STATE OF VERMONT

SUPERIOR COURT
Chittenden Unit

CIVIL DIVISION
Docket No. 520-6-16 Cncv

JOSEPH MONTGOMERY,
Plaintiff,

v.

SCOTT HAMMOND and CLEARWATER BUILDERS, INC.,
Defendants.

RULING ON PENDING MOTIONS

This is a personal injury suit arising out of a two-car collision that occurred on August 23, 2013, on North Willard Street in Burlington, Vermont. Plaintiff alleges that he was a passenger in a vehicle traveling southbound on North Willard Street when Defendant Scott Hammond negligently backed into the roadway directly into Plaintiff's path of travel, causing the collision. Plaintiff alleges that he was injured in the collision, and he seeks damages both from Hammond and Hammond's employer, Defendant Clearwater Builders, Inc.

Presently before the court are motions for summary judgment filed by both Defendants seeking judgment in their favor on the grounds that Plaintiff's suit is barred by the applicable statute of limitations. Also before the court is Plaintiff's motion to retroactively enlarge the time for completing service of process. Plaintiff is represented by David J. Pollock, Esq., and Defendants are represented by Daniel L. Burchard, Esq.

The following facts are undisputed. Plaintiff commenced this action by filing his complaint against the Defendants with this court on June 27, 2016. On August 11, 2016, Plaintiff's counsel mailed summonses and copies of the complaint to the respective sheriffs' offices for service on the Defendants.

The summons and complaint were not served on Defendant Clearwater Builders, Inc. until September 12, 2016. Deputy Sheriff Daniel Gamelin of the Chittenden County Sheriff's Department received the summons and complaint from Plaintiff's counsel on August 17, 2016, apparently with instructions to serve them on Clearwater Builders, Inc.'s registered agent, David Robinson, at 11 Mills Avenue in South Burlington, Vermont (Gamelin Affidavit dated 9/28/16). Between August 22 and September 8, 2016, Deputy Gamelin made five unsuccessful attempts to serve Mr. Robinson at that address (Id.). On September 12th Deputy Gamelin served the

summons and complaint on Kim Robinson, who identified herself to Gamelin as the secretary of the corporation (Id.).

Plaintiff's counsel elected to service process on Defendant Scott Hammond under the provisions of 12 V.S.A. §§ 891 and 892, which make the Vermont Commissioner of Motor Vehicles the agent for service of process on persons who operate motor vehicles which are involved in accidents within the State. On August 15, 2016, a deputy sheriff at the Washington County Sheriff's Department served the summons and complaint upon the Commissioner of Motor Vehicles. Plaintiff's counsel received the completed return of service paperwork from the Washington County Sheriff on August 18, 2016. On August 30, 2016, Plaintiff's counsel sent copies of the summons and complaint, with the deputy's return of service, to Defendant Hammond by certified mail addressed to Hammond at 11 Mills Avenue, South Burlington, Vermont. Plaintiff's counsel received the certified mail receipt "PS Form 3811" date stamped September 2, 2016, showing that the copy of the summons and complaint were received by Kim Robinson at that address on that date. Plaintiff's counsel filed his affidavit of compliance, attesting to his compliance with the requirements of § 892(a), with the court on September 19, 2016.

Defendants contend that they are entitled to judgment in their favor because Plaintiff's claim is barred by the applicable three-year statute of limitations as a matter of law. More specifically, Defendants contend that, although the Plaintiff filed his complaint with this court within the three-year deadline, he then failed to serve process upon the Defendants within the sixty-day deadline set forth in V.R.C.P. Rule 3, and his suit is therefore time barred.

Plaintiff opposes the Defendants' motions and asks the court to retroactively enlarge the time for service of the summonses and complaint under V.R.C.P. Rule 6(b). Plaintiff contends that his failure to meet the sixty-day deadline was the result of excusable neglect, that he missed the deadline by just a few days, and that the Defendants have not suffered any prejudice by the delay in effecting timely service of process.

"[S]ummary judgment should be granted when, taking all allegations made by the nonmoving party as true, there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." Richart v. Jackson, 171 Vt. 94, 97 (2000). Generally, the court must consider the facts presented in the light most favorable to the nonmoving party, who "is entitled to the benefit of all reasonable doubts and inferences." Lamay v. State, 2012 VT 49, ¶ 6, 191 Vt. 635; see also Madkour v. Zoltak, 2007 VT 14, ¶ 12.

As noted earlier, this is a personal injury suit arising out of a two-car collision that occurred on August 23, 2013. Personal injury suits are subject to a three-year statute of limitations. See 12 V.S.A. § 512(4) ("Actions for the following causes shall be commenced within three years after the cause of action accrues, and not after: … injuries to the person suffered by the act or default of another person, provided that the cause of action shall be deemed to accrue as of the date of the discovery of the injury…."). Plaintiff does not claim that he suffered any injuries in the

collision that were not discovered until sometime after the collision. Therefore, Plaintiff had to commence his suit within three years of the collision, i.e., by no later than August 23, 2016.

Plaintiff had the choice of commencing his suit either by filing or by service. See V.R.C.P. Rule 3 ("A civil action is commenced by filing a complaint with the court, except that in any case where attachment of real or personal property or attachment on trustee process is not to be made, or goods are not to be replevied, an action may be commenced by the service of a summons and complaint."). Having elected to commence this action by filing his Complaint with the court on June 27, 2016, Plaintiff had sixty (60) days after the date of filing, i.e., until August 26, 2016, within which to effect service of process upon the Defendants. Id. ("When an action is commenced by filing, summons and complaint must be served upon the defendant within 60 days after the filing of the complaint."). Failure to meet the sixty-day deadline can result in dismissal of the suit. Id. ("If service is not timely made … the action may be dismissed on motion, including motion of the court pursuant to Rule 41(b)(1), and notice….").

The summons and complaint were not served on Defendant Clearwater Builders, Inc., until September 12, 2016, seventy-seven days after the complaint was filed. Plaintiff missed the sixty-day deadline for serving process upon Defendant Clearwater Builders, Inc. by seventeen days. Plaintiff concedes that the statute of limitations expired before Defendant Clearwater Builders, Inc. was served ("Motion to Enlarge Time for Service of Summons and Complaint," at p. 9). Therefore, Plaintiff's claim against that defendant will have to be dismissed, unless the court grants Plaintiff's motion to retroactively enlarge the deadline. See Weisburgh v. McClure Newspapers, Inc., 136 Vt. 594, 595 (1979) ("[I]f the filing of a complaint is to be effective in tolling the statute of limitations as of that filing date, timely service under the Rules of Civil Procedure must be accomplished. This has long been a requirement of our law….") and Fercenia v. Guiduli, 2003 VT 50, ¶ 9, 175 Vt. 541 (mem.) (following Weisburgh).

Plaintiff also failed to complete all the steps needed to serve process on Defendant Scott Hammond within the sixty-day deadline. When a claimant elects to serve process upon a defendant through the Commissioner of Motor Vehicles, the claimant must proceed in accordance with the requirements of 12 V.S.A. § 892(a). That statute provides:

> Service of process shall be made by leaving a copy of the process with a fee of $15.00 with the Commissioner…. Service shall be sufficient upon the person, provide that a copy of the process with the officer's return on it, showing service upon the Commissioner as provided in this section, is sent by the plaintiff to the defendant … by registered or certified mail, and provided further that the plaintiff's affidavit of compliance is filed with the process in court….

Plaintiff did serve copies of the summons and complaint upon the Vermont Commissioner of Motor Vehicles within the August 26 deadline, but service on the Commissioner alone was not enough. In order for such service to be "sufficient," within the express meaning of the statute, Plaintiff also had to comply with the requirements that process be sent to Defendant Hammond by certified mail and that an affidavit of compliance be filed with the court. Plaintiff did do these

two things but not until after the August 26 deadline had passed. Plaintiff did not send copies of the summons and complaint, with the Washington County Deputy Sheriff's return of service on the Commissioner of Motor Vehicles, by certified mail to Defendant Scott Hammond until August 30, 2016, and he did not file his affidavit of compliance with § 892(a) with the court until September 19, 2016. Therefore, the statute of limitations expired before service was complete.

Relying on Brammall v. Larose, 105 Vt. 345 (1933), Plaintiff argues that his failure to mail process to Defendant Hammond or to file an affidavit of compliance with the court within the sixty-day deadline do not warrant dismissal of his complaint because those requirements are merely ministerial and not jurisdictional in nature. Plaintiff's argument is without merit. In Brammall plaintiff's counsel fully complied with all the requirements of the then-existing version of § 892(a), including the requirements of mailing process to the defendant and filing an affidavit of compliance with the court. Defendant's only ground for challenging the sufficiency of service in that case was the fact that those tasks had been performed by the plaintiff's attorney, not by the plaintiff herself. In rejecting that challenge, the Vermont Supreme Court noted that "[a] statute providing for substituted service must be strictly construed" but should not "receive a construction so strict as to defeat its purpose." Id., 105 Vt. at 349. The Court noted that "[t]he provision that a copy of the process shall be sent by the plaintiff to the … defendant is a necessary part of the service upon the latter," but that the requirement is satisfied if performed by the plaintiff's attorney, rather than by the plaintiff herself. Id. at 350. In addition, the Court held that an affidavit of compliance signed by plaintiff's counsel was also sufficient because "[t]he filing of the affidavit of compliance is not, strictly speaking, a part of the service" and "[i]t is analogous to the return of process, made by the authorized officer." Id. at 351. In the case at bar, neither the Plaintiff nor his attorney completed these required tasks within the sixty-day deadline. Therefore, Plaintiff's complaint against Defendant Hammond will have to be dismissed, unless the court grants Plaintiff's motion to retroactively enlarge the deadline. See Fercenia, 2003 VT 50, at ¶¶ 9 and 13 (holding that the statute of limitations expired when the plaintiff failed to file defendant's signed acceptance of service form with the court within the 60-day deadline set forth in the rules, adding "[w]e require plaintiffs to strictly comply with the rules when expiration of the statute of limitations is an issue.").

On October 19, 2016, Plaintiff filed a motion with the court under V.R.C.P. Rule 6(b)(2) seeking a retroactive enlargement of the deadline for completed service of process on the Defendants. Rule 6(b)(2) provides:

> When by these rules … an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion … upon motion made after the expiration of the specified period permit the act to be done when the failure to act was the result of excusable neglect….

Plaintiff contends that his delay in completing service of process on the Defendants was the result of "excusable neglect." However, Plaintiff offers no explanation for why he failed to mail the summons and complaint to Defendant Hammond or to file his affidavit of compliance with the

court within the required deadline.[1] With respect to Defendant Clearwater Builders, Inc., Plaintiff alleges that the delay in completing service was not due to any fault of Plaintiff or his attorney, but, rather, was due to circumstances that were unanticipated and beyond Plaintiff's control, namely, the fact that Clearwater's registered agent was unavailable to accept service at the office designated by Clearwater with the Vermont Secretary of State on any of the five occasions when Deputy Sheriff Gamelin came to serve him, and the fact that Deputy Gamelin went on vacation for a week before completing service on Clearwater ("Motion to Enlarge Time for Service of Summons and Complaint," at 9-10). Lastly, with respect to both Defendants, Plaintiff argues that the court should, in the exercise of its discretion, deny their motions for summary judgment and retroactively enlarge the time to complete service, because the delay in completing service on the Defendants was not substantial, the delay did not prejudice either Defendant or adversely impact the orderly proceeding of the litigation, the Plaintiff attempted in good faith to achieve timely service, and the dismissal of Plaintiff's suit for so minimal a violation of the Rules would be draconian (Id.).

The Vermont Supreme Court has described the factors to be considered by the trial courts, in determining whether a delay in completing service of process was the result of "excusable neglect," as follows:

> … The factors include "the danger of prejudice to the [opposing party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith….."

Clark v. Baker, 2016 VT 42, ¶ 18, 146 A.3d 326 (quoting from Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 396-97 (1993)). The Court added that the most important of these factors "is the reason for the delay, including whether it was within the party's control." Id.¶ 19. In addition, the Court noted that "the threshold created by the excusable neglect standard remains high and will be found only in rare cases." Id. (quotations omitted).

Given this "high standard," the court cannot conclude that the delay in completing service of process on the Defendants in this case was the result of "excusable neglect." The primary reason why Plaintiff failed to complete service within the applicable time limit is because Plaintiff's counsel waited 45 days, i.e. until August 11, 2016, before mailing summonses and copies of the complaint to the respective sheriff's offices for service on the Defendants. This left the sheriffs only 15 days within which to effect service by the August 26 deadline. The decision of when to mail process to the sheriffs was entirely within the control of Plaintiff's counsel, yet

[1] The only explanation that the court could find in Plaintiff's "Motion to Enlarge Time for Service of Summons and Complaint," for the delay in completing service on Defendant Hammond, was at pp. 7-8, where Plaintiff counsel indicates that his secretary would have mailed copies of the summons and complaint to Defendant Hammond on August 29, 2016, instead of on August 30, 2016, but for the fact that he began trial in another matter on the 29th and needed her she assistance in that other case that day. This information does not aid Plaintiff's cause, inasmuch as August 29th was also beyond the August 26th deadline.

counsel has offered no explanation for this 45-day delay. The risks inherent in such a delay, such as the risk that a sheriff's office might temporarily be shorthanded due to vacations or otherwise, or that a diligent sheriff might not be able to find the right person upon whom to serve process on such short notice, were entirely foreseeable. To wait 45 days before taking the first step to serve the Defendants, without offering any explanation for the delay, cannot be viewed as "excusable neglect."

Not surprisingly, the Chittenden County Sheriff's office was unable to complete service of process on Defendant Clearwater Builders, Inc. within the August 26th deadline. Indeed, the first effort to serve that defendant did not even take place until August 22nd (See "Affidavit of Due Diligent Search," of Deputy Sheriff Daniel Gamelin). Service on that defendant did not take place until September 12, 2016, seventeen days after the statute of limitations had expired. If, after waiting 45 days to send any paperwork to the sheriff, Plaintiff's counsel then took any action to alert the sheriff to the looming deadline or to the need for urgent action, there is no evidence of it in the record.

The Washington County Sheriff's Department was able to serve the Commissioner of Motor Vehicles in Montpelier on August 15th, but, for reasons that have not been explained, Plaintiff's counsel then waited until August 29th before asking his secretary to send copies of the summons and complaint, with the Washington County Sheriff's return of service on the Commissioner, to Defendant Hammond. Counsel also offers no explanation for why he waited until September 19th before filing his affidavit of compliance with the court.

The court agrees that the delays here were only on the order of several days' or weeks' duration, and that they did not impact the litigation, other than by resulting in the motions addressed herein. Defendants have not been prejudiced by the delay, although they would suffer some degree of prejudice, from loss of the repose that attends an expired statute of limitations, if the court allowed the case to continue. The court does not question the good faith of the Plaintiff or his counsel, and the court acknowledges that the Plaintiff will be suffer significant prejudice if his motion to enlarge is denied and his complaint dismissed.

However, these considerations are outweighed by the fact that the delay in completing service in accordance with the rules was primarily caused by inaction on the part of Plaintiff's counsel for which no justification or explanation has been offered. The Vermont Supreme Court has emphasized that mere oversight and inattention to detail do not constitute "excusable neglect." See Taft-Blakely v. Reinhart Foodservice, LLD, No. 2015-314, 2016 WL 3248841, at *3 (June Term, 2016) (unpublished mem.) (affirming, under facts quite similar to the case at bar, trial court's determination "that plaintiff's counsel's admitted oversight in following the correct procedure fell short of the excusable-neglect standard."); In re Town of Killington, 2003 VT 87A, ¶ 17, 176 Vt. 60 (holding that "inattention to detail," such as "an internal office procedure breakdown in [a lawyer's] office [that] resulted in the failure to calendar the appeal deadline date," did not constitute excusable neglect); Bergeron v. Boyle, 2003 VT 89, ¶ 22, 176 Vt. 78 ("Plaintiff's excuse that an attorney's vacation and a related breakdown in internal office procedures resulted in the late filing is insufficient to warrant a finding of excusable neglect.");

Shields v. Gerhart, 163 Vt. 219, 221 (1995) (affirming trial court's finding that "mere oversight" did not meet the criteria for excusable neglect.).

For all the foregoing reasons, Plaintiff's Motion to Enlarge Time for Service of Summons and Complaint is DENIED, Defendants' Motions for Summary Judgment are GRANTED, and Plaintiff's Complaint is DISMISSED.

SO ORDERED this 15th day of February, 2017

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Robert A. Mello
Superior Court Judge