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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001351-MR

SANDRA AND MICHAEL GREEN — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 98-CI-002927

KENTUCKY KINGDOM
AMUSEMENT COMPANY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: BAKER, GUIDUGLI AND KNOPF, JUDGES.

GUIDUGLI, JUDGE. Sandra and Michael Green ("the Greens") appeal from an order of the Jefferson Circuit Court dismissing their premises liability action against Kentucky Kingdom Amusement Company ("Kentucky Kingdom"). We affirm.

On May 31, 1997, Sandra Green was injured when she slipped and fell on a wet surface at Kentucky Kingdom in Louisville, Kentucky. Thereafter, the Greens filed the instant

premises liability action seeking damages from Kentucky Kingdom and other defendants.

The Greens, through counsel, sought to serve Kentucky Kingdom by delivering the summons and complaint to Kentucky Kingdom's general counsel, Gaylee Gillim ("Gillim"). Gillim was registered with the Kentucky Secretary of State to receive process for Kentucky Kingdom. It is uncontroverted that service was not delivered to Gillim's correct address. The Greens would later maintain either that the Secretary of State provided an incorrect address or that Kentucky Kingdom incorrectly identified the address of its registered agent to the Secretary of State.

Though there was some interaction between the parties over the years that followed, the action languished as to the claim against Kentucky Kingdom. Apparently believing that Kentucky Kingdom had been properly served in 1997, the Greens filed a motion seeking a default judgment in 2001. The trial court denied the motion upon concluding that no service had been made. The Greens then served Kentucky Kingdom at the correct address. Kentucky Kingdom responded by filing a motion to dismiss for insufficient service of process and/or failure to prosecute. Upon considering the record and the parties' written arguments, the trial court entered an order on June 14, 2002, dismissing the action. This appeal followed.

The Greens now argue that the trial court committed reversible error in granting Kentucky Kingdom's motion to dismiss. They maintain that the service of process was sufficient and was made in good faith. They note that they relied on the information provided by the Secretary of State, and that Kentucky Kingdom and its general counsel (Gillim) were aware of Green's slip and fall and of the pending lawsuit. They also argue that they did not fail to prosecute the claim, and that a motion to dismiss for such a failure should be granted only for "grave dilatory conduct." In sum, the Greens seek to have the circuit court's order reversed, and the matter remanded for trial.

We have closely studied the record, the law, and the written arguments, and find no reversible error in the trial court's entry of the order of dismissal. There are numerous published opinions which stand for the proposition that Kentucky Rule of Civil Procedure (CR)4 requires personal service, and that one who is not served is not a party to a proceeding. In R. F. Burton & Burton Tower Co. v. Dowell Div. of Dow Chemical Co., Ky., 471 S.W.2d 708, 710-711 (1971), for example, the former Court of Appeals stated as follows:

> CR 4.04 directs that "Service shall be made by delivering a copy of the summons *personally* to the person to be served...". Kentucky has long followed a strict adherence to the rule of "In-hand Service of

> Process." In Case v. Colston, 58 Ky. 145 (1858), we held that reading the summons to the defendant was not valid service; the officer must deliver it personally, and if refused he must offer personal delivery to the person to be served. In Newsome v. Hall, 290 Ky. 486, 161 S.W.2d 629, 140 A.L.R. 818 (1942), the sheriff attempted to serve the defendant by delivering a copy of the summons to his wife, and we declared that this did not constitute valid service. We wrote in Rosenberg v. Bricken, 302 Ky. 124, 194 S.W.2d 60 (1946), that "...mere knowledge of the pendency of an action is not sufficient to give the court jurisdiction, and, in the absence of an appearance, there must be a service of process." ...We continue to require personal service except in those instances in which non-personal service is authorized by statute or rule.

The Court went on to cite 42 Am.Jur. 8, Process, § 4, which sates that, "[T]he mere fact that a defendant has knowledge of a suit pending against him is not sufficient to give the court jurisdiction.... One who is not served with process does not have the status of a party to the proceeding." Id.

While there is nothing in the record to dispute that the Greens' attempted to serve Kentucky Kingdom, neither CR 4 nor the case law makes a good faith exception to compliance with the civil rules. Similarly, the Greens were availed of the opportunity to confirm that proper service had been made and did not do so. While the address provided by the Secretary of State apparently was inaccurate, a cursory examination of the record would have revealed that service was not accomplished. The

Greens were required to serve Kentucky Kingdom with the summons and complaint and did not do so. As such, this issue forms a proper basis for the trial court's order of dismissal.

Similarly, if the order on appeal was based on the Greens' failure to prosecute the claim, we again find no error. The trial court may dismiss an action for failure to prosecute, CR 41.02, and such a dismissal falls within the sound discretion of the court. Thompson v. Kentucky Power Co., Ky.App., 551 S.W.2d 815 (1977). The injury was sustained in 1997, and no action was taken by the Greens as to Kentucky Kingdom until 2002. This fact, taken alone, forms a sufficient basis for the trial court's dismissal of the action against Kentucky Kingdom. The trial court's rulings are presumptively correct, City of Louisville v. Allen, Ky., 385 S.W.2d 179 (1964), and the Greens have not overcome that presumption. As such, we find no error.

For the foregoing reasons, we affirm the order of the Jefferson Circuit Court.

BAKER, JUDGE, CONCURS IN RESULT ONLY.

KNOPF, JUDGE DISSENTS.

KNOPF, JUDGE, DISSENTING: Respectfully, I must dissent from the majority opinion affirming the trial court's dismissal of the Greens' complaint due to lack of timely service of process and failure to prosecute. First, it appears from the record that Kentucky Kingdom may have failed to keep current the

address of its registered agent. Consequently, it should be estopped from complaining that the summons and complaint were sent to the wrong address. Moreover, even if Kentucky Kingdom was not properly served in 1997, such a failure does not necessarily warrant dismissal of the Greens' complaint. They clearly acted in good faith and reasonably believed that Kentucky Kingdom had notice of the pending action. Furthermore, Kentucky Kingdom has since been properly served with the summons and complaint. Finally, the absence of any findings on Kentucky Kingdom's motion to dismiss for failure to prosecute precludes our review of this issue, and compels that we remand this matter back to the trial court for further findings.

KRS 271B.5-010(1) requires a corporation to maintain a registered agent in this state. A corporation's registered agent shall be the corporation's agent for service of process.[1] KRS 271B.5-020 sets out how a corporation may change its registered office, agent or the address of its registered office or agent. In this case, Kentucky Kingdom had designated its general counsel, Gaylee Gillim, as its registered agent, and listed her address as 937 Phillips Lane, Louisville, Kentucky, 40209. In response to the Greens' inquiry, the Secretary of State's office provided this address to the Greens, and they attempted to serve the summons and complaint on Gillim at this

[1] KRS 271B.5-040.

address. However, as noted by the majority, the address was no longer accurate, and Gillim did not personally receive the summons. In fact, Gillim was not served with the summons and complaint until April of 2002.

CR 4.04(5) provides that service upon a corporation shall be made by serving an officer or managing agent, the chief agent in the county where the action is brought, or any other agent authorized by appointment or law to receive service on its behalf. Although Gillim was not actually served with the summons and complaint, the Greens mailed it to her at the address on file with the Secretary of State's office. A party may be equitably estopped from denying the validity of service of process where: (1) Its conduct, including acts, language and silence, amount to a representation or concealment of material facts; (2) The estopped party is aware of these facts; (3) These facts are unknown to the other party; (4) The estopped party must act with the intention or expectation his conduct will be acted upon; and (5) The other party in fact relied on this conduct to his detriment.[2] In my opinion, Kentucky Kingdom's failure to update the address of its registered agent on file with the Secretary of State would bar it from objecting to the sufficiency of the service of process upon it.

[2] Gray v. Jackson Purchase Production Credit Association, Ky. App. 691 S.W.2d 904, 906 (1985), citing Jones v. Travis, 302 Ky. 367, 194 S.W.2d 841 (1946).

But even if the incorrect address on file with the Secretary of State's office was not the fault of Kentucky Kingdom, [3] I would still hold that the Greens' complaint should not have been dismissed due to the lack of service of process. The absence of proper service of process merely renders a court without jurisdiction to enter a judgment against the non-responding party.[4] But as noted above, Gillim was served with the summons and complaint in April of 2002. The operative question is whether the Greens' lapse has rendered untimely their claims against Kentucky Kingdom. Under the circumstances of this case, I would conclude that their claims remain viable.

A civil action is deemed to commence upon the filing of a complaint with the court and the issuance of the summons in

[3] On appeal, Kentucky Kingdom submits a form entitled "Statement of Change of Registered Office or Registered Agent or Both". On its face, the form indicates that it was filed on April 24, 1998, and was recorded by the county clerk on April 29, 1998 – approximately one month before the Greens filed their complaint. Kentucky Kingdom argues that this Court should take judicial notice of the filing, and the fact that it complied with its statutory obligation to keep current the address of its registered agent. While an appellate court can take judicial notice of noticeable facts, KRE 201(f), Parkrite Auto Park, Inc. v. Shea, Ky., 314 Ky. 520, 235 S.W.2d 986 (1950), that notice should be used sparingly on appeal in cases where a party did not make a request for judicial notice before the trial court. Newberg v. Jent, Ky. App., 867 S.W.2d 207, 210 (1993). Since there is no indication that Kentucky Kingdom submitted this document to the trial court, and since the document attached to Kentucky Kingdom's brief is merely an unattested photocopy, the majority properly declines Kentucky Kingdom's invitation to take judicial notice of the document.

[4] *See* R. F. Burton & Burton Tower Co. v. Dowell Division of Dow Chemical Co., Ky. 471 S.W.2d 708 (1971).

good faith.[5] The issuance of a summons does not commence an action unless accompanied by an intent that the summons be served in due course.[6] If, when the summons was issued, the plaintiff had a bona fide, unequivocal intention of having it served presently or in due course or without abandonment, the summons was issued in good faith.[7]

Our courts have repeatedly held that mere negligence in the execution and issuance of a summons will not bar a cause of action.[8] Although the Greens clearly should have exercised greater diligence in attempting to serve Kentucky Kingdom after the first summons was returned to the clerk's office, they reasonably relied upon the address provided by the Secretary of

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[5] KRS 413.250; CR 3.01.
[6] Whittinghill v. Smith, Ky. App., 562 S.W.2d 649, 650 (1977).
[7] Roehrig v. Merchant's & Businessmen's Mutual Insurance Co., Ky., 391 S.W.2d 369, 371 (1965).
[8] *See* Jones v. Baptist Healthcare System, Inc., Ky. App., 964 S.W.2d 805 (1997) (Secretary of State provided incorrect name for the defendant's agent for service of process); Crowe v. Miller, Ky., 467 S.W.2d 330, 333 (1971) (Plaintiff's mistake as to the proper method of service of process upon an unmarried defendant, over eighteen but less than twenty-one years of age did not amount to bad faith); Roehrig v. Merchants & Businessmen's Mut. Ins. Co., *supra*, (Plaintiff's attempt to serve process on a foreign corporation through the incorrect agent did not amount to bad faith); Commonwealth, Dept. of Highways v. Parker, Ky., 394 S.W.2d 899 (1965) (Plaintiff's mistake in seeking to obtain service upon the Workmen's Compensation Board by having summons served on the Attorney General did not amount to bad faith); and Hausman's Adm'r v. Poehlman, 314 Ky. 453, 236 S.W.2d 259 (1951) (Although plaintiff's counsel should have exercised greater diligence in discovering the defendant's correct address, the Court held that the mistake did not warrant a finding that the summons had not issued in good faith).

State's office. Furthermore, Gillim received actual notice of the filing of the action, and the parties engaged in extensive correspondence over the matter during the next two years. Although settlement negotiations between the parties cannot be used to extend the statute of limitations, they are relevant to show that Kentucky Kingdom had notice of the Greens' intent to sue before the statute of limitations expired.[9]

Lastly, I agree with the majority that the Greens' delay in obtaining proper service and in proceeding with their claims against Kentucky Kingdom may be grounds for involuntary dismissal of their claims with prejudice under CR 41.02. However, because of the grave consequences of a dismissal with prejudice, a dismissal pursuant to CR 41.02 should be resorted to only in the most extreme cases, and this Court should carefully scrutinize the trial court's exercise of discretion in doing so.[10] Each case must be considered in light of the particular circumstances involved and length of time is not alone the test of diligence.[11] The trial court must take care in analyzing the circumstances and must justify the extreme action of depriving the parties of their trial.[12]

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[9] Jones v. Baptist Healthcare System, Inc., 964 S.W.2d at 808.
[10] Polk v. Wimsatt, Ky. App., 689 S.W.2d 363, 364-65 (1985).
[11] Gill v. Gill, Ky., 455 S.W.2d 545, 546 (1970).
[12] Ward v. Housman, Ky. App., 809 S.W.2d 717, 719 (1991).

The court's order does not state that it is dismissing the Greens' complaint due to their failure to timely prosecute the action, nor does it set forth any grounds for doing so. A dismissal of an action under these circumstances should be accompanied by some articulation on the record of the trial court's resolution of the factual, legal, and discretionary issues presented. When such a severe sanction is imposed, values of consistency, predictability, reviewability and deterrence outweigh the values of economy and efficiency that may be promoted by allowing unexplained decisions.[13] Although such a dismissal may be appropriate, the lack of any findings on this question leaves us with nothing to review. Therefore, I would reverse the trial court's dismissal of the Greens' complaint, and I would remand this matter to the trial court for further findings on Kentucky Kingdom's motion to dismiss for failure to prosecute.

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BRIEF FOR APPELLEE:

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[13] Greathouse v. American National Bank and Trust Co., Ky. App., 796 S.W.2d 868, 870 (1990); *citing* Taylor v. Medtronics, Inc., 861 F.2d 980, 986 (6th Cir.1988).