IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 23, 2015 Session

DIANE R. WRIGHT, ET AL. V. SHONEY'S TENN1 LLC.

Appeal from the Circuit Court for Davidson County
No. 11C3695 Hamilton V. Gayden, Jr., Judge

No. M2014-00731-COA-R3-CV – Filed July 28, 2015

Suit was brought for personal injuries allegedly sustained in a slip-and-fall at Defendant's restaurant. Plaintiffs filed a notice of voluntary non-suit and then re-filed the complaint within a year of dismissal; service of process was not obtained for twenty months. On Defendant's motion to dismiss the complaint as being ineffective because of Plaintiffs' alleged intentional delay in securing service of summons in contravention of Tenn. R. Civ. P. 4.01(3), the court held that the delay was intentional and dismissed the complaint. Finding that the evidence does not support the finding that Plaintiffs intentionally delayed service of process, we reverse the judgment and remand the case for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court for Davidson County Reversed and Case Remanded

RICHARD H. DINKINS, J., delivered the opinion of the court, in which ANDY D. BENNETT and W. NEAL MCBRAYER, JJ., joined.

Rebecca T. Garland, Nashville, Tennessee, for the appellant, Diane R. Wright and Richard Wright.

Thomas J. Dement, II, Nashville, Tennessee, for the appellee, Shoney's Tenn. 1, LLC.

OPINION

I. FACTUAL AND PROCEDURAL HISTORY

This is an appeal from the trial court's dismissal of Plaintiffs' suit based upon a finding that Plaintiffs intentionally delayed service of process, in contravention of Tenn. R. Civ. P. 4.01(3) and that, consequently, the filing of the complaint was ineffective. The suit arises from injuries allegedly sustained by Diane Wright after she slipped and fell in the salad bar line at a Shoney's restaurant in Nashville on February 27, 2007. Ms. Wright and her husband ("Plaintiffs") timely filed suit against Shoney's Tenn1 LLC. ("Defendant") in February 2008. Plaintiffs filed a Notice of Voluntary Non-Suit on September 13, 2010, and the court entered an Order of Dismissal without prejudice on September 17. According to an affidavit filed by Plaintiffs' counsel, Plaintiffs re-filed the complaint on September 16, 2011 and attempted service of the complaint by certified mail; no card evidencing receipt of the Complaint was returned to Plaintiffs' counsel. Plaintiffs caused a subsequent summons to be issued on September 13, 2012; the record does not show the reason that it was not served.

On May 2, 2013, the court notified the parties that, because the suit had been pending for more than one year, it "shall be dismissed unless within the next thirty (30) days, the following takes place: (1) A motion to set is filed and heard . . . or (2) Specific permission is obtained from the court for this case to be exempted from this one (1) year rule." On May 24, Plaintiffs filed a Motion to Exempt from the One Year Rule, stating that:

> 1) Plaintiff has attempted service through the issuance of an original summons and attempted service through certified mail on the registered agent listed with the Secretary of State of Tennessee but the green card evidencing service was not returned.
> 2) Plaintiff undertook an investigation on the web site of the Us.Postal service [sic] but was not able to track the certified receipt number.
> 3) Plaintiff does expect to have personal service on the Registered Agent of Defendant prior to June 1, 2013 and will find [sic] evidence withe [sic] the Court.
> 4) This Complaint was filed after a volantary [sic] non=suit [sic] by the Plaintiffs and extensice [sic] discovery has been completed in the prior action. While updated discovery, including expert identification will need to be completed, it is anticipated that once service is completed that counsel will be able to enter into a scheduling order.

Plaintiffs caused summons to be issued on May 30, 2013, which was duly served.

Defendant filed a motion seeking to dismiss "certain allegations contained in Plaintiffs' Complaint" pursuant to Tenn. R. Civ. P. 12.02 and Tenn. Code Ann. § 28-1-105 on the grounds that the allegations "are barred as untimely as a matter of law as said allegations were voluntarily dismissed pursuant to Rule 41 of the Tennessee Rules of Civil Procedure on September 17, 2010 but were not refiled until June 12, 2013." Defendant filed a second Rule 12.02 motion to dismiss for failure to comply with Rule 4.01, asserting that Plaintiffs intentionally delayed service of process. Plaintiffs responded to the motions, and a hearing on both motions was held before Marian Kole, a Special Master.[1] The Special Master requested that counsel establish "what efforts you took once you had the summons issued to serve the defendant." In response, Plaintiffs' counsel filed two affidavits in which she set forth the efforts she took in issuing summonses in September 2011, September 2012, and May 2013.[2]

The court entered an order on March 12, 2014, which detailed the history of the case. The Court found that the Complaint was filed on September 16, 2011, within one year of the previous non-suit, and that this allowed Plaintiffs to "rely upon the original commencement if the plaintiff continues the action by obtaining the new issuance of process within one year from issuance of the previous process." On April 22 the court entered a final order incorporating the March 12 order and granting Defendant's motion to dismiss the Complaint.

Plaintiffs appeal, asserting that the trial court erred in holding that there was an intentional delay in service of process and that the action was time-barred.

II. DISCUSSION

We review the trial court's findings of fact *de novo* upon the record, accompanied by a presumption of correctness, unless the evidence preponderates against such a finding. Tenn. R. App. P. 13(d). We review questions of law *de novo* without a presumption of correctness. *Id.*

Rule 4 of the Tennessee Rules of Civil Procedure governs the issuance and service of process. At issue in this case is Rule 4.01(3), which reads:

[1] The record does not contain the order appointing the Master, specifying or limiting the Master's power or designating the issues upon which the Master was to report. Further, there is no Master's report in the record.

[2] The two affidavits and their attached exhibits are identical with the exception that the second affidavit includes a certificate of service.

> If a plaintiff or counsel for plaintiff (including third-party plaintiffs) intentionally causes delay of prompt issuance of a summons or prompt service of a summons, filing of the complaint (or third-party complaint) is ineffective.

A finding of "an intentional delay under Tenn. R. Civ. P. 4.01(3) mandates a conclusion that the original complaint was not effectively filed." *Jones v. Cox,* 316 S.W.3d 616, 621 (Tenn. Ct. App. 2008). The burden is on the moving party "to prove that the plaintiffs' failure to serve [the Defendant] was 'intentional' as that word is used in Rule 4.01(3)." *Crabtree v. Lund,* No. E2009-01561-COA-R3-CV, 2010 WL 4272738, at *6 (Tenn. Ct. App. Oct. 28, 2010).

The Court found that "the address for the defendant had not changed from the first suit and the Plaintiff did not return any of the first summonses which were issued with any notation as to why service was not obtained. . . . Service of process was delayed almost two years after the filing of the second lawsuit. Also, there was never a return of service on the previously issued summons." The court held that "there was an intentional delay of service of process pursuant to TRCP 4.01(3) such that the filing date of the compliant [sic] was ineffective to commence the action and the Complaint must be dismissed as time barred."

Plaintiffs do not dispute these findings but contend that the trial court erred in holding that there was an intentional delay of service of process and thereby granting Defendant's motion for dismissal; Plaintiffs assert that Defendant provided "no evidence that would show Plaintiffs intentionally delayed service of process or which identifies an[] advantage gained by Plaintiffs by the delay."

Defendant claims in its brief, as it did before the trial court, that the following two facts prove that Plaintiffs intentionally delayed service of process:

> First, Plaintiffs had effected service on the same Defendant/Appellee when the lawsuit was originally filed in February 2008. Second, Plaintiffs correctly stated in the 2011 Complaint both Defendant's/Appellee's correct principal place of business … and its registered agent for service of process. … Plaintiffs/Appellants have still not even attempted to answer the seminal question: why could Plaintiff/Appellants not complete service on that Defendant/Appellee at the same address with the same counsel as the lawsuit as it did when the case was originally filed in 2009?

The evidence in the record germane to the issue of whether the delay of service was intentional is contained in Plaintiffs' counsel's affidavits, in which the following statements were made:

> 6. A Summons was issued on the same day the Complaint was filed in September 2011. A copy of the Complaint was mailed via certified mail shortly thereafter in an attempt to effect service. At the time my office was in the process of relocating and although forwarding notifications were filed with the U. S. Postal Service mail disruptions did occur. In any event no green card was returned. Subsequence [sic] Summons were [sic] issued on September 13, 2012 and again on May 30, 2013. This last Summons was served and returned to this Court with proof of service filed [sic] out on the back of the original Summons.
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> 7. My case file does have notes referencing an attempt to personally serve the Complaint by a subsequently issued Summons by delivery to the office address of Defendant which failed because the server was unexpectedly delayed and did not arrive at the office until after business hours but I have no record as to whether this was noted on the back of the relevant Summons.
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> 8. The file does contain a copy of the original Summons which does have a notation on the back as to mailing dates and no return. (Copy attached). The file does not contain any original issued Summons either the first one issued on September 16, 2011 or any subsequently issued alias or pluras Summons.
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> 9. To the best of my recollection, when subsequent Summons [sic] were prepared and brought to the Clerk's office to be issued, the original of the prior expired Summons was included. The file for this matter in my office has no originals of any expired Summons but other than the copy attached hereto, the backs of the copies of the other Summons [sic] are either not there or show no notation. It is therefore possible that no notation regarding failure of service was made on the back of other expired Summons when such were returned.
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> 10. I can and do affirmatively state that there was no decision by Plaintiffs or their counsel to intentionally delay service of this matter. Efforts were made to effect service by certified mail and later by personal service. Plaintiffs had no reason to delay service and gained no advantage particularly since this was a refiling after non suit and Plaintiffs had both been deposed and had identified medical providers at the time of the injury in the originally filed case prior to the Voluntary Non-Suit.

Defendant has not cited, and our review of the record has not uncovered, evidence to counter these statements.

As this Court noted in *Watson v. Garza*, "Because the trial court's jurisdiction of the parties is acquired by service of process, proper service of process is an essential step in a proceeding. The record must establish that the plaintiff complied with the requisite procedural rules." 316 S.W.3d 589, 593 (Tenn. Ct. App. 2008) (internal citations omitted). The statements of Plaintiffs' counsel attest that Plaintiffs timely refilled the complaint and, upon the filing, issued summons in accordance with Rule 4.01(1); the affidavit records additional efforts made to secure service. Without question, Plaintiffs should have been much more diligent in their efforts, and we do not endorse Plaintiffs' approach to obtaining service of process. However, Defendant failed introduce any evidence contrary to the matters stated in counsel's affidavit or to show in any other fashion that Plaintiffs intentionally delayed service of process. The evidence produced by Plaintiff is uncontradicted in the record and preponderates against the court's finding that Plaintiffs intentionally delayed service of process.[3]

III. CONCLUSION

For the foregoing reasons, the judgment of the trial court is reversed, and the matter is remanded for further proceedings in accordance with this opinion.

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RICHARD H. DINKINS, JUDGE

[3] We also acknowledge Defendant's argument, made in reliance on *Crabtree v. Lund* that "there is substantial proof from external factors that Plaintiffs have gained an advantage by the accumulation of physical symptoms which Plaintiffs Diane Wright can try to 'relate back' to the 2008 slip-and-fall" resulting in a tactical advantage caused by the delay of service of process. We note that Defendant leaves out a critical phrase in its citation to *Crabtree*, i.e., that the external factors suggesting that it was to the Plaintiffs' advantage to intentionally delay service must "appear[] *in the record*." *Crabtree*, 2010 WL 4272738, at *6 (emphasis added). Defendant does not cite any proof in the record of such an advantage, and in our examination of the record before us, we find no evidence of the alleged "accumulation of physical symptoms" of Ms. Wright.