

STATE OF MICHIGAN
COURT OF APPEALS

MARGARET BRYSON,

Plaintiff-Appellant,

v

V.T.S., Inc. d/b/a BRANDY'S II,

Defendant-Appellee,

and

LORI ELLA JOKELA, INC.,

Defendant.

UNPUBLISHED

August 26, 1997

No. 186573

Wayne Circuit Court

LC No. 92-234878-NS

Before: Markman, P.J., and Holbrook, Jr., and O'Connell, JJ.

PER CURIAM.

In this dramshop action, plaintiff appeals as of right the trial court's final order (a default judgment against defendant Jokela), arguing that the trial court erred in quashing its service of process upon defendant V.T.S., Inc. We reverse and remand.

Plaintiff's second summons in this matter had a June 18, 1993, expiration date. The trial court issued an order for substituted service allowing plaintiff to serve defendant by delivering the summons and complaint "to any person at V.T.S., Inc" *and* mailing the summons and complaint to defendant. The affidavit of plaintiff's process server indicates that on June 1, 1993, he posted the summons, complaint, and order allowing substituted service at 26331 Mary, Taylor, Michigan.¹ On July 15, 1993, defendant filed a motion to quash the purported service of process alleging that plaintiff's service was ineffective because it did not comply with the order for substituted service. Defendant also filed an answer to the complaint and affirmative defenses (including the claim of ineffective service) on July 15, 1993. The trial court granted defendant's motion to quash.

There is no dispute that plaintiff's manner of service did not comply with the trial court's order for substituted service. However, MCR 2.105(J)(3) provides that "[a]n 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."²

In *In re Estate of Gordon*, ___ Mich App ___; ___ NW2d ___ (Docket No. 177275, issued 3/7/97), slip op at 4, this Court stated:

Generally, defective service of process will not warrant dismissal of a party's pleading unless the service failed to notify the defendant of the action "within the time prescribed for service." MCR 2.105(J)(3). However, a complete failure of service, e.g., failure to serve the summons with the complaint within the time for service, warrants dismissal for improper service of process.

Thus, where there is a defect in the manner of service of process, the relevant question is generally whether the defendant actually received a copy of the summons and complaint before the summons expired. *Hill v Frawley*, 155 Mich App 611, 613; 400 NW2d 328 (1986); *Holliday v Townley*, 189 Mich App 424, 425-426; 473 NW2d 733 (1991).

Here, defendant's filing of an answer to the complaint on July 15, 1993, indicates that it must have received a copy of the complaint by that date. However, it is unclear from the record whether defendant received actual notice of the action under MCR 2.105(J)(3) before the summons expired on June 18, 1993. An evidentiary hearing is necessary to resolve this question. The trial court erred in granting defendant's motion to quash service of process without resolving this question.

Additionally, we must determine whether defendant's decision to address the merits of plaintiff's claim constitutes submission to the court's jurisdiction and makes moot the question whether he received actual notice of the action under MCR 2.105(J)(3) before expiration of the summons. The *Gordon* Court stated:

Still, a party, who enters a general appearance and contests a cause of action on the merits, submits to the court's jurisdiction and waives service of process objections. [*Gordon*, *supra* slip op at 4.]

The *Gordon* Court cited *Penny v ABA Pharmaceutical Co (On Remand)*, 203 Mich App 178, 182; 511 NW2d 896 (1993) for this proposition. The root of this proposition can be traced to *Nelson v McCormick*, 334 Mich 387, 389; 54 NW2d 694 (1952), which states, "the entering of a general appearance by the principal defendant gives the court jurisdiction *in personam*." The *Penny* Court considered the implications of such a submission to the court's jurisdiction under MCR 2.102(E)(2). MCR 2.102(E) states in pertinent part:

(1) On the expiration of the summons as provided in subrule (D), 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. . . .

(2) After the time stated in subrule (E)(1), the clerk shall examine the court records and enter an order dismissing the action as to a defendant who has not been served with process or submitted to the court's jurisdiction. The clerk's failure to enter a dismissal order does not continue an action deemed dismissed.

Under MCR 2.102(E)(2), it is a defendant's submission to the court's jurisdiction *before the expiration of the summons* that waives service of process objections and keeps the clerk from dismissing the action.³ In *Penny*, this Court found that the defendant could not raise service of process defects because it submitted to the court's jurisdiction by retaining counsel who appeared and participated in the action. *Penny, supra* at 182. These actions by the defendant, specifically a January 8, 1988, letter from the defendant's counsel to the plaintiff's counsel, occurred before the summons expired (January 27, 1988). *Id.* at 180, 182. Thus, the *Penny* Court, and the line of cases holding that entry of a general appearance waives service of process objections, do not address the effect of a submission to the court's jurisdiction *after* expiration of the summons. MCR 2.102(E) states that an action is deemed dismissed regarding a defendant when the summons expires without service on the defendant or submission by the defendant to the court's jurisdiction. Accordingly, while entry of a general appearance after expiration of a summons may constitute submission to the court's in personam jurisdiction, if a defendant has not been served or submitted to the court's jurisdiction as of the expiration of the summons, the action would be deemed dismissed as of that time, and there would not be any pending action.

Here, defendant did not file an answer to the complaint (i.e., submit to the court's jurisdiction) until after the expiration of the summons. Under MCR 2.102(E)(2), the present action is deemed dismissed as of the summons' expiration date if defendant was neither served nor submitted to the court's jurisdiction by that date. Accordingly, unless defendant received actual notice of the action under MCR 2.105(J)(3) before the summons expired as discussed above, plaintiff's case was deemed dismissed on June 18, 1993, and there was no case pending at the time defendant filed its answer to plaintiff's complaint. Therefore, defendant's filing of an answer to plaintiff's complaint after the expiration of the summons does not make the question whether it received a copy of the summons and complaint before the summons' expiration date moot.

For these reasons, we reverse the trial court's order granting defendant's motion to quash service of process and remand for further proceedings consistent with this opinion.⁴ We do not retain jurisdiction.

/s/ Stephen J. Markman
/s/ Donald E. Holbrook, Jr.
/s/ Peter D. O'Connell

¹ This is apparently the address of Terry Alcorn, whom plaintiff alleged was defendant's resident agent. Under MCR 2.105(D)(1), service of process on a private corporation may be made by serving a summons and complaint on its resident agent.

² We note defendant's contention that a party should be able to contest service of process defects without waiving such defects. MCR 2.117(A)(2) provides in pertinent part: "Filing an appearance without taking any other action toward prosecution or defense of an action neither confers nor enlarges the jurisdiction of the court over the party." *Penny v ABA Pharmaceutical Co (On Remand)*, 203 Mich App 178, 181-182; 511 NW2d 896 (1993) appears to provide for an appearance for the limited purpose of objecting to jurisdiction: "Generally any action on the part of a defendant that recognizes the pending proceedings, *with the exception of objecting to the court's jurisdiction*, will constitute a general appearance." (Emphasis added.) However, as discussed below, a party objecting to a defect in service will have to demonstrate that he did not have actual notice of the action within the time for service. MCR 2.105(J)(3).

³ Similarly, MCR 2.102(F) provides that such a dismissal may be set aside only by stipulation of the parties or if three conditions are met, one of which is that the defendant in fact be served or submit to the court's jurisdiction *before* the expiration of the summons as set forth in MCR 2.102(D).

⁴ Because it was not decided by the trial court, we do not address defendant's argument that entering a default judgment against defendant Jokela constituted a violation of the dramshop act's name and retain provision, MCL 436.22(6); MSA 18.993(6). Defendant is free to raise this argument on remand.