IN THE COURT OF APPEALS OF IOWA

No. 0-641 / 10-0139
Filed September 22, 2010

CASSIDY BUCKINGHAM,
Plaintiff-Appellant,

vs.

THRESSA BRANDING and PROGRESSIVE CASUALTY INSURANCE COMPANY,
Defendants-Appellees.

Appeal from the Iowa District Court for Clarke County, John D. Lloyd, Judge.

A plaintiff contends that the district court erred in dismissing his petition for failure to properly serve the defendant. **AFFIRMED.**

Steven C. Jayne, Des Moines, for appellant.

Michael T. Gibbons and Amy M. Stanosheck of Woodke & Gibbons, P.C., Omaha, Nebraska, for appellee Branding.

Scott J. Beattie, Des Moines, for appellee Progressive Casualty.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ.

VAITHESWARAN, P.J.

Cassidy Buckingham sued Thressa Branding for injuries arising from a motorcycle/car accident. As Branding was not an Iowa resident, Buckingham attempted to use an out-of-state service procedure authorized by Iowa Code section 321.501 (2009). He completed the first prong of this procedure by mailing a copy of the original notice and petition to the director of the Iowa Department of Transportation. He did not successfully complete the second step of this procedure, which required him to mail Branding

> within ten days after said filing with the directors, by restricted certified mail addressed to the defendant at the defendant's last known residence or place of abode, a notification of said filing with the director.

Iowa Code § 321.501(2).

Buckingham concedes this failure. He also concedes he did not alternately have Branding personally served with process within ninety days after the filing of the petition as prescribed by Iowa Rule of Civil Procedure 1.302(5). He nonetheless argues that "good cause exists" for failing "to properly serve Branding."

Buckingham's good cause argument is premised on a conversation his attorney's legal assistant had with defense counsel's secretary. According to an affidavit filed by plaintiff's legal assistant, she was asked not to seek a default judgment against Branding. The legal assistant responded that her office would not seek a default because they knew an answer was forthcoming. The legal assistant also advised defense counsel's secretary that Branding was served with process via the Director of the Department of Transportation.

The district court acknowledged this affidavit but stated that even if the conversation between plaintiff's legal assistant and defense counsel's secretary was exactly as claimed, it did not furnish an excuse for Buckingham's failure to timely serve Branding. We discern no error in this ruling. *See Crall v. Davis*, 714 N.W.2d 616, 619 (Iowa 2006) (setting forth scope and standards of review and noting that court may consider matters outside pleadings in ruling on a motion to dismiss for delay of service, and court's fact findings are reviewed for substantial evidence).

As Buckingham himself points out, good cause for a failure of service requires the plaintiff to have taken "'some affirmative action to effectuate service of process upon the defendant'" or to "'have been prohibited, through no fault of his [or her] own, from taking such affirmative action.'" *Id.* at 621 (quoting *Meier v. Senecaut*, 641 N.W.2d 532, 542 (Iowa 2002)); *see also Mokhtarian v. GTE Midwest Inc.,* 578 N.W.2d 666, 669 (Iowa 1998) ("Once a plaintiff files a petition, we believe it only appropriate that the plaintiff should bear the burden of ensuring that service of the original notice and petition on defendant is both proper and timely."). There is no indication that Buckingham took affirmative steps to effectuate proper service within the ninety-day deadline or that he was prevented from doing so.

Nor is there any indication that Branding's attorney agreed to waive any deficiencies in service of process. Indeed, Buckingham conceded defense counsel's secretary "made no suggestion . . . that counsel had an issue with the timeliness of the [service]" and "did not express any intention of waiving any

defenses, including any deficiency in notice to the defendant." Accordingly, Buckingham's reliance on the conversation set forth in the affidavit is misplaced. *See Mokhtarian,* 578 N.W.2d at 669 ("The plaintiff cannot rely on the opposing party to inform him or her that service was not sufficient under our rules of civil procedure and then argue the delay in service was justified by previous unsuccessful or legally insignificant attempts at service."). We also note that Buckingham failed to obtain an order granting an extension for time to complete service as required by Iowa Rule of Civil Procedure 1.302(5). *See Brubaker v. Estate of DeLong*, 700 N.W.2d 323, 327 (Iowa 2005). The district court did not err in concluding Buckingham lacked good cause for the delay in service.

Buckingham makes an additional argument in support of reversal based on a strained reading of the out-of-state service provisions of Iowa Code chapter 321 in conjunction with Iowa Rule of Civil Procedure 1.302(5). We find this argument unpersuasive.

We affirm the district court's dismissal of the petition against Branding for failure of service.

AFFIRMED.