IN THE COURT OF APPEALS OF IOWA

No. 3-653 / 93-480

FILED
JAN 25 1994
CLERK SUPREME COURT

BEVERLY GILLESPIE and LEE GILLESPIE,

Appellants,

vs.

KMART CORPORATION, DIAL ENTERPRISES CORPORATION, DI-CORP, INC., and SHERWOOD PLAZA SHOPPING CENTER,

Appellees.

Appeal from the Iowa District Court for Pottawattamie County, James Richardson, Judge.

The Gillespies appeal from a district court order dismissing their tort suit against defendants due to an allegedly unreasonable delay in the service of the original notice on the defendants. **AFFIRMED.**

Forrest E. Ebersold of Ebersold Law Office, Omaha, Nebraska, for appellants.

David M. Woodke and Alison L. McGinn of Gross & Welch, P.C., Omaha, Nebraska, for appellees.

Heard by Oxberger, C.J., and Sackett and Critelli, S.J.*

*Senior judge from the 5th Judicial District serving on this court by order of the Iowa Supreme Court.

OXBERGER, C.J.

The Gillespies appeal from an order dismissing their tort suit on grounds that delay of service of the original notices upon defendants was unjustified. We affirm.

Background facts and proceedings. On January 21, 1990, Beverly Gillespie was injured when she slipped and fell on some ice at a KMart Store located in Sherwood Plaza in Council Bluffs.

On January 20, 1992, Beverly Gillespie contacted an attorney about the incident; they met on January 21, 1992. Counsel filed a petition at law that same day on behalf of Beverly and her husband, Lee, alleging defendants' negligence caused her injuries. No further action was taken until August 6, 1992, when the original notices were issued. Defendants were served thereafter.

In September 1992, the Gillespies consented to defendants' informal requests for an extension to file their answers.

On December 30, 1992, defendants filed a motion to dismiss on the grounds of (1) lack of personal jurisdiction, (2) lack of subject matter jurisdiction, (3) insufficiency of service of process, and (4) failure to state a claim upon which relief could be granted. The Gillespies resisted, alleging the delay in serving the original notices was necessary to investigate whether the statute of limitations had expired. Following a hearing, the district court granted the motion to dismiss.

The Gillespies' subsequent motion to enlarge was overruled and they appeal. We reject defendants' contention that the motion to enlarge was improper and, consequently, this appeal is untimely. The Gillespies contend that the burden of showing that their delay was unreasonable should have been placed on defendants. In any event, they maintain they proved that the delay was not unreasonable.

Scope of review. A district court's ultimate determination of whether to dismiss the action is not discretionary; such a determination rests upon legal grounds and our review therefore is for errors of law. Dennis v. Christianson, 482 N.W.2d 448, 450 (Iowa 1992).

Burden of proof. Relying chiefly on Taylor v. Wiebold, 390 N.W.2d 128 (Iowa 1986), the Gillespies argue that the burden of proving abusive delay lies with the defendant. The case is inapposite. In Taylor v. Wiebold, defendant was challenging the timeliness of plaintiff's suit on a motion for summary judgment. Here, defendants challenged the personal jurisdiction of the court.

> 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 the applicable statute.** Once a prima facie showing of proper service has been made, the burden of going forward with the evidence shifts to the defendant to overcome the showing if possible.

Dennis v. Christianson, 482 N.W.2d at 450 (citations omitted, emphasis added). There is no doubt that the burden of "showing an adequate and timely service" lay with the Gillespies.

Was service timely? As in Bean v. Midwest Battery & Metal, Inc., 449 N.W.2d 353 (Iowa 1989), the Gillespies totally ignored the requirements of Iowa Rule of Civil Procedure 49. The Gillespies did not deliver written directions for service of the original notices with the petition. Thus, the original notices were not delivered "forthwith" by the clerk of court. Our supreme court has stated that the rule for service of original notice "contemplates that ordinarily the Defendants will promptly learn of the action." Scieszinski v. City of Wilton, 270 N.W.2d 450, 452 (Iowa 1978). Defendants here did not promptly learn of the action and we conclude the seven-month delay between the filing of the petition and serving defendants is presumptively abusive.

Was delay justified? The Gillespies argue that delay of service of the original notices was justified because it was necessary to investigate their claim. However, the Gillespies had two years to investigate their claim. They waited until the eleventh hour, the day they believed the statute of limitations ran, to file their petition. The Gillespies do not explain why it required an additional seven months to determine whether their claim was timely. We conclude that the Gillespies have failed to justify the delay of service.

The district court did not err in dismissing the petition for unjustified delay in serving defendants.

Estoppel. The Gillespies assert defendants are precluded from challenging the delay due to laches or waiver, i.e., their own delay in filing the motion to dismiss. The Gillespies invited defendants' actions in consenting to an indefinite delay in defendants' answer.

AFFIRMED.