[Cite as *Carter v. St. Ann's Hosp.*, 2012-Ohio-1662.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Larry E. Carter, Executor of the Estate of Sandra L. Carter, Deceased,	:	
Plaintiff-Appellant,	:	
v.	:	No. 11AP-715
	:	(C.P.C. No. 09CV-11-17681)
St. Ann's Hospital et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on April 12, 2012

Blue + Blue, LLC, and *Douglas J. Blue*, for appellant.

Earl, Warburton, Adams & Davis, and *Grier Schaffer*, for appellee St. Ann's Hospital.

Freund, Freeze & Arnold, and *Mark L. Schumacher*, for appellee Mark T. Rubertus, M.D.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Larry E. Carter, executor of the estate of Sandra L. Carter, is appealing from the dismissal of Mark T. Rubertus, M.D., from the wrongful death lawsuit filed by the estate. Two assignments of error are presented:

> 1. THE TRIAL COURT ERRED WHEN IT ORDERED A HEARING ON APPELLEE MARK T. RUBERTUS' MOTION TO DISMISS TO HEAR ADDITONAL EVIDENCE THE APPELLEE HAD FAILED TO INCLUDE IN HIS MOTION TO DISMISS.

2. THE TRIAL COURT ERRED WHEN IT FOUND SERVICE HAD NOT BEEN COMPLETED UPON APPELLEE MARK T. RUBERTUS.

{¶ 2} Because the two assignments of error heavily overlap, they initially will be addressed together.

{¶ 3} On November 25, 2009, the estate refiled its wrongful death lawsuit, once again naming Dr. Rubertus as a defendant. The complaint listed the address for Dr. Rubertus as 3215 North Hills Boulevard, Springdale, Arkansas.

{¶ 4} Service of process was issued for Dr. Rubertus at 3215 North Hills Boulevard, Fayetteville, Arkansas. A Nancy J. Mitchell signed for the certified mail.

{¶ 5} Counsel for Dr. Rubertus filed an answer which included three general defenses and ten affirmative defenses, including "insufficiency of process" and "insufficiency of service of process." The answer was filed December 21, 2009.

{¶ 6} On the same day the answer was filed, the envelope which had contained the complaint naming Dr. Rubertus as a defendant was returned to the clerk of courts. The complaint was not in the envelope. The envelope had a handwritten message on it which read, "Return to Sender."

{¶ 7} Dr. Rubertus has not been a member of Washington Regional Medical Staff since March 14, 2008. He left no forwarding address, according to the note on the envelope.

{¶ 8} On February 5, 2010, counsel for Dr. Rubertus filed a motion seeking to have the case reclassified by the clerk of courts to reflect the actions as being a "professional tort," not as being "other torts."

{¶ 9} Later in February, the parties entered into a stipulation that the discovery pursued in the first filing of the lawsuit could be used in the refiled lawsuit.

{¶ 10} Apparently, counsel for Dr. Rubertus submitted interrogatories and a request for production of documents to counsel for the estate and counsel for the estate responded with discovery materials on or about July 7, 2010.

{¶ 11} Counsel for Dr. Rubertus provided an initial disclosure of witnesses on September 27, 2010.

{¶ 12} On December 7, 2010, counsel for Dr. Rubertus filed a motion asking that the lawsuit be dismissed with respect to Dr. Rubertus because "[p]laintiff failed to serve Dr. Rubertus with the Complaint within one year of its filing." (Motion of Defendant, Mark T. Rubertus, M.D. to Dismiss Plaintiffs' Complaint.) The motion further alleged that the court did not have personal jurisdiction over Dr. Rubertus, despite the fact counsel had entered an appearance on behalf of Dr. Rubertus, had filed an answer, had filed a prior motion on behalf of Dr. Rubertus, had pursued discovery on his behalf, and had entered into a stipulation on his behalf.

{¶ 13} Counsel for the estate filed a memorandum in response to the motion to dismiss. Counsel for Dr. Rubertus filed a reply memorandum.

{¶ 14} The trial judge assigned to the case referred the motion to dismiss to a magistrate to conduct appropriate proceedings.

{¶ 15} The magistrate initially scheduled the matter for a hearing on February 23, 2011 but then reset the hearing for March 9, 2011 at the request of counsel for Dr. Rubertus, who wished to seek the testimony of witnesses to support the motions. Counsel for Dr. Rubertus then scheduled a deposition of Thomas J. Olmstead for Fayetteville, Arkansas and noticed the other parties with regard to the deposition.

{¶ 16} Similar notice was given for a deposition of Nancy Mitchell, who had signed for the certified mail service.

{¶ 17} Counsel for the estate filed a motion requesting that the evidentiary hearing scheduled for March 9, 2011 be vacated and the motion to dismiss the complaint as to Dr. Rubertus be decided on the contents of the court file. The trial judge assigned acknowledged: "In this instance if the Court were not going to have a hearing it would have to resolve the competing inferences (service completed but later returned with a note from office staff) in favor of Plaintiff." (Feb. 18, 2011 Decision & Entry Denying Plaintiff's Motion to Vacate Hearing.) However, the judge felt reasonable minds could differ on the service issue, so allowed the hearing to proceed.

{¶ 18} The hearing did, in fact, proceed and the magistrate issued a magistrate's decision which recommended granting the motion to dismiss. The magistrate acknowledged that the defense or defenses used here were "procedural gamesmanship at its best/worst," but felt compelled by legal precedent to grant the motion. (Magistrate's

Decision Granting Defendant Rubertus' Motion to Dismiss as Filed on December 7, 2010, at 10.)

{¶ 19} Counsel for the estate in the meantime served Dr. Rubertus and alleged the new service mooted the motion to dismiss. Counsel alleged that since Dr. Rubertus had always been outside the state of Ohio, the statute of limitations had not run. Under case law from the Ohio Supreme Court, the new request for service may be deemed a re-filing of the complaint. However, the Ohio Supreme Court precedent did not address a situation in which a complaint had previously been dismissed. *See Goolsby v. Anderson Concrete Corp.*, 61 Ohio St.3d 549 (1991).

{¶ 20} With respect to the first assignment of error, a trial court has broad discretion in deciding whether to conduct an evidentiary hearing on a motion before it. The local rules provide for a motion to be submitted for consideration based upon the material in the record after 28 days. However, those rules do not prevent a trial judge from extending the time for consideration or from receiving evidence to clarify the issues. The trial judge here acted within his discretion.

{¶ 21} The first assignment of error is overruled.

{¶ 22} The second assignment of error presents a more challenging issue. The evidence presented at the evidentiary hearing on the issue of service clearly showed that Dr. Rubertus did not personally receive the complaint in this second filing. Dr. Rubertus had once worked at the medical clinic at the address where certified mail service was attempted. He had left his employment at that location over one year before the second complaint was filed.

{¶ 23} However, the record also shows that the law firm which represented Dr. Rubertus in the first lawsuit entered a general appearance in the second lawsuit. A full answer was filed, a motion was filed seeking affirmative relief from the court as to the lawsuit, and a classification and stipulation was entered into by the parties as to the use of discovery from the first lawsuit in the second lawsuit. This course of litigation pursued by counsel for Dr. Rubertus distinguished the present case from the facts in the decision of the Ohio Supreme Court in *Maryhew v. Yova*, 11 Ohio St.3d 154 (1984). In the *Maryhew* case, no answer was filed on behalf of the named defendant. As noted by the Ohio Supreme Court "there was not a voluntary entry of appearance on behalf of the defendant

by way of an entry of the court, or a responsive pleading to the merits of the case." *Id.* at 156. The result is that *Maryhew* did not require dismissal of this case as a result of the service problems presented.

{¶ 24} The case law from the Tenth District has upheld dismissal under circumstances similar to those presented here. The trial court properly dismissed a lawsuit where the defendant had filed an answer in the lawsuit, but no motion to dismiss before the one-year period allowed for service had expired. *Sheets v. Sasfy*, 10th Dist. No. 98AP-539 (Jan. 26, 1999). A distinction between the *Sheets* case and the present case is that the record in *Sheets* did not show that defense counsel filed any motions in the trial court before filing the motion to dismiss.

{¶ 25} However, this court held that "[w]here a defendant appears and participates in the case without objection, he waives the defense of lack of personal jurisdiction due to failure of service." *Harris v. Mapp*, 10th Dist. No. 05AP-1347, 2006-Ohio-5515, ¶ 11.

{¶ 26} *Harris* was cited as good authority more recently in *Columbus Homes, Ltd. v. S.A.R. Constr. Co.*, 10th Dist. No. 06AP-759, 2007-Ohio-1702.

{¶ 27} No longer does a defendant who has not been serviced enter a special appearance to contest jurisdiction. The Ohio Supreme Court held in *Maryhew* that such special appearances were no longer the appropriate procedure. As a result, the gamesmanship mentioned by the magistrate in his decision is now apparently sanctioned.

{¶ 28} This conclusion is supported by the more recent case of *Gliozzo v. Univ. Urologists of Cleveland, Inc.*, 114 Ohio St.3d 141, 2007-Ohio-3762. The syllabus reads:

> When the affirmative defense of insufficiency of service of process is properly raised and properly preserved, a party's active participation in the litigation of a case does not constitute waiver of that defense.

The Ohio Supreme Court was following its own precedent that was decided about the same time as the *Maryhew* case. *First Bank of Marietta v. Cline*, 12 Ohio St.3d 317 (1984). In *First Bank of Marietta*, the issue of sufficiency of service of process was raised in the answer but not seriously addressed until all the evidence had been presented at trial.

{¶ 29} We note that in the present case, the clerk of courts apparently did not send a notice that service had failed after initially it appeared that service had been perfected because Nancy Mitchell had signed for the certified mail service. However, the failure of counsel for the estate to discover that Dr. Rubertus had not actually received the complaint and that the complaint was returned to the clerk's office does not seem to change the requirement to dismiss as dictated by Ohio Supreme Court case law.

{¶ 30} We must follow the Ohio Supreme Court's syllabus in the *Gliozzo* case and therefore we overrule the second assignment of error.

{¶ 31} Both assignments of error having been overruled, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

KLATT and SADLER, JJ., concur.

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