

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-172

OCTOBER TERM, 2005

Marlene Hutchins	}	APPEALED FROM:
	}	
	}	
v.	}	Rutland Superior Court
	}	
Michael Lerch	}	DOCKET NO. 387-6-04 Rdcv
	}	

Trial Judge: William D. Cohen

In the above-entitled cause, the Clerk will enter:

Plaintiff Marlene Hutchins appeals from a superior court order dismissing her personal-injury action for failure to effect timely service of the complaint, which resulted in an untimely filing under the applicable three-year statute of limitations. Plaintiff contends the court erred in dismissing the action because: (1) she served the complaint within the extended period granted by the trial court; and (2) the trial court relied on inapposite authority. We affirm.

On July 5, 2001, plaintiff suffered personal injuries in an automobile accident involving defendant Michael Lerch. On June 21, 2004, two weeks before the three-year statute of limitations was to expire, plaintiff filed a personal-injury complaint against defendant, but failed to serve the complaint. On August 24, 2004, plaintiff filed a motion for an additional ninety days to effect service, alleging that defendant was a resident of Canada and that personal service had been difficult to accomplish. The court granted the motion. Thereafter, plaintiff filed two additional motions to enlarge time to serve, again citing difficulties associated with defendant=s residence in Canada, which the court also granted. Finally, in February 2005, a return of service was filed with the court, indicating that the sheriff=s department had effected service by leaving a copy of the complaint with the Vermont Motor Vehicle Commissioner, pursuant to 12 V.S.A. ' 891 (deeming operation of vehicle equivalent to appointment of commissioner as agent for acceptance of service).

Defendant moved to dismiss the action, arguing that timely service of the complaint within sixty days of the filing, as required by V.R.C.P. 3, was necessary to toll the statute of limitations as of the filing date. The trial court issued a decision in March 2005 granting the motion. This appeal followed.

We have held that A >[i]f the filing of a complaint is to be effective in tolling the statute of limitations as of that filing date, timely service under the Rules of Civil Procedure must be accomplished.= @ Fercenia v. Guiduli, 2003 VT 50, & 9, 175 Vt. 541 (mem.) (quoting Weisburgh v. McClure Newspapers, Inc., 136 Vt. 594, 595 (1979)). In Fercenia, as here, the plaintiff had filed a complaint within days of the expiration of the three-year statute of limitations, but failed to file a timely acceptance and waiver of service within sixty days of the filing, as required by V.R.C.P. 3 and 4(1)(5). Applying the general rule stated above, we held that the filing of the complaint was not effective to toll the statute of limitations. As we explained, A[p]rejudice or lack thereof to defendants is inconsequential.@ Id. & 12. AWe require plaintiffs to strictly comply with the rules when expiration of the statute of limitations is an issue,@ and the failure to effect timely service of process meant that plaintiff=s suit was time-barred. Id. & 13.

In light of the foregoing, the conclusion is inescapable that plaintiff=s filing of the complaint was ineffective to toll the statute, which expired when plaintiff failed to effect timely service of process within sixty days of the filing. Although plaintiff asserts that her case is distinguishable because she requested and received several extensions of time to effect service, the argument is unpersuasive. As the trial court here observed, plaintiff cannot claim that she received permission to extend the statute of limitations or that she relied to her detriment on such rulings when the court, in granting the motions, was unaware of any statute of limitations issue. Plaintiff also relies on Weisburgh, one of the cases cited in Fercenia, where this CourtCin holding that the plaintiff=s complaint was time-barred for failure to effect service of process within the requisite time periodCobserved that A[n]o motion to enlarge the time for completing service under V.R.C.P. 6 was made within the period.@ Weisburgh, 136 Vt. at 595. We are doubtful whether this dicta in Weisburgh implies that a motion to enlarge time for service can actually enlarge the time prescribed by a statute of limitations, but note that plaintiff=s motion here was not filed Awithin the period@ for service of process. Accordingly, Weisburgh provides no basis to find that the complaint was timely.

Affirmed.

BY THE COURT:

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice