

IN THE UTAH COURT OF APPEALS

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Bryn T. Ayers,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Petitioner and Appellant,)	
)	Case No. 20080494-CA
v.)	
)	F I L E D
Tiffany Rusk,)	(October 9, 2008)
)	
Respondent and Appellee.)	2008 UT App 358

First District, Brigham City Department, 074100233
The Honorable Ben H. Hadfield

Attorneys: Daniel S. Drage and Michael J. Boyle, Ogden, for
Appellant
Larry S. Jenkins, Kathryn Ogden Balmforth, and Lance
D. Rich, Salt Lake City, for Appellee

Before Judges Greenwood, Thorne, and Orme.

PER CURIAM:

Appellant Bryn T. Ayers appeals the dismissal of his paternity action on grounds that he failed to timely serve the petition. This case is before the court on a sua sponte motion for summary disposition.

On July 20, 2007, Ayers filed a paternity petition in Utah. On November 19, 2007, the 120-day period for service of process under rule 4(b)(i) of the Utah Rules of Civil Procedure expired. See Utah R. Civ. P. 4(b)(i). On February 5, 2008, the summons was personally served on Appellee Tiffany Rusk. Rusk moved to dismiss the petition based upon the untimely service. Ayers conceded that service was not accomplished within the 120-day period allowed by rule 4(b)(i). Although Ayers alleged that Rusk had evaded service, he did not provide evidence that he attempted to serve Rusk with the Utah paternity petition during the 120-day period following its filing or that Rusk acted to evade service of the Utah petition. Instead, he argued that she had evaded service of an earlier paternity petition filed in Indiana. Ayers argued that dismissal of his petition for failure to timely serve was not mandatory and that the district court had discretion to

extend the time for service after the fact based upon his claim of evasion of service.

The district court found that service of the summons and petition did not occur until February 11, 2008--more than 195 days after Ayers filed the petition--and also found that Ayers did not seek leave of court to serve Rusk beyond the 120-day period mandated by rule 4(b)(i). Furthermore, although Ayers argued that Rusk "intentionally attempted to avoid service, thus causing the delay," the court found that Ayers failed "to set forth any evidence, beyond mere conclusory statements, . . . to support this assertion." Based upon "the express language of rule 4(b)(i)," the district court found "that [Ayers's] Petition should be dismissed as the required service on [Rusk] did not occur until months after the expiration of the 120 day requirement." The court further found "that [Ayers] has failed to show good cause for the delay in service."

Rule 4(b)(i) requires that a summons and a copy of the complaint "shall be served no later than 120 days after the filing of the complaint unless the court allows a longer period of time for good cause shown." Id. "If the summons and complaint are not timely served, the action shall be dismissed, without prejudice." Id. Although conceding that service was not timely, Ayers contends that the district court had the discretion to deny the motion to dismiss the action, relying upon case law construing Federal Rule of Civil Procedure 4(b), which Ayers characterizes as substantially similar. However, examination of this argument readily reveals material differences between the analogous federal and Utah rules. While both rules state the court "shall" dismiss an action if it is not served within 120 days of filing a complaint, the federal rule allows the alternative of "direct[ing] that service be effected within a specified time." Fed. R. Civ. P. 4. The federal rule also states that "if the plaintiff shows good cause for the failure, the court shall extend the time for an appropriate time." Id. Utah's rule contains neither provision, and the district court did not err in rejecting Ayers's argument.

It is undisputed that Ayers did not serve Rusk within 120 days of the filing of his Utah paternity petition. It is also undisputed that Ayers did not move to extend the time to effect service prior to the untimely service of the petition. Finally, the district court sua sponte considered and rejected any claim

of good cause for failure to timely serve the petition.
Accordingly, we affirm the dismissal of the petition.

Pamela T. Greenwood,
Presiding Judge

William A. Thorne Jr.,
Associate Presiding Judge

Gregory K. Orme, Judge