

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-349

JANUARY TERM, 2004

} APPEALED FROM:
Kurt Ostheimer }
 } Windham Superior Court
 }
v. }
 } DOCKET NO. 86-2-03 Wmcv
Timothy Stark }
 } Trial Judge: John P. Wesley
 }
 }

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

Plaintiff Kurt Ostheimer appeals from a judgment of the Windham Superior Court, dismissing his complaint against defendant Timothy Stark for failure to serve the complaint within the requisite time period. Plaintiff contends the court abused its discretion in denying a motion to retroactively enlarge the time for service. We affirm.

Plaintiff in this ski accident case filed a complaint with the court on February 20, 2003, three days before the expiration of the one-year statute of limitations. See 12 V.S.A. § 513 (actions to recover for injuries sustained while participating in sport of skiing must be commenced within one year after cause of action accrues). Service of the complaint on defendant was not completed until April 25, 2003, four days beyond the 60-day period allowed for service under V.R.C.P. 3. Defendant moved to dismiss the complaint for failure to effect timely service. Plaintiff opposed the motion, and moved to enlarge the time to complete service, relying on counsel=s affidavit explaining the circumstances underlying the delay. See V.R.C.P. 6(b)(2) (upon motion made after expiration of specified time period, court may enlarge time A where the failure to act was the result of excusable neglect@). Counsel explained that after filing the complaint on February 20, 2003, he had made an effort to determine the appropriate party to make service on the defendant, who was then residing in New York City.@Having determined that the proper agent was the New York City Sheriff=s Department, counsel forwarded the summons and complaint, together with a check for \$37.00, to the Sheriff on March 26, 2003. However, on April 3, 2003, the summons and complaint were returned to counsel with a note indicating that payment of \$42.00 was required. Counsel sent the summons and complaint with the proper payment the next day. Service on defendant was accomplished on April 25, 2003, four days beyond the 60-day limit.

The trial court denied the motion to retroactively enlarge time for service of the complaint, noting that the statute of limitations had expired, and that plaintiff had not demonstrated excusable neglect. The court rejected counsel= s assertion that he had been misinformed about the correct fee for effecting service in New York, and that this A bureaucratic mix up@ constituted excusable neglect. Problems of this sort are common, the court noted, and counsel contributed to the problem by the unexplained delay of nearly five weeks B over half of the 60 days allotted to effect service B between plaintiff= s filing of the complaint on February 20th and the original forwarding of the summons and complaint on March 26th. Accordingly, the court granted defendant= s motion to dismiss. This appeal followed.

Plaintiff contends the court abused its discretion in denying his motion for retroactive extension of time to complete service of the complaint. We have made it clear, however, that plaintiffs must strictly comply@ with the rules for service of a complaint A when expiration of the statute of limitations is an issue.@ Fercenia v. Guiduli, 2003 VT 50, &

13. Thus, in *Weisburgh v. McClure Newspapers, Inc.*, 136 Vt. 594, 595 (1979), we held that where, as here, a complaint is filed within the statute of limitations but timely service is not effected until after expiration of the statute, dismissal of the complaint is warranted. As we explained, A if 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. @ *Id.*; accord *Fercenia*, 2003 VT 50, at & 9 (where plaintiff= s complaint was filed one day before expiration of statute of limitations but waiver of service was not accomplished until months later, after time required by rules had expired, claim was time barred).

Moreover, the rules Aplace responsibility for seeing to service squarely upon the plaintiff. @ *Weisburgh*, 136 Vt. at 597. Although plaintiff here faults the court for not A inquir[ing]@ about the reason for the five-week delay in mailing the initial summons and complaint to New York (counsel attributes the delay to the necessity of locating defendant= s precise address, but this reason was not advanced in his motion), it was not the court= s responsibility to so inquire. Nor was this five-week delay, or the one-week delay caused by the return of the initial summons and complaint, the kind of A unavoidable@ occurrence that would constitute excusable neglect under the rules. *Id.* Accordingly, we discern no abuse of discretion warranting reversal of the judgment.

Affirmed.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

John A. Dooley, Associate Justice

Paul L. Reiber, Associate Justice