STATE OF MICHIGAN

COURT OF APPEALS

DRUISILLA SHARP, an incapacitated person, by VERNA EDWARDS, conservator of the estate of DRUISILLA SHARP,

Plaintiff-Appellant,

v

JOHN HENRY ADAMS,

Defendant-Appellee.

UNPUBLISHED
September 17, 1996

No. 181277
LC No. 93333886 NI

Before: Marilyn Kelly, P.J., and Gribbs and W.E. Collette,* JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial judge's decision to set aside her default judgment against defendant and to dismiss her case with prejudice. Plaintiff argues that the judge erred in finding lack of jurisdiction. She asserts that dismissal was improper, because defendant had actual notice of the action before the statutory period of limitations ran. We affirm.

On August 25, 1991, defendant's vehicle collided with the vehicle in which plaintiff was a passenger. On August 9, 1993, plaintiff filed a complaint against defendant. It was voluntarily dismissed due to plaintiff's inability to serve process.

A second complaint was filed on December 2, 1993. Defendant failed to answer and a default was entered on May 19, 1994. A default judgment in the amount of $250,000 was entered on August 19, 1994.

Defendant then filed an appearance and a motion to set aside the default judgment. He alleged that the court lacked jurisdiction to enter the default judgment, because he had not been served with process. Following an evidentiary hearing, the judge found that defendant had not been served with notice of the claim. The statute of limitations had expired, precluding plaintiff from refiling the claim.

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*Circuit judge, sitting on the Court of Appeals by assignment.

We review a judge's decision to set aside a default judgment for an abuse of discretion. *Gavulic v Boyer*, 195 Mich App 20, 24; 489 NW2d 124 (1992). The judge's findings of fact are reviewed for clear error. MCR 2.613(C); *Townsend v Brown Corp of Ionia, Inc*, 206 Mich App 257, 263; 521 NW2d 16 (1994).

A trial court lacks jurisdiction to enter a default or default judgment where the defendant has not received notice of the action. *H & L Heating v Bryn Mawr Apartments of Ypsilanti, LTD*, 97 Mich App 496, 503; 296 NW2d 354 (1980). The party attacking the jurisdiction of the court has the burden of demonstrating the failure to serve process. *James v James*, 57 Mich App 452, 454; 225 NW2d 804 (1975).

In this case, the judge did not abuse her discretion in setting aside the default judgment. Harris described the man he served as being between forty and forty-five years old. Defendant is only twenty-five years old. There were discrepancies regarding the alleged date of service. Harris testified that he served defendant on December 3, 1993. He asserted that he could not have served defendant on December 31, 1993, the date listed on the return of service, because defendant was out of town. However, documents provided by Harris' employer indicated that the company did not receive the summons and complaint from plaintiff's counsel until December 15, 1993. Therefore, the trial judge could properly find that Harris' assertion as to when he served defendant lacks credibility.

Defendant testified that he did not live at the address where the papers were delivered. Defendant's mother, Bonita Larkin, testified that she saw Harris at her home around December 31, 1993, and he handed papers to her ten year old daughter. Larkin stated that she did not give the papers to defendant. Defendant found the summons and complaint four months later in a drawer at his mother's house.

We have considered all the evidence presented at the hearing and given due deference to the judge's evaluation of the credibility of witnesses. The judge's finding that defendant was not served with process was not clearly erroneous. Given this finding, the judge's decision that she lacked jurisdiction to enter a default judgment was not an abuse of discretion.

Plaintiff also argues that, if a defendant receives a copy of the summons and complaint before expiration of the limitations period, the case cannot be dismissed for improper service. We disagree.

MCR 2.105(J)(3) states:

> An action shall not be dismissed for improper service of process unless the service failed to inform the defendant of the action within the time provided in these rules for service.

Therefore, to reinstate a claim dismissed for insufficient service, the plaintiff must show notification was made within the statutory service period, not merely before the running of the limitations period. See

Hill v Frawley, 155 Mich App 611; 400 NW2d 328 (1986). If a defendant actually receives a copy of the summons and complaint within the permitted time, he cannot have the action dismissed because the manner of service contravenes the rules. *Id*.

Here, however, defendant did not receive actual notice of the summons and complaint until August 15, 1994. The time limit for serving him expired long before that date. See MCR 2.102(D). Therefore, the trial judge properly dismissed the action, even though defendant had notice of the lawsuit before the statute of limitations expired.

Affirmed.

/s/ Marilyn Kelly
/s/ Roman S. Gribbs
/s/ William E. Collette