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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

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Varden Capital Properties, LLC

v.

Alexis Reese

**Appeal from Montgomery Circuit Court
(CV-18-901986)**

SELLERS, Justice.

Pursuant to Rule 5, Ala. R. App. P., Varden Capital Properties, LLC ("Varden"), appeals from an interlocutory order of the Montgomery Circuit

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Court denying Varden's motion for a summary judgment based on the statute of limitations. We reverse and remand.

Introduction

Alexis Reese alleges that, on October 29, 2016, she suffered a fall on real property owned or maintained by Varden. On October 29, 2018, exactly two years later, on the last day before the statute of limitations expired, Reese sued Varden, alleging negligence and wantonness. See Booker v. United American Ins. Co., 700 So. 2d 1333, 1339 (Ala. 1997) (noting that negligence claims are governed by a two-year limitations period); Ex parte Capstone Bldg. Corp., 96 So. 3d 77 (Ala. 2012) (noting that wantonness claims are governed by a two-year limitations period).

Reese did not request the circuit clerk to serve the complaint and summons by certified mail. Instead, she submitted a summons along with her complaint indicating that a private process server would be used to accomplish service. A process server served the complaint and summons at an address in Montgomery on February 6, 2019, 100 days after the complaint was filed. Apparently, however, the address where the materials were served was not Varden's. Notwithstanding, Varden was

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somehow made aware of the action and appeared for the sole purpose of filing a motion to quash service. Thereafter, the trial court entered orders giving Reese more time to serve Varden's agent at the appropriate address. See Rule 4(b), Ala. R. Civ. P. (requiring service to be accomplished within 120 days of the filing of a complaint but giving trial courts discretion to extend that deadline). On June 14, 2019, Reese served Varden by certified mail by the deadline set by the trial court.

Varden filed a motion for a summary judgment, asserting that Reese's claims are barred by the statute of limitations. In support, Varden pointed to, among other authority, Precise v. Edwards, 60 So. 3d 228 (Ala. 2010), in which this Court acknowledged the principle that "[t]he filing of a complaint commences an action for purposes of the Alabama Rules of Civil Procedure but does not 'commence' an action for purposes of satisfying the statute of limitations." 60 So. 3d at 230-31. Rather, "[f]or statute-of-limitations purposes, the complaint must be filed and there must also exist 'a bona fide intent to have it immediately served.'" Id. at 231 (quoting Dunnam v. Ovbiagele, 814 So. 2d 232, 237-38 (Ala. 2001)). "The question whether such a bona fide intent exist[s] at the time [a]

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complaint [is] filed must be determined by an objective standard." ENT Assocs. of Alabama, P.A. v. Hoke, 223 So. 3d 209, 214 (Ala. 2016). Varden argued in its summary-judgment motion that Reese waited 100 days to take any steps to serve the complaint and that she therefore did not possess a bona fide intent to have the complaint immediately served when she filed it. In response, Reese's attorney submitted an affidavit stating that Reese had "a bona fide intent to effectuate immediate service on [Varden] with a copy of the summons and complaint." The affidavit, however, omits any explanation of the specific steps taken to accomplish service.

The trial court denied Varden's summary-judgment motion but certified the following question under Rule 5, Ala. R. App. P.:

"Under ENT Associates of Alabama, P.A. v. Hoke and Precise v. Edwards, is this action barred by the two-year statute of limitations in Alabama Code 1975, 6-2-38(1), on the grounds that [Reese] did not possess a bona fide intent to serve [Varden] at the time the Complaint was filed, as evidenced by [Reese's] unexplained delay of over three months before attempting to serve [Varden]?"

This Court granted Varden's petition for permission to appeal. Our standard of review is de novo. ENT, 223 So. 3d at 213. See also Precise,

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60 So. 3d at 230 (applying the standard of review applicable to rulings on summary-judgment motions, which requires appellate courts to view the evidence in a light most favorable to the nonmovant and to determine whether there is substantial evidence demonstrating a genuine issue of material fact).¹

Discussion

In Ward v. Saben Appliance Co., 391 So. 2d 1030 (Ala. 1980), the plaintiff filed a complaint just before the applicable limitations period was to expire and instructed the circuit clerk to withhold service so that the plaintiff's attorney could investigate the case further before deciding whether to proceed. This Court held that the filing of the complaint did not "commence" an action for purposes of the statute of limitations

¹Reese asserts that the trial court "made a finding of fact" that she possessed the necessary intent to effectuate service at the time she filed the complaint and that this Court must afford deference to that alleged finding. Trial courts, however, do not make findings of fact when considering summary-judgment motions. Owens v. Rado, 659 So. 2d 87, 92 (Ala. 1995). As discussed herein, there is no evidence indicating that Reese took any steps to accomplish service for 100 days after filing the complaint, which establishes as a matter of law the lack of the requisite intent.

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"because [the complaint] was not filed with the bona fide intention of having it immediately served." Id. at 1035. Since Ward was decided, the bona fide-intention principle has been extended to various other circumstances. See, e.g., De-Gas, Inc. v. Midland Res., 470 So. 2d 1218 (Ala. 1985) (filing a complaint without paying the filing fee indicated that the plaintiff did not have a bona fide intention to proceed with the action); Pettibone Crane Co. v. Foster, 485 So. 2d 712 (Ala. 1986) (filing a complaint without providing the circuit clerk with any instructions for service of process or explanation why it was impossible to do so indicated a lack of bona fide intent to proceed); Dunnam, 814 So. 2d at 238 (holding that delay in providing the circuit clerk with a defendant's address for service by mail indicated a lack of bona fide intent to proceed).

In Precise, which is cited in the trial court's order certifying the question for interlocutory review, a wrongful-death complaint was filed a little more than 1 year and 11 months after the decedent's death. At the time the complaint was filed, the plaintiffs indicated that it would be served by a process server. The defendants were not served until four months later, and they moved for a summary judgment based on the

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expiration of the two-year statute of limitations. According to this Court's opinion: "[T]he plaintiffs offered no evidence in support of their opposition [to the summary-judgment motion], nor did they actually explain the 131-day delay in service." 60 So. 3d at 230. The trial court granted the defendants' summary-judgment motion.²

On appeal, this Court stated that, "when the plaintiff, at the time of filing [a complaint], does not perform all the tasks required to effectuate service and delays a part of the process, a lack of the required bona fide intent to serve the defendant is evidenced." 60 So. 3d at 233. Conversely, "'a bona fide intent to have [a complaint] immediately served' can be found when the plaintiff, at the time of filing, performs all the tasks required to serve process." Id. (quoting Dunnam, 814 So.2d at 237–38).

The Court concluded:

"The instant case involves service by process server, not by certified mail. The plaintiffs elected this procedure and undertook the duty to obtain a process server. At the time of filing, and for over four months thereafter, the plaintiffs failed

²After entry of the summary judgment, the plaintiffs in Precise submitted affidavits attempting to demonstrate good cause for the delay, but the trial court struck those affidavits as untimely. 60 So. 3d at 230.

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to do so. Like the plaintiff in [Dunnam v. Ovbiagele, 814 So. 2d 232 (Ala. 2001)], the plaintiffs here were tardy in performing the steps required of them to effectuate service. This unexplained failure to perform tasks required to effectuate service at the time of filing, 'viewed objectively, evidences a lack of the required bona fide intent to have [the defendants] immediately served.' 814 So.2d at 239. This lack of intent was un rebutted in the trial court."

60 So. 3d at 233 (footnote omitted). Accordingly, this Court affirmed the summary judgment in favor of the defendants.

In ENT Associates of Alabama, also cited in the trial court's certification order, this Court reversed the order denying the defendants' summary-judgment motion based on the statute of limitations. The complaint in ENT was filed one day before the applicable two-year limitations period expired. At the time the complaint was filed, the plaintiff's attorney informed the circuit clerk that the complaint would be served by a process server. The complaint was served approximately 69 days later. On appeal, this Court noted that "delay in conjunction with the absence of evidence of any steps taken by the plaintiff to effectuate service at the time of filing the complaint is evidence of a lack of a bona fide intent to immediately serve the complaint." 223 So. 3d at 215

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(emphasis omitted). In reversing the trial court's order denying the defendants' summary-judgment motion, the Court concluded:

"[B]ecause [the plaintiff] elected to use a process server, she 'undertook the duty to obtain a process server.' [Precise, 60 So. 3d] at 233. There is no evidence in the record indicating that [the plaintiff] made any effort to obtain a process server at the time she filed her complaint, or that she 'performed all the tasks required to serve process' at the time of filing. Precise, 60 So. 3d at 233. Both [the plaintiffs' attorneys'] affidavits are silent as to what efforts they made to have the defendants served at the time the complaint was filed."

223 So. 3d at 214. The Court rejected the plaintiff's argument that simply informing the circuit clerk that the complaint would be served by a process server was sufficient to establish that she had a bona fide intention to immediately serve the complaint. Id. at 215.

Like the plaintiffs in Precise and ENT, Reese elected to serve her complaint via a process server. Also like the plaintiffs in Precise and ENT, Reese delayed before taking any steps to effectuate service. Although her attorney submitted an affidavit to the trial court stating in conclusory fashion that Reese had a bona fide intent to effectuate immediate service, there is no explanation of what steps were actually taken to serve the complaint. The evidence indicates that Reese simply

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did not hire a process server and that she made no attempts at service for 100 days after the complaint was filed. Accordingly, based on Precise and ENT, the trial court should have granted Varden's motion for a summary judgment.

Reese attempts to distinguish ENT on the ground that one of the plaintiff's attorneys in ENT was not licensed to practice law in Alabama when the complaint was filed and indicated that he planned to serve the complaint after filing a motion for admission to practice pro hac vice. Reese suggests that the plaintiff's attorney in ENT therefore conceded that he did not have a bona fide intention to serve the complaint at the time it was filed. In contrast, Reese points out that her attorney is licensed to practice law in Alabama and that he was "capable of effectuating service immediately," thus suggesting that he did not concede a lack of intent to serve the complaint at the time it was filed. Although the opinion in ENT does indicate that the plaintiff's attorney's excuse for delaying service suggested that he did so "intentionally," 223 So. 3d at 216, ENT turned primarily on the lack of effort to accomplish service, not on a concession by the plaintiff's attorney. Indeed, the plaintiff in ENT

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asserted that she had retained Alabama counsel before the complaint was filed, and this Court relied on the fact that "there [was] no explanation provided in the record as to why ... local counsel ... did not attempt to effectuate service on the defendants." 223 So. 3d at 218. That Reese's attorney was "capable of effectuating service immediately" does not change the fact that there is no indication that any steps were actually taken to accomplish service for 100 days after the complaint was filed. If anything, the fact that counsel was capable of effectuating service highlights that fact.

Reese also points out that the complaint in ENT did not provide addresses for the defendants and that, in contrast, the summons Reese submitted with her complaint "provided Varden's name and address based on [a lease]." That an address was submitted with the summons is irrelevant. Reese did not request the circuit clerk to serve Varden by certified mail. Instead, she elected to use a process server and thereafter did nothing to accomplish service for 100 days. See Precise, 60 So. 3d at 233 n.3 ("Because this case involves service by process server, the fact that the plaintiffs knew and disclosed the defendants' addresses to the circuit

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clerk is irrelevant -- the circuit clerk was not charged with a responsibility to act on those addresses.").

Reese's attempts to distinguish Precise are also unconvincing. She first points out that the plaintiff in Precise delayed 131 days before attempting service and that Reese delayed "only" 100 days. But any appreciable delay in attempting service indicates a lack of bona fide intent to serve a complaint. In ENT, service was attempted and accomplished 69 days after the complaint was filed, and this Court held that the plaintiff's claims were barred.

Reese also relies on her attorney's affidavit testimony averring that Reese had a bona fide intent to serve the complaint, while there was no such evidence considered in Precise. As noted, however, Reese's attorney's affidavit simply makes a conclusory assertion that she intended to have the complaint served but fails to provide particular details of any specific efforts taken. Whether the necessary intent existed is an objective inquiry to be answered based on the plaintiff's actions, not conclusory statements of subjective intent. See ENT, 223 So. 3d at 214 (noting that an objective standard applies and that affidavits submitted by the plaintiffs' attorneys

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were "silent as to what efforts they made to have the defendants served at the time the complaint was filed").

Reese's primary response to Varden's statute-of-limitations argument is that the trial court granted her request for an extension of the deadline for service set out in Rule 4(b), Ala. R. Civ. P., which generally requires service within 120 days of the filing of a complaint. Reese asserts that service was accomplished within the deadline in Rule 4(b), as extended by the trial court, and was therefore timely. As the Court stated in ENT, however: "[T]he fact that the defendants ... were served within the time limit for service set forth in Rule 4(b) has no bearing on the question whether the action was timely commenced for purposes of the statute of limitations." 223 So. 3d at 217 (emphasis omitted). As Varden states in its petition for permission to appeal: "The time afforded [Reese] by Rule 4(b), even as extended by the grace of the trial court, has nothing to do with her obligation to demonstrate bona fide intent to serve process on Varden at the time she filed suit."

To the extent Reese suggests that the fact that she requested an extension, by itself, demonstrates the requisite intent to serve the

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complaint, we find that argument unpersuasive. An unexplained delay in attempting service after filing a complaint demonstrates a lack of bona fide intent to serve a complaint at the time it was filed, and the fact that a complaint is served within the 120-day deadline of Rule 4(b) does not change that conclusion. We fail to see how a plaintiffs' request for an extension of that deadline, made after a delay in attempting service, could possibly call for a different result. Indeed, in Precise, the fact that the plaintiffs had sought, and were denied, more time to serve under Rule 4(b) was "immaterial" to the statute-of-limitations issue. 60 So. 3d at 234.³

Reese also argues that confusion regarding the identity of the proper defendant saves her from the statute of limitations. According to Reese, Varden has asserted that it is not the proper defendant, and she claims that "uncertainty over the true Defendant is a material factor to be

³Reese appears to suggest in her brief to this Court that Varden waited too long to attempt a challenge to the trial court's orders providing Reese with more time to accomplish service under Rule 4(b). But Varden does not challenge those orders; it appeals from the order denying its motion for a summary judgment, which was based on a ground that is not affected by the extension of the deadline to accomplish service under Rule 4(b).

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considered in determining whether or not [Reese] delayed in serving or attempting to serve the Defendant." But she does not persuasively explain why her alleged uncertainty justified delaying service of process on Varden. Whether Varden turns out to be the proper defendant, Varden is the entity that Reese sued, and she did indeed delay attempts to serve that entity. As to any claims against Varden, viable or not, there is no question Reese did not "commence" her action within the limitations period.⁴

That Reese had the wrong address for Varden when she filed the complaint also is not relevant in this case. What matters is the lack of effort to accomplish service for 100 days after filing the complaint, which demonstrates a clear lack of bona fide intent to serve the complaint when it was filed. Dunnam does not call for a different result. In that case, this Court held that it could not, as a matter of law, conclude that the plaintiff did not have a bona fide intent to immediately serve a medical-

⁴Reese should have taken her uncertainty into consideration in choosing to file suit so close to the expiration of the statute of limitations.

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malpractice complaint on two of the three defendant medical providers, even though she did not provide the circuit clerk with those defendants' addresses for service by mail until more than three months after she filed the complaint. The plaintiff's attorney in Dunnam submitted evidence indicating that, at the time the complaint was filed, he did not know the whereabouts of the two defendants, that he informed the circuit clerk of that circumstance, and that, in the interim between filing the complaint and accomplishing service, "he diligently searched for the addresses of those two doctors." 814 So. 2d at 238. In contrast, there is no evidence in the present case indicating that Reese knew that she did not have the correct address for Varden and that, after filing the complaint, diligently sought that address. Although Reese asserts in her brief to this Court that she decided to use a process server in an attempt to ensure that service was made at the correct address, she points to no evidence of such intent, no evidence establishing when she hired a process server, and no evidence demonstrating that any steps at all were taken to discover the proper address for service. Indeed, even 100 days after filing the complaint, she simply served it at the incorrect address she had when the

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complaint was filed, indicating that any effort to identify the correct address was minimal at best.⁵

Conclusion

There are no meaningful differences between the present case and Precise and ENT. Accordingly, we reverse the trial court's order denying Varden's summary-judgment motion and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Parker, C.J., and Bolin, Shaw, and Mitchell, JJ., concur.

Bryan, Mendheim, and Stewart, JJ., concur in the result.

⁵Thompson v. E.A. Industries, Inc., 540 So. 2d 1362 (Ala. 1989), also is inapposite. In that case, the Court held that a plaintiff who initially attempted service at an incorrect address was not barred by the statute of limitations even though he failed to perfect service until more than three years after he filed the complaint and approximately two and one-half years after learning of the defendant's correct address. In contrast to the present case, the plaintiff's initial failed attempt at service in Thompson occurred contemporaneously with the filing of the complaint. Because he attempted service at that time, "the requisite intent appear[ed] to have been there at the time of filing." Id. at 1363. Reese, however, took no steps to accomplish service for 100 days after filing her complaint.

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MENDHEIM, Justice (concurring in the result).

I concur in the result reached by the main opinion.

A petition for permission to appeal may be granted under Rule 5(a), Ala. R. App. P., only if the trial court certifies, among other things, that "the interlocutory order involves a controlling question of law as to which there is substantial ground for difference of opinion." (Emphasis added.) In Mid-Century Insurance Co. v. Watts, [Ms. 1180852, Sept. 18, 2020] ___ So. 3d ___, ___ (Ala. 2020), this Court recently adopted the following reasoning concerning the Rule 5(a) requirement that the controlling question of law identified by the trial court be an issue as to which there is substantial ground for difference of opinion:

"[T]he limitation in Rule 5[, Ala. R. App. P.,] to issues "as to which there is substantial ground for difference of opinion" is a limitation to questions of law that either have never been decided or are the subject of a split of authority or a conflict in our precedents. Otherwise, this Court is merely performing the trial court's function of researching and deciding legal issues, a task for which the trial court is well equipped and to which it equally is assigned. See, e.g., Couch v. Telescope Inc., 611 F.3d 629, 633 (9th Cir. 2010) (noting that "[c]ourts traditionally will find that a substantial ground for difference of opinion exists where '... novel and

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difficult questions of first impression are presented' " (quoting 3 Federal Procedure § 3:212 (Lawyers ed. 2010)).'

"Once Upon a Time[, LLC v. Chappelle Props., LLC], 209 So. 3d [1094,] 1107 [(Ala. 2016)] (Murdock, J., dissenting)."

In the present case, the issue is whether the plaintiff filed the complaint with the bona fide intention of having it immediately served. As ably detailed by the main opinion, this is not an issue "as to which there is substantial ground for difference of opinion." That is to say that the issue presented in this case is not an issue that has "'never been decided or [is] the subject of a split of authority.'" Mid-Century, ___ So. 3d at ___ (quoting Once Upon a Time, LLC v. Chappelle Props., LLC, 209 So. 3d 1094, 1107 (Ala. 2016) (Murdock, J., dissenting)). Quite the contrary, the law concerning whether a plaintiff filed a complaint with the bona fide intention of having it immediately served is well settled. Accordingly, I do not believe that the petition for permission to appeal should have been granted in this case. However, the parties do not raise this argument; thus, I concur in the result.

Stewart, J., concurs.