Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2019-262

JANUARY TERM, 2020

Michael D. Messier* v. Kay H. Bushman & The Standard Fire Insurance Company d/b/a Travelers	}	APPEALED FROM:
	}	
	}	Superior Court, Washington Unit, Civil Division
	}	
	}	DOCKET NO. 34-1-17 Wncv
	}	
	}	Trial Judge: Mary Miles Teachout

In the above-entitled cause, the Clerk will enter:

This is plaintiff's second appeal in this negligence action. Plaintiff argues that the trial court erred by determining that he did not properly complete service of process on defendant and dismissing his complaint with prejudice. We affirm the trial court's decision but strike the statement in the judgment order that dismissal is with prejudice.

The following facts are relevant to this appeal. On January 13, 2017, plaintiff Michael Messier filed a complaint against defendant Kay Bushman for damages that plaintiff allegedly suffered as a result of a collision between the parties' vehicles in January 2014.[1] Plaintiff initially attempted to have the sheriff serve defendant at her home. The sheriff indicated on his return that he attempted service on January 6 and February 1, 2017, but was unable to accomplish service because defendant was studying in Europe for a semester. He did not leave a copy of the summons and complaint with anyone residing in the household.

Plaintiff then attempted to serve defendant through the Commissioner of Motor Vehicles pursuant to 12 V.S.A. §§ 891-892. To properly complete substituted service under § 892(a), a plaintiff must leave a copy of the process at the Commissioner's office along with a $15 fee; send a copy of the process with the officer's return showing service upon the Commissioner to the defendant by registered or certified mail; and file an affidavit of compliance in court. Plaintiff served the Commissioner on February 21, 2017. On March 1, plaintiff's counsel filed an affidavit with the trial court stating that he sent "a copy of the summons, complaint, and return of service" to defendant. The affidavit indicated that counsel attempted to personally serve defendant and enclosed the sheriff's unsuccessful return of service, but did not state that service was made on the

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[1] Plaintiff also claimed that defendant's insurer, Travelers, had violated the Vermont Consumer Protection Act. The trial court dismissed plaintiff's claim against Travelers under V.R.C.P. 12(b)(6). We affirmed that decision in the previous appeal. <u>Messier v. Bushman</u> (<u>Messier I</u>), 2018 VT 93, ¶ 25, 208 Vt. 261.

Commissioner or specify that the return of service allegedly mailed to defendant was the return showing service upon the Commissioner.

Defendant moved for judgment on the pleadings, asserting insufficient service of process. In an affidavit, defendant's mother stated that she received a registered letter from plaintiff's counsel on February 25. On March 4, after speaking with defendant, defendant's mother opened the envelope. She stated that the only return of service in the envelope was the return showing the sheriff's unsuccessful attempt to serve defendant at her residence. She further asserted that neither the return showing service on the Commissioner nor plaintiff's counsel's affidavit were in the envelope. Without holding a hearing, the trial court granted defendant's motion and dismissed plaintiff's complaint. Plaintiff appealed to this Court.

In our decision, we first noted that although it was styled as a motion for judgment on the pleadings, defendant's motion effectively sought dismissal under V.R.C.P. 12(b)(5). Messier I, 2018 VT 93, ¶ 10. We explained that "[t]his is a distinction with a difference" because a dismissal for failure to properly serve the summons and complaint "is not a merits adjudication." Id. We stated that "[plaintiff] is correct that if the motion was properly granted, the relief should have been dismissal of the claims against [defendant], not a judgment in her favor." Id. ¶ 11. We concluded that the court lacked sufficient evidence to decide whether plaintiff's counsel sent a copy of the return of service to defendant and did not acknowledge the parties' competing assertions regarding this issue or hold an evidentiary hearing. Id. ¶¶ 15-16. We therefore remanded "for further proceedings in the V.R.C.P. 12(b)(5) context" to resolve the competing evidence. Id. ¶ 16.

On remand, the court held an evidentiary hearing. Defendant's mother testified that after obtaining permission from defendant, she opened the envelope from plaintiff's counsel and read the contents. She stated that there were ten pieces of paper in the envelope and the return of service on the Commissioner was not among them. She made a copy of the documents on her home printer and returned them to the envelope. She had stored the envelope in her home since then. The envelope and its contents were admitted into evidence.

Plaintiff's attorney testified that he personally put the substituted service paperwork, including the return of service on the Commissioner, in the envelope and mailed it to defendant. He stated that he knew there were eleven pages in total "[b]ecause those are the items I would've put in there and that would've added up to eleven pages." He testified that based on the amount of postage paid, the envelope weighed between 2.1 and 3.0 ounces when it was mailed. He presented demonstrative evidence that an identical package containing only ten pieces of paper weighed 1.9 ounces. Therefore, he asserted, the envelope sent to defendant must have contained an additional piece of paper, which was the return of service on the Commissioner.

The trial court announced its decision on the record at the conclusion of the hearing. It found that defendant's mother was credible in her testimony that the return of service on the Commissioner was not in the envelope she received from plaintiff's counsel. The court declined to draw the inference requested by plaintiff that the weight of the package meant that it contained eleven pieces of paper, one of which had to be the return of service. The court noted that the difference between 1.9 and 2.1 ounces was "tiny" and there could be many explanations for why the envelope registered as greater than two ounces, such as a different type of paper or the placement of the envelope on the scale. The court found that the affidavit plaintiff's counsel filed in court was vague about which return of service it referred to. The court found that the evidence indicated "a lack of careful attention to the details of the requirements of . . . service, and that simply, a mistake was made." It concluded that service was insufficient and granted defendant's

motion to dismiss. The court subsequently entered a judgment order stating that the dismissal was "with prejudice." Plaintiff appealed.

As a threshold matter, we address defendant's claim that this Court lacks jurisdiction because plaintiff's notice of appeal was filed more than thirty days after the court announced its decision at the June 18, 2019 hearing. This argument lacks merit. A notice of appeal must be filed within thirty days "after entry of the judgment or order appealed from." V.R.A.P. 4(a); Casella Const., Inc. v. Dep't of Taxes, 2005 VT 18, ¶ 3, 178 Vt. 61 ("The timely filing of a notice of appeal is a jurisdictional requirement."). The process of entry of judgment is governed by Vermont Rule of Civil Procedure 58, which requires the court to enter a separate judgment order when it makes a decision granting or denying relief. V.R.C.P. 58(a)-(b). "Without such an order, the docket entry of the court's decision does not constitute entry of judgment and does not commence the running of the appeal period." Powers v. Hayes, 170 Vt. 639, 640 (2000) (mem.). In this case, the decision granting defendant's motion to dismiss was a final appealable order that had to be set forth on a separate document in order to trigger the appeal period. Id.; cf. In re Balivet, 2014 VT 41, ¶ 30, 196 Vt. 425 (explaining denial of motion to revoke guardianship was final appealable order that required entry of judgment under probate equivalent to V.R.C.P. 58). The court entered its judgment order on June 27, 2019. Plaintiff filed his notice of appeal on July 26, 2019, twenty-nine days afterward. The notice of appeal was timely.

We therefore turn to plaintiff's first argument on appeal, which is that the court erred in finding that the envelope plaintiff's counsel sent to defendant did not contain the return of service on the Commissioner. We will uphold factual findings "unless, viewing the evidence in the light most favorable to the prevailing party, there is no credible evidence to support the findings." Okemo Mountain, Inc. v. Lysobey, 2005 VT 55, ¶ 8, 178 Vt. 608 (mem.). Findings that are not clearly erroneous will stand on appeal "despite inconsistencies or substantial evidence to the contrary." Pion v. Bean, 2003 VT 79, ¶ 15, 176 Vt. 1.

Plaintiff argues that the court engaged in speculation when it observed that there could be a variety of reasons for why the envelope registered on the scale as weighing over two ounces. He also argues that the court improperly speculated that "[f]or [defendant's mother] to have removed a page from the envelope would have been a deliberate and intentional act of deception" that would require sophisticated legal knowledge about the requirements of service. He claims the court erred in stating that there was "no evidence" to suggest that anyone removed the return of service from the envelope, because his counsel's testimony regarding the weight of the package was evidence to the contrary.

The trial court's findings are supported by the record and are not clearly erroneous. Although a trial court may not "bridge evidentiary gaps with speculation," see Kwon v. Edson, 2019 VT 59, ¶ 26, __ Vt. __ (quotation omitted), we disagree that the trial court did so here. The court was simply explaining why it was not persuaded by plaintiff's proposed inference that defendant's mother, or someone else, removed the return of service from the envelope in an effort to end the lawsuit. The court acknowledged that there were other possible explanations for the apparent discrepancy between the weight of the envelope and defendant's mother's testimony that the envelope contained only ten pages. However, it concluded that defendant's mother was credible and that the return of service was simply omitted from the package when it was sent. This was a reasonable inference to draw based on the evidence.

Plaintiff further argues that the court improperly presumed that the pages contained in the envelope were in the same order that they were received. Plaintiff objected to this finding below, and the court conceded that there was virtually no evidence to support this assumption. However,

it stated that "even if I threw that factor out altogether, the result would be the same considering the other evidence." As explained above, the remaining evidence supports the court's determination. Thus, any error in this regard was harmless.

The court was presented with conflicting evidence regarding whether plaintiff mailed the return of service to defendant and found defendant's mother's version of events to be more persuasive. "As the trier of fact, it was the province of the trial court to determine the credibility of the witnesses and weigh the persuasiveness of the evidence." Cabot v. Cabot, 166 Vt. 485, 497 (1997). We therefore affirm the court's finding that service was incomplete, and, in turn, its decision granting defendant's motion to dismiss. See Messier I, 2018 VT 93, ¶ 14 (holding that failure to mail return of service on Commissioner to defendant renders substituted service insufficient).

Plaintiff's second argument on appeal is that the court erred by dismissing the matter "with prejudice." We agree. As we explained in Messier I, a dismissal for failure to complete service amounts to a dismissal for lack of personal jurisdiction. Id. ¶ 10; see also Smith v. Brattleboro Reformer, Inc., 147 Vt. 303, 304 (1986) (explaining failure to substantially comply with statutory requirements for service of process deprives court of jurisdiction). Under Vermont Rule of Civil Procedure 41(b)(3), a dismissal for lack of personal jurisdiction does not operate as an adjudication upon the merits. U.S. Bank Nat. Ass'n v. Kimball, 2011 VT 81, ¶ 22, 190 Vt. 210. Thus, even though the trial court stated its dismissal was "with prejudice," plaintiff is not precluded from pursuing his claim on the merits based solely on his failure to complete service in accordance with 12 V.S.A. § 892. See U.S. Bank Nat. Ass'n, 2011 VT 81, ¶ 22. (holding that court's dismissal for lack of jurisdiction did not preclude bank from pursuing foreclosure on merits if it met necessary elements, even though court stated dismissal was "with prejudice"). We therefore strike the portion of the judgment order stating that dismissal is "with prejudice."

In so ruling, we expressly decline to reach the issue of whether plaintiff is barred by the statute of limitations from refiling his complaint. The parties' arguments regarding the applicability of 12 V.S.A. § 558 "are not properly before the court in this, the original, action." Messier I, 2018 VT 93, ¶ 16 n.4; see Cenlar FSB v. Malenfant, 2016 VT 93, ¶ 42, 203 Vt. 23 ("In general, a court should not dictate preclusion consequences at the time of deciding a first action." (quotation omitted)).

The phrase "with prejudice" is stricken from the June 27, 2019 judgment order. The decision is otherwise affirmed.

BY THE COURT:

Beth Robinson, Associate Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice