VERMONT SUPREME COURT
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Case No. 2021-098

Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

DECEMBER TERM, 2021

Marjorie Johnston* & Kamberleigh Johnston* v. Kamberleigh Johnston et al. (City of Rutland)	}	APPEALED FROM:
	}	Superior Court, Rutland Unit,
	}	Civil Division
	}	CASE NO. 20-CV-00352
	}	Trial Judge: Helen M. Toor

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

Plaintiffs appeal the court's dismissal of their complaint for lack of service. We affirm.

In August 2020, plaintiffs Marjorie and Kamberleigh Johnston filed a pro se complaint against the City of Rutland, seven named individuals, and two individuals referred to as John and Jane Doe. Plaintiffs asked the court for a temporary restraining order (TRO) to enjoin the City from conducting a tax sale of properties owned by plaintiffs at 49 and 52 Pine Street in Rutland, which was scheduled for early September 2020. Plaintiffs argued that the properties were the subject of active tax appeals, and the sales should not occur until those appeals were resolved. Plaintiffs also asked the court to give Kamberleigh limited guardianship rights over Marjorie for the purpose of assisting her in the litigation, and named Kamberleigh as a defendant because "M. Johnston has rights to determine the scope and power of the limited guardian[ship]."

The court denied the request for an emergency TRO, finding that the requirements of the rule were not met. Plaintiffs then filed another request for a TRO, arguing that the City should be enjoined from holding tax sales during the pandemic. The court again denied the request.

In January 2021, the court sent plaintiffs a notice warning them that the court had not received proof of service for any defendants and that pursuant to Vermont Rule of Civil Procedure 41(b)(1), the case would be subject to dismissal if proof of service was not provided within fourteen days. Kamberleigh filed a waiver of service of summons for himself as a defendant and a motion asking the court to deem service complete on all parties. The court denied the motion to deem service complete, explaining that service was a requirement for every case. Insofar as the case was filed in August 2020 and no proof of service had been filed, the court dismissed the case. Plaintiffs then filed a motion for a ninety-day extension of time to complete service. The court denied the motion, explaining that a motion to extend the time for service after the ninety days had expired must be based on "excusable neglect," V.R.C.P. 6(b)(1)(B), and the standard had not been met. Plaintiffs then filed a motion to reconsider,

requesting that the court reverse its prior four rulings. The court concluded that there was no legal basis for the motion and denied it. Plaintiffs filed this appeal.

On appeal, plaintiffs argue that the court abused its discretion in dismissing the case for lack of service. When a civil action is commenced by filing, like in this case, the defendants must be served with the complaint within sixty days. See V.R.C.P. 3 (requiring that when action is commenced by filing complaint with court, "summons and complaint must be served upon the defendant within 60 days after the filing of the complaint," and "[i]f service is not timely made . . . , the action may be dismissed" under Rule 41(b)(1)); V.R.C.P. 4 (describing how summons and complaint must be served). It is the plaintiff's responsibility to complete service within the required time. Smith v. Brattleboro Reformer, Inc., 147 Vt. 303, 304 (1986). After reasonable notice, the court may dismiss an action when the plaintiff has not filed proof of service on a defendant within ninety days of filing the action. V.R.C.P. 41(b)(1)(ii).

There is no merit to plaintiffs' argument that dismissal was inappropriate in this case because the statute of limitations had not yet run on their claims. This and several other of plaintiffs' arguments center around the language in various civil rules. "The interpretation of procedural rules is a question of law which we review de novo." State v. Amidon, 2008 VT 122, ¶ 16, 185 Vt. 1. In construing a rule, we employ statutory construction rules and focus primarily on the plain language of the rule. Id. Here, the plain language of Rule 41(b)(1) refutes plaintiffs' claim. By its terms, the rule allows dismissal if a plaintiff has not filed proof of service within ninety days, regardless of when the statute of limitations will run on the plaintiff's claims. Here, the dismissal was well within the timeline provided by the rule.

Plaintiffs next argue that the letter alerting them of the possible dismissal was void because there was a prior order by a different superior judge indicating that the case would be scheduled for a status conference once service was complete.* There was no error. Under the plain terms of Rule 41(b)(1), a case may be dismissed after reasonable notice. Here, plaintiffs failed to provide proof of service for any defendants within the ninety-day period and the court provided plaintiffs with reasonable notice that the case was subject to dismissal.

Plaintiffs contend that all defendants had constructive notice of the suit because they were provided a copy of the complaint at their public email accounts. Constructive notice is insufficient to meet the standard for service under the rules. Vermont Rule of Civil Procedure 4 describes how the summons and complaint must be served and the plaintiff must submit a certificate of service. Plaintiffs failed to serve defendants in a manner complying with Rule 4.

Plaintiffs also contend that the trial court applied the wrong standard to their request to extend the time to serve by requiring them to show excusable neglect. There was no error. Plaintiffs requested to extend the time to serve defendants well beyond the sixty-day period for service. Therefore, the court acted in conformance with Vermont Rule of Civil Procedure

* Plaintiffs assert that because one superior judge had denied the motion for a TRO, it was error for a different superior judge to dismiss the case for lack of service, citing to Vermont Rule of Civil Procedure 65(f), which states that when an injunction is sought from one judge it should not be presented to another judge except for certain circumstances. Nothing in Rule 65(f) precludes dismissal for lack of service by a different judge than the judge that denied a request for a TRO.

6(b)(2), which states that the court may extend the time to act on a motion made after time has expired "if the party failed to act because of excusable neglect."

Plaintiffs' final argument is that Kamberleigh was a defendant and properly served and therefore the entire case should not be dismissed. This Court's jurisdiction is limited to deciding actual controversies between adverse litigants and a case becomes moot when "this Court can no longer grant effective relief." Paige v. State, 2017 VT 54, ¶ 7, 205 Vt. 287 (quotation omitted). There is no remaining controversy between adverse parties and no relief that this Court can grant plaintiff against himself. Therefore, with the dismissal of the case against all other defendants, the case is moot and dismissal of the entire action was proper.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice