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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No 4-400 / 94-0500

COMMITTEE FOR BETTER GOVERNMENT BY J. LOWELL SIMONS,

Plaintiff-Appellant.

vs.

THE HONORABLE JUDGE STEPHEN P. CARROLL,

Defendant-Appellee.

Appeal from the Iowa District Court for Franklin County, Joel E. Swanson, Judge.

The plaintiff appeals from the district court's ruling dismissing his tort action against defendant district court judge. **AFFIRMED.**

J Lowell Simons, pro se, Hampton, for appellant.

Thomas J. Miller, Attorney General, Roxann M. Ryan, Deputy Attorney General, for appellee.

Considered by Donielson, C.J., and Sackett and Habhab, JJ.

PER CURIAM

On July 24, 1992, the plaintiff, The Committee for Better Government by J Lowell Simons (Simons), commenced a tort action against District Court Judge Stephen P Carroll. The suit was captioned "Bias, illegal and immoral acts" and alleged the judge had acted improperly as the presiding judge during the foreclosure action involving Simons' farm. Simons sought $80,000 plus punitive damages. Simons is a pro se litigant.

On October 6, 1992, the district court sent an order to Simons informing him the file did not indicate that the defendant had ever been served with an original notice. The court stated it was deferring action in the case until such time as the plaintiff served the defendant with an original notice.

On May 10, 1993, District Court Judge Joel E. Swanson wrote a letter to Simons, directing him to the rules of civil procedure concerning the commencement of actions. The court again informed Simons he had not complied with the rules for proper service of an original notice. Simons caused an original notice to be published in the Hampton Chronicle on May 20, May 27, and June 3, 1993.

On February 9, 1994, the State, on behalf of Judge Carroll, filed a motion to dismiss, claiming Simons had failed to effectuate proper personal service of an action. The State also claimed the delay in service was abusive and the case should be dismissed.

The motion to dismiss was heard on March 17, 1994. At the hearing, Judge Carroll testified he had never been served with original notice of the pleading. He stated he had seen Simons in the Franklin County courthouse many times after the suit had been filed. Sheriff Duane Payne testified he had previously served notices for Simons in other lawsuits. Also, Captain James Wobschall of the Hampton police department similarly testified he had previously served notices for Simons

Simons testified he had served notice by three different means. He stated he sent Judge Carroll notice by mail He stated he had given a notice to the deputy clerk of court, and asked her to put a copy on the judge's desk. He also stated he gave notice by publication

The district court found the case had been on file for about twenty months, and Simons had not yet properly served the defendant with original notice. The court found the means Simons had used were inappropriate under the rules of civil procedure. The court determined the delay of personal service in this case was abusive. The court dismissed plaintiff's action with prejudice. Simons appealed.

Our scope of review is for the correction of errors of law. See Dennis v. Christianson, 482 N.W.2d 448, 450 (Iowa 1992).

A civil action is commenced by filing a petition with the court. Iowa R. Civ. P. 48. There is no statutory provision limiting the time for serving of the original notice once the petition is filed. Porter v Good Eavespouting, 505 N.W.2d 178, 181 (Iowa 1993). However, the only method by which a plaintiff may compel a defendant to submit to the court for a binding adjudication of their differences is by serving the defendant with original notice of the suit. McArtor v. Pete's Cafe, 175 N.W.2d 369, 372 (Iowa 1970). While there must be substantial compliance with the process requirements to give a court jurisdiction to hear the case, the statutory requirements as to the manner of service must be strictly followed to secure court jurisdiction. Harrington v. City of Keokuk, 258 Iowa 1043, 1051, 141 N.W.2d 633, 638-639 (1966).

When a defendant challenges the personal jurisdiction of the court, the burden is on the plaintiff to sustain the requisite jurisdiction by showing an adequate and timely service and compliance with any applicable statute. Dennis, 482 N W.2d at 450. A plaintiff must show specific evidentiary facts indicating he or she served process upon defendant promptly after filing the petition or good cause for not so doing. Becker v. Star Auto, Inc., 376 N.W.2d 645, 648 (Iowa App. 1985).

There are four generally recognized methods of service: (1) personal service; (2) substituted service; (3) acceptance of service; and (4) publication of service. Harrington, 258 Iowa at 1049, 141 N.W.2d at 637

Simons designated three methods by which he attempted to serve notice to the defendant in this case. First, Simons mailed notice to defendant. However, a mailed notice does not comply with personal service as set out in rule 56.1. Id. at 1050, 141 N.W.2d at 637 Therefore, Simons was not able to personally serve the defendant by this means.

Second, Simons delivered a notice to the deputy clerk at the county clerk of court's office, and asked her to deliver a copy to defendant Neither the clerk of court, nor anyone in the clerk's employ, is responsible for delivering original notices. McArtor, 175 N.W.2d at 373 It is the responsibility of the parties or their attorney to deliver a proper original notice under the rules. Id

Third, Simons caused an original notice to be published in the Hampton Chronicle. Rule 60 sets forth several types of cases in which the original notice may be served by publication. The present suit does not fit within any of these categories.

Furthermore, an affidavit that personal service cannot be had on the adverse party in Iowa must be filed before service by publication is permissible. Simons filed no such affidavit. Moreover, we believe personal service could have been made upon defendant. Judge Carroll testified he had encountered plaintiff several times after the suit was filed. There was no evidence to show plaintiff was unable to locate defendant in order to serve him with notice.

Plaintiff also argues that even if defendant was not served with notice of the suit, defendant was aware of the suit and should be made to defend it. We disagree with this argument Actual notice is no substitute for service of notice according to statute. State v. Kaufman, 201 N.W.2d 722, 724 (Iowa 1972). Knowledge on the part of the defendant will not supply the need for a valid, legal notice or summons, as required by rule or statute. Harrington, 258 Iowa at 1050, 141 N.W.2d at 638.

We conclude plaintiff failed to properly serve defendant under our rules of civil procedure. There is clear authority providing for dismissal if there is abusive delay in completing service on the defendant. Bean v. Midwest Battery & Metal, Inc., 449 N W 2d 353, 355 (Iowa 1989). The plaintiff has the burden to justify a delay Dennis, 482 N W 2d at 451 In determining whether a delay is abusive, the court considers the length of the delay and whether the delay was intentional. Turnbull v. Horan, 522 N.W.2d 860, 861 (Iowa App 1994)

Here, the delay was twenty months. The supreme court has previously found a delay of eight months was presumptively abusive Bean, 449 N W.2d at 355 Also, we recently found a delay of 126 days was abusive Turnbull, 522 N.W.2d at 861. We determine the delay of twenty months here was abusive.

We also determine the delay was intentional. Simons was informed on October 6, 1992 and on May 10, 1993, that he had not yet served the defendant with notice and the case would not proceed until this was accomplished. Also, the testimony of the sheriff and police captain showed they had previously delivered legal papers for Simons, and thus, Simons knew of the requirement for personal service.

We conclude this case should be dismissed due to the delay in service. We have considered only those issues the appellant raised in its brief. We affirm the trial court. Costs of this appeal are assessed to appellant.

AFFIRMED.