IN THE COURT OF APPEALS OF IOWA

No. 8-246 / 07-1309
Filed May 29, 2008

D'ARCY BARNETT, on behalf of the estate and next of kin to James R. Barnett and Katherine Barnett,
Plaintiff-Appellant,

vs.

CAREY WIMER, D.O.; STEVEN HERWIG, D.O.; IOWA ENT, P.C.; ANGELA S. COLLINS, M.D.; DEB KIMBALL, M.D.; and THE IOWA CLININC, P.C.,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Glenn E. Pille, Judge.

Plaintiff appeals from the district court's ruling that she did not qualify for a good cause extension to the service deadline. **AFFIRMED.**

Jeffrey Carter, Jessica J. Chandler, and Matt Gebhardt of Jeffrey Carter Law Offices, P.C., Des Moines, for appellant.

Michael Figenshaw and Thomas M. Boes of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, for appellee Carey Wimer, D.O.

James Gowling of Gislason & Hunter, L.L.P., Minneapolis, MN, for appellee Deb Kimball, M.D.

Jack Hilmes of Finley, Alt, Smith, Scharnberg, Craig, Hilmes & Gaffney, P.C., Des Moines, for appellee Steven Herwig, D.O.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

VAITHESWARAN, J.

D'Arcy Barnett sued Drs. Carey Wimer, Steven Herwig, and others, following the death of her husband. Barnett had ninety days to serve the defendants. Iowa R. Civ. P. 1.302(5). Sixty-five days after the petition was filed, a process server attempted to serve Drs. Wimer and Herwig[1] by giving the papers to an attorney who worked for the physicians' employer.

After the service deadline expired, Drs. Wimer and Herwig moved to dismiss the petition. The district court granted the motion. The court determined (1) the "doctors were not served within 90 days of the Petition," and (2) Barnett did not qualify for a "good cause" extension of the service deadline.

Barnett only challenges the court's second determination. She maintains "the district court erred in not finding good cause to extend time to personally serve defendants Herwig and Wimer."[2]

I. Analysis

Motions to dismiss are reviewed for correction of errors at law. *Crall v. Davis*, 714 N.W.2d 616, 619 (Iowa 2006). While such motions are generally limited to the pleadings, we may look beyond the pleadings when motions are "based on delay of service." *Id.* In this case, the district court held an evidentiary hearing on the motion to dismiss and, following the hearing, made pertinent findings of fact. Those findings are binding if supported by substantial evidence. *Id.*

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[1] Although other defendants were named, the only defendants on appeal are these physicians. Therefore all references will be to them.

[2] We are not persuaded by the defendants' error preservation concerns and, accordingly, we proceed directly to the merits.

> Iowa Rule of Civil Procedure 1.302(5) provides in pertinent part:
>
> > 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 Supreme Court has confirmed the following interpretation of good cause:

> > Good 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 process or engaged in misleading conduct, the plaintiff has acted diligently in trying to affect service or there are understandable mitigating circumstances . . . .

Wilson v. Ribbens, 678 N.W.2d 417, 421 (Iowa 2004) (quoting 4B Charles A. Wright and Arthur R. Miller, *Federal Practice & Procedure* § 1137 at 342 (2002)). Latching on to this language, Barnett contends good cause for an extension existed because: (1) the process server misled her, (2) the defendants misled her, and (3) there are mitigating circumstances.

(1) The process server's conduct

Barnett first argues she relied on the representation of the process server that the attorney who received the service papers was authorized to accept service on behalf of the doctors. In her view, she

> > believed she had good service based upon the representations made by the process server, until the testimony at the Hearing on the Motion to Dismiss made it clear that the process server had misled Plaintiff, Plaintiff's counsel and the Court.

The district court rejected this argument. The court determined that the process server's return did not "comply with the rules regarding personal service" and Barnett's reliance on the return "demonstrates either inadvertence or ignorance of the rule," rather than good cause. Substantial evidence supports these determinations.

Good cause requires that "the 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." *Crall*, 714 N.W.2d at 620 (citation omitted). Approximately three weeks before the service deadline expired, an employee of Barnett's attorney instructed the process server that "the doctors need served personally at home or at work unless an individual signs an acceptance of service on their behalf, which I have attached." The same day, the process server executed an affidavit of service that noted Drs. Wimer and Herwig were served "Personally." Over the space indicating the "name and title or relationship of individuals served," the server wrote "c/o Craig Kelinson, J.D." No acknowledgment of service form was attached to this affidavit. The document was filed with the clerk of court three days before the service deadline.

There is no indication that Barnett's attorney followed up with the process server before the service deadline expired to determine why the physicians were not personally served, what Attorney Kelinson's relationship was to the physicians, whether he had authority to accept service on behalf of the physicians, and whether he signed an acceptance of service form, as directed. At the evidentiary hearing on the motion to dismiss, the process server testified that such a form was attached to some of the petitions but not to the ones he was to serve on Drs. Wimer and Herwig. He agreed with defense counsel that if an acceptance form had been attached to the documents he was to serve on these physicians, he did not think Kelinson "would have signed for that."

Because Barnett's attorney failed to investigate a facially confusing return of service, the district court did not err in finding no good cause for the delay in service. *See Palmer v. Hofman*, 745 N.W.2d 745, 748 (Iowa Ct. App. 2008) (stating attorney's failure to monitor progress of service in his office did not amount to good cause).

(2) Defendants' "misleading" conduct

Barnett cites two examples of "misleading" conduct by the defendants. First, she contends the defendants should not have waited to file their motion to dismiss until after the expiration of the ninety-day service window. The district court rejected this argument, stating:

> Defendants had no legal obligation to alert the Plaintiff as to any such deficiencies, except as required to do so within the Rules of Civil Procedure. In fact, they may have been remiss in their duties as attorneys for the Defendants to do other than what they did in this particular case.

We discern no error in this conclusion. *See Mokhtarian v. GTE Midwest Inc*., 578 N.W.2d 666, 669 (Iowa 1998) (stating 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).

Barnett next contends that Attorney Kelinson misled her by acknowledging receipt of the documents. We recognize the process server obtained Kelinson's signature on the bottom of his service directions, creating some confusion as to whether Kelinson accepted service on behalf of the physicians. The district court resolved this confusion in favor of the defendants, citing Kelinson's testimony that he was not the personal attorney of either Wimer or Herwig and "did not have

any authority to accept service on behalf of any of these individual physicians." The court's finding is supported by substantial evidence. Additionally, it is established that the plaintiff has the burden of ensuring proper and timely service. *Id.* Based on this principle, it was incumbent on Barnett to resolve any confusion generated by Kelinson's signature. In light of her failure to do so, the district court did not err in finding an absence of good cause for delayed service.

(3) Mitigating circumstances

Barnett's final argument is a reiteration of arguments made above. We find it unnecessary to address them again.

II. Disposition

We affirm the district court's dismissal of Barnett's petition. To the extent Barnett raises additional arguments in support of reversal, we conclude the district court adequately addressed them and correctly applied the law.

AFFIRMED.

Vogel and Vaitheswaran, JJ. concur. Sackett, C.J. dissents.

SACKETT, C.J. (dissenting)

I dissent. I would reverse and remand.

I believe Barnett qualified for a "good cause" extension of the service deadline.