IN THE COURT OF APPEALS OF IOWA

No. 0-984 / 10-0965
Filed February 9, 2011

DANIELLE BUTLER,
Plaintiff-Appellee,

vs.

EDWARD NALVANKO,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Artis I. Reis, Judge.

In this interlocutory appeal, Edward Nalvanko contends the district court erred in denying his motion to dismiss. **REVERSED AND REMANDED.**

Michael A. Carmoney and Ashleigh E. O'Connell of Grefe & Sidney, P.L.C., Des Moines, for appellant.

James J. Biscoglia and Gary G. Mattson of LaMarca & Landry, P.C., Des Moines, for appellee.

Considered by Mansfield, P.J., and Danilson and Tabor, JJ.

DANILSON, J.

In this interlocutory appeal, defendant Edward Nalvanko contends the district court erred in denying his pre-answer motion to dismiss due to plaintiff Danielle Butler's failure to effect timely service of original notice pursuant to Iowa Rule of Civil Procedure 1.302(5). Because we agree Butler failed to timely serve Nalvanko and lacked justification for the delay in service, we reverse the district court.

Rule 1.302(5) provides:

> If service of the original notice is not made upon the defendant, respondent, or other party to be served within [ninety] days after filing the petition, the court, upon motion or its own initiative after notice to the party filing the petition, shall dismiss the action without prejudice as to that defendant, respondent, or other party to be served or direct an alternate time or manner of service. If the party filing the papers shows good cause for the failure of service, the court shall extend the time for service for an appropriate period.

Our rules of civil procedure "are to be liberally construed for the purpose of promoting the speedy determination of litigation upon its merits . . . ." *Wilson v. Ribbens*, 678 N.W.2d 417, 420 (Iowa 2004).

Here, the petition[1] was filed on January 6, 2010.[2] On January 8, Butler attempted to serve Nalvanko by process server at the Ankeny address listed for him on the 2004 traffic accident report. The process server was unable to locate Nalvanko at that address, and Butler learned Nalvanko had moved to Miami, Florida.

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[1] Danielle Butler alleges that on April 13, 2004, the bicycle she was riding was struck by Edward Nalvanko's vehicle. Butler filed suit against Nalvanko, claiming damages for personal injuries she suffered relating to the motor vehicle/bicycle collision.

[2] All dates referenced are 2010 unless specifically noted otherwise.

Butler next attempted to effectuate nonresident service to Nalvanko, pursuant to Iowa Code section 321.501 (2009). That section instructs the plaintiff to serve an original notice as follows:

> 1. By filing a copy of said original notice of suit with said director [Department of Transportation], together with a fee of two dollars, and
> 2. By mailing to the defendant, and to each of the defendants if more than one, within ten days after said filing with the director, by *restricted certified mail* addressed to the defendant at the defendant's last known residence or place of abode, a notification of the said filing with the director.

Iowa Code § 321.501 (emphasis added).

On February 6, Butler filed a copy of the original notice with the Iowa Department of Transportation. On February 8, Butler mailed a notice by *certified mail* to Nalvanko's last known address in Miami. In mid-February, the notice was returned undelivered and unopened to Butler's attorney marked "RETURNED TO SENDER, Attempted—Not known." On March 16, Butler's counsel filed an affidavit indicating service on Nalvanko had been obtained pursuant to section 321.501.

The ninety-day deadline to serve the original notice expired on April 6. On April 29, Nalvanko filed a pre-answer motion to dismiss, contending Butler failed to send the notice via *restricted certified mail* as required by section 321.501(2), and "even if the mailing had been properly restricted, Butler cannot show that the notification was ever received or rejected by Nalvanko, as required to effect service under Iowa law."

Butler resisted the motion and explained her unsuccessful attempt to serve Nalvanko, admitting:

> Plaintiff erroneously used certified mail instead of restricted certified mail (which compliance with § 617.3, but not § 321.501), but served the Department of Transportation (complying with § 321.501). However the method of service was moot because the service was returned as "attempted, address unknown."

Butler also requested the court grant an extension for time to serve Nalvanko. (Butler's motion for extension of time was filed on May 7, a month after the service deadline had passed.) On May 12, the district court denied Nalvanko's motion to dismiss, granted an extension to Butler, and found Butler "has shown good cause for this extension." Nalvanko filed an application for interlocutory appeal seeking relief from the district court's order,[3] which the supreme court granted. The case was transferred to this court.

We review a motion to dismiss for failure to effect timely service of process for the correction of errors at law. *Wilson*, 678 N.W.2d at 418; *Carroll v. Martir*, 610 N.W.2d 850, 857 (Iowa 2000). Where the district court makes findings of fact, those findings are binding upon us so long as they are supported by substantial evidence. *Wilson*, 678 N.W.2d at 418. We are not, however, bound by the district court's legal conclusions or application thereof. *Id.*

When, as here, there is no service within ninety days and no order extending time for service, the delay is presumptively abusive. *See Crall v. Davis*, 714 N.W.2d 616, 620 (Iowa 2006). In determining whether to grant a defendant's motion to dismiss under such circumstances, the court must "decide if the plaintiff has shown justification for the delay." *Meier v. Senecaut*, 641

[3] In the meantime, Butler filed another motion for extension of time for service and requested the court to order service by publication. Nalvanko filed a renewed motion to dismiss and requested oral hearing. Again, the court summarily granted Butler's request for extension of time and ordered service by publication.

N.W.2d 532, 542 (Iowa 2002). Courts employ a "good cause" standard in determining whether such justification exists, and if good cause is shown, the court must grant an extension. *Id.* at 541; *see Wilson*, 678 N.W.2d at 420.

Good cause requires that "[t]he plaintiff must have taken some affirmative action to effectuate service of process upon the defendant or have been prohibited, through no fault of his [or her] own, from taking such an affirmative action." *Henry v. Shober,* 566 N.W.2d 190, 191 (Iowa 1997).

> [G]ood cause is likely (but not always) to be found when the plaintiff's failure to complete service in timely fashion is a result of the conduct of a third person, typically the process server, the defendant has evaded service of the process or engaged in misleading conduct, the plaintiff has acted diligently in trying to effect service or there are understandable mitigating circumstances.

Meier, 641 N.W.2d at 541.

However, inadvertance, neglect, misunderstanding, ignorance of rule 1.302(5) or its burden, or half-hearted attempts at service have generally been deemed insufficient to show good cause. *Crall*, 714 N.W.2d at 620. Failure to move for an extension may weigh against a finding of good cause:

> [R]ule 1.302(5) requires service within ninety days and requires the plaintiff to take affirmative action to obtain an extension or directions from the court if service cannot be accomplished. In interpreting comparable Federal Rule of Civil Procedure 4(m), federal courts have held that a failure to move for an extension of time may be construed as an absence of good cause for the delay.

Id. at 621 (internal citations and quotations omitted).

With these principles in mind, we review the district court's finding that there was good cause for the delay in service. Nalvanko argues Butler's actions failed to constitute adequate justification for the delay because (1) the notification

was not mailed via restricted certified mail and (2) no further action was taken "to locate and serve Defendant Nalvanko after the notification was returned undelivered." Butler contends she "acted diligently by attempting to serve Nalvanko just two days after filing the lawsuit," which was "followed by what Butler believed was a successful attempt to serve Nalvanko pursuant to Iowa Code § 321.501." We acknowledge Butler took affirmative action to effect process on Nalvanko. Nevertheless, we conclude there was not substantial evidence in the record to support the district court's finding that these affirmative steps constituted good cause or justification for the delay.

Although Butler took affirmative action to effectuate service and in fact believed service had been completed, she acknowledges her attempt was not in compliance with section 321.501. That section requires "restricted certified mail" as the method of service, which is defined as mail that contains the endorsement "Deliver to addressee only," and affords the mailer with a return receipt setting forth details of delivery. *See* Iowa Code § 618.15 (noting that, in comparison, "certified mail" merely provides the mailer with a receipt to prove mailing). Our supreme court has identified the restricted certified mail method of service required by section 321.501 as "extraordinary in character," and has stated that it "must be strictly followed." *See Esterdahl v. Wilson*, 252 Iowa 1199, 1203, 110 N.W.2d 241, 243 (1961).

In this case, the envelope was mailed by certified mail; reflects a postage date of February 8, 2010; and clearly states, "RETURNED TO SENDER, Attempted—Not known." We can only assume the mail deliverer could not locate Nalvanko at the residence. *See Emery Transp. Co. v. Baker*, 254 Iowa 744, 749,

119 N.W.2d 272, 276 (1963) (noting that nonresident "notice is not received or jurisdiction acquired unless the notification is either *delivered* or is *rejected* by the addressee") (emphasis added).

These facts do not permit us to conclude Nalvanko attempted to evade service. We note this action was initiated almost six years after the accident. Our supreme court has observed that in our mobile society, "[i]t should come as no surprise" that someone may relocate in as little as two years. *McCormick v. Meyer*, 582 N.W.2d 141, 145 (Iowa 1998).

Under these circumstances, the delay in service may properly be attributed to Butler's erroneous assumption that service could be accomplished by certified mail. Butler's "lack of knowledge, misunderstanding or ignorance of our rules of civil procedure, however, does not excuse the delay in proper service." *Mokhtarian v. GTE Midwest, Inc.*, 578 N.W.2d 666, 669 (Iowa 1998); *see also Brubaker v. Estate of DeLong*, 700 N.W.2d 323, 327 (Iowa 2005) ("This record supports inadvertence, neglect, and half-hearted attempts to obtain service over the defendant."). As our supreme court has stated:

> 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. 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.

Mokhtarian, 578 N.W.2d at 669.

Butler's attempt in serving Nalvanko by certified mail was in clear contravention of section 321.501. As such, it constituted a legally insignificant attempt to serve that failed to provide adequate justification for the delay in

service. *Id*. Further, Butler's application for an extension of time to complete service after Nalvanko filed a pre-answer motion to dismiss does not satisfy Butler's burden of ensuring timely service. *Id*.; *see also Meier*, 641 N.W.2d at 543 (emphasizing that rule 1.302(5) "requires service within ninety days and requires the plaintiff to take affirmative action to obtain an extension or directions from the court if service cannot be accomplished"); *Crall*, 714 N.W.2d at 621.

Because there was not substantial evidence to support the district court's finding of good cause in this case, we conclude the district court erred as a matter law in failing to grant Nalvanko's motion to dismiss. Accordingly, we reverse the district court decision and remand for an order dismissing the petition.

REVERSED AND REMANDED.