

IN THE COURT OF APPEALS OF IOWA

No. 2-242 / 11-1688
Filed May 23, 2012

KEVIN KILGORE,
Plaintiff-Appellant,

vs.

**SPENCER LUMBARD and
MELINDA ENGLAND,**
Defendants-Appellees.

Appeal from the Iowa District Court for Ringgold County, Gary G. Kimes,
Judge.

Plaintiff, in his action contesting the election of county officers, appeals the
dismissal of the action by the district court for failure to timely serve notice to the
defendants. **REVERSED AND REMANDED.**

Kevin Kilgore, Diagonal, pro se.

Clinton L. Spurrier, County Attorney, for appellees.

Considered by Eisenhauer, C.J., Bower, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

MAHAN, S.J.**I. Background Facts & Proceedings.**

Kevin Kilgore contested the election of a Township Trustee and Township Clerk under Iowa Code chapter 62 (2011), naming Spencer Lumbard and Melinda England as incumbents. Such cases are held before a contest court.¹ See Iowa Code § 62.1A. The contest court issued a decision on March 22, 2011. Under section 62.20, a decision of a contest court may be appealed to the district court. Kilgore filed an appeal of the decision of the contest court in district court on April 7, 2011.

On July 18, 2011, on its own initiative, the district court issued an “Order Setting Deadline for Service of Process,” which noted that the respondents had not been served with original notice, as required by the Iowa Rules of Civil Procedure.² The order provided that on August 1, 2011, the case would be dismissed without prejudice unless (1) service had been accomplished prior to that date or (2) Kilgore filed an affidavit setting forth the justification for failing to timely serve notice, in which case an extension might be filed. Lumbard and England were served with notice of the appeal of the contest court decision on July 26, 2011, which was within the deadline for service set by the district court.

On July 27, 2011, Lumbard and England filed a motion to dismiss, stating they had not been served within ninety days after the appeal had been filed in the district court. A hearing on the motion to dismiss was held on August 15, 2011,

¹ The contest court is a three-member panel. Iowa Code § 62.1A.

² The Iowa Rules of Civil Procedure are applicable to contested elections in the area of service of process. *Bauman v. Maple Valley Cmty. Sch. Dist.*, 649 N.W.2d 9, 16 (Iowa 2002).

before a different district court judge. The court granted the motion to dismiss. Kilgore now appeals the district court ruling dismissing his appeal of the contest court decision.³

II. Standard of Review.

Under section 62.20, appeals of contest court decisions are heard in equity. See *Taylor v. Cent. City Cmty. Sch. Dist.*, 733 N.W.2d 655, 657 (Iowa 2007). Generally, our review of an appeal of a district court decision in an election contest would be de novo. See *id.* In reviewing a district court order on a motion to dismiss an election contest proceeding, however, our review is for the correction of errors at law. *Bauman v. Maple Valley Cmty. Sch. Dist.*, 649 N.W.2d 9, 12 (Iowa 2002).

III. Merits.

Iowa Rule of Civil Procedure 1.302(5) provides:

If service of the original notice is not made upon the defendant, respondent, or other party to be served within 90 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.

Rule 1.302(5) permits either party, or the court on its own initiative, to take action if a defendant has not been served within ninety days. *Meier v. Senecaut*, 641 N.W.2d 532, 542 (Iowa 2002). “The type of action directed by the rule is to dismiss the action without prejudice, impose alternative directions for service, or

³ Kilgore filed a motion for reconsideration of the dismissal of his appeal to the district court. He filed an appeal before the court ruled on the motion, thereby depriving the district court of jurisdiction to consider his motion. See *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 628 (Iowa 2000).

grant extension of time to complete service for an appropriate period of time.” *Id.* at 541.

In the present case, the district court on its own initiative entered an order imposing alternative directions for service. The district court granted Kilgore until August 1, 2011, to serve notice on the defendants. The defendants’ motion to dismiss does not challenge the legality of the district court’s “Order Setting Deadline for Service of Process.” Therefore, we do not question the propriety of the order. See *Brubaker v. Estate of DeLong*, 700 N.W.2d 323, 326 n.2 (Iowa 2005) (noting that where the defendant did not raise the issue of whether the district court had the authority to extend the time for service, on appeal the court would assume the extension was proper under rule 1.302(5)). Furthermore, the district court’s ruling on the motion to dismiss did not rescind or overrule the July 18, 2011 order.

We conclude the “Order Setting Deadline for Service of Process” directed an alternate time or manner of service, as permitted by Iowa Rule of Civil Procedure 1.302(5), giving Kilgore until August 1, 2011, to complete service. The defendants were served on July 26, 2011, within the time permitted by the court’s order. Because alternate directions for service had been granted, and the defendants were served within that time period, we conclude the district court erred by dismissing the action for failure to serve notice within ninety days. We reverse the decision of the district court and remand for further proceedings.

REVERSED AND REMANDED.