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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-183

NOVEMBER TERM, 2008

Stephen Robert Bain	}	APPEALED FROM:
	}	
	}	
v.	}	Windham Superior Court
	}	
	}	
Keith Clark	}	DOCKET NO. 30-1-08 Wmcv
		Trial Judge: David A. Howard

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

Plaintiff appeals the superior court's dismissal of his complaint for lack of service of process. We affirm.

On January 18, 2008, plaintiff filed with the superior court a complaint for a writ of mandamus to compel defendant, a sheriff, to produce certain documents. According to plaintiff, he sent defendant a copy of his complaint and a waiver of service of summons, but the waiver was not returned, and there is no indication in the record that proof of service was filed with the court, as required by V.R.C.P. 4(i). After an attorney for the Attorney General's Office declined representation, another attorney entered an appearance on behalf of defendant on March 21 and filed a motion to dismiss. Following an April 2 status conference on the motion, the superior court dismissed the complaint for lack of service of process.

On appeal, defendant acknowledges that he may not have complied with the applicable rules on service of process, but contends that, in the interests of justice, he should not be barred from amending his complaint to perfect service. The problem with this argument is that nothing in the record indicates that he asked the court for another opportunity to perfect service, or that the court denied such a request. Plaintiff has not produced a transcript of the status conference, and the docket entries do not indicate any such request. It was plaintiff's obligation to ensure proper service of process. See V.R.C.P. 4(i) ("The plaintiff's attorney shall, within the time during which the person served must respond to the process, file the proof of service with the court."); Smith v. Brattleboro Reformer, Inc., 147 Vt. 303, 304 (1986) (noting that term "plaintiff's attorney" in Rule 4 includes party appearing without counsel). Because no proof of service of process was timely filed with the court in this case, the court acted within its discretion in dismissing the complaint. See V.R.C.P. 3 ("If service is not timely made or the complaint is not timely filed, the action may be dismissed on motion . . . .").

Here, plaintiff fails to demonstrate that the superior court abused its discretion in dismissing the complaint. Plaintiff states that he was led to believe that this case would be handled by alternative dispute resolution and that nothing in V.R.C.P. 16.3 mentions service of process, but we fail to seek how this argument could lead to the conclusion that he was relieved of his duty to abide by the general rules for service of process. Plaintiff also notes that defendant is a sheriff and that the sheriff is normally responsible for service of process, but he does not suggest that service of process was impossible in this instance or that he satisfied the rules for service of process, which do not require service by a sheriff. Indeed, as noted, he acknowledges that he failed to comply with the rules. See Brady v. Brauer, 148 Vt. 40, 44 (1987) ("[T]he responsibility for any failure to fulfill the provisions of V.R.C.P. 4(d) and (e), if the opportunity was presented, must be borne by plaintiff.").

Affirmed.

BY THE COURT:

____

Paul L. Reiber, Chief Justice

____

John A. Dooley, Associate Justice

____

Marilyn S. Skoglund, Associate Justice