IN THE COURT OF APPEALS OF IOWA

No. 8-142 / 97-0425

FILED
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CLERK SUPREME COURT

TERRA CHEMICALS INTERNATIONAL, INC.,

Plaintiff-Appellee,

vs.

ROBERT JR. GEATER,

Defendant-Appellant,

GREG R. GEATER,

Defendant.

Appeal from the Iowa District Court for Benton County, Larry J. Conmey and L. Vern Robinson, Judges.

Defendant Robert Geater appeals from summary judgment for plaintiff in its action for breach of promissory notes and security agreement covering farm products.

REVERSED.

Robert L. Rausch of Rausch Law Firm, Waterloo, for appellant.

Morris L. Eckhart of Milroy, Eckhart and Thompson, Vinton, for appellee.

Considered by Sackett, P.J., and Streit and Mahan, JJ.

SACKETT, P.J.

Defendant-appellant Robert Jr. Geater appeals from a judgment for plaintiff-appellee Terra Chemicals International, Inc. Defendant contends (1) the trial court should have found an abuse of process because of the delay in serving him with an original notice of suit, and (2) plaintiff's claim was barred by the statute of limitations.

In March 1983, Robert gave Farmer Ag Credit Corporation a promissory note for $45,000. The note, due and payable on or before February 1, 1984, was ultimately assigned to plaintiff. The note was not paid, and on March 2, 1984, plaintiff filed its petition seeking payment from defendant Greg Geater.. Greg was personally served with notice of the suit on March 5, 1984.

On November 12, 1986, plaintiff amended to include Robert as a defendant. Plaintiff published notice, Robert did not appear, and on February 19, 1987, a default judgment against him was entered.

On May 20, 1994, Robert was ordered to appear for a debtor's examination. Robert filed a motion to vacate and set aside the February 19, 1987 judgment. The district court sustained the motion finding:

> The Court specifically finds that Defendant Robert Jr. Geater was served only by publication and mailed notice in this case and neither the Defendant Robert Jr. Geater nor any attorney appeared on his behalf in this case. Consequently, this Court never had jurisdiction of the person of the Defendant Robert Jr. Geater. *See* Iowa Rule of Civil Procedure 234; *see also Dimmitt v. Campbell*, 151 N.W.2d 562 (Iowa 1967); *Rosenberg v. Jackson*, 247 N.W.2d 216 (Iowa 1976).
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> The Court further finds that when there is a total absence of jurisdiction of the person, the judgment is void and no additional showing is required in order for the Court to expunge the personal judgment.

On July 25, 1994, plaintiff made a motion for summary judgment. Plaintiff contended Robert's attorney appeared for Robert on June 8, 1994,[1] and in doing so, subjected defendant to the court's jurisdiction. Plaintiff further alleged defendant made the notes and defaulted on them.

Robert resisted the motion alleging as an affirmative defense any cause of action had accrued more than ten years hence and was barred by the statute of limitations. He further contended he was not served within the ten-year period.

The trial court did not rule on the motion but directed the parties to further develop the record as to the delay of service on defendant. The record was expanded and the district court ruled:

> Having reviewed the file and Judge Robinson's previous ruling, the Court agrees that the only remaining issue is whether Plaintiff delayed in effecting personal service on Defendant. At the time of Judge Robinson's order, the record was inadequate to make such a determination. However, Plaintiff now submits evidence showing its efforts at personal service. Particularly illuminating to the Court is the fact that although Defendant insists he was living at the Walker, Iowa address at the time service was attempted, the envelope sent to that address indicates Defendant had moved without leaving a forwarding address. The Court finds no abuse of process to preclude entry of summary judgment. Moreover, Defendant's statute of limitations defense was previously determined to be without merit by Judge Robinson. For these reasons, Plaintiff's motion for summary judgment should be granted.

The filing of a petition is deemed the commencement of an action. Iowa R. Civ. P. 55. Generally, the filing of the petition tolls the statute of limitations. *Henry v. Shaber*, 566 N.W.2d 190, 192 (Iowa 1997). However, if there is an intentional

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[1] This was over ten years from when the note was due and payable.

delay in service, the filing of the petition alone does not toll the statute. *Id.* Iowa cases require dismissal of an action if there is an unjustified abusive delay in completing service. *Id.*

Plaintiff elected a method of service, completed it, and obtained judgment. The judgment has been vacated and plaintiff does not challenge this order on appeal. Plaintiff's attempt to obtain valid service ten years later is abusive. We reverse.

REVERSED.