

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 37427

CURTIS COCKERUM,)	2011 Unpublished Opinion No. 649
)	
Plaintiff-Appellant,)	Filed: October 4, 2011
)	
v.)	Stephen W. Kenyon, Clerk
)	
KENNETH KHATAIN, M.D.,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Respondent.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Cheri C. Copsey, District Judge.

Order granting motion to dismiss, affirmed.

Curtis Cockerum, Twin Falls, pro se appellant.

Naylor & Hales, P.C.; Bruce J. Castleton, Boise, for respondent.

GUTIERREZ, Judge

Curtis Cockerum appeals from the district court’s dismissal of his complaint due to failure to serve the defendant within six months of filing. For the reasons set forth below, we affirm.

I.

BACKGROUND

On June 1, 2009, Cockerum filed a summons and complaint in district court, alleging medical malpractice against Kenneth Khatain. Pursuant to Idaho Rule of Civil Procedure 4(a)(2), Cockerum needed to serve Khatain by December 1, 2009, for this case to proceed. On July 21, 2009, before Cockerum made any attempts to effectuate service, Khatain’s counsel advised Cockerum that service of process could be accomplished by delivering the summons and complaint to counsel’s law offices, which was authorized to accept on behalf of Khatain. Though Cockerum did not submit enough copies of the summons at the original filing in order to receive proper documentation to serve Khatain, Cockerum alleges he mailed the court clerk the necessary copies of the summons in August of 2009 for processing. The clerk returned the

documents unfiled, though, two weeks later.¹ Nearly two months later, Cockerum signed and filed a motion for enlargement of time for service, along with a motion for reissuance of a summons. The court clerk filed the motions on October 27, 2009, and October 28, 2009, respectively, and issued proper copies of the summons the same day of that motion's filing, providing Cockerum over a month to effectuate timely service. During this time, the Idaho Department of Correction moved Cockerum to an institution in northern Idaho. The move resulted in Cockerum receiving the properly issued summons for service almost two weeks later. One week after service was due and because he had not been served, Khatain filed a motion to dismiss the complaint.² The district court held a hearing on the motion to dismiss and after argument from both parties, granted the motion because Cockerum did not show good cause for failing to serve Khatain. Because Cockerum did not notice for hearing his motion for enlargement of time for service, the court never considered that motion.

Cockerum argues the district court's failure to consider the motion for enlargement of time for service and provide him a hearing violated his due process rights. Further, he appeals the court's decision to grant the dismissal, claiming prejudice by the court and the clerk due to his pro se status and his incarceration during relevant proceedings.

II.

DISCUSSION

A. The District Court Properly Granted the Motion to Dismiss.

Pro se litigants are held to the same standards as those litigants represented by counsel. *Nelson v. Nelson*, 144 Idaho 710, 718, 170 P.3d 375, 383 (2007); *Golay v. Loomis*, 118 Idaho 387, 392, 797 P.2d 95, 100 (1990). Pro se litigants are not excused from abiding by procedural rules simply because they are appearing pro se and may not be aware of the applicable rules. *See Golay*, 118 Idaho at 392, 797 P.2d at 100. Among the applicable rules for service of process,

¹ This activity is not reflected in the district court's record of actions. Cockerum's contact with the clerk in late August or early September is referenced in both parties' briefs, although no explanation is provided as to why the documents were returned unfiled. Presumably, it was for failure to pay the court fees, an inference drawn from the discussion at the hearing on the motion to dismiss. Cockerum also alleges he took the same actions in late September, a month later, referenced only in his brief.

² Cockerum actually served Khatain's counsel on December 29, 2009, six months and twenty-eight days after the complaint was filed.

Idaho Rule of Civil Procedure 4(a)(2) requires service of process to be made within six months from the date the complaint is filed. If service is not effectuated within six months and the plaintiff cannot show good cause for the failure, the court must dismiss the complaint. I.R.C.P. 4(a)(2). Absent good cause, dismissal is mandatory. *Nerco Minerals Co. v. Morrison Knudsen Corp.*, 132 Idaho 531, 534, 976 P.2d 457, 460 (1999).

The party who failed to effect timely service has the burden to show that good cause exists in order to avoid dismissal of a complaint not served within six months. *Martin v. Hoblit*, 133 Idaho 372, 375, 987 P.2d 284, 287 (1999). Whether good cause exists is a factual determination. *Harrison v. Bd. of Prof'l Discipline of the Idaho State Bd. of Med.*, 145 Idaho 179, 183, 177 P.3d 393, 397 (2008); *Rudd v. Merritt*, 138 Idaho 526, 532, 66 P.3d 230, 236 (2003). This Court's standard of review of a lower court's factual determination and grant of a motion to dismiss is the same as that for reviewing a grant of a motion for summary judgment. *Rudd*, 138 Idaho at 532, 66 P.3d at 236. This Court will view the facts in the light most favorable to the nonmoving party and draw all reasonable inferences in its favor. *Telford v. Mart Produce, Inc.*, 130 Idaho 932, 934, 950 P.2d 1271, 1273 (1998); *Sammis v. Magnetek, Inc.*, 130 Idaho 342, 346, 941 P.2d 314, 318 (1997).

Cockerum argues he demonstrated good cause because he exercised due diligence through his multiple requests to the court clerk to return a properly processed summons. He claims these requests were ignored. He asserts the court and its clerks were prejudiced towards him by their actions, and inactions, in large part due to his pro se status and his classification as an incarcerated person who can only make contact via the U.S. Postal Service. Cockerum asks the court to consider his inability to call or come in person to the clerk's desk to request needed documents and weigh these facts in his favor.

Khatain argues the failure to receive a file-stamped copy of the summons from the district court is not good cause for failure to complete service of process in six months. Khatain contends that all Cockerum needed to do to receive the proper paperwork for service was present a copy of the summons to the district court for file-stamping along with a self-addressed, stamped envelope. Even if Cockerum was not aware of these very basic requirements after filing the complaint, he failed to obtain such information until well into the six months. Khatain also points to the facts that Cockerum knew Khatain's attorney would accept service and actually

received the documents he needed with time left to effectuate service; yet, Cockerum made no attempt within the six-month period to serve Khatain.

We must look at the facts and circumstances in each particular case when determining whether good cause has been shown: there is no bright-line test. *Harrison*, 145 Idaho at 183, 177 P.3d at 397. In every case, the six-month period following the filing of the complaint is the main focus of a court's inquiry regarding why timely service was not made. *Martin*, 133 Idaho at 375, 987 P.2d at 287. Looking at the totality of the circumstances in its good cause determination, the court may also look at a plaintiff's diligent attempts to effectuate timely service and factors outside the plaintiff's control, such as sudden illness, natural catastrophes, or defendant's evasion of service. *Id.* at 377, 987 P.2d at 289. However, where no attempt at service is made in the six-month time period of the rule, it is unlikely the court will find good cause. *Id.* Factors that are irrelevant to the good cause analysis are the pro se status of the plaintiff, the statute of limitations for the cause of action, lack of prejudice to the defendant from untimely service, prior notice of claim to the defendant, and the timing of the defendant's motion to dismiss. *Id.* at 375-76, 987 P.2d at 287-88. In sum, any focus on the defendant or other issues that fail to answer *why* timely service was not made should not be considered. Finally, a mistaken or narrow reading of a rule that results in ignorance or misinterpretation of that rule's requirements does not constitute good cause for failure to effect timely service--regardless of whether the plaintiff is represented by counsel or appearing pro se. *See Harrison*, 145 Idaho at 183, 177 P.3d at 397; *Sammis*, 130 Idaho at 347, 941 P.2d at 319.

Applying the above principles to the facts in this case, we conclude the district court did not err in determining Cockerum failed to show good cause for failure to serve Khatain within the six months required by Idaho Rule of Civil Procedure 4(a)(2). First, Cockerum's pro se status did not excuse him from following procedural rules. When he filed the case, Cockerum did not provide extra copies of the summons for the clerk to conform and return to him copies for service on Khatain. The clerk has no responsibility to make such copies unless a party requests and pays for them. Additionally, the record indicates that Cockerum had not been paying the filing fees in accordance with rules applicable to indigent prisoners and such failure to pay court

fees provided the district court a basis to dismiss on its own motion.³ Cockerum claims he misunderstood the procedure for paying such fees through the Department of Correction. However, misunderstanding of the applicable rules is not good cause. Cockerum's argument is also belied by the fact that when Cockerum did follow proper procedure in submitting forms to the court clerk, a summons was issued that very day.

Second, Cockerum's assertion that he was unable to receive proper documents due to being ignored by the court clerks is contradicted by other actions that he took with the court. For example, in the time period between the filing of the complaint and the first attempts to obtain appropriate paperwork for service of process, Cockerum was able to file a motion for appointment of counsel, a supplemental complaint, and a motion for reconsideration. Each was timely addressed by the clerk and the court. This suggests the requests for proper documents for service of process were not unanswered due to prejudice toward Cockerum, but rather some procedural defect.

Finally, though Cockerum's involuntary institutional move to northern Idaho weighs in his favor because it delayed his receipt of the properly issued summons, it constituted only a two-week interruption out of six months. Though the move was beyond his control, Cockerum could have avoided any hindrance in his attempt to serve Khatain by taking proper action prior to late October. Further, even after receipt of the summons, Cockerum had time remaining to serve Khatain. Cockerum's efforts did not demonstrate due diligence even viewing these facts favorably to Cockerum and drawing reasonable inferences in his favor. Cockerum did not attempt actual service within the six months and there is no explanation for his initial three-month delay before contacting the court clerk for information necessary to receive file-stamped documents from the court to effectuate proper service.

To the extent Cockerum contends the district court nonetheless erred in granting the dismissal based on the holding in *Crawford v. Pacific Car & Foundry Co.*, 112 Idaho 820, 736

³ These rules are found in Idaho Code § 31-3220A. Though failure to adhere to these rules may not in and of itself be used to justify the grant of the motion to dismiss, *see State Bureau of Child Support Services v. Garcia*, 132 Idaho 505, 508-09, 975 P.2d 793, 796-97 (Ct. App. 1999), if a prisoner is ordered to pay court fees and fails to do so within thirty days of the order or any time thereafter, the court then may, on its own motion, dismiss an action. I.C. § 31-3220A(4), (5)(a). In this case, Cockerum's failure to adhere to the partial payment rules in this case is one fact of many that demonstrates Cockerum's failure to show good cause.

P.2d 872 (Ct. App. 1987), his reliance is misplaced. In *Crawford*, the court found service of process reasonable even though effectuated eighteen months after the filing of the complaint because the plaintiff used due diligence against a difficult-to-locate defendant and the corporation did not suffer any prejudice as a result of the delay. Cockerum claims, based on *Crawford*, service made six months and twenty-eight days after filing the complaint is reasonable. However, *Crawford* pre-dates Idaho Rule of Civil Procedure 4(a)(2) and the Idaho Supreme Court's more recent holdings that lack of prejudice to the defendant is irrelevant to the good cause analysis. *Crawford* was decided under an abuse of discretion standard, not the mandatory language in the current rule.

B. Other Issues on Appeal

Cockerum argues the court's failure to consider and hold a hearing on his motion for enlargement of time for service violated his constitutional due process rights. He also asserts Khatain's acceptance of service rendered the motion to dismiss moot, and alternatively, the statute of limitations should be tolled from the date of the complaint until this appeal is finalized so that the cause of action is still available to him.

Generally, issues not raised below may not be considered for the first time on appeal. *Sanchez v. Arave*, 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991). Appellate court review is limited to the evidence, theories, and arguments that were presented below. *Nelson*, 144 Idaho at 714, 170 P.3d at 379. None of Cockerum's contentions, excepting opposition to the motion to dismiss, were argued before the trial court either during the hearing or in a written response to Khatain's motion to dismiss. Therefore, this Court cannot decide these issues.

III.

CONCLUSION

We conclude Cockerum failed to show good cause for failure to serve Khatain. The district court properly granted Khatain's motion to dismiss the complaint brought by Cockerum. We therefore affirm.

Chief Judge GRATTON and Judge MELANSON **CONCUR.**