

Case No. 2015-CA-01708

SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

VIOLA BOLTON,
Appellant (Defendant below)

v.

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellee (Plaintiff below)

and

CLIFF BISHOP
Appellee (Plaintiff below)

Appeal from the Circuit Court of Attala County, Mississippi

BRIEF OF APPELLANT

VIOLA BOLTON

Oral Argument Requested

SUBMITTED BY:

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Viola Bolton, Appellant
 2. Bruce L. Barker, Attorney of record for Appellant
 3. Larry Stamps, Attorney of record for Appellant
 4. Cliff Bishop, Appellee
 5. Illinois Central Railroad, Appellee
 6. Romney H. Entrekin, Attorney of record for Appellee
 7. Grayson Lacey, Attorney of record for Appellee
 8. Clarence E. Morgan, Former Circuit Judge, Mississippi Fifth Judicial Circuit
- SO CERTIFIED, this 30TH day of June 2016.

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STATEMENT OF THE ISSUES

1. The Defendants offered no evidence whatsoever beyond the non-testimonial arguments of counsel in support of their Motions for Summary Judgment. This is not sufficient to meet the ‘substantial evidence’ threshold necessary for the circuit court to consider without abusing its discretion in making its ruling.

2. Under Rule 4(h) of the Mississippi Rules of Civil Procedure (hereafter referred to as “MRCP”) good cause may be established by presenting evidence that the defendant intentionally evaded service by providing false or misleading information, or any other misconduct by the defendants meant to frustrate service. Defendant Bishop intentionally provided a false address and telephone number on the police report after the accident giving rise to this cause. Illinois Central Railroad Company refused to provide contact information for service of Mr. Bishop. Under Rule 4(h) of MRCP did the Attala County Circuit Court err in failing to find that good cause existed to extend the deadline for service when the defendants attempt to evade service.

3. Rule 4(h) of the MRCP “good cause” may be established by showing that plaintiff made reasonable diligent efforts to locate and serve defendants. The plaintiff was diligent in attempting to ascertain the address of the Defendant, and served the Defendant as soon as she had done so. Under Rule 4(h) did the circuit court err in ruling that dismissal was proper when “good cause” for the Plaintiff’s failure to serve process may be established through a showing that Plaintiff acted reasonably diligent in attempting to locate and serve the Defendants.

STATEMENT OF THE CASE

A. Nature of the Case

This Court must decide whether - on a motion for summary judgment where the moving party bears the burden of showing that there is no genuine issue of material fact -the non-testimonial arguments and allegations of counsel, without supporting testimony, affidavit, or other evidence, are sufficient to form the “substantial evidence” necessary to uphold the circuit court’s decision to dismiss the case, where the good cause for Appellant’s counsel’s delay in service of process could be established. If this court finds that the moving party has a duty to produce evidence beyond bald allegation, then it should reverse the decision of the Circuit Court. Further, if this Court finds the existence of “Good Cause” for Plaintiff’s delay in serving the Defendants then it should reverse the Circuit Court’s order of dismissal.

In *Jenkins v. Oswald*, 3 So.3d 746 (Miss. 2009), the court held that good cause is likely to be found “when the plaintiff’s failure to complete service in timely fashion is a result of the conduct of a third person, typically the process server, the defendant has evaded service of the process or engaged in misleading conduct, the plaintiff has acted diligently in trying to effect service or there are understandable mitigating circumstances . . .” *Jenkins* 3 So.3d at 749

This being the case, good cause did exist to extend the deadline for service because defendant Bishop attempted to evade service of process by engaging in misleading conduct. Specifically Cliff Bishop provided a false address and telephone number on the police report after his train struck the plaintiff. Instead of providing his own contact information in the places provided, he used the address of a railyard in Jackson, MS, and the telephone number of an office at that yard, without indicating that it was not his own address and telephone number. When counsel for the Plaintiff called the number he was connected to Illinois Central Railroad

Company's (hereafter "ICRC") rail yard in Jackson, MS. The persons who took the call disavowed any knowledge regarding where their engineer, Mr. Bishop, resided. They also failed to co-operate when requested to provide someone who might be able to provide contact information for Mr. Bishop. By virtue of their intransigence they colluded with Mr. Bishop to frustrate service. These facts alone would be sufficient to establish that good cause existed under *Jenkins*. The Court had no evidence whatsoever, let alone 'substantial evidence' to the contrary – these facts were freely admitted by the defendants - therefore dismissal was improper and should be reversed.

However, it can also be shown that plaintiff's counsel was diligent in his efforts to locate and effectuate service of process. Plaintiff's counsel made numerous attempts to both locate the defendant. He further acted diligently to obtain extensions of the service deadline before time expired. Counsel's reasonable diligence in his attempts to serve Defendant Bishop are another independent basis for good cause, and the Circuit court was presented with no substantial evidence to the contrary, therefore the dismissal was improper and should be reversed.

B. Course of the Proceedings

This case arises from an accident which occurred on July 6, 2011 at approximately 3:34 p.m. wherein the plaintiff was struck by a train owned and operated by Defendant ICRC, on a railway operated and maintained by ICRC. Said train was under the immediate control and being operated by Defendant Bishop. Plaintiff filed her complaint on July 3, 2014. (R. at 4-9).

On November 3, 2014, having been unable to locate Defendant Bishop and being occupied with a jury trial elsewhere in the state, plaintiff filed her first motion for additional time to serve process, which the circuit court granted and provided an additional 90 days for plaintiffs to locate and effectuate service on defendants (R. at 12-15) .

On February 2, 2015, before the first extension expired, plaintiff filed her second motion for additional time to complete service which the Court granted on February 4, 2015 giving plaintiff an additional 90 days to complete service on defendants (R. at 17-20).

The Plaintiff, with assistance from the Attala County sheriff's office, located Defendant Bishop in April of 2015, before the second extension expired. On April 24th, 2015 a Summons was issued and served onto Clifford Bishop and Illinois Central Railroad Company. (R. at 23-26).

Process was served on Clifford Bishop on April 30th, 2015, and ICRC was served with process on May 30, 2015. (R. at 146). Subsequently, Clifford Bishop filed a motion to dismiss the claim based on incomplete and improper service of process on May 22nd, 2015. (R. at 31-38).

On June 11th, 2016 defendant ICRC filed their Motion to dismiss, similarly arguing that dismissal was proper based on ineffective service of process. (R. at 77-82).

Plaintiff served her response to Bishop's Motion to Dismiss on June 4th, 2015 arguing that good cause existed as to the plaintiff's inability to serve process on the defendant which would make dismissal improper. (R. at 52-60). Plaintiff served her response to Illinois Central Railroad's Motion to Dismiss on June 24, 2015 (R. at 86-96). A hearing on the Defendants' Motions to Dismiss was held on September 8th, 2015 (R. at 83). The Circuit Court entered its order granting the Defendants' Motions to Dismiss on October 5, 2015. (R. at 114 – 117). The plaintiff filed her notice of appeal on November 13, 2015 (R. at 119).

C. Statement of Facts

Viola Bolton was crossing the Brown Street railroad intersection in McLain, MS on July 6th, 2011 when the car she was driving was violently struck by a locomotive under the operation of the defendants. (R. at 5.) The vehicle was completely destroyed and Ms. Bolton suffered

multiple fractures to her pelvis, legs and wrists as well as significant trauma to her face and entire left side of her body. (R. at 5.) Ms. Bolton has undergone substantial pain and suffering resulting from the collision. (R. at 5.)

Following the collision, a police report was generated. (R. at 66.) In this police report, in the areas provided for his contact information Defendant Bishop furnished an address and telephone number belonging to his co-defendant, ICRC. (R. at 66). He did not anywhere indicate that the contact information was not his own. Upon utilizing the contact information provided by Defendant, plaintiff's counsel was connected to a railyard in Jackson, MS, where the employees answering the call denied any information concerning Defendant Bishop's whereabouts. (R. at 54).

Two extensions of time were requested by plaintiff's counsel and granted by the trial judge. (R. at 53). These extensions were necessary to give Plaintiff's counsel time to track down Defendant Bishop while still otherwise engaging in the practice of law in other matters. (R. at 55). After a search by plaintiff's counsel and assistance from the Attala County Sheriff's Office, Defendant Bishop's address was finally accurately ascertained. (R. at 58). Service of process was timely affected during the second extension of time granted by the trial judge. (R. at 59).

SUMMARY OF THE ARGUMENT

The court erred in dismissing Plaintiff's claims against defendants because the Defendants, who bore the burden of proof that there was no good cause for the delay, produced *no evidence whatsoever* indicating that there was no good cause, only naked allegations by the Defendants' counsel. The non-testimonial statements and arguments of counsel are not evidence, and do not meet the 'substantial evidence' threshold necessary to avoid the determination that the circuit court abused its discretion in granting the Defendants' motions for summary judgment.

The Plaintiff, on the other hand, produced hard evidence that Defendant Bishop intentionally lied to the police and furnished false information on a police report by producing the false report itself. Plaintiff's counsel also showed that he had been as diligent as the law required in affecting service, especially given the fact that the Defendants both engaged in conduct meant to frustrate service of process.

ARGUMENT

I. Standard of Review

The standard of review for a determination of good cause is abuse of discretion. "When reviewing fact-based findings, the Supreme Court will only examine whether the trial court abused its discretion and whether there was substantial evidence supporting the determination." *Holmes v. Coast Transit Authority*, 515 So.2d 1183 (Miss. 2002); *See also Darville v. Mejia*, 184 So.3d 312 (Miss.App.2016). "A trial court's finding of fact on the existence of good cause for the delay in service of process has been deemed 'a discretionary ruling . . . and entitled to deferential review' on appeal." *Triple C Transport, Inc. v. Dickens*, 870 So.2d 1195 (Miss. 2004), (citing *Holmes v. Coast Transit Auth.*, 815 So.2d 1183, 1135 (Miss. 2002.).

However, the question of whether or not there was good cause was brought in the context of a motion for summary judgment, and that standard is not addressed at all in order in this case. In drafting the Court's Order¹ for former Judge Morgan, counsel for the Defense simply repeated the naked allegations he made in his Motion to dismiss: That there was no good cause for delay. Like his motion, there is no evidence presented in support of those allegations.

¹The transcript and the record indicate that proceedings were weighed against the Plaintiff, and former Judge Morgan was unwilling to even address the legal merits of the Plaintiff's arguments, but the extent to which the Court privileged the Defendant over the Plaintiff is indicated by the fact that Defense counsel was tasked with drafting the Court's Order, and allowed to submit the it without any review whatsoever from Plaintiff's counsel. The result was a pages-long recitation of the Defendants original motion arguments, given the imprimatur of the authority of the Court by Judge Morgan's signature.

Summary Judgment may be granted if “there is no genuine issue as to any material fact.”

The Mississippi Supreme Court as explained the standard as follows:

“This Court conducts *de novo* review of orders granting or denying summary judgment and looks at all the evidentiary matters before it – admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. The evidence must be viewed in the light most favorable to the party against whom the motion has been made, that is, the non-movant is given the benefit of the doubt. If the moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his favor. Otherwise the motion should be denied. Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter and another says the opposite. In addition, the burden of demonstrating that no genuine issue of fact exists is on the moving party.”
Aetna Casualty and Surety Co. v. Berry, 669 So.2d 56, 70 (Miss. 1996).

The Mississippi Supreme Court has repeatedly and consistently stated, “[t]he burden of proving that no genuine issue of material fact exists rests upon the party requesting the summary judgment. The trial court must carefully review all evidentiary matters before it...in the light most favorable to the party against whom the motion for summary judgment is made.” *Johnson v. City of Cleveland*, 846 So.2d 1031, 1035 (Miss. 2003) (citations omitted). Further, “The party moving for summary judgment has the burden of production and persuasion.” *Fipps v. Glenn Miller Construction Co. Inc.*, 662 So.2d 594, 596 (Miss. 1995) (Citations omitted).

Further, “An extension of time to serve process continues to toll the statute of limitations if granted for good cause. If service is made within the additional time, the statute of limitations will not be held to have expired.” *Heard v. Remy*, 937 So.2d 939, 943 (Miss. 2006).

Therefore, in order to prevail in his motion to dismiss in the case at bar, this standard dictates that Defendants should have shown, with all evidence viewed in a light most favorable to the Plaintiff, that there is no genuine issue of material fact as to whether or not the Plaintiff

could show good cause for an extension of time to serve the summons under Miss. R. Civ. P. 4(h).

II. The Circuit Court abused its Discretion when it ignored genuine issues of material fact and did not base its finding of lack of good cause on substantial evidence

The Defendant failed to make the requisite 12(b)(6) showing, because a rational jury could look at the police report, and decide that the defendant did engage in misleading behavior that frustrated service, and so good cause did exist. This presents an issue of material fact, and removes the case from being subject to 12(b)(6) summary judgment. Former Judge Morgan abused his discretion by utterly ignoring the evidence, the Defendant offers no evidence whatsoever to weigh against the Plaintiff's claim that she needed extra time to find the defendant because he did not give his proper address on the police report. His only purported 'evidence' is the fact that the summons was not issued until the second extension was granted.

However, the fact that the Plaintiff asked for extensions before issuing the summons is not evidence of neglect on the part of the Plaintiff – the Plaintiff didn't have the summons issued because she wasn't sure which address the Defendant was at, and she was granted the extensions to ascertain that information. The fact that there was difficulty at all in ascertaining the address for service, however, was entirely the fault of the Defendant because he intentionally furnished the police a false address and phone number on the police report to avoid service. He should not be allowed to profit from his own malfeasance.

Defendant argues that Plaintiff cannot demonstrate "good cause" for failing to serve Defendant within 120 days after filing the complaint. In addition, Defendant bases this argument on the fact that the summons was not issued until over nine months after Plaintiff filed the complaint. As *Jenkins* shows, good cause is not based on when the summons is issued. Instead,

good cause is based upon whether or not the plaintiff makes a reasonably diligent effort to serve the defendant within the 120 – day period. *Triple C Transport, Inc. v. Dickens*, 870 So.2d 1195, 1201 (Miss. 2004) (quoting *Holmes v. Coast Transit Auth.*, 815 So.2d 1183, 1186 (Miss. 2002)). Furthermore, when a defendant purposefully evades service of process or demonstrates misleading conduct, good cause may also be established. *Id.* Here, there are both.

As the Defendant points out in his motion, twice the Plaintiff went to the trial judge to ask for extensions to serve. In each motion, the Plaintiff was clear about their cause - because they could not ascertain Defendant Bishop's address because the address and telephone number he provided on the police report was that of the rail yard in Jackson, MS where they denied any knowledge of how to contact Defendant Bishop. The trial judge twice made written rulings that good cause existed to extend the period. Nothing has changed in that regard between then and now.

III. Dismissal should be reversed because the Plaintiff demonstrated Good Cause

Good cause is established in this case both by the defendant's furnishing of false information to evade service of process as well as acted in a way intended to materially misrepresent the location of defendant, Cliff Bishop, and that plaintiff and plaintiff's attorney acted with the diligence required to toll the statute while they determined the Defendant's address for service.

This is not the first case where service has been delayed due to a defendant's attempt to evade, and Mississippi caselaw is soundly on the side of the Plaintiff in this regard: “[G]ood cause is likely to be found when the plaintiff's failure to complete service in timely fashion is a result of the conduct of a third person, typically the process server, [or] the defendant has evaded service of the process or engaged in misleading conduct, [or] the plaintiff has acted diligently in

trying to effect service or there are understandable mitigating circumstances, or the plaintiff is proceeding pro se or in forma pauperis.” *Holmes v. Coast Transit Authority*, 515 So.2d 1183, 1186 (Miss. 2002). To establish good cause under Rule 4(h), the plaintiff must demonstrate “at least as much as would be required to show excusable neglect, as to simple inadvertence or mistake of counsel or ignorance of the rules usually does not suffice.” *Watter v. Stripling*, 675 So.2d 1242, 1243 (Miss. 1996) (citing *Peters v. United States*, 9 F.3d 344 (5th Cir. 1993)).

In the case at bar, good cause existed in two of the forms described in *Holmes*. First, Cliff Bishop provided a false address and Illinois Central Railroad Company’s employees refused to furnish Mr. Bishop’s proper address. Secondly, good cause also existed in this case because the plaintiff made several efforts and acted with reasonable diligence to determine the proper address for the defendant and her subsequent failure to do so without seeking extensions of time was not a result of her inactions but the result of the defendants’ actions.

a. Defendants attempted to evade service of process and engaged in conduct that was intended to mislead the Plaintiff, giving rise to good cause

“[G]ood cause is likely to be found when the plaintiff’s failure to complete service in a timely fashion is a result of. . . the defendant has evaded service of process or engaged in misleading conduct . . .” *Triple C. Transport, Inc. v. Dickens*, 870 So.2d 1195 (Miss. 2004) (citing *Holmes v. Coast Transit Authority*, 515 So.2d 1183, 1186 (Miss. 2002)).

Plaintiff can show that good cause existed as to her failure to serve process within the statutory period because such failure was a direct result of the defendant’s evasion and misleading conduct. Plaintiff could not timely ascertain defendant Bishop’s address because he put the address of a railyard on the police report – a document designed to be looked to for contact information regarding parties to an accident. Obviously, defendant Bishop knows his

own address, but he chose to give another, so it is reasonable to assume that this was an intentional misrepresentation. During the hearing on the matter, defense counsel offered that it was ICRC policy to have engineers give the contact information of the railyard, so that persons interested could get information from the train master there. (TR. Pg. 16). But this does nothing but implicate Defendant ICRC in the misleading behavior – counsel for the Plaintiff did contact the train yard, but, contrary to defense counsel’s assertions, they did not furnish any information regarding where to locate Mr. Bishop.

It was reasonable for plaintiff to believe that the address Bishop provided was his actual and accurate address and to rely on said address in attempting to serve process. This was the only information the Plaintiff had to locate Defendant Bishop. Once this proved to be false, and Defendant ICRC began to obstruct the process by refusing to divulge where their engineer might be located to serve, the service of process became frustrated, and good cause for an extension under *Holmes* and its progeny was created.

b. Despite the evasion and obstruction by the Defendants, the Plaintiff acted diligently to ascertain Defendant Bishop’s whereabouts and serve him

The Plaintiff did not sit by idly after it became apparent that the Defendants were attempting to evade process. The Plaintiff called the railyard several times to request the Defendant Bishop’s contact information. The Plaintiff conducted address and name searches that resulted in a great number of Cliff Bishops being found across the State. The Plaintiff then cross referenced them by age to find several matches in Attalla County. The Plaintiff moved the Court diligently twice for extensions before the deadline elapsed, listing their good cause, and twice the judge granted the extensions. The Plaintiff then worked with the Attala County Sheriff’s office to confirm which Attala County address was the proper one. Once that was

ascertained, and before the extension passed, the Plaintiff had the summons issued, and had Mr. Bishop served. During this period Counsel for the Plaintiff conducted a jury trial, briefed other issues in other cases, and generally ran a busy law practice. The law only demands a level of “excusable neglect” to show sufficient diligence. The Plaintiff’s actions, especially in light of the Defendants’ active attempts to frustrate and evade service, certainly rise to that standard.

In discussing Rule 4(h) Mississippi Supreme Court has held, “the rule should not be used to penalize plaintiffs who demonstrate reasonable diligence in effecting timely service on defendants.” *Holmes v. Coast Transit Auth.*, 815 So.2d 1183, 1186 (Miss. 2002) (quoting 4B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1137, at 342 (3d ed. 2000)). Plaintiff has demonstrated reasonable diligence, and should no more be penalized for it, than the Defendants should be allowed to profit from their misdirection and evasion. The dismissal should be reversed.

CONCLUSION

For the reasons cited herein the Plaintiff prays that this Honorable Court reverse the former judge's decision in the Circuit Court of Attala County to dismiss the Plaintiff, and render the case to the lower court to proceed.

Respectfully submitted this the 1st day of July, 2016.

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CERTIFICATE OF SERVICE

I, Bruce L. Barker, attorney for Appellant, do hereby certify that I have this day filed via the Court's electronic filing system, a true and correct copy of the foregoing copy of the Appellant's Brief, which caused the same to be transmitted to:

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Hon. George Mitchell, Jr.
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THIS, the 1st day of July 2016.

/s/ Bruce L. Barker
BRUCE L. BARKER