May 8, 1995 had notice of plaintiffs' complaint as a result of plaintiffs' improper substitute service on American States, then the court should permit plaintiffs to proceed with their case. However, in the event the evidence shows that defendants lacked such notice, then the court may properly dismiss plaintiffs' complaint.

Plaintiffs also argue that because the circuit court ordered substituted service and the clerk issued a new summons, this was the functional equivalent of the court ordering a new summons pursuant to MCR 2.102. The circuit court therefore erred in dismissing the action for lack of proper service because Jacqueline and Anthony were each served before the expiration of the second summons. Because this issue involves the interpretation and application of the court rules, the standard of review is de novo. *Saint George Greek Orthodox Church v Laupmanis Associates, PC*, 204 Mich App 278, 282; 514 NW2d 516 (1994). This issue also arises as a result of the circuit court's decision to grant summary disposition in favor of Jacqueline and Anthony Lavelle.[2] This Court reviews the circuit court's decision on motions for summary disposition de novo to determine whether the prevailing party was entitled to judgment as a matter of law. *G&A Inc v Nahra*, 204 Mich App 329, 330; 514 NW2d 255 (1994).

As a close reading of the court rules will show, plaintiffs' argument is without merit. MCR 2.102(A) provides:

> Issuance. On the filing of a complaint, the court clerk shall issue a summons to be served as provided in MCR 2.103 and 2.105. A separate summons may issue against a particular defendant or a group of defendants. A duplicate summons may be issued from time to time and is as valid as the original summons.

In turn, MCR 2.102(D) provides:

> Expiration. A summons expires 91 days after the date the complaint is filed. However, within that 91 days, on a showing of good cause, the judge to whom the action is assigned may order a second summons to issue for a definite period not exceeding 1 year from the date the complaint is filed. If such an extension is granted, the new summons expires at the end of the extended period. The judge may impose just conditions on the issuance of the second summons. Duplicate summonses issued under subrule (A) do not extend the life of the original summons. The running of the 91-day period is tolled while a motion challenging the sufficiency of the summons or of the service of the summons is pending.

Upon the expiration of the summons, "the action is deemed dismissed without prejudice as to a defendant who has not been served with process as provided in these rules, unless the defendant has submitted to the court's jurisdiction." MCR 2.102(E)(1). The court clerk's failure to enter a dismissal order "does not continue an action deemed dismissed." MCR 2.102(E)(2).

Here, the court clerk was plainly without authority to issue a second summons with an extended expiration date, because the circuit court did not issue an order authorizing this action. *Durfy v Kellogg*, 193 Mich App 141, 144; 483 NW2d 664 (1992). Nothing in the court rules requires the circuit court to sua sponte extend the life of a summons when it grants an order for substituted service. Therefore, this second summons was issued erroneously

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Plaintiffs alternatively argue that American States' May 11, 1995 motion to quash had the effect of tolling the expiration date of the second summons until the circuit court issued its order to quash on June 12, 1995. However, as noted above the second summons was issued erroneously, and plaintiffs' tolling argument fails. Moreover, because the original summons expired on May 8, 1995, the circuit court was correct in revoking its reinstatement and extension of the summons. MCR 2.102(F)(1) required plaintiffs to demonstrate that they in fact effectuated service of process on the dismissed defendants before the expiration of the original summons, *Durfy, supra* at 145, which plaintiffs failed to do.

Finally, plaintiffs argue that because the circuit court ordered substituted service and later ordered the summons reinstated, those orders related back to the filing of the complaint pursuant to MCR 2.102(C). This issue was not raised before the circuit court and is therefore not preserved for this Court's review. *Royce v Citizens Ins Co*, 219 Mich App 537, 545; 557 NW2d 144 (1996). Moreover, the argument, an apparent attempt to avoid the requirements set forth in MCR 2.102(F) to set aside a dismissal, is without merit

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Accordingly, we reverse the circuit court's orders granting summary disposition to Anthony and Jacqueline Lavelle, and remand to the trial court for a determination whether defendants had notice of plaintiffs' claims prior to expiration of plaintiffs' original summons. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Kathleen Jansen
/s/ Hilda R. Gage

[1] Apparently the process server mistakenly visited 6279 Webster Road in Owosso, rather than the correct same address in Flint.

[2] Although not clear from the order of dismissal, the circuit court apparently granted summary disposition pursuant to MCR 2.116(C)(1) ("[t]he court lacks jurisdiction over the person"), (C)(3) ("[t]he service of process issued in the action was insufficient"), and (C)(7) ("[t]he claim is barred because of . . . statute of limitations").