

2018 IL App (4th) 170337-U

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

NOTICE This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1). Appellate Court of Illinois, Fourth District.

Mark MILLER, Plaintiff-Appellant,

v.

W. Keith DAVIS, Defendant-Appellee.

NO. 4-17-0337

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FILED August 1, 2018

Appeal from the Circuit Court of McLean County, No. 13L181, Honorable Paul G. Lawrence, Judge Presiding.

### ORDER

PRESIDING JUSTICE HARRIS delivered the judgment of the court.

\*1 ¶ 1 *Held*: The trial court did not err in dismissing with prejudice plaintiff's legal malpractice claim against defendant.

¶ 2 On April 24, 2017, the trial court dismissed with prejudice a legal malpractice claim filed by plaintiff, Mark Miller, against defendant, W. Keith Davis, finding that Miller did not act with reasonable diligence in effecting service of process of his complaint on Davis. Miller appeals and we affirm.

### ¶ 3 I. BACKGROUND

¶ 4 In September 2011, the State filed a petition to have Miller committed to the Department of Human Services (DHS) as a sexually violent person. Davis was appointed as Miller's public defender and represented him through August 2012, when the trial court granted the State's petition and ordered Miller committed. Miller appealed and, on August 21, 2012, new counsel was appointed to represent him. On appeal, Miller argued

Davis's representation had been ineffective. In July 2013, this court agreed, reversed the trial court's judgment, and remanded the matter for a new trial. *In re Commitment of Miller*, 2013 IL App (4th) 120759-U.

¶ 5 On October 25, 2013, Miller, still a DHS detainee, filed his *pro se* legal malpractice complaint against Davis along with an application to sue as a poor person. He included a certificate of service with his filing, asserting a copy of his complaint "was mailed to all parties involved" on October 20, 2013, but not setting forth any specific names or addresses. On November 8, 2013, Miller filed a motion for the appointment of counsel and a petition for order of *habeas corpus* to testify. The same day, the trial court made a docket entry, granting Miller's application to sue as a poor person, denying his motion for the appointment of counsel, and denying his petition for order of *habeas corpus* on the basis that there was no hearing pending that required Miller's presence. A docket entry dated November 12, 2013, reflects that a certified copy of the court's November 8 docket entry was sent to Miller.

¶ 6 On November 22, 2013, Miller filed a motion for substitution of judge for cause. He alleged the trial judge in the case was the same judge who presided over his commitment proceedings and maintained the judge had "shown his bias and prejudice against" Miller by "ignore[ing]" Davis's deficient performance in the commitment case. Again, Miller included a certificate of service with his filing. This time, he explicitly asserted his motion was mailed to Davis and set forth Davis's address.

¶ 7 On March 14, 2014, a letter from Miller to the circuit clerk was filed. Miller noted that he had filed a motion for substitution of judge for cause, which had "not been heard yet" and inquired about the status of both his case and motion. On March 18, 2014, the circuit clerk's office responded, stating that, at that time, there were "no court dates set for [Miller's] case." On April 4, 2014, a second letter from Miller to the circuit clerk's office was filed, asking for copies of the record in a 1991 felony case.

\*2 ¶ 8 The record reflects nothing further occurred in the case until August 3, 2016, when a third letter from Miller to the circuit clerk's office was filed. Again, he inquired on "the status" of his legal malpractice claim. On August 18, 2016, the circuit clerk's office responded, informing Miller that he had failed to "set a court date" in his case, which was his responsibility as a *pro se* litigant. The clerk's office

further informed Miller that court dates could be set by contacting the judge's secretary.

¶ 9 On August 30, 2016, a letter from Miller to the trial judge was filed, requesting a court date. On September 21, 2016, the trial judge responded, stating Miller “may request a court date once there ha[d] been proper service of the Defendant.” The same day, the court entered a written order striking Miller's motion for substitution of judge for cause.

¶ 10 On September 30, 2016, a letter from Miller to the circuit clerk was filed requesting “any forms” to assist him with issuing a summons on Davis. Ultimately, on October 13, 2016, a summons was issued and Davis was served the following day, October 14, 2016.

¶ 11 On October 24, 2016, Davis filed a motion to dismiss pursuant to [Illinois Supreme Court Rule 103\(b\)](#) (eff. July 1, 2007). He alleged that, although Miller's complaint was filed on October 25, 2013, Miller did not seek the issuance of a summons until October 13, 2016, nearly three years later. Davis asserted Miller's delay in serving him with a summons was a clear violation of [Rule 103\(b\)](#) (eff. July 1, 2007), which requires the exercise of reasonable diligence by a plaintiff in obtaining service on a defendant. He asked the trial court to dismiss Miller's action with prejudice.

¶ 12 On April 24, 2017, the trial court conducted a hearing in the matter. During the hearing, Miller explained his delay in service as being due to his understanding that “if [he] filed the motion for substitution of judge, nothing could be done, or heard, or ruled on while that motion was in effect.” He also asserted that he had no access to legal counsel or a law library in the facility in which he was detained. Miller asserted his facility had “everything on the computer, and [he did not] know how to use the computer.” Ultimately, the court granted Davis's motion to dismiss.

¶ 13 This *pro se* appeal followed.

## ¶ 14 II. ANALYSIS

¶ 15 On appeal, Miller argues the trial court erred in granting Davis's motion to dismiss and maintains “special circumstances” affected his efforts to obtain service on Davis. In particular, Miller asserts he had been detained

in a facility with no access to a law library and that, as a result, he “did not know the proper time to file the summons.”

¶ 16 The Code of Civil Procedure (Code) provides that “[e]very action \* \* \* shall be commenced by the filing of a complaint” and “[t]he clerk shall issue summons upon request of the plaintiff.” [735 ILCS 5/2-201\(a\)](#) (West 2012). “[A] plaintiff has a nondelegable duty to (1) assure the clerk issued the summons, (2) deliver the summons to the process server for service, and (3) see the process server made a prompt and proper return.” [Smith v. Menold Construction, Inc.](#), 348 Ill. App. 3d 1051, 1056, 811 N.E.2d 357, 362 (2004).

¶ 17 Pursuant to [Rule 103\(b\)](#) (eff. July 1, 2007), a complaint may be dismissed where the plaintiff fails to exercise reasonable diligence in obtaining service on the defendant. “If the failure to exercise reasonable diligence \* \* \* occurs after the expiration of the applicable statute of limitations, the dismissal shall be with prejudice \* \* \*.” [Ill. S. Ct. R. 103\(b\)](#) (eff. July 1, 2007). The Code provides that a legal-malpractice claim “must be commenced within [two] years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought.” [735 ILCS 5/13-214.3\(b\)](#) (West 2012). Additionally, “[u]nder [Rule 103\(b\)](#), the plaintiff has the burden of showing reasonable diligence in service of process.” [Smith](#), 348 Ill. App. 3d at 1055 (citing [Segal v. Sacco](#), 136 Ill. 2d 282, 286, 555 N.E.2d 719, 720 (1990) ).

\*3 ¶ 18 “In considering the exercise of reasonable diligence, the court shall review the totality of the circumstances[.]” [Ill. S. Ct. R. 103\(b\)](#) (eff. July 1, 2007). Factors for consideration include the following:

“(1) the length of time used to obtain service of process; (2) the activities of plaintiff; (3) plaintiff's knowledge of defendant's location; (4) the ease with which defendant's whereabouts could have been ascertained; (5) actual knowledge on the part of the defendant of pendency of the action as a result of ineffective service; (6) special circumstances that would affect plaintiff's efforts; and (7) actual service on defendant.” [Case v. Galesburg Cottage Hospital](#), 227 Ill. 2d 207, 212-13, 880 N.E.2d 171, 175 (2007).

[Rule 103\(b\)](#) does not provide a specific time limit, “[r]ather, a court must consider the passage of time in relation to all the other facts and circumstances of each

case individually.” *Id.* at 213. “Additionally, while the court may consider the defendant's lack of prejudice, the defendant does not have the burden to establish he was prejudiced by the delay.” *Smith*, 348 Ill. App. 3d at 1055.

¶ 19 On review, the trial court's decision to grant or deny a [Rule 103\(b\)](#) motion to dismiss “will not be disturbed absent an abuse of discretion.” *Case*, 227 Ill. 2d at 213. “A court abuses its discretion only if its decision was ‘clearly against logic.’ ” *Smith*, 348 Ill. App. 3d at 1055 (quoting *State Farm Fire & Casualty Co. v. Leverton*, 314 Ill. App. 3d 1080, 1083, 732 N.E.2d 1094, 1096 (2000)).

¶ 20 Here, the trial court found plaintiff failed to exercise reasonable diligence in obtaining service on defendant. The record reflects the court considered appropriate and relevant factors in reaching its decision and that it did not abuse its discretion.

¶ 21 In this case, Miller does not dispute that he had knowledge of Davis's location. There is also no dispute that Davis was not served until nearly three years after Miller originally filed his complaint in October 2013. In fact, Miller did not even request the issuance of a summons by the circuit clerk until September 2016. Once the summons was issued, Davis was served the following day. Additionally, the record reflects that service occurred well after the expiration of the applicable statute of limitations.

¶ 22 Miller claims the “special circumstances” that should excuse his failure to promptly serve Davis include his status as a *pro se* litigant, his ignorance of the law, and his inability to access the law library because of his detainment. However, “*pro se* litigants must comply with the same rules of procedure as would be required of litigants represented by counsel.” *Kole v. Brubaker*, 325 Ill. App. 3d 944, 952, 759 N.E.2d 129, 135-36 (2001) (stating a plaintiff's “initial choice to proceed *pro se* did not relieve her of her obligation to act diligently in serving [the] defendants”). Also, the record shows Miller was familiar enough with the legal process to initiate the underlying proceedings and file several motions on his own behalf. See *Smith*, 348 Ill. App. 3d at 1056 (stating that, “while [the] plaintiff was proceeding *pro se*, the record indicate[d] he was familiar with the legal process, and no special circumstances existed”).

\*4 ¶ 23 Moreover, we note the record shows there was a lengthy period of time, over two years, where Miller did nothing to move his case forward. When he finally did make inquiries regarding the status of his case, he received prompt responses that led him to request the issuance of a summons and have Davis served. Thus, the record indicates that, had Miller diligently pursued his claim, he could have obtained service on Davis much sooner than ultimately occurred.

¶ 24 Finally, we note that the record indicates that Davis had actual knowledge of Miller's complaint soon after it was filed, a fact not disputed by Davis. However, “the presence of actual knowledge and the absence of prejudice do not require this court to find reasonable diligence” as they do not “outweigh the other factors.” *Billerbeck v. Caterpillar Tractor Co.*, 292 Ill. App. 3d 350, 354-55, 685 N.E.2d 1018, 1021 (1997); see also (*Womick v. Jackson County Nursing Home*, 137 Ill. 2d 371, 380, 561 N.E.2d 25, 29 (1990) (finding actual notice of a lawsuit was not sufficient to preclude dismissal under [Rule 103\(b\)](#) where the plaintiff “made no attempt to place summons for a period of almost nine months after the expiration of the statute of limitations” and offered no explanation for this inactivity). Here, a period of almost three years elapsed before Miller requested the issuance of a summons. Once the summons was issued, Davis was immediately served. Moreover, the record reflects a lengthy period of inactivity in the case—from April 2014 to August 2016—for which Miller offered no explanation. Accordingly, due to Miller's lack of diligence, Davis's actual knowledge of the case or apparent lack of prejudice are insufficient to preclude dismissal under [Rule 103\(b\)](#).

### ¶ 25 III. CONCLUSION

¶ 26 For the reasons stated, we affirm the trial court's judgment.

¶ 27 Affirmed.

Justices [Holder White](#) and [DeArmond](#) concurred in the judgment.

**All Citations**

Not Reported in N.E. Rptr., 2018 IL App (4th) 170337-  
U, 2018 WL 3689679

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