STATE OF MICHIGAN

COURT OF APPEALS

WILLIE WRIGHT,

Plaintiff-Appellant,

v

MICRO ELECTRONICS, INC.,

Defendant-Appellee,

and

TONY NUNEZ and FRANK ANGELUCCI,

Defendants.

UNPUBLISHED
June 30, 2005

No. 252790
Oakland Circuit Court
LC No. 2003-050906-NO

Before: O'Connell, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Plaintiff failed to serve defendant, Micro Electronics, Inc., in accordance with the court rules, but sent a copy of the summons and complaint to the attorney representing defendant in a related federal action brought by plaintiff. The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(3) (service of process was insufficient). Plaintiff appeals as of right, asserting that dismissal was improper pursuant to MCR 2.105(J)(3). Defendant contends that this case involved a complete failure of service and, therefore, MCR 2.105(J)(3) is inapplicable. We disagree and reverse. This case is being decided without oral argument pursuant to MCR 7.214(E).

We review the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

MCR 2.105(J)(3) provides that "[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." The principal dispute between the parties is whether this case involved "improper service of process" or a complete failure of service of process. The importance of the distinction is discussed in *Holliday v Townley*, 189 Mich App 424; 473 NW2d 733 (1991).

In *Holliday*, the plaintiff filed a complaint and sent a copy to the defendant with a cover letter threatening to "formally serve the papers" if the defendant did not provide the plaintiff with dental records that she requested. The defendant was never served with or received a summons. The summons expired, and the limitation period expired. The trial court dismissed the action for failure to serve the defendant. On appeal, the plaintiff relied on MCR 2.105(J)(3) and argued that the defendant had actual notice of the lawsuit. This Court concluded that MCR 2.105(J)(3) was inapplicable "where the question is not one of defects in the manner of service, but rather a complete failure of service of process." *Id*. at 425. The Court stated that the rule "forgives errors in the manner or content of service of process. It does not forgive a failure to serve process." *Id*. at 426. The summons is a necessary part of service of process. "MCR 2.105(J)(3), as well as every other court rule governing service of process, assumes that the summons will be served with the complaint, even if in a technically defective fashion." *Id*. The Court in *Holliday* concluded that there was a complete failure of service of process and, therefore, affirmed the dismissal of the action.

In contrast to *Holliday*, both *Hill v Frawley*, 155 Mich App 611; 400 NW2d 328 (1986), and *Bunner v Blow-Rite Insulation Co*, 162 Mich App 669, 674; 413 NW2d 474 (1987), are examples of errors in the manner of service to which MCR 2.105(J)(3) applies.

In *Hill*, the plaintiff filed a complaint and attempted to serve it by certified mail, but did not enclose a copy of the complaint. He made a second attempt to serve the defendant, but someone other than the defendant signed the return receipt. The defendant filed a motion for summary disposition on the basis that process and service were insufficient. The motion was filed before the summons expired. Although the service did not comply with MCR 2.105(A)(2), this Court relied on MCR 2.105(J)(3) to conclude that the defendant was not entitled to summary disposition. "[I]f a defendant actually receives a copy of the summons and complaint within the permitted time, he cannot have the action dismissed on the ground that the manner of service contravenes the rules." *Id*. at 613. In *Hill*, the defendant acknowledged receiving the summons and complaint within the pertinent time period by retaining counsel and filing a motion for summary disposition. *Id*. at 613-614.

In *Bunner*, the plaintiffs filed an action against a defendant ("Rapco") that was involved in bankruptcy proceedings and had ceased to do business. The plaintiffs served Rapco's bankruptcy trustee, who forwarded the summons and complaint to an insurance company, and counsel was hired to represent Rapco. The trial court granted Rapco's motion to quash and dismissed the case. This Court explained that it was not clear whether the plaintiffs had complied with all requirements for proper service on Rapco. However, dismissal was improper pursuant to MCR 2.105(J)(3). The Court stated:

> While the exact nature of Rapco's current existence is somewhat unclear, it is clear in this case that Rapco is aware of the pending action. Service on the trustee is undisputed. At the hearing on the motion to quash, Robert Roth stated that he was appearing on behalf of Rapco, not an insurance company. Accordingly, the trial court erred in quashing service and dismissing Rapco when Rapco was fully aware of the pending action despite any errors in the manner of service. [*Id*. at 674.]

We conclude that the present case involves an error in the manner of service rather than a complete failure of service, as in *Holliday*. The summons and complaint were sent to defendant's attorney rather than served on defendant as specified in the court rule. We disagree with defendant's position that failure to serve an entity in compliance with MCR 2.105 means that there is a "complete failure of service" to which MCR 2.105(J)(3) does not apply. This interpretation is not suggested by the holding in *Holliday*, where the crucial defect was the failure to send a summons in the first instance. Nor is it consistent with the holdings in *Hill* and *Bunner*, *supra*.

The evidence submitted to the trial court indicates that counsel for plaintiff and defendant discussed the state court action and defense counsel received a copy of the summons and complaint before the summons expired. This is adequate to show that the service informed defendant of the action. Indeed, defendant does not argue to the contrary. Accordingly, dismissal of plaintiff's action was improper pursuant to MCR 2.105(J)(3).

Reversed.

/s/ Peter D. O'Connell
/s/ Bill Schuette
/s/ Stephen L. Borrello