

IN THE COURT OF APPEALS OF IOWA

No. 6-1011 / 05-1938
Filed January 31, 2007

ROTIMI WADDY,
Plaintiff-Appellant,

vs.

**ALEX LUMBARD, LISA M. AND ROBERT
J. LUMBARD, as Parents of ALEX LUMBARD,**
Defendants-Appellees.

and RACHELLE WILLIAMS, RICKY D.
AND RHONDA WILLIAMS, as Parents of
RACHELLE WILLIAMS,
Defendants.

Appeal from the Iowa District Court for Polk County, D.J. Stovall, Judge.

Plaintiff-appellant appeals from an order denying his motion to extend the time to serve the defendants-appellees and sustaining the defendants-appellees' motions to dismiss. **AFFIRMED.**

Robert A. Wright, Jr., of Wright and Wright, Des Moines, for appellant.

David L. Phipps of Whitfield & Eddy, P.L.C., Des Moines, for appellees.

Considered by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

EISENHAUER, J.

Rotimi Waddy appeals from an order denying his motion to extend the time to serve Alex, Lisa, and Robert Lumbard and sustaining the Lumbards' motions to dismiss for failure to timely serve process. We affirm.

On July 5, 2002, Waddy claims he was assaulted by Alex Lumbard while at a party at the home of Ricky and Rhonda Williams. Settlement negotiations ensued between Waddy and the attorney for the Lumbard family. On July 6, 2004, Waddy filed a petition against Ricky and Rhonda Williams, Alex Lumbard, and Robert and Lisa Lumbard, as the parents and guardians of Alex, for injuries resulting from the incident. The day after filing the petition, Waddy's counsel wrote the following letter to the Lumbards' attorney:

Per our prior discussions, please find enclosed a copy of the Petition for Damages and Jury Demand which I have prepared and filed with respect to my client, Rotimi Waddy.

I am enclosing an Acceptance Of Service for you to sign if your clients authorize you to accept service on their behalf.

My client is open to accepting the \$2,000 payment from the parents of Alex to resolve that aspect of the case.

Please contact me upon receipt of this correspondence and advise as to your client's position and whether you are authorized to accept service on behalf of either Alex and/or his parents. Thank you.

Lumbards' attorney replied:

My clients have directed me to get this matter resolved without necessity of further expense to them and their son, and ask that you revise your pleadings to drop *each of the Lumbards* from your lawsuit as Defendants and in return, we will forward you [a \$2000 payment] for settlement and ask for a complete Release and Satisfaction from Mr. Rotimi Waddy.

(Emphasis added). The settlement was not consummated and the acceptance of service was never returned to Waddy. On October 7, 2004, ninety-three days

after the petition was filed, the district court filed an order titled "Order Re: Setting Deadline For Service of Process." The order stated:

Upon review of the file, the Court finds the Plaintiff has not served the Defendant with the Original Notice as required by Iowa Rule of Civil Procedure 1.302. In an effort to comply with the time standards, the Court therefore notifies Plaintiff(s) that this case will be dismissed, without prejudice, under Iowa Rule of Civil Procedure 1.302(5), on November 10, 2004, unless the party filing the Petition applies to the Court for an extension, in compliance with Rule 1.302(5).

In response to this order, Waddy's attorney sent another letter to the Lumbards' attorney once again asking whether it would be necessary to serve the Lumbards personally or whether he could accept service on their behalf. The attorney replied that he was not authorized to accept service on behalf of the Lumbards. On November 8, 2004, a process server served the petition and original notice on Lisa Lumbard.

On November 15, 2004, Waddy filed a motion to extend time with the court. Waddy requested an extension of seven days to file the proof of service on the Lumbards. Shortly thereafter, a new attorney for Robert and Lisa Lumbard filed a motion to dismiss because Robert and Lisa were not served with notice of the petition until 125 days after the petition had been filed. A similar motion to dismiss was filed on behalf of Alex Lumbard.¹ Waddy resisted these motions, arguing the court's October 7, 2004 order extended the ninety-day

¹ Alex Lumbard's motion to dismiss contained an additional argument challenging whether Alex, who was now an adult living in Iowa City, was adequately served when the process server delivered the original notice and petition to Lisa Lumbard at her home in Des Moines. The district court did not address this issue in its decision to dismiss Alex from the case, presumably because it found there was not good cause for the delay in service.

service requirement and he had good cause for not serving the Lumbards within ninety days.

The district court overruled Waddy's motion to extend and sustained the Lumbards' motions to dismiss.

Waddy appeals, once again arguing the court's October 7, 2004 order extended the ninety-day service requirement² and that he had good cause for not serving the Lumbards "due to the ongoing negotiations between he and the [Lumbards'] attorney who wasn't responding to [his] requests regarding service."

We review the district court's decision for correction of errors at law and assess whether the court's findings are supported by substantial evidence. *Carroll v. Martir*, 610 N.W.2d 850, 857 (Iowa 2000).

Iowa Rule of Civil Procedure 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." *Meier v. Senecaut*, 641 N.W.2d 531, 543 (Iowa 2002) (emphasis added). When there is no service within ninety days and no order extending the time for service, the delay is presumptively abusive. See *id.* at 542. If there was good cause that prevented Waddy from serving the Lumbards within the ninety days, then the district court had no discretion; it was required to extend the time for service for an appropriate period. See *id.* at 541; Iowa R. Civ. P. 1.302(5) ("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."). If there was no such good cause, then the

² The judge that issued the October 7, 2004 order did not preside over the rest of the case.

district court was required to dismiss the action without prejudice. *Meier*, 641 N.W.2d at 542. Therefore, the only question before this court is whether substantial evidence supports the district court's finding that Waddy did not demonstrate good cause for the delay in service. See *id.*

Our good cause standard requires a showing by the plaintiffs that they have:

taken some affirmative action to effectuate service of process upon the defendant[s] or have been prohibited, through no fault of [their] own, from taking such an affirmative action. Inadvertence, neglect, misunderstanding, ignorance of the rule or its burden, or half-hearted attempts at service have generally been waived as insufficient to show good cause.

Id. (citations omitted).

Sending opposing counsel a form for acceptance of service for his clients is, at best, a "half-hearted" attempt at service, rather than an affirmative action to effectuate service of process. Also, "good-faith settlement negotiations standing alone do not constitute good cause for delays in service beyond the ninety-day limit." *Wilson v. Ribbens*, 678 N.W.2d 417, 422 (Iowa 2004) (citation omitted). The district court was correct to conclude there was not good cause for the delay in service.

We also agree with the district court's conclusion that the October 7, 2004 order did not extend the deadline for service. While the caption of the order—"Order Re: Setting Deadline for Service of Process"—was misleading, the order clearly stated the petition would be dismissed on November 10, 2004, "unless" Waddy filed for an extension to the ninety-day service requirement. As this order

was filed after the lapse of the ninety-day service requirement, it also did not constitute good cause for the delay in service.

Because there was not good cause to excuse the delay in service of process, the district court properly denied Waddy's motion for extension and properly sustained the Lumbards' motions to dismiss.

AFFIRMED.