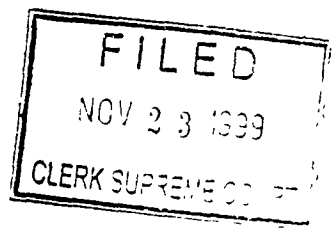
IN THE COURT OF APPEALS OF IOWA

No. 1999-149 (9-365) / 98-1907
Filed November 23, 1999



WILLIAM E. CARROLL, JR.,
Plaintiff-Appellant,

vs.

RIZALDO A. MARTIR, E & E INVESTMENT CO., and C.R. ENGLAND & SONS, INC.,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, George Bergeson, Judge.

Plaintiff appeals from the district court order dismissing his personal injury action for failure to timely serve defendants. Plaintiff contends the court erred by finding his delay in serving process was without justification. **REVERSED AND REMANDED.**

Jerry R. Foxhoven, Des Moines, for appellant.

James A. Pugh of Morain, Burlingame **& Pugh, P.L.C., West Des** Moines, for appellees.

Considered by Huitink, P.J., and Mahan and Hecht, JJ.

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HECHT, J.

I. Factual Background and Proceedings. On January 18, 1996, William E. Carroll (hereinafter "Carroll"), a resident of Mississippi, was involved in a motor vehicle accident in Polk County, Iowa. In his petition filed in the Polk County District Court on December 11, 1997, he alleged a vehicle he was operating was rear-ended by a vehicle driven by Rizaldo Martir (hereinafter "Martir"), a resident of California. Carroll sought damages for property damage and permanent personal injury. Consistent with the investigating officer's report, plaintiff's petition alleged the vehicle driven by Martir at the time of the crash was owned by E & E Investment Co., and C.R. England & Sons, Inc., whose primary place of business was located at 4701 W. 2100 South, W. Valley City, Utah 84120.

On June 5, 1998, Carroll's Iowa counsel filed a motion requesting an extension of time to serve process upon defendants. He informed the district court the defendants were not registered to do business in the State of Iowa; he had expended great time and energy attempting to locate a proper person or agent for service of process upon the corporate defendants. In the motion, Carroll's counsel informed the court he had hired a private investigator to assist in the identification of proper agents upon whom service of process could be achieved. On the same date, the district court found "the Plaintiff has established good cause for an extension of the time for service of process" and entered an order extending the time for service of process "up to and including June 26, 1998." Carroll achieved service on the defendants by serving the

Iowa Department of Transportation on June 23, 1998, and by mailing notification to the defendants in compliance with Iowa Code section 321.501(2). Defendants filed their motion to dismiss on July 16, 1998. They asserted the 195-day delay between the filing of the petition and the service of the original notice upon the defendants constituted a violation of Iowa Rule of Civil Procedure 49 warranting dismissal of Carroll's action.

In his resistance, Carroll urged the district court to overrule the motion to dismiss because service had been achieved prior to June 26, 1998, consistent with the court's order of June 5, 1998. In an affidavit supporting the resistance, Carroll's counsel informed the court he had learned through the private investigator's work a company by the name of C.R. England & Sons, Inc. (the name listed on the accident investigator's report) had been registered in the State of Illinois, but the company's corporate status had been revoked in that State for failure to file an annual report. The affidavit also disclosed additional work by the investigator had produced evidence a Utah corporation with a similar name (C.R. England, Inc.) was doing business in Salt Lake City, Utah.

In their reply to plaintiff's resistance, defendants asserted Carroll had been aware of the name and address of C.R. England, Inc. since at least February of 1996. Defendants noted at least six pieces of correspondence had passed between Carroll's Mississippi counsel and C.R. England, Inc., between February 12, 1996 and May 26, 1998. This correspondence confirms medical records were provided to the Utah

company by Carroll's Mississippi counsel, and some preliminary settlement discussions occurred between the parties as early as February of 1996.

II. Standard of Review. A district court's determination of whether to dismiss the action for failure to make timely service is not discretionary. Such a determination rest upon legal grounds and is therefore subject to appellate review. *Decorah State Bank v. Zidlicky,* 426 N.W.2d 388, 390 (Iowa 1988). Although a district court's factual findings are binding on appeal if they are supported by substantial evidence, we are not bound on appeal if they are supported by substantial evidence, we are not bound by a district court's application of legal principles or its conclusions of law. *McCormick v. Meyer,* 582 N.W.2d 141, 144 (Iowa 1998); *Dennis v. Christianson,* 482 N.W.2d 448, 450 (Iowa 1992). On appeal, Carroll challenges the district court's dismissal of his case for abusive delay in service of the notice. Our review is for errors of law. Iowa R. App. P. 4.

III. Consideration of Matters Outside the Pleadings. Carroll supported his resistance to the motion with his counsel's affidavit. Appellees supported their reply to the resistance with copies of correspondence that, prior to commencement of suit, had passed between Carroll's counsel and representatives of C.R. England, Inc.. Neither the parties nor the district court apparently voiced objection to consideration of matters extraneous to the petition (the only pleading then on file) in disposing of the defendants' motion to dismiss. Nevertheless, we note a motion to dismiss is directed to the *pleadings*. Facts outside the pleadings should not be considered.

Estate of Dyer v. Krug, 533 N.W.2d 221, 223 (Iowa 1995). Nonetheless, we will reluctantly consider extraneous facts where the parties relied on the materials in their submission of this matter to the district court and on appeal, and where, as in *Estate of Dyer*, the matter in dispute is not the adequacy of the petition to state a claim for relief.

IV. Timeliness of Service of Process. When Carroll's petition was filed in December, 1997, the applicable rule of procedure directed the petition, original notice, and directions for service be "promptly" delivered by the clerk to the sheriff. Iowa R. Civ. P. 49(b). The rule, as then configured, set no time limit within which service was to be accomplished. *Dennis,* 482 N.W.2d at 450.

An amendment to Iowa Rule of Civil Procedure 49 effective January 24, 1998, provides as follows:

> If service of the original notice is not made upon the defendant, respondent, or other party to be served within 90 days after filing the petition, the court, upon motion or its own initiative after notice to the party filing the petition, shall dismiss the action without prejudice as to that defendant, respondent, or other party to be served or direct an alternate time or manner of service. If the party filing the papers shows good cause for the failure of service, the court shall extend the time for service for an appropriate period.

This amendment of a procedural rule was in effect when the district court entered its June 5, 1998 order extending time for service of process and its September 25, 1998 order dismissing Carroll's case for failure to timely serve process.

Carroll failed to serve the process within ninety days as prescribed by rule 49. When measured against the authorities which interpret the antecedent of the present

rule 49; Carroll's delay of 176 days prior to filing the motion for extension of time to effect service would be characterized as presumptively abusive. *McCormick*, 582 N.W.2d at 145 (delay of 483 days "is without question presumptively abusive"); *Henry v. Shober*, 566 N.W.2d 190, 192 (Iowa 1997) (169-day delay was both intentional and presumptively abusive); *Alvarez v. Meadow Lane Mall*, 560 N.W.2d 588, 591(Iowa 1997) (159-day delay was presumptively abusive). If a presumption of abuse arises, it them becomes the plaintiff's burden (in order to avoid dismissal) to establish justification for delay. *Alvarez*, 560 N.W.2d at 591. Carroll asserts his delay in effecting service should be excused for good cause related to difficulties surrounding the identity and location of the defendants.

"Good cause" for an extension of time to serve process has been described as follows:

> [t]he plaintiff must have taken some affirmative action to effectuate service of process upon the defendant or have been prohibited, through no fault of his or her own, from taking such an affirmative action. Inadvertence, neglect, misunderstanding, ignorance of the rule or its burden, or half-hearted attempts at service have generally been waived as insufficient to show good cause.

Henry, 566 N.W.2d at 192-93.

In its interlocutory order of June 5, 1998, the district court found Carroll had shown good cause for an extension. The court retained the power to review and change the ruling, however, because it had jurisdiction of the case and the parties. *McCormick*, 582 N.W.2d at 144. We must, therefore, determine whether the district

court erred when it subsequently reversed itself and found the facts do not constitute adequate justification for the delay in service of process in this case.

Carroll's Iowa counsel began his search for the corporate defendants by a review of the investigating officer's accident report. That document listed those defendants' address as "4701 W. 2100 South, W. Valley City, Utah 84120." Plaintiff's counsel then contacted the Iowa Secretary of State and learned C.R England & Sons, Inc. was not authorized to do business in Iowa. An investigator was then hired to assist in locating the defendants.[1] With the investigator's assistance, Carroll's Iowa counsel learned a company by the name of C.R. England & Sons, Inc. had, at one time, been registered in Illinois, but that registration had expired for failure to file an annual report. These efforts by Carroll's counsel and his investigator were, of course, essential because identification of the location of the defendants is required even for long-arm service of a nonresident motorist pursuant to Iowa Code section 321.501. *See Emery Transp. Co. v. Baker,* 254 Iowa 744, 750, 119 N.W.2d 272, 276 (1963) (mailing notice to nonresident will not establish in personam jurisdiction unless the notice is received or rejected by the defendant).

By June of 1998, Carroll's private investigator had located a company in Salt Lake City, Utah, doing business as C.R. England, Inc. At that juncture, Carroll's Iowa counsel had identified a company with a different, but similar, name doing

[1] Copies of correspondence in the record suggest Carroll's Iowa counsel was not aware Carroll's Mississippi counsel had located and corresponded directly with C.R. England, Inc. in Salt Lake City, Utah, as early as February 16, 1996. The Mississippi attorney was not counsel of record in this Iowa litigation.

business at a different address than that which was disclosed in the investigating officer's report. Upon further investigation, it was determined C.R. England, Inc. is the successor corporation of C.R. England & Sons, Inc. When he learned defendants' correct names and addresses, Carroll's Iowa counsel promptly, and within the time specified by the district court's order extending time for service, filed process with the director of the department of transportation and mailed notice to the defendants pursuant to Iowa Code section 321.501.

The facts shown in the record convince us the district court was correct when it originally found these facts established good cause for an extension of time for service of process. The investigating officer's report listed an incorrect name and address for the corporate defendants. This led to confusion of Carroll's Iowa counsel, and resulted in the employment of a private investigator to assist in the identification and location of the proper defendants. We believe these steps by Iowa counsel under the circumstances constitute "affirmative action to effectuate service of process" precluding imposition of the extremely harsh remedy of dismissal pursuant to rule 49 after expiration of the applicable statute of limitations. Moreover, Iowa counsel's efforts to identify and locate the nonresident defendants make it abundantly clear plaintiff did not file his petition merely to "ice" the statute for a later determination on whether to proceed with the suit. On the contrary, he made reasonable efforts, including but not limited to the employment of an investigator, during the 176 days after filing the petition to achieve service of process. The district court's finding of

inadequate justification for the delay in service is not supported by substantial evidence in the record. Accordingly, we reverse and remand this case to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.