

IN THE COURT OF APPEALS OF IOWA

No. 3-227 / 12-1362
Filed May 15, 2013

TIFFANY PARISH,
Plaintiff-Appellant,

vs.

NARASIMHA MULE,
Defendant-Appellee.

Appeal from the Iowa District Court for Linn County, Patrick R. Grady,
Judge.

Tiffany Parish appeals the dismissal of her petition for failure to effect service of notice on the defendant in a personal injury action. **REVERSED AND REMANDED WITH DIRECTIONS.**

Frank J. Nidey and John W. Pilkington of Nidey, Erdahl, Tindal & Fisher, P.L.C., Cedar Rapids, for appellant.

Apryl M. DeLange of Hopkins & Huebner, P.C., Des Moines, for appellee.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

DANILSON, J.

Tiffany Parish appeals the dismissal of her petition for failure to effect service on the defendant in a personal injury action. Because the district court did not allow sufficient time for Parish to effect service after a finding of good cause for extension, we reverse the district court's dismissal of Parish's petition and remand to the district court for entry of an order authorizing service by publication and granting Parish sixty days to complete service.

I. Background Facts and Proceedings.

This personal injury action arose from an automobile accident that occurred on November 22, 2009. Tiffany Parish filed a petition on September 7, 2011. She attempted to personally serve Mule, via process server, by inquiry at the United States Postal Office, the Iowa Department of Motor Vehicles, and local utility companies; however, the process server was unable to locate Mule. Parish then attempted service by publication. An original notice was published on three separate occasions; however, Parish failed to file an affidavit asserting personal service could not be had and also failed to obtain an order permitting service by publication.

While Parish was attempting to serve Mule, there was an ongoing dialogue between Parish's counsel and Mule's insurance company, GEICO. Parish contends GEICO informed her counsel that it did not intend to hire an attorney, and it wished to reach a quick settlement.¹

¹ Parish did not provide evidence of this exchange, but we find the content of the alleged communication unnecessary for disposition.

On December 12, 2011, the district court filed an order requiring Parish to notify the court of her intentions regarding default judgment. The order mistakenly indicated that Mule had been properly served. In response to that order, nine days after the ninety-day period for service of original notice had expired, GEICO retained counsel for Mule and filed a pre-answer motion to dismiss. Parish resisted.

In a March 1, 2012 order, the district court denied the motion to dismiss, citing Parish's compliance with the substantive requirements of the rule, GEICO's awareness of the claim, and ongoing settlement discussions, noting: "[a]lthough there was no explicit agreement to delay service, there was correspondence and communication between Plaintiff and Defendant's insurance company requesting settlement communications and proposals." The court concluded there was good cause to grant Parish an extension. The court granted Parish an additional thirty days in which to effectuate service, but expressly stated that if Parish wished to utilize any method other than personal service she must make "the appropriate application and showing to the Court, all as required by the Iowa Rules of Civil Procedure." The court also stated, "[t]he court does not at this time, however, authorize service by publication."

On March 22, Parish's counsel visited with the apartment manager at Mule's last known residence in Cedar Rapids, and was told that Mule had likely left the country. Having determined that personal service could not be had, on March 30, Parish filed an application for equitable relief requesting permission to serve by publication, or by any means deemed just and equitable by the court.

Mule resisted, noting that Parish's application was filed one day before the expiration of her extension. Mule argued that Parish should have utilized the long-arm statute, citing Iowa Code sections 321.501 and 321.504 (2011); thereby making service by publication unnecessary. On April 3, 2012, Mule disclosed for the first time in an affidavit filed with the resistance that since the accident he had lived in Kansas, Nebraska, and Minnesota.

In a contested hearing, Parish's counsel argued that given Parish's continued efforts to locate Mule, there was good cause to allow more time to effect service upon Mule by publication.

In a May 21, 2012 order, the district court denied Parish's application for equitable relief and dismissed the underlying petition, finding that Parish could have utilized the long-arm statute because "it appeared that Defendant was no longer living in Iowa, a fact known to Plaintiff's counsel in early April of 2012 at the latest," Parish had not "sought leave for a further extension of time" and thus "failed to utilize the statutory procedures available to her."

Parish filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2) noting that she only learned Mule in fact lived out of state, thereby rendering the long-arm statute applicable after the thirty-day extension had expired. The court denied her motion. Parish appeals the denial of her application for equitable relief and dismissal of the underlying petition.

II. Standard of Review.

"We review a motion to dismiss for failure to effect timely service of process for the correction of errors at law." *Wilson v. Ribbens*, 678 N.W.2d 417,

418 (Iowa 2004); *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. We are not, however, bound by the district court's legal conclusions or application thereof.” *Wilson*, 678 N.W.2d at 418 (citation omitted).²

III. Discussion.

In determining whether to grant Mule’s motion to dismiss or Parish’s application for equitable relief, the court was required to “decide if the plaintiff has shown justification for the delay.” *Meier v. Senecaut*, 641 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 541-42; 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. Inadvertance, neglect, misunderstanding, ignorance of the rule or its burden, or half-hearted attempts at service have generally been [deemed] insufficient to show good cause.

Crall v. Davis, 714 N.W.2d 616, 620 (Iowa 2006). Failure to move for an extension may weigh against a finding of good cause. *Id.* at 621 (noting federal courts interpreting Federal Rule of Civil Procedure 4(m) have held that failure to move for an extension may be construed as an absence of good cause); see

² We note Parish entitled her application an “application for equitable relief” but we view the application as one that sought permission to serve by publication or directions and not invoking equitable jurisdiction, as this action was initiated in law.

also Rucker v. Taylor, 828 N.W.2d 595, 604 (Iowa 2013) (noting “our rule is exceedingly similar to Rule 4(m)” and as such “we find federal court interpretations persuasive.”). When there is no service within ninety days and no order extending time for service, the delay is presumptively abusive. See *Crall*, 714 N.W.2d at 620.

Here Parish was granted an order extending time for service after a finding of good cause justifying delay. That order indicated Parish must make additional effort to serve Mule personally, or make further application to the court for permission to utilize an alternative method. In light of the fact that publication was not authorized, the order infers another method of service must be attempted. Mule did not appeal from the order finding good cause for an extension. Further, the order filed May 21, 2012, upon which this appeal is premised, did not revisit the issue of whether there was good cause for the initial extension.

Parish then took further affirmative action, first making multiple attempts to locate Mule or ascertain his address. Finding these attempts unsuccessful, Parish then filed her application for equitable relief before the thirty-day period expired. At the hearing on her application, Parish specifically requested additional time, and further asked the court to (1) approve notice by publication, (2) compel counsel for Mule to accept service for him, or (3) compel counsel for Mule to disclose his address.

Our rules of civil procedure “are to be liberally construed for the purpose of promoting the speedy determination of litigation upon its merits.” *Wilson*, 678

N.W.2d at 420. Iowa Rule of Civil Procedure 1.302(5) controls service of original notice. It 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.*

(Emphasis added.) Thirty days was not an appropriate period of extension in this case, where the order of extension suggested additional effort to effect personal service was necessary and, although requested, permission to serve by publication was not granted. Under these circumstances, where personal service was not possible, thirty days was an insufficient time to file an affidavit to serve by publication, obtain a court order granting leave of the court to serve by publication and to publish notice for three consecutive weeks, as required by rule 1.313.

Mule contends service by publication was unnecessary as Parish could have served Mule by the “long-arm” statute provided in Iowa Code section 321.501. The court’s order filed on May 21, 2012, adopts the same position. However, we find that manner of service was not available to Parish under these facts.

Section 321.501 provides the acceptable manner of service of original notice of an action against a nonresident seeking recovery of damages that arose from a motor vehicle accident. 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.

Thus, in order to utilize this long-arm statute, the plaintiff must have knowledge of a last known address for the defendant which is outside of the state of Iowa. Parish did not have such information here. The only address known to Parish was Mule's Iowa address. The affidavit which indicated Mule was a resident of Minnesota was not submitted until after expiration of the thirty-day extension period. Moreover, no address in Minnesota was provided in the affidavit.

We conclude the district court erred in its determination that plaintiff was able to utilize the long-arm statutes for service of non-resident motorists in the order filed May 21, 2012 denying Parish's application. Moreover, thirty days was not an "appropriate period" of extension after a finding of good cause for failure of service within the original ninety-day period. Accordingly, we reverse the district court's dismissal of Parish's petition and remand to the district court for entry of an order authorizing service by publication upon the filing of a proper affidavit, and granting Parish sixty days to complete service.

REVERSED AND REMANDED WITH DIRECTIONS.