NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

MARISOL AND MIGUEL FIGUEROA, HUSBAND AND WIFE Appellants v. KHALED SAAD Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 623 MDA 2013

Appeal from the Order Entered March 8, 2013
In the Court of Common Pleas of Berks County
Civil Division at No(s): 10-23640

BEFORE: PANELLA, J., OLSON, J., and PLATT, J.*

MEMORANDUM BY PANELLA, J. **FILED MAY 23, 2014**

Appellants, Marisol and Miguel Figueroa, husband and wife (collectively, "Appellants"), appeal from the order entered March 8, 2013, by the Honorable Timothy J. Rowley, Court of Common Pleas of Berks County, which sustained with prejudice Appellee, Khaled Saad's preliminary objections to Appellants' Complaint. We affirm.

The trial court summarized the undisputed facts of this case as follows:

> This case concerns an automobile accident that occurred on December 27, 2008. [Appellee] Khaled Saad allegedly rear-ended a vehicle in which [Appellant] Marisol Torres Figueroa was the driver and her husband [Appellant] Miguel Nieves was a passenger. The action sought compensation for personal injuries

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* Retired Senior Judge assigned to the Superior Court.

to [Appellant] Miguel Nieves; further details of the accident and injuries are not material to the issues on appeal.

On December 15, 2010, shortly before the statutory limitations period expired, [Appellants] filed a writ of summons. On January 12, 2011, the Sheriff filed a return of service form indicating service had not been made. Thereafter, [Appellants] communicated with [Saad's] insurer, informing the insurer of the writ's filing and docket number and seeking help in locating [Saad]. The insurer did not have current contact information for [Saad]. [Appellants] conducted an online search of unspecified extent, described in their concise statement as a "computer name search and a West Law people search and name search." [Appellants] have not presented a concise timeline for these initial efforts to locate [Saad], but they admit to tabling the search for a period of months and assuming the insurer would get in touch if it was concerned about the suit.

A renewed computer search in March 2012 apparently revealed a new potential address for [Saad]. After a gap of more than fourteen months with no docket activity whatsoever, [Appellants] filed a praecipe to reissue the writ on March 26, 2012. Service was once again unsuccessful, and the Sheriff filed a form to that effect on April 17, 2012.

At this point, [Appellants] again contacted [Saad's] insurer, but the insurer had no new information as to [his] location. [Appellants] also asked the insurer to accept service of the writ on [Saad's] behalf, but the insurer refused.

Apparently in response to a letter and copy of the writ sent by regular mail, [Saad] himself contacted [Appellants'] counsel. [Saad] refused to give his exact location, saying only that he was near Adamstown, Pennsylvania (which is on the border of Berks and Lancaster Counties), but he did give his phone number. Around this time, [Appellants'] counsel had sought the assistance of a larger law firm in finding [Saad]; with the phone number the other firm was able to find another address. On May 1, 2012, [Appellants] filed a praecipe to reissue the writ again, and the Lancaster County Sheriff's Office finally accomplished service on May 17, 2012.

After [Saad] filed a praecipe for rule to file a complaint on June 26[, 2012] and then sent a ten-day notice of default for failure to file a complaint on August 6[, 2012], [Appellants] filed a complaint on August 8, 2012. [Saad] thereafter filed

> preliminary objections, on which the [c]ourt heard argument January 7, 2013. By order dated March 8, 2013, the [c]ourt sustained [Saad's] preliminary objections on the basis of [Appellants'] failure to diligently pursue service of the writ, and dismissed the action with prejudice. [Appellants] filed [a timely] notice of appeal on April 8, 2013.

Trial Court Opinion, 6/25/13 at 1-3.

On appeal, Appellants raise the following issues for our review:

> A. Whether the lower court erred in sustaining Appellee's preliminary objections and failing to determine that Appellee had either actual or constructive notice that a civil action had been initiated where Appellee's agent, the insurance carrier, has knowledge of same.
>
> B. Whether the delay in service of process of the writ of summons actually prejudiced [Appellee] and, therefore, did so to an extent that [Appellee's] substantial rights had been [a]ffected.
>
> C. Whether the lower court erred in failing to determine what, if any, rights of the [Appellee] had been prejudiced by a delay in service of process.

Appellants' Brief at 4 (capitalization omitted).

Our standard when reviewing a trial court's decision to sustain preliminary objections is as follows:

> The scope of review in determining whether a trial court erred in sustaining preliminary objections and dismissing a complaint is plenary.
>
> In determining whether the trial court properly sustained preliminary objections, the appellate court must examine the averments in the complaint, together with the documents and exhibits attached thereto, in order to evaluate the sufficiency of the facts averred. When sustaining the trial court's ruling will result in the denial of claim or a dismissal of suit, preliminary objections will be sustained only where the case is free and clear of doubt, and this Court will reverse the trial court's decision

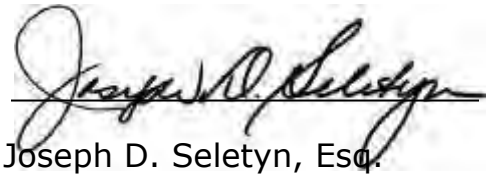
> regarding preliminary objections only where there has been an error of law or an abuse of discretion.

Sulkava v. Glaston Finland Oy, 54 A.3d 884, 889 (Pa. Super. 2012) (citation omitted), ***appeal denied***, 75 A.3d 1282 (Pa. 2013).

With our standard of review in mind, we have examined the certified record, the briefs of the parties, the trial court's opinion, and the applicable law. In its opinion, the trial court addressed Appellants' arguments, and concluded that they lack merit. Trial Court Opinion, 6/25/13 at 3-9. We agree with the sound reasoning of the trial court, as set forth in its opinion, and affirm on this basis.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/23/2014

6/27/2013

MARISOL TORRES FIGUEROA and MIGUEL NIEVES, Plaintiffs, v. KHALED SAAD, Defendant.	IN THE COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA CIVIL DIVISION – LAW NO. 10-23640 JEFFREY L. SCHMEHL, J.

Orest Bezpalko II, Esq.
Counsel for Plaintiffs

James L. Barlow, Esq.
Counsel for Defendant

MEMORANDUM OPINION, SCHMEHL, J.L., JUDGE
June 25, 2013

In this automobile accident case, Plaintiffs filed a writ of summons to toll the statute of limitations but failed to effectuate service of the writ for more than a year. Plaintiffs' attempts to locate Defendant were too minimal and involved too lengthy a lapse in activity to constitute the necessary good-faith effort to serve Defendant. Plaintiffs' desire to rely on giving notice to Defendant's insurer rather than accomplishing proper service is likewise unacceptable.

Factual and Procedural Background

This case concerns an automobile accident that occurred on December 27, 2008. Defendant Khaled Saad allegedly rear-ended a vehicle in which Plaintiff Marisol Torres Figueroa was the driver and her husband Plaintiff Miguel Nieves was a passenger. The action sought compensation for personal injuries to Plaintiff Miguel Nieves; further details of the accident and injuries are not material to the issues on appeal.

On December 15, 2010, shortly before the statutory limitations period expired, Plaintiffs filed a writ of summons. On January 12, 2011, the Sheriff filed a return of service form indicating service had not been made. Thereafter, Plaintiffs communicated with Defendant's insurer, informing the insurer of the writ's filing and docket number and seeking help in locating Defendant. The insurer did not have current contact information for Defendant. Plaintiffs conducted an online search of unspecified extent, described in their concise statement as "a computer name search and a West Law people search and name search." Plaintiffs have not presented a precise timeline for these initial efforts to locate Defendant, but they admit to tabling the search for a period of months and assuming the insurer would get in touch if it was concerned about the suit.

A renewed computer search in March 2012 apparently revealed a new potential address for Defendant. After a gap of more than fourteen months with no docket activity whatsoever, Plaintiffs filed a praecipe to reissue the writ on March 26, 2012. Service was once again unsuccessful, and the Sheriff filed a form to that effect on April 17, 2012.

At this point, Plaintiffs again contacted Defendant's insurer, but the insurer had no new information as to Defendant's location. Plaintiffs also asked the insurer to accept service of the writ on Defendant's behalf, but the insurer refused.

Apparently in response to a letter and copy of the writ sent by regular mail, Defendant himself contacted Plaintiffs' counsel. Defendant refused to give his exact location, saying only that he was near Adamstown, Pennsylvania (which is on the border of Berks and Lancaster Counties), but he did give his phone number. Around this time, Plaintiffs' counsel had sought the assistance of a larger law firm in finding Defendant; with the phone number, the other firm was able to find another address. On May 1, 2012,

Plaintiffs filed a praecipe to reissue the writ again, and the Lancaster County Sheriff's Office finally accomplished service on May 17, 2012.

After Defendant filed a praecipe for rule to file a complaint on June 26 and then sent a ten-day notice of default for failure to file a complaint on August 6, Plaintiffs filed a complaint on August 8, 2012. Defendant thereafter filed preliminary objections, on which the Court heard argument January 7, 2013. By order dated March 8, 2013, the Court sustained Defendant's preliminary objection on the basis of Plaintiffs' failure to diligently pursue service of the writ, and dismissed the action with prejudice. Plaintiffs filed notice of appeal on April 8, 2013.

Discussion

On appeal, Plaintiffs argue they made the necessary good-faith effort to serve Defendant but were frustrated by the difficulty in locating him. They further argue that Defendant's insurer is his agent and that informing the insurer of the pending action should satisfy the requirement of service. Plaintiffs simply let too long a period pass without efforts to locate and serve Defendant to maintain the writ's tolling of the statute of limitations, and insurers are simply not their insureds' agents for the purpose of service of original process. Plaintiffs' attempt to rely on Defendant's insurer for help in finding Defendant and as an alternate avenue of service underscores the insufficiency of their own efforts to effect proper service.

This appeal concerns the well known line of cases beginning with *Lamp v. Heyman*, 366 A.2d 882, 889 (Pa. 1976), which held that a writ of summons will toll the statute of limitations "only if the plaintiff then refrains from a course of conduct which

serves to stall in its tracks the legal machinery he has just set in motion." Subsequently, the Supreme Court reiterated and clarified that "*Lamp* requires of plaintiffs a good-faith effort to effectuate notice of commencement of the action." *Farinacci v. Beaver Cnty. Indus. Dev. Auth.*, 511 A.2d 757, 759 (Pa. 1986). "What constitutes a 'good faith' effort to serve legal process is a matter to be assessed on a case by case basis." *Moses v. T.N.T. Red Star Express*, 725 A.2d 792, 796 (Pa. Super. Ct. 1999); *see also Farinacci*, 511 A.2d at 759 (stating that good-faith effort is in the court's discretion).

In considering whether good-faith effort requires strict compliance with state and local rules of civil procedure, the Supreme Court has adopted what it calls a "flexible approach" that calls for dismissal only "where plaintiffs have demonstrated an intent to stall the judicial machinery or where plaintiffs' failure to comply with the Rules of Civil Procedure has prejudiced defendant." *McCreesh v. City of Philadelphia*, 888 A.2d 664, 670-74 (Pa. 2005) (explaining further that actual notice may overcome technical noncompliance). *McCreesh*'s somewhat lenient attitude and focus on prejudice or plaintiffs' intent may be limited to cases in which strict compliance with the rules is the primary issue. The general good-faith effort test is still employed, and simple inaction on a plaintiff's part may demonstrate the absence of a good-faith effort. Where plaintiffs filed a writ and never checked to see whether the Sheriff had successfully served it, their "inaction demonstrated an intent to stall the judicial machinery which was put into motion by the filing of the initial writ and simply cannot be excused." *Englert v. Fazio Mech. Servs., Inc.*, 932 A.2d 122, 127 (Pa. Super. Ct. 2007). Further:

> It is not necessary [that] the plaintiff's conduct be such that it constitutes some bad faith act or overt attempt to delay before the rule of *Lamp* will apply. Simple neglect and mistake to fulfill the responsibility to see that requirements for service are carried out may be sufficient to bring the rule

> in *Lamp* to bear. Thus, conduct that is unintentional that works to delay the defendant's notice of the action may constitute a lack of good faith on the part of the plaintiff.

Id. at 124-25 (quoting *Devine v. Hutt*, 863 A.2d 1160, 1168 (Pa. Super. Ct. 2004)).

Despite an argument made by Defendant below, it appears that failure to continually reissue a writ is not in itself sufficient to warrant dismissal, even when the statutory limitations period expires while the writ is lapsed. *Witherspoon v. City of Philadelphia*, 768 A.2d 1079, 1084 (Pa. 2001), does seem to call for dismissal in such circumstances, but that conclusion appears in a mere plurality opinion. According to the Superior Court's subsequent interpretation, *Witherspoon* only stands for the proposition that sometimes the absence of good faith effort to serve is so clear that no hearing is necessary. *See Parr v. Roman*, 822 A.2d 78, 81 (Pa. Super. Ct. 2003) (finding a hearing necessary to assess the plaintiffs' claim "that they never let a month go by without taking significant steps to locate the" defendant, where the record demonstrated at least several attempts at service, which was eventually accomplished five months after the writ was first filed). Nevertheless, courts may consider a lapse in continual reissuance of a writ problematic, especially given the availability of alternative service. *See Witherspoon*, 768 A.2d at 1084 n.3. Indeed, while the continual reissuance rule did not command a majority of the Court in *Witherspoon*, a majority did agree that lack of good faith effort to serve was evident even without a hearing where, after a process server's mistake, service was not effected for another nine months during which the writ was not reissued. *See Witherspoon*, 768 A.2d at 1084-1085 (Saylor, J., concurring).

Here, Plaintiffs made an initial attempt to serve the writ, contacted Defendant's insurer to inquire about his location, and conducted some amount of searching on the

internet. Later, they again searched for Defendant online, reissued and made additional attempts to serve the writ, and again contacted Defendant's insurer. These two clusters of activity may constitute good-faith efforts to serve during their respective time periods. It is the long gap in between that clearly demonstrates the failure to make a good-faith effort. There was no docket activity for fourteen months, all subsequent to the expiration of the statute of limitations. Though the timing of the internet searches and contacts with the insurer is not precisely established, a hearing was unnecessary, as Plaintiffs admit to at least several months during which they made no efforts to search for or serve Defendant. While discontinuing a futile search may be reasonable, there seems to be no excuse why Plaintiffs could not have requested an order allowing service by publication under Pa. R.C.P. 430. Assuming Plaintiffs indeed conducted sufficient investigation, the court would have certainly granted such an order, and if Defendant was in the nearby Adamstown area, service by publication may well have alerted him to the pending action. The failure to reissue the writ for such a long period, while not determinative, also evidences a lack of diligent effort on Plaintiffs' part. Altogether, the long span of inactivity, the limited and passive nature of the claimed internet searches, and Plaintiffs' attempt to rely on Defendant's insurer (discussed more fully below) indicate Plaintiffs' abdication of their obligation to notify Defendant of the action they wished to bring against him.

As a separate point on appeal, Plaintiffs maintain their argument that providing notice of the action to Defendant's insurer was sufficient service. It is true that service of original process may under certain specified conditions be effected upon someone other than the defendant:

result of claims against the insured. In another case that, despite Plaintiffs' framing, has essentially nothing to do with insurers, the Superior Court explained the general concept that "[a]n agency relationship is created where there is a manifestation by the principal that a person shall act for him, the person accepts the undertaking, and the parties understand that the principal is in control of the undertaking." *Refuse Mgmt. Sys., Inc. v. Consolidated Recycling and Transfer Sys., Inc.*, 671 A.2d 1140, 1147 (Pa. Super. Ct. 1996).

Although service may be made upon an agent, and insurers are agents for some purposes, Plaintiffs' inability to cite any authority linking these two concepts to authorize service of original process upon an insurer is telling. As Plaintiffs themselves point out, the handling of litigation by insurers is completely routine in our legal system. If service upon insurers were acceptable, it would be a basic, well known fact of legal practice. Rather, it is simply not acceptable in practice, nor is there any precedent for it.

On its face, Pa. R.C.P. 402 cannot be read to authorize service upon Defendant via his insurer. Defendant's insurer is not an adult in his family or in charge of his residence, and Defendant does not appear to have a usual place of business, certainly not one at which his insurer is his agent. No acceptance of service was filed, so Pa. R.C.P. 402(b) does not apply; the insurer was clearly not in a position to accept service on Defendant's behalf in any event. *Refuse Mgmt.* calls for a manifestation of an undertaking, and the facts do not manifest any undertaking by Defendant's insurer to act as his agent for service of original process. Quite to the contrary, the insurer specifically denied authority to accept service when Plaintiffs asked. Further, actual service was never effected upon the insurer. The insurer merely happened to receive notice that a writ had

been filed when Plaintiffs called to investigate Defendant's whereabouts. Even if that informal notice could alleviate the lack of true service, here the insurer was specifically informed that Plaintiffs had been unable to locate and serve Defendant, so in effect the insurer was on notice that the suit was not underway. Both the law and the specific facts of this case clearly establish that providing notice to Defendant's insurer is no substitute for proper service of original process upon Defendant.

For all of the above stated reasons, this Court respectfully recommends that the instant appeal be denied.

The Prothonotary shall forward the remainder of the file to the Superior Court forthwith.