VERMONT SUPERIOR COURT

SUPERIOR COURT Washington Unit	CIVIL DIVISION Docket No. 231-4-19 Wncv

Vermont Human Rights Commission Plaintiff v. Town of Waterbury Defendant	

Opinion and Order On Defendant's Motions To Dismiss
And The Plaintiff's Motion To Extend Time For Service

Pending before the Court are Defendant Town of Waterbury's Motion to Dismiss and the Plaintiff Human Rights Commission's (HRC's) Motion to Extend Time for Service. The Court held a hearing on the motions and both parties offered arguments. HRC was represented by Attorneys Bor Yang and Melissa Horwitz. The Town was represented by Attorney Michael Leddy. The Court makes the following determinations.

Background

During the summer of 2017, the Town operated a summer camp in which the child of "Mr. Oak" was enrolled.[1] Several days into camp, the child exhibited extraordinary difficult and threatening behaviors, prompting the Town's Recreation Director to expel him from the camp. Mr. Oak later contacted the Town, and, for

[1] The HRC has referred to the family pseudonymously with the last name of Oak.

the first time, explained that the child has severe emotional problems, and requested that the child be permitted to return to camp with certain modifications to camp policies and procedures that allegedly would help the child participate in camp successfully. The Town refused to re-enroll the child following his disturbing behaviors and expulsion.

The HRC filed this action claiming that the Town's failure to grant the requested modifications and re-enroll the child in camp violates Vermont's Fair Housing and Public Accommodations Act (VFHPAA), 9 V.S.A. §§ 4500–4507.

The Town has filed two motions to dismiss. It argues that this case should be dismissed because the HRC has started the proceeding outside of the six-month statute of limitations, 9 V.S.A. § 4554(e), applicable to actions brought by the Commission. The Town also argues that it had no legal obligation under the VFHPAA to re-enroll the child—in effect giving him a "second chance" at complying with camp policies—once it had lawfully expelled him from camp for noncompliant behavior without modifications that had never been requested.

HRC counters that discovery might establish that the Town had some knowledge of the child's disabilities prior to the expulsion or that the "final decision" to expel the child occurred at a later point when the Town was plainly on notice of such circumstances. HRC also disputes whether it is appropriate to apply the line of cases declining to allow persons a "second chance" for accommodations when they failed to raise the issue of the need for such accommodations prior to the point when the events at issue occurred. HRC also argues that the Town has waived any defect

relating to service, and, failing that, the HRC asks that the Court grant it an extension of the applicable statute of limitations.

Analysis

The Court concludes that dismissal is appropriate for lack of compliance with the statute of limitations and declines to address the Town's alternative basis for dismissal.

I. Compliance with Six-Month Limitations Period

The HRC is empowered to "investigate and enforce complaints of unlawful discrimination in violation" of the VFHPAA. 9 V.S.A. §§ 4506(c), 4552(b)(1). If the HRC finds that there are reasonable grounds to believe that a violation occurred, it shall attempt to resolve the allegedly discriminatory conduct through negotiations and "conciliation." If such efforts fail, it may bring an enforcement action in Superior Court within 6 months of its reasonable grounds determination. 9 V.S.A. § 4554(e); *see Human Rights Commission v. Vermont Agency of Transportation*, 2012 VT 88, ¶¶ 9–10, 192 Vt. 552, 556–57 (concluding that six-month limitation period following reasonable grounds determination is mandatory).

In this case, the HRC made its reasonable grounds determination on September 21, 2018. The six-month limitation period would have expired on March 21, 2019. The parties were still in the conciliation process, however, and the Town assented to an extension of the statute of limitations to April 30. Conciliation efforts ultimately failed, and the HRC filed its complaint in this case on April 29.

Under Rule 3, service must be complete within 60 days when an action is begun by filing a complaint. The HRC sought to satisfy its service obligation by requesting that the Town waive personal service. *See* Vt. R. Civ. P. 4(l). The Town promptly agreed and returned an executed waiver to the HRC on May 9. Under Rule 4(l)(5), "[w]hen the plaintiff files a waiver of service with the court, the action shall proceed . . . as if a summons and complaint had been served at the time of filing the waiver, and no proof of service shall be required."[2] Thus, to comply with the requirements of Rules 3 and 4(l)(5) – and, importantly for this case, meet the statute of limitations period – the HRC had to file the executed waiver within 60 days of filing the complaint, *i.e.,* June 29.

The HRC did not file the executed waiver with the Court by June 29, and on July 9, the Town sought dismissal for failure to perfect service and properly initiate

[2] By contrast, where the defendant is personally served, proof of service must be filed with the court. Vt. R. Civ. P. 4(i). By Rule, however, "[f]ailure to make proof of service shall not affect the validity of the service." *Id*. This is presumably so because personal service itself is what gives the court jurisdiction. *See, e.g., Cintas Corp. v. Lee's Cleaning Servs.*, Inc., 700 A.2d 915, 918 (Pa. 1997) ("[T]he absence of or a defect in a return of service does not necessarily divest a court of jurisdiction of a defendant who was properly served. '[T]he fact of service is the important thing in determining jurisdiction and . . . 'proof of service may be defective or even lacking, but if the fact of service is established jurisdiction cannot be questioned.'" (citation omitted)); *see generally* Annotation, *Failure to Make Return as Affecting Validity of Service or Court's Jurisdiction*, 82 A.L.R.2d 668 (1962). The federal waiver of service provisions, similar in effect to Vermont's, expressly state: "When the plaintiff files a waiver, proof of service is not required and these rules apply as if a summons and complaint had been served at the time of filing the waiver." Fed. R. Civ. P. 4(d)(4). Thus, it is the filing of the executed waiver with the court that amounts to the functional equivalent of formal service of process.

this action within the limitation period. On July 11, the HRC finally filed the executed waiver. On July 22, it opposed dismissal on limitations grounds and sought a retroactive extension of the time for service under the excusable neglect provision of Rule 6(b)(1)(B).

Vermont law is clear that, absent a retroactive extension of the time for service, the HRC did not commence this action in a timely manner under the applicable 6-month limitation period, 9 V.S.A. § 4554(e). The general rule is that the filing of the complaint will toll a limitation period on the date of filing -- provided that service of process is completed in a timely manner under the civil rules. *Weisburgh v. McClure Newspapers, Inc.*, 136 Vt. 594, 595 (1979). Where formal service is waived, to commence suit properly and for limitations purposes, the plaintiff must file the executed waiver with the court in compliance with Rule 4(l)(5), which means within 60 days of filing the complaint pursuant to Rule 3. *Fercenia v. Guiduli*, 2003 VT 50, ¶¶ 7–9, 175 Vt. 541, 543. The HRC failed to make that timely filing. As a result, filing of the complaint failed to toll the statute of limitation, and the limitation period expired the day after the complaint was filed.

The Supreme Court has consistently required those initiating lawsuits to follow those rules. As the Court stated in *Ferencia*: "We require plaintiffs to strictly comply with the rules when expiration of the statute of limitations is an issue." *Id.* ¶ 13, 175 Vt. at 545. Failure to do so warrants dismissal. *Id.*; *see Quinlan v. Five-Town Health All., Inc.*, 2018 VT 53, ¶ 20.

The HRC seeks to avoid this outcome in two ways. First, it argues that, by waiving personal service, the Town waived defects in service and that the HRC's failure to file the executed waiver in a timely manner is a mere "defect" in service that the Town has waived. Second, it seeks a retroactive extension of the time for service under Rule 6. A properly granted Rule 6 extension would extend the time for service under Rule 3 and would preserve the tolling of the limitation period. *See Clark v. Baker*, 2016 VT 42, ¶ 15, 201 Vt. 610, 617–18 (so concluding under Rule 6(b)(1)(B)); *Bessette v. Dep't of Corrections*, 2007 VT 42, ¶¶ 10–12, 182 Vt. 1, 5–6 (so concluding under Rule 6(b)(1)(A)). The Court is not persuaded by either contention.

A. Waiver of Defects

The HRC argues for the first time in its Reply to the Town's Opposition to its motion for an extension of time that, by executing the waiver of service, the Town somehow waived its right to seek dismissal for lack of compliance with the limitation statute. In essence, the argument is that the failure to satisfy the statute of limitations amounts to a defect in service, and the Town waived defects in service by executing the waiver of service form. The HRC claims that a Vermont trial court has so ruled but has not provided a citation for that ruling, and the Court has found none. Nor has the Court discovered any other decisions supporting the HRC's position. The HRC's argument fails on a number of grounds.

First, the entire premise of Rule 4(l) is that an action can proceed by "notice" as opposed to "service" of a summons. The alleged waiver in this case is the waiver of service that the Town executed at the HRC's request. It expressly provides: "The

Town of Waterbury will retain all defenses or objections to the lawsuit or to the jurisdiction or the venue of the court *except for objections based on a defect in the summons or in the service of the summons*." *See* Waiver of Service of Summons (filed July 11, 2019) (emphasis added); *see also* Vt. R. Civ. P. Form 1C (containing the same operative language). There is no meaningful sense in which the HRC's failure to comply with the limitation statute is a defect in the summons or the service of the summons. Indeed, pursuant to Vt. R. Civ. P. 4(l), there is no relevant summons or service of any summons in this case because the HRC sought, and the Town assented to, the waiver of formal service of a summons. The *waiver of service* does not refer to service by mail or service by some other substitute method; it refers to avoiding formal service altogether. *See* Advisory Committee's Notes—1993 Amendment, Fed. R. Civ. P. 4 ("The former text described [the waiver of service] process as service-by-mail. This language misled some plaintiffs into thinking that service could be effected by mail without the affirmative cooperation of the defendant. It is more accurate to describe the communication sent to the defendant as a request for a waiver of formal service." (citation omitted)). The Town's waiver of service did not, *ipso facto,* waive the HRC's failure to commence this action within the applicable limitation period.

Second, the HRC's contention that, by signing the waiver of service the Town waived compliance with the return of waiver provision of Rule 4(l)(5), is also belied by the Reporter's Notes to the Vermont Rule and the Federal Rule of Civil Procedure upon which it is based. If simply returning the signed waiver "waived"

compliance with Rule 4(l)(5), there would have been no reason for the Notes to advise plaintiffs of the independent need to make a timely return in order to toll the statute of limitations. *See* Vt. R. Civ. P. 4, Reporters Notes 1996 Amendment ("when service is waived, the effective date of service for tolling the statute of limitations … is the time at which plaintiff files the waiver, rather than the date on which the defendant signs it"); Fed. R Civ. P. 4 Committee Notes 1993 Amendment (noting same with regard to analogous provision of Fed. R. Civ. P. 4(d)(4)). The same Reporter's Notes also make clear that a plaintiff must provide notice to defendant of the date on which the return was filed, presumably, to allow the defendant to know whether plaintiff has complied with Rule 4(l)(5). Moreover, if mere execution of the waiver of service of summons also waived compliance with Rule 4(l)(5), the Court's dismissal in *Fercenia* would have been unwarranted. 2003 VT 50, ¶¶ 7–9, 175 Vt. at 543.

Lastly, a "waiver is a voluntary relinquishment of a known right." *Waterbury Feed Co., LLC v. O'Neil*, 2006 VT 126, ¶ 9, 181 Vt. 535, 536. As the Town explained at the hearing on the motions, at the time it executed the waiver, it could not have known that the HRC subsequently would fail to file it in a timely manner. It, therefore, could not have known that it would have any right to dismissal for failure to comply with the limitation statute. Because a waiver is a voluntary relinquishment of a known right, the Town cannot reasonably be considered to have waived its limitations argument in these circumstances.

B. Rule 6 Extension and Excusable Neglect

Rule 6 gives a court broad discretion to extend the time within which "an act may or must be done" when the request for an extension *precedes* the expiration of the time period. Vt. R. Civ. P. 6(b)(1)(A). When the extension is sought after the time already has expired, the court's discretion is far more circumscribed: such an extension is properly granted only when the failure to comply with the rules was caused by *excusable neglect*. Vt. R. Civ. P. 6(b)(1)(B).

The Vermont Supreme Court, following federal precedent, has explained that the standard for excusable neglect is "elastic" and "equitable." *In re Town of Killington*, 2003 VT 87A, ¶ 16, 176 Vt. 60, 68 (*citing Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 392 (1993)). Factors that may be evaluated include: "the danger of prejudice to the [nonmovant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *In re Town of Killington*, 2003 VT 87A, ¶ 16 (citation omitted). Despite those potential factors, our High Court has made plain that "the appropriate focus is on the third factor: the reason for delay, including whether it was within the reasonable control of the movant." *Id.* Courts must take a "hard line" and be "strict" on what is excusable "lest there be a de facto enlargement" of time. *Id.* ¶ 17; *see also Clark v. Baker*, 2016 VT 42, ¶ 19, 201 Vt. 610, 620 ("[T]he threshold created by the excusable neglect standard 'remains high' and will be found 'only in rare cases.'" (citation omitted)).

Here, even allowing that the other factors favor the HRC, the third factor does not support a finding of excusable neglect. The HRC has provided little support for its claim in that regard. It proffers that the applicable limitation statute is shorter than many others, that it is obliged to make pre-litigation conciliation efforts, that it represents the State, that its Executive Director "wears many hats" and has myriad responsibilities, and that it advocates for the public interest. These circumstances, however, would be present in any case brought by the HRC, and the HRC otherwise fails to explain how any of them, or any other circumstances, *caused* it to fail to comply with its obligation to file the executed waiver of service in a timely manner in this case. As the Court has often held: "[O]rdinary negligence," "office breakdowns," "mistakes of law," and "later-regretted 'tactical decisions'" all are insufficient to satisfy the excusable neglect standard. *Clark*, 2016 VT 42, ¶ 22, 201 Vt. 610, 621.

The third excusable neglect factor, thus, provides significant down weight in favor of the Town. That conclusion is further supported by the fact that the HRC was well aware of the statute of limitations issue in this case. The parties had negotiated and expressly agreed to one extension of the limitation deadline in the spring of 2018. The HRC's subsequent failure to meet the applicable filing deadline simply does not meet the standard of excusable neglect.

The Court acknowledges, as the HRC argues, that it was created by the Legislature to serve a worthwhile and vital public purpose. The Court's decision, however, cannot be influenced by the nature of the litigant. If Court's rules of

procedure are to continue to have force and to retain the fealty of the public and the bar, they must be applied equally to all, regardless of whether any particular litigant is popular or unpopular, or is supported by or abhorred by the government.

III. Conclusion

The HRC is not entitled to a retroactive extension of the time to commence this action. The HRC was required, but failed, to commence this action within the statute of limitations, and the Town is entitled to dismissal on that basis. It is unnecessary to address the Town's other motion to dismiss, which addresses the substance of the HRC's VFHPAA claim. The Court makes clear that this ruling applies to the HRC's claim and does not purport to address the child's ability to file his or her own claims in connection with these events.

Order

The HRC's motion for extension of time is denied. The Town's motion to dismiss based on the statute of limitations is granted. The Town's motion to dismiss for failure to state a claim is denied as moot.

Dated this __ day of December, 2019 at Montpelier, Vermont.

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Timothy B. Tomasi
Superior Court Judge