

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF GREENVILLE )  
  
RONALD CARL COX III )  
 )  
Plaintiff )  
 )  
v. )  
 )  
MICHAEL JOHN DIMAGGIO )  
 )  
Defendant )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
2022-CP-23-02830

ORDER



This matter came before the Court on July 24, 2023 on Defendant’s Motion to Dismiss the Complaint for failure of the Plaintiff to properly commence the action pursuant to S.C. Code Ann. §15-3-20 and under Rule 3 of the South Carolina Rules of Civil Procedure.

The Defendant argues the Plaintiff failed to serve the Summons and Complaint prior to the expiration of the statute of limitations or, after the expiration of the statute of limitations, within 120 days of the filing of the Summons and Complaint. The Defendant contended that he was therefore entitled to a dismissal of the Summons and Complaint. For the reasons set forth below, the motion is granted.

**BACKGROUND**

The Plaintiff filed the Summons and Complaint in this matter on May 31, 2022, alleging Assault and Battery, Negligence and Gross Negligence against the Defendant for an incident occurring June 1, 2019. The statute of limitations for Assault and Battery and for Negligence and Gross Negligence in South Carolina is three years. S.C. Code Ann §§ 15-3-530(5), 15-3-535

Because the plaintiff filed, but did not serve, the Summons and Complaint prior to the expiration of the applicable statute of limitations, the Plaintiff is required to serve the Summons

and Complaint within One Hundred and Twenty (120) days of the filing of the Summons and Complaint. S.C. Code Ann. §15-3-20 and Rule 3(a).

In accordance with the affidavit of Steven Evett which was filed with Plaintiff's Motion for Order to Serve by Publication dated September 30, 2022, the Plaintiff's first attempts to serve the Defendant took place on August 31, 2022, the 91<sup>st</sup> day after the filing of the Summons and Complaint. Attempts at personal service continued until September 8<sup>th</sup>, 2022, the 99<sup>th</sup> day after filing of the Summons and Complaint. Evett explains that there were delays in attempting service due to their investigator failing to provide the current address for the Defendant at that time.

Evatt also related that in an August 31, 2022 telephone call, the Defendant instructed him to serve the Summons and Complaint on his attorney, Austin McDaniel. The Defendant related by affidavit that Evatt said nothing about a summons and complaint but said he was with the "Victim's Fund". In any event, Attorney McDaniel advised Evatt on September 2, 2022 that he represented the Defendant in a criminal matter and was not authorized to accept service in a civil matter.

On September 9, 2022, the 100<sup>th</sup> day after filing of the Summons and Complaint, the Plaintiff filed a Motion to allow Service by Publication. However, no affidavit testifying that service of the summons could not be made after due diligence was attached as required by S.C. Code Ann. §15-3-20 and no action was taken by the Court.

On September 30, 2022, the 121<sup>st</sup> day after filing of the Summons and Complaint, a new Motion for Service by Publication was filed by the Plaintiff, with one legible and one illegible affidavit. An Order allowing service by Publication was entered by the Court on October 6, 2022, the 127<sup>th</sup> day after filing of the Summons and Complaint.

Thereafter, the Plaintiff submitted to the Greenville News legal classifieds section the Court's Order for Publication instead of the Summons as required by S.C. Code Ann. § 15-9-740 and it was published on October 27, November 3 and November 10 of 2022, the 148<sup>th</sup>, 155<sup>th</sup> and 162<sup>d</sup> days after filing of the Summons and Complaint.

### **DISCUSSION**

Defendant argues that Plaintiff has failed to serve the Summons and Complaint within 120 days of filing of the same in the day or two before the running of the Statute of Limitations, as required by S.C. Code Ann. §15-3-20 and SCRCivP 3(a).

Plaintiff argues that (1) counsel was led to believe that service was being handled by his staff during a time when he had medical issues; (2) "that a specific instruction by a party to deliver a summons and complaint to someone else, including his counsel, when then delivered, should be considered satisfactory service"; (3) that publication of the incorrect document, when done in good faith, should constitute notice to the Defendant and in fact gives the Defendant greater insight into the civil action against him; (4) that mistakes were made, but were made in good faith and constitute excusable neglect pursuant to Rule 60(b)(1) (dealing with relief from judgments); (5) that he believes the Defendant is not being truthful in his representations that he was unaware of a civil summons and complaint when contacted by Mr. Evatt and in hanging up on Mr. Evatt during a second call.

In order for the Court to conclude that service was sufficient, the Court would need to conclude that (1) the attempted service on an attorney who declined authorization to accept service is, in fact, good service because the Defendant disputedly told a process server to send it to his attorney; or (2) that the deadline for service of process should be equitably tolled due to the Defendant's attempts to evade service. Tolling would be required for the attempts made by

publication which occurred after after the 120 day period allowed for service pursuant to S.C. Code Ann. §15-3-20 and Rule 3(a).

ATTEMPTED SERVICE ON MCDANIEL

Plaintiff argues service was accomplished on Defendant's counsel, Austin McDaniel. However, the evidence indicates that Mr. Dimaggio believed that Mr. Evatt had contacted him about a matter involving the victim's compensation fund, which is a matter that Mr. McDaniel may have handled.

In his affidavit of July 27, 2023, plaintiff's counsel, through hearsay, advises that Steve Evatt called the Defendant and explained that he had a summons and complaint for delivery to him. The affidavit of MR. Dimaggio advises that Mr. Evatt represented he was with the victims' fund. Per the affidavit, Mr. Dimaggio relates that he had received funds from the South Carolina Victims's Compensation Fund for the payment of medical bills he incurred after having been rendered unconscious by a kick to his face and a stomp with the boot heel of the Plaintiff's brother. The Plaintiff and his brother were caused to reimburse the South Carolina Victim's Compensation Fund as a condition of dismissing felony charges against them and as such were well aware of Mr. Dimaggio's involvement with the same. Mr. Dimaggio denies that Mr. Evatt ever explained that he had a civil summons and complaint to serve upon him, and therefore argues he could not have been avoiding service of which he was unaware. Mr. Evatt relates in his affidavit that he advised the Defendant that he had "legal papers" for him but makes no mention of a Summons and Complaint.

Mr. Dimaggio is further provided a voicemail received on his telephone from Steve Evatt, where Mr. Evatt states:

*“Yes, Mr. Dimaggio, this is Steve, we spoke yesterday. Uh, you, uh, you gave me your attorney’s information however your attorney does not, or he says he is not your attorney, he doesn’t rep you, represent you in any matter. Uh, I need you to call me back as soon as possible or I’ll just, ah, have to go up and talk to your, your, your employer or something, so, um I’d like to get this taken care of. This has nothing to do with, um, with uh, criminal charges. So, thank you.”*

This voicemail establishes that Evatt was notified that attorney McDaniel could not accept service. Significantly, Evatt feels it necessary to advise that “this has nothing to do with...criminal charges.” A logical reason for him to explain this is that Evatt understood that Dimaggio had reason to believe that Evatt’s previous call concerned criminal matters. Coupled with Dimaggio’s prior involvement with the SC Victim’s Compensation Fund, this lends further credence to Dimaggio’s representation in his affidavit that he believed that the call from Evatt involved a criminal matter and that Dimaggio was therefore not on notice of a civil complaint against him. Given this series of events occurred September 1<sup>st</sup> and 2<sup>nd</sup>, as established by the emails between Steve Evatt and Austin McDaniel and provided by counsel, one is led to the conclusion that Dimaggio did not refer Evatt to McDaniel because McDaniel was authorized to accept service, but because Dimaggio believed that Evatt’s contact with him concerned a criminal matter.

“No other proof of service shall be required when acceptance of service is acknowledged in writing and signed by the person served or his attorney, and delivered to the person making service” Rule 4(j) SCRCF. No such writing was delivered or alleged to have been delivered in this case.

In the absence of a writing evidencing acceptance by attorney McDaniel, a designation by the Defendant that McDaniel is his attorney for service of process, which is denied to have occurred, is insufficient to constitute service in this case. No service was accomplished on attorney McDaniel.

### EQUITABLE TOLLING

In order for Service by Publication to be effective in this case, the Court must find that there is a basis to extend the 120 day deadline for service established by S.C. Code Ann. §15-3-20 and SCRCivP 3(a) as every date of publication in this case, even erroneous ones, occurred after 120 days from filing.

#### **§ 15-3-20. General rule as to time for commencement**

(A) Civil actions may only be commenced within the periods prescribed in this title after the cause of action has accrued, except when, in special cases, a different limitation is prescribed by statute.

(B) A civil action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing.

#### **RULE 3. COMMENCEMENT OF ACTION**

(a) Commencement of civil action. A civil action is commenced when the summons and complaint are filed with the clerk of court if:

(1) the summons and complaint are served within the statute of limitations in any manner prescribed by law; or

(2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing.

South Carolina courts have addressed equitable tolling of the statute of limitations during the 120 period set forth by the above statute and rule. In those cases, the Court has analyzed

whether to extend the statute of limitations for the time period when the Plaintiff may have been prevented from serving the Defendant.

In Hooper v Ebenezer Sr. Services, 687 S.E.2d 29, 386 S.C. 108 (S.C. 2009), the Supreme Court extended the statute of limitations when the Defendant was unable to be served until 127 days after filing. Hooper is distinguishable from this case because the Defendant there was a nursing facility that had sold and changed names. The Defendant's registered agent for service had moved without a forwarding address and when a residential address for the registered agent was located, the agent had divorced his wife and moved away and his location was unknown. The Plaintiff had made continued attempts to serve the agent over the course of the 120 days and did not fail to serve the Defendant due to their own errors or delay, but diligently and competently attempted service through process servers and two sheriff's offices. In Hooper, the Court noted that the Defendant had failed to comply with state statutes that required an up-to-date registered agent for service. Even then, the Court noted that, "under the unique circumstances of this case, we conclude it is appropriate to equitably toll the statute of limitations for the time Hooper spent in pursuit of Ebenezer's nonexistent agent."

In Pelzer v. State, 662 S.E.2d 618, 378 S.C 516 (Ct. App. 2008) the Court stated that "[A]ny invocation of equity to relieve the strict application of a statute of limitations must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes. To apply equity generously would lose the rule of law to whims about the adequacy of excuses, divergent responses to claims of hardship, and subjective notions of fair accommodation. We believe, therefore, that any resort to equity must be reserved for those rare instances where-due to circumstances external to the party's own conduct-it would be

unconscionable to enforce the limitation period against the party and gross injustice would result.”

In the present case, the evidence shows a single attempt to serve the Defendant at an address that they were able to verify. Of note, suit was filed on May 31, 2023 the day before the running of the statute of limitations. There appears to be no attempt of service of the summons and complaint until the 91<sup>st</sup> day after filing suit. According to the evidence put forth, when the attempts began, the employee who performed the skip-trace failed to provide the process servers with the correct address, even though arguably it appears that plaintiff was in possession of that address. The process server attempted to serve an attorney, but the attorney informed the process server he did not have authority to accept service and could not accept service. On September 8, 2023 a single attempt to serve the Defendant at a verified residential address failed, but the process server verified the address on that day through neighbors. The next day the process server was advised by the neighbors that groceries had been delivered to the residence, but no further attempts were made to serve the Defendant at the residence.

Instead, the Plaintiff sought to serve the Defendant through publication. On September 9, 2023 a Petition for publication was filed that failed to provide an affidavit testifying that service of the summons could not be made after due diligence as required by S.C. Code Ann. §15-9-710. In correcting that Petition, on September 30, 2023 a new petition was filed that included an affidavit. Significantly, however, this corrected Petition was filed after the 120 had expired. Also, in that September 30, 2023 Petition, it was alleged that the current place of residence of the Defendant could not be ascertained after the exercise of reasonable diligence. Defendant argued this was not correct and challenged that statement. When the a petition for publication was not filed to comply with statute, the Plaintiff lost 21 days.

The Order for publication was granted October 6, 2023. However, it was then an additional 21 days before a document was first published. And, when publication occurred, an incorrect document was published. Ultimately, the Plaintiff published the summons on December 27, 2022 and on January 10, 2023 proper publication was completed, which, according to the evidence, was 223 days after the filing of the summons and complaint. Defendant further submits that no proof of service by publication was filed with the court.

The Court finds no evidence of evasion of service on the part of Defendant.

### **CONCLUSION**

On the basis of the above, the Defendant's Motion to Dismiss is granted.

IT IS SO ORDERED.



Greenville Common Pleas

**Case Caption:** Ronald Carl Cox III vs. Michael John Dimaggio

**Case Number:** 2022CP2302830

**Type:** Order/Dismissal

So Ordered

G.D. Morgan Jr.