

STATE OF MICHIGAN
COURT OF APPEALS

ARTHUR GARCIA, JR.,

Plaintiff-Appellant,

v

LAWRENCE G. KALUZYNY,

Defendant-Appellee.

UNPUBLISHED

January 7, 2000

No. 205867

Lenawee Circuit Court

LC No. 97-007376 NM

Before: White, P.J., and Sawyer and Griffin, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of dismissing his legal malpractice claim. We affirm.

Plaintiff, a prisoner with the Michigan Department of Corrections, filed a legal malpractice complaint against defendant based on defendant's allegedly deficient representation of plaintiff in an underlying murder case. The summons for plaintiff's complaint was issued on March 5, 1997, and was set to expire on June 4, 1997. Plaintiff attempted to serve defendant via certified mail on March 22, 1997, but defendant refused delivery. Thereafter, plaintiff asked the trial court for a court appointed process server, but this request was denied. Eventually the court dismissed plaintiff's claim for failure to serve defendant. Plaintiff's motion to set aside the dismissal was denied.

On appeal, plaintiff argues that the trial court misinterpreted MCR 2.102(F), the court rule dealing with setting aside dismissals. We disagree. Statutory interpretation is a question of law which is reviewed de novo on appeal. *Oakland Co Bd of Rd Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998).

This case was dismissed based on MCR 2.102(E) which provides that, "[o]n the expiration of the summons as provided in subrule (D) [91 days], the action is deemed dismissed without prejudice as to a defendant who has not been served with process as provided in these rules, unless the defendant has submitted to the court's jurisdiction." Thus, subrule (E) applies when a defendant has not been properly served within the ninety-one days provided for in subrule (D). See also *Bush v Beemer*, 224

Mich App 457, 459; 569 NW2d 636 (1997). However, a dismissal under MCR 2.102(E) may be set aside. MCR 2.102(F) provides:

A court may set aside the dismissal of the action as to a defendant under subrule (E) only on stipulation of the parties or when all of the following conditions are met:

(1) within the time provided in subrule (D), service of process was in fact made on the dismissed defendant, or the defendant submitted to the court's jurisdiction;

(2) proof of service of process was filed or the failure to file is excused for good cause shown;

(3) the motion to set aside the dismissal was filed within 28 days after notice of the order of dismissal was given, or, if notice of dismissal was not given, the motion was promptly filed after the plaintiff learned of the dismissal.

The trial court found that plaintiff complied with MCR 2.102(F)(3) by filing his motion within twenty-eight days of the notice of dismissal, but that plaintiff failed to comply with the other two requirements. Plaintiff argues that the court misinterpreted and misapplied the court rule. We disagree, as the plain language of the court rule is clear and not subject to more than one interpretation. *Lorencz v Ford Motor Co*, 439 Mich 370, 376; 483 NW2d 844 (1992).

Plaintiff argues that it is counterintuitive to interpret MCR 2.102(F)(1) as a requirement that actual process be served upon a defendant. Plaintiff asks how it can be that a dismissal based on the fact that a defendant was not served could be set aside only when a plaintiff could show that the defendant was, in fact, served. Michigan Court Rules Practice explains, “[u]nder these stringent requirements, contested relief from dismissal under MCR 2.102 can be achieved only if, in effect, it was wrongly granted in the first place, either by error of the clerk, or by proper dismissal by the clerk because of (excusable) failure by the plaintiff to file proof of service.” Dean & Longhofer, Michigan Court Rules Practice, § 2102.8, p 91. Thus, a dismissal will be set aside only when it was wrongly granted to begin with. Plaintiff has not shown that the dismissal was wrongly granted. Therefore, plaintiff failed to meet the requirement of MCR 2.102(F)(1).

With regard to the proof of service in this case, it should be noted that plaintiff failed to file a proof of service with the court indicating that he had served defendant with the summons and complaint. The only evidence that a proof of service may have been filed was in plaintiff's subsequent motion for a process server. Plaintiff attached a March 22, 1997, proof of service as an exhibit to that motion. It indicated that on that day, plaintiff sent the summons and complaint to defendant via certified mail. It appears that the proof of service was properly notarized, yet it was not filed with the court prior to the time that plaintiff filed a motion for a process server. Thus, other than as an exhibit to a motion, proof of service of the summons and complaint was never separately filed. As the court pointed out, plaintiff never offered an explanation for his failure to file the proof of service. Therefore, plaintiff failed to satisfy

MCR 2.102(F)(2). Because plaintiff failed to satisfy both MCR 2.102(F)(1) and (F)(2), the trial court properly denied his motion to set aside the dismissal.¹

Affirmed.

/s/ Helene N. White
/s/ David H. Sawyer
/s/ Richard Allen Griffin

¹ Plaintiff asserts that he sent a letter dated May 27, 1997 (within the life of the summons), to the court clerk, setting forth his efforts at service and requesting that the clerk "re-issue this summons." However, the letter was not filed as a motion and does not appear in the court file. It is unclear whether the letter was ever received by the court. Under the circumstances, plaintiff has not demonstrated an entitlement to relief on this basis.