

STATE OF MICHIGAN
COURT OF APPEALS

HEKMAT PUTRUSS, PIERRE PUTRUSS,
SALWA PUTRUSS, and MODA COUTURE,
INC.,

UNPUBLISHED
October 7, 2014

Plaintiffs-Appellants,

v

NAMEER KASTAW, NASHAWN PETROS
PETROS, THAMIR MIKHAIL, and BRENDA
KASTAW,

No. 316853
Oakland Circuit Court
LC No. 2012-125297-NO

Defendants-Appellees.

Before: METER, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendants' motion to dismiss. We reverse and remand this case for further findings.

This case arose out of events occurring at a Southfield clothing store owned by plaintiff Pierre Putruss. Defendant Brenda Kastaw entered the clothing store with some associates and allegedly demanded alterations to a dress. An argument arose and Brenda and her group refused to leave, with Brenda allegedly becoming increasingly hostile. Plaintiffs Hekmat Putruss and Pierre Putruss closed the store, locked the doors, and called the Lathrup Village Police Department to have Brenda and her associates removed from the store. Defendants Nameer Kastaw, Nashawn Petros, and Thamir Mikhail arrived at the clothing store before the police did, and Brenda unlocked the door and let them in without plaintiffs' consent. A melee ensued, during which, plaintiffs claimed, defendants assaulted and battered them and damaged or destroyed many fixtures and items in the store. A jury acquitted Nameer Kastaw, Nashawn Petros, and Thamir Mikhail of criminal charges.

Plaintiffs' attorney notified defendants' criminal attorney, Doraid Markus, that a civil suit had been filed, a gesture plaintiff's attorney characterizes as a professional courtesy extended at Markus's request. The parties dispute whether Markus made representations that would justify plaintiffs' belief that defendants authorized Markus to accept service on their behalf. Plaintiffs' attorney mailed Markus four copies of the complaint and summons and a letter requesting acknowledgement of service. He followed up with Markus weeks later and was told that Markus

had not yet talked with defendants. He contacted Markus again five days later and apparently was told that the acknowledgement would hopefully be forthcoming. Two days after that, Markus informed plaintiffs' attorney that he would not be representing defendants in the civil matter, and plaintiffs' attorney contacted his process server, Chris Cook, and instructed him to effectuate personal service.

Two months later, defendants still had not been served, and plaintiffs filed an ex parte motion to extend summons. In the motion, plaintiffs reported the conversations with Markus, indicated that they contacted a process server the day they were informed that Markus would not be representing defendants in the civil matter, and alleged that the server reported that defendants "have evaded or misled him in an attempt to avoid service." Plaintiffs asserted that they had exercised due diligence in attempting to serve defendants. The trial court granted plaintiffs' ex parte motion and issued a second summons set to expire on July 29, 2012.

Plaintiffs hired an additional process server, Brad Resnick. Four days before the expiration of the second summons, because, evidently, neither Cook nor Resnick had been able to serve defendants personally, plaintiffs filed an ex parte motion for alternate service. Affidavits from Cook and Resnick were provided as supporting documentation. Cook attested to having tried to serve defendants on March 1 (at two business locations), March 11, March 25 (at two residential locations), April 19, May 11, and May 12. Resnick averred that between July 10 and July 23, he had attempted service multiple times at each defendant's home and at their business address.

The court granted plaintiffs' motion for alternate service by tacking, first-class mail, and certified mail. That same day, a complaint and summons, a complaint and demand for a jury trial, and a scheduling order were sent by first-class mail and certified mail to multiple addresses for each defendant. Proofs of service were also filed for tacking at defendants' homes and businesses. Plaintiffs assert that, of the 24 mailings plaintiffs sent in compliance with the order for alternate service, three never came back; three came back as unclaimed and unable to be forwarded; six came back as attempted, "not known," and unable to be forwarded; and 12 came back as refused.

On October 4, 2012, defendants filed a motion to dismiss pursuant to MCR 2.116(C)(2) (insufficient process), (C)(3) (insufficient service), and (C)(7) (statute of limitations). At the motion hearing, defendants insisted that plaintiffs had never really tried to serve them during the duration of the first summons and also asserted fraud. To this latter contention, defendants noted that although plaintiffs' attorney had contacted Cook on March 23, Cook indicated in his affidavit that he attempted service on March 1 and March 11. Defendants also pointed out that, according to Resnick's affidavits, he twice traveled the approximately 11 miles between defendant Nashawn Petrus's Warren house and defendant Nameer Kastaw's Sterling Heights house in six minutes or less. Defendants implied that these presumed irregularities invalidated the alternative-service order. Plaintiffs' attorney explained that Cook had the paperwork in his possession to attempt service before March 23; the attorney did not address Resnick's travel records. Plaintiffs' attorney suggested an evidentiary hearing to determine if defendants had notice, at which Cook and Resnick could explain their actions. The court granted defendants' motion, stating simply: "The state of the law is what it is. I am convinced that there was lying under oath, which is something pretty serious, so the Court is going to grant the Motion."

Plaintiff now appeals, and we review de novo the court's action on the motion. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2002). A trial court may grant a party's motion for summary disposition in a civil suit if the process issued in the action was insufficient, MCR 2.116(C)(2); the service of process was insufficient, MCL 2.116(C)(3); or the statute of limitations for the action has expired, MCL 2.116(C)(7). The trial court must consider the affidavits, pleadings, depositions, or other documentary evidence then filed in the action. MCR 2.116(G)(5). The court must only consider the affidavits, depositions, admissions, and documentary evidence to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion. MCR 2.116(G)(6).

Service-of-process rules are intended to satisfy the due process requirement that the defendant be informed of the pendency of an action by the best means available, by methods reasonably calculated to give a defendant actual notice of the proceeding and an opportunity to be heard and to present objections or defenses. [*Hill v Frawley*, 155 Mich App 611, 613; 411 NW2d 328 (1986); see also MCR 2.105(J)(1).]

“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 [the Michigan Court Rules] for service.” MCR 2.105(J)(3). MCR 2.105(J)(3) “forgives errors in the manner or content of service of process.” *Holliday v Townley*, 189 Mich App 424, 426; 473 NW2d 733 (1991). However, dismissal for improper service is warranted where there is a complete failure to serve the summons and complaint within the period established by the court rules. *Id.*

The court failed to make findings on the record regarding service; it also failed to specify the court rule pursuant to which defendants' motion was being granted or to explain whether the case was being dismissed as a sanction. Defendants based their objections to Cook's affidavit on its apparent inconsistency with plaintiffs' attorney's statement in the ex parte motion to extend service that he contacted Cook on March 23, 2012, to effectuate personal service. As evidenced at the motion hearing, defendants' accusation that Cook lied in his affidavit was based on their assumption that he did not receive the necessary papers until March 23. However, plaintiffs' attorney addressed defendants' perception by explaining to the trial court that Cook filed the complaint and kept copies of the necessary papers for service. We note that the complaint was filed on February 29 and Cook averred that he first attempted service on March 1. Plaintiffs' explanation removed the basis for defendants' accusation about the unreliability of Cook's affidavit.

While Resnick's affidavit may have seemed suspect, there were no allegations of wrongdoing against plaintiffs themselves. Nor did defendants claim that plaintiffs' attorney was at fault or that he knowingly submitted untruthful or unreliable affidavits. On the contrary, defendants' attorney stated that the motion to dismiss was not based on anything that plaintiffs' attorney had done and praised plaintiffs' attorney on the record for being a gentleman. Defendants' attorney stated that “[t]he Motion to Dismiss is based not on [plaintiff's counsel's] difficulties, but on the difficulties of people he relied on.”

The trial court's stated reasons for its ruling failed to clarify for the parties why defendants' motion was granted and the case dismissed with prejudice. On a motion to dismiss

for insufficient process, insufficient service, and running of the statute of limitations, the trial court made no findings regarding process, service, or the statute of limitations. If the trial court imposed dismissal with prejudice as a sanction, it failed to specify what plaintiffs had done to merit such a sanction.

Because the trial court's ruling lacks sufficient findings regarding service or plaintiffs' misconduct to make it clear to the parties why defendants' motion to dismiss was granted, we reverse and remand this case to the trial court for new and specific findings. We note that, if the court dismissed for lack of service, it should have resolved questions of fact in accordance with the court rules. See, e.g., MCR 2.116(I)(3) and (4).

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly
/s/ Michael J. Kelly