

STATE OF SOUTH CAROLINA)
 COUNTY OF ORANGEBURG)
)
)
)
 James D. Van Buren,)
)
 Plaintiff,)
)
 v.)
)
 Tess R. Brown,)
)
 Defendant.)

IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL CIRCUIT
2016-CP-38-01490

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SC Court of Appeals

ORDER

THIS MATTER came before the Court for a hearing on Defendant's Motion to dismiss on July 11, 2017. Present were Frank A. Barton, Esq., attorney for Plaintiff, and Robert P. Wood, attorney for Defendant.

While this case was filed prior to the expiration of the statute of limitation, this action must be dismissed due to Plaintiff's failure to effectuate service within one hundred twenty (120) days of such filing.

BACKGROUND

The following facts are undisputed:

Plaintiff alleges he was injured in an automobile accident on December 22, 2013. Defendant is a resident of Georgia. Plaintiff filed the action which is now before this Court on November 23, 2016, approximately one (1) month before the statute of limitations was to expire. He did not serve Defendant by December 22, 2016, when the statute of limitations expired, and he attempted to effectuate service during the 120-day grace period provided for in Rule 3(a)(2) of the South Carolina Rules of Civil Procedure. That rule states that if a summons and complaint have been filed with the clerk of court, but not served

within the statute of limitations, then "actual service must be accomplished not later than one hundred twenty days after filing" of the summons and complaint.¹

Plaintiff attempted to serve Defendant through the South Carolina Department of Motor Vehicles (SCDMV). The statute authorizing service of a non-resident motorist through the SCDMV provides procedures which, if followed, allow this substituted service to carry the same force and legal effect as if process had been personally served upon the Defendant.² Because the procedures provided for in this statute were not accomplished within one hundred twenty days of the summons and complaint being filed, this suit must be dismissed for lack of personal jurisdiction and insufficiency of service of process.

Based upon the affidavits submitted by the parties, the chain of events relevant to this action are as follows:

December 22, 2013: The accident occurred.

November 23, 2016: Plaintiff filed the summons and complaint.

March 16, 2017: SCDMV received a copy of the summons and complaint from Plaintiff.

March 21, 2017: SCDMV sent notice and a copy of the summons and complaint to Defendant via certified mail.

March 23, 2017: One hundred twenty (120) days after the summons and complaint were filed with the Clerk of court.

April 24, 2017: Notice and copy of the summons and complaint were returned to the SCDMV as undeliverable. SCDMV did not receive a return receipt.

May 9, 2017: SCDMV sent by open mail the March 21, 2016 notice and a copy of the summons and complaint to Defendant at her residence in Augusta, GA.

¹ SCRPC Rule 3(a)(2); see also S.C. Code Ann. § 15-3-20(B) (stating that 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").

² S.C. Code Ann. § 15-9-380.

May 11, 2017: Defendant received the notice and a copy of the summons and complaint.

May 25, 2017: Defendant served an answer and motion to dismiss.

June 2017: Plaintiff filed with the Clerk of court evidence that SCDMV had sent the notice and a copy of the summons and complaint by open mail and the envelope and affidavit of mailing with sufficient postage of such open letter.

ANALYSIS

Pursuant to Rule 12(b)(2) and Rule 12(b)(5) of the South Carolina Rules of Civil Procedure, a complaint may be dismissed for lack of personal jurisdiction³ or for insufficient service of process.⁴ "Rule 12(b)(5) is the proper vehicle for challenging both the mode of delivery or the lack of delivery of the summons and complaint." *Unisun Ins. V. Hawkins*, 342 S.C. 537, 543 (Cl. App. 2000). The purpose of a summons is to acquire personal jurisdiction of the defendant and to give them notice of the action and an opportunity to appear and defend. *White Oak Manor, Inc. v. Lexington Ins. Co.*, 407 S.C. 1, 753 S.E.2d 537 (2014).

In *Mims v. Babcock Center, Inc.*, the South Carolina Supreme Court construed the service requirements dictated by statute⁵ and rule⁶ to conclude that "if filing but not service is accomplished within the statute of limitations, then service must be made within 120 days." 399 S.C. 341, 732 S.E.2d 395 (2012). Therefore, when Plaintiff filed suit on November 23, 2016, with the statute of limitations

³ S.C.R. Civ. Pro. 12(b)(2)

⁴ S.C.R. Civ. Pro. 12(b)(5)

⁵ The statute cited by the Supreme Court reads, "[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 (120) days after filing." S.C. Code Ann. § 15-3-20(B).

⁶ The rule cited by the Court reads, "if [the summons and complaint are] not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing." S.C.R. Civ. Pro. (3)(a).

due to expire, he had one hundred twenty days to have Defendant served with the summons and complaint. Plaintiff failed to accomplish this.

Plaintiff elected to attempt service of Defendant through the DMV as a nonresident motorist. Defendant has, at all times relevant to this action, been a resident of Augusta, Georgia. South Carolina Code Ann. § 15-9-370(a) provides for substituted service on the Director of the SCDMV for nonresident drivers. That statute calls for a plaintiff to deliver a copy of the summons and complaint to the Director, who is to send it with notice to the defendant via certified mail. If the defendant in such a case does not accept or return a receipt for the certified mail, then § 15-9-380 applies. This section reads:

If the defendant in any such cause shall fail or refuse to accept and receipt for certified mail containing the notice of service and copy of the process and it shall be returned to the plaintiff or the Department of Motor Vehicles, the original envelope as returned shall be retained and the notice and copy of the summons shall be sent by open mail and the envelope and affidavit of mailing with sufficient postage of such open letter shall be filed with the clerk of court in which such action is pending and upon the filing thereof shall have the same force and legal effect as if such process has been personally served upon such defendant.

S.C. Code Ann. § 15-9-380 (emphasis added).

There are two ways in which the statutory process of substitute service on SCDMV was incomplete by March 23, 2017 (one hundred twenty days after the suit was filed). First, SCDMV had not sent by open mail the March 21 notice with a copy of the summons and complaint to Defendant. Second, Plaintiff had not filed proof of service with the Clerk of Court by that date. Because service was not completed as mandated by the controlling statute, dismissal is the appropriate remedy.

IT IS THEREFORE ORDERED that this action is dismissed with prejudice due to Plaintiff's failure to comply with the statutory service requirements.

IT IS SO ORDERED!



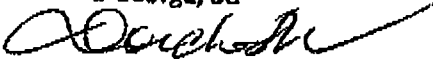
Judge Diane Schafer Goodstein

Diane Schafer Goodstein
Chief Administrative Judge

First Judicial Circuit

3-8, 2018

St. George, SC



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April 26, 2018

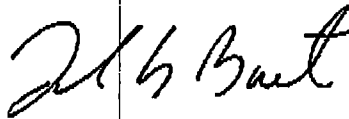
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Dear Clerk Kitchings:

I am sending a complete copy of the Order on Appeal by fax and regular mail.
Please do not hesitate to call if you have any questions.

Truly Yours,



Frank A. Barton

FAB/lfm

cc: William H. Boman, III, Esquire
The Honorable Winnifa B. Clark, Orangeburg County Clerk of Court

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