

IN THE COURT OF APPEALS OF IOWA

No. 3-561 / 12-2212
Filed August 21, 2013

SHAWN T. ROBERTS,
Plaintiff-Appellant,

vs.

**NORTHERN STATES TRANSPORTATION
INC., and KENNETH ARMSTRONG,**
Defendants-Appellees.

Appeal from the Iowa District Court for Mahaska County, James Blomgren, Judge.

Shawn Roberts appeals the district court order granting defendant Northern States Transportation's motion to dismiss. **AFFIRMED.**

Jeffrey A. Smith, Oskaloosa, for appellant.

Guy R. Cook and Adam D. Zenor of Grefe & Sidney, P.L.C., Des Moines, for appellees.

Considered by Vogel, P.J., and Vaitheswaran and Bower, JJ.

BOWER, J.

Shawn Roberts appeals the district court order granting defendant Northern States Transportation's motion to dismiss. Roberts argues the district court improperly dismissed the petition because he had established good cause for delay in service. Because we find Roberts failed to request an extension of the ninety-day service requirement and his service was untimely, we affirm.

I. Background Facts and Proceedings

Shawn Roberts filed a petition alleging Northern States Transportation (Northern) owned a tractor trailer which was negligently operated, and caused him injuries. Northern is a Wisconsin corporation doing business in Iowa.

A petition for damages was filed on July 31, 2012 and served on Robert Gillespie on October 6, 2012. Shortly thereafter, Gillespie contacted Roberts's attorney and reported he was no longer Northern's registered agent.

Roberts contacted the Iowa Secretary of State to determine the identity of Northern's registered agent and learned Northern had not filed a certificate of authority to conduct business in Iowa. Roberts next attempted to contact Northern directly and became concerned there might be multiple entities doing business under this name. Roberts claims he then contacted Northern's offices in Minnesota and was told Northern would discuss the issue with their attorney and return his call. Roberts claims Northern failed to do so.

Finally, Roberts contacted the Wisconsin Secretary of State and was informed Northern had a registered agent in Madison, Wisconsin. The record does not indicate when this information was received. On October 29, 2012, the

ninetieth day after the petition was filed, Roberts received a no service document from the case coordinator of the Eighth Judicial District of Iowa indicating the case would be dismissed pursuant to Iowa Rule of Civil Procedure 1.302(5) in twenty-five days “unless the moving party shows good cause for the failure of service. If good cause is shown, the Court may grant an extension of time for an appropriate period to perfect service.” Northern’s agent in Wisconsin was served the following day.

Northern filed a pre-answer motion to dismiss on November 13, 2012, which was granted by the court on November 30, 2012.

II. Standard of Review

A motion to dismiss is reviewed for corrections of errors at law. *Crall v. Davis*, 714 N.W.2d 616, 619 (Iowa 2006). Normally confined to the pleadings, when the basis is a delay of service, we accept the factual findings if supported by substantial evidence. *Id.*

III. Discussion

Roberts makes two closely related arguments. First, he contends he has shown good cause for the delay in perfecting service. Second, he argues the document sent by the case coordinator on October 29, 2012 guaranteed him an additional twenty-five days to perfect service.

Iowa Rule of Civil Procedure 1.302(5) gives a plaintiff ninety days to serve original notice on the defendant and allows for an extension of time upon a showing of good cause. Good cause under the rule has been interpreted by our supreme court to require the plaintiff “take affirmative action to obtain an

extension or directions from the court if service cannot be accomplished.” *Meier v. Senecaut*, 641 N.W.2d 532, 543 (Iowa 2002).¹ Failure to take affirmative action can be fatal to the action. *Id.* Though the rule gives the district court the power to dismiss the action on its own motion, the plaintiff is required to request an extension of time or ask for directions from the court when service cannot be accomplished within the ninety day period. Iowa R. Civ. P. 1.302(5); *Meier*, 641 N.W.2d at 543. The court has no power to extend the time on its own motion. When service is not accomplished within ninety days, and no extension has been granted, the delay is presumptively prejudicial. *Meier*, 641 N.W.2d at 542.

Roberts failed to accomplish service within ninety days and failed to request an extension of time to do so. Under *Meier* and rule 1.302 the district court was required to dismiss the action without prejudice.

Roberts’ related argument that the document received from the case coordinator on October 29, 2012 extended the time for service is unpersuasive. The document informed Roberts the case would be dismissed in twenty-five days “unless [Roberts] *shows good cause* for the failure of service. *If good cause is shown*, the Court may grant an extension of time for an appropriate period to perfect service.” By its plain terms, the case coordinator’s notice established good cause must first be affirmatively demonstrated to the court, and only then would the court consider providing an extension of time for service. This notice cannot be read to provide an extension by itself, or change the rule to allow

¹ *Meier* examined our old rule 49 which is the predecessor to our current rule 1.302. The former rule 49 and our current rule 1.302(5) contain the same good cause standard.

Roberts to serve the notice and then retroactively obtain an extension by way of demonstrating good cause.²

AFFIRMED.

² We are additionally unconvinced Roberts would be able to demonstrate good cause. The circumstances are similar to those found in *Meier*. See *Meier*, 641 N.W.2d at 543. Roberts filed the petition on July 31, 2012, but waited until October 6, 2012, to attempt service on anyone. After learning he had served the wrong individual, Roberts waited an additional twenty-three days to contact the Wisconsin Secretary of State, to learn the name of the registered agent, for service.