

2019 WL 134080 (Pa.Com.Pl.) (Trial Order)
Court of Common Pleas of Pennsylvania.
Lackawanna County

Domenick MANDARANO, Plaintiff,

v.

Tina PLINK and Zacharellis Gardens, LLC, Defendants.

No. 18 CV 2099.

January 8, 2019.

Memorandum and Order

[Tullio DeLuca](#), Esquire, Law Office of Tullio DeLuca, 381 North 9th Avenue, Scranton, PA 18504, tullio.deluca@verizon.net, for plaintiff.

[Harry T. Coleman](#), Esquire, Law Offices of Harry Coleman, 41 North Main Street, Suite 316, Carbondale, PA 18407, harry@harrycolemanlaw.com, for defendant, Tina Plink.

[Frank A. Marcin](#), Esquire, 814 Main Street, Dickson City, PA 18519, MarcinEsq@aol.com, for defendant, Zacharellis Garden, LLC.

[Terrence R. Nealon](#), Judge.

*1 CIVIL ACTION - LAW

NEALON, J.

Plaintiff commenced this premises liability action one day prior to the expiration of the two-year statute of limitations, and personally served the president of the defendant-limited liability company (“LLC”) with original process at its principal place of business on a timely basis under [Pa.R.C.P. 401\(a\)](#), albeit by a private detective agency rather than the sheriff as required by [Pa.R.C.P. 400\(a\)](#). After the LLC filed a preliminary objection asserting improper service of process and seeking its dismissal as a named defendant based upon the corresponding expiration of the statute of limitations, plaintiff reinstated the complaint under [Pa.R.C.P. 401\(b\)\(1\)](#) and had it timely served by the sheriff upon the LLC's president at the same principal place of business. The LLC contends in its preliminary objection that this action is time-barred against it due to plaintiff's alleged failure to make a good faith effort to effectuate proper service of original process.

To warrant the dismissal of an action based upon the untimely service of original process, the record must reflect that either (1) plaintiff demonstrated an intent to stall the judicial machinery by delaying the proper service of process, or (2) the defendant was prejudiced by plaintiff's failure to comply with the procedural rules governing service. The record is devoid of any indication that plaintiff intentionally acted in a manner that was designed to stall the judicial machinery, and the LLC has not identified any prejudice that it allegedly suffered as a result of plaintiff's defective service of original process by a detective instead of the sheriff. Moreover, since the LLC's officer was furnished with timely notice of the filing of this suit, the purpose of the statute of limitations has been satisfied in this case. Therefore, the LLC's preliminary objection seeking its dismissal based upon improper service of original process will be overruled.

I. FACTUAL BACKGROUND

On April 4, 2018, Domenick Mandarano (“Mandarano”), commenced this personal injury action against Tina Plink (“Plink”) and Zacharellis Gardens, LLC (“Zacharellis Gardens”) as a result of a slip-and-fall that allegedly occurred on April 5, 2016. (Docket Entry No. 1 at ¶ 5). Mandarano avers that Plink is “the owner of real property located at 702 Saint Mary's Villa Road, Elmhurst Township,” and that Zacharellis Gardens is a limited liability corporation “with a principal place of business located at” that address. (*Id.* at ¶¶ 2-3). He maintains that while he “was a business invitee/guest attending a wedding” at that property on April 5, 2016, he was injured in a fall while “descending a staircase.” (*Id.* at ¶ 5). In Count I of the complaint, Mandarano asserts a negligence cause of action against “Tina Plink, Individually and t/d/b/a Zacharellis Gardens,” whereas Count II advances an identical negligence claim against Zacharellis Gardens. (*Id.* at ¶¶ 8-13, 15-20).

According to an “Affidavit of Service” that was executed by Brian Duffy of Krayter Detective Agency on April 24, 2018, the complaint was personally served upon Plink “on April 23, 2018 at 2:35 PM at 702 Saint Mary's Villa Road, Elmhurst Township.” (Docket Entry No. 9). On June 4, 2018, Plink filed an answer to the complaint in which she admitted that she is “the owner of real property located at 702 Saint Mary's Villa Road, Elmhurst Township,” and that Zacharellis Gardens maintains its principal place of business at that location. (Docket Entry No. 5 at ¶¶ 2-3). On June 11, 2018, Mandarano served a ten-day notice upon Zacharellis Gardens pursuant to Pa.R.C.P. 237.1(a)(2)(ii) and 237.5 indicating his intention to enter a default judgment against it for failing to file a timely response to the complaint. (Docket Entry No. 4).

*2 On June 20, 2018, Zacharellis Gardens filed a preliminary objection under Pa.R.C.P. 1028(a)(1) alleging improper service of initial process by Krayter Detective Agency rather than the Sheriff of Lackawanna County, and arguing that Mandarano's defective service did not toll the expiration of the two-year statute of limitations. (Docket Entry No. 8). After Mandarano reinstated the complaint on June 25, 2018, Lackawanna County Deputy Sheriff Alexander Rivera made three unsuccessful attempts to serve Zacharellis Gardens at 702 Saint Mary's Villa Road on July 2, 2018, July 6, 2018, and July 10, 2018. (Docket Entry Nos. 10, 12). Following a second reinstatement of the complaint on August 15, 2018, Lackawanna County Deputy Sheriff Phil Chiavacci personally served the complaint upon Zacharellis Gardens on August 21, 2018, by hand-delivering it to “Tina Plink – President” at 702 Saint Mary's Villa Road. (Docket Entry Nos. 15, 20).

Zacharellis Gardens contends that Mandarano neglected to comply with Pa.R.C.P. 400(a) which requires the service of original process to be accomplished “within the Commonwealth only by the sheriff.” (Docket Entry No. 14 at p. 2). Citing *Lamp v. Heyman*, 469 Pa. 465, 366 A.2d 883 (1976), it submits that “the statute of limitations is tolled only if the plaintiff makes a good faith effort to effectuate service of process on the opposing party.”¹ (*Id.* at p. 3). Noting that the two-year statute of limitations governing personal injury claims technically expired on April 5, 2018, and that the deputy sheriff did not serve the reinstated complaint upon it until August 21, 2018, Zacharellis Gardens alleges that Mandarano “made no effort, good faith or otherwise, to comply with the law,” as a result of which “the statute of limitations was not tolled and expired.” (*Id.* at p. 4).

Mandarano “acknowledges that a detective agency was inadvertently used to effectuate service on both Defendants but nevertheless both were served with the Complaint.” (Docket Entry No. 22 at p. 5). He alleges that Plink was personally served “in her individual capacity but never raised the issue of improper service but later comes forward as the principal of Zacharellis [Gardens], LLC and raises such issue in an attempt to obtain dismissal of the action.” (*Id.* at pp. 3-4). Stating that Pa.R.C.P. 126 enables a court to “disregard any error or defect of procedure which does not affect the substantial rights of the parties,” Mandarano posits that “Zacharellis [Gardens] through its agent and principal, Tina Plink, was placed on adequate notice of the lawsuit filed against it,” and “fails to describe any prejudice that would result from being served by a detective instead of the Sheriff's Office.” (*Id.* at pp. 6-7). He claims that he “did not stall or delay in serving the complaint, and when it (*sic*) discovered [his] inadvertent error in using a detective agency to serve the Complaint, he acted diligently and in [a] speedy manner to serve the Reinstated Complaint on Zacharellis [Gardens],” such that any

contention that the statute of limitations “has expired due to improper service is without merit and finding.”² (*Id.* at pp. 7-8).

II. DISCUSSION

(A) STANDARD OF REVIEW

*3 Zacharellis Gardens has filed a preliminary objection pursuant to Pa.R.C.P. 1028(a)(1) asserting improper service of the complaint. “Service of process is a mechanism by which a court obtains jurisdiction of a defendant, and therefore, the rules concerning service of process must be strictly followed.” *Trexler v. McDonald's Corp.*, 118 A.3d 408, 412 (Pa. Super. 2015) (quoting *Cintas Corp. v. Lee's Cleaning Services, Inc.*, 549 Pa. 84, 91, 700 A.2d 915, 918 (1997)). The parties do not dispute, and the court record clearly reflects, that Plink was personally served with the complaint by Krayer Detective Agency on April 23, 2018, but was not served by the Sheriff's Office until August 21, 2018. (Docket Entry Nos. 9, 20). Therefore, Zacharellis Gardens' preliminary objection does not raise an issue that cannot be determined from the facts of record, as a result of which it is unnecessary to consider any additional evidence or to direct the parties to conduct limited discovery in order to properly address the pending challenge to the service of process. *Trexler*, 118 A.3d at 411 & n.3.

(B) SERVICE OF INITIAL PROCESS

Except for actions commenced in the First Judicial District (Philadelphia County), Domestic Relations matters governed by Pa.R.C.P. 1930.4, or civil actions seeking injunctive relief, perpetuation of testimony, appointment of a receiver, partition, or declaratory judgment, or in which the sheriff is a named party, “original process shall be served within the Commonwealth only by the sheriff.” Pa.R.C.P. 400(a). A “limited liability company” such as Zacharellis Gardens is considered to be a “corporation or similar entity” under the Rules of Civil Procedure, *see* Pa.R.C.P. 2176, and service of original process upon a corporation or similar entity may be effectuated by hand-delivering the summons or complaint to the defendant-entity's officer, partner, trustee, or authorized agent, or the manager or person in charge at any regular place of business or activity of the entity. *See* Pa.R.C.P. 424. Since Plink is the president of Zacharellis Gardens, service upon her would constitute service upon Zacharellis Gardens under Rule 424. However, Plink was not originally served by the sheriff on April 23, 2018, as required by Rule 400(a), and was first served by the sheriff with the reinstated complaint on August 21, 2018, more than four months after the expiration of the two-year statute of limitations on April 5, 2018. *See* 42 Pa.C.S. § 5524(2) (providing that actions to recover damages for personal injuries caused by the negligence of another must be commenced within two years).

Although “our Rules of Civil Procedure are essential to the orderly administration and efficient functioning of the courts,” the Supreme Court of Pennsylvania has “always understood that procedural rules are not ends in themselves, and that rigid application of our rules does not always serve the interests of fairness and justice.” *Womer v. Hilliker*, 589 Pa. 256, 267, 908 A.2d 269, 276 (2006). To that end, Rule 126 directs that the procedural rules “shall be liberally construed to secure the just, speedy and inexpensive determination of every action,” and that “[t]he court at every stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties.” Pa.R.C.P. 126. Our Supreme Court has “made Rule 126 a rule of universal application, such that the trial court may disregard a procedural defect or error at every stage of any action or proceeding to which the civil procedural rules apply.” *Womer*, 589 Pa. at 268, 908 A.2d at 276; *Anthony Biddle Contractors, Inc. v. Preet Allied American Street, LP*, 28 A.3d 916, 924 n.12 (Pa. Super. 2011).

Zacharellis Gardens' service of process and accompanying statute of limitations arguments are premised upon the seminal holding in *Lamp*, which originally produced conflicting interpretations by the Commonwealth Court in *Teamann v. Zafiris*, 811 A.2d 52 (Pa. Cmwlth. 2002) and the Superior Court in *Leidich v. Franklin*, 394 Pa. Super. 302, 575 A.2d 914 (1991). In *McCreesh v. City of Philadelphia*, 585 Pa. 211, 888 A.2d 664 (2005), the Supreme Court reviewed the

Commonwealth Court's application of its *Teamann* standard, and “determine[d] whether to adopt the strict approach of cases such as the case *sub judice* and *Teamann*, which require rigid compliance with the Rules of Civil Procedure in order to satisfy the *Lamp* test, or the more flexible approach of the *Leidich* line of cases, which allows for the continued validity of the [original process] despite non-compliance with the rules so long as the defendant received actual notice and was not prejudiced.” *Id.* at 221, 888 A.2d at 670-671. The Superior Court in *Leidich* had concluded that a plaintiff's obligation to make a “good faith” attempt at service under *Lamp* involved the inquiry “of whether a plaintiff engaged in a ‘course of conduct’ forestalling the legal machinery put in motion by his/her filings,” or instead inadvertently furnished notice of the suit in a defective manner that did not affect any substantial rights of the defendant(s). *Leidich*, 394 Pa. Super. at 311-314, 575 A.2d at 918-920.

*4 In *McCreesh*, the plaintiff commenced a personal injury action on the eve of the expiration of the two-year statute of limitations, and erroneously served the defendant by certified mail rather than personal service. *McCreesh*, 585 Pa. at 214-215, 888 A.2d at 666. Almost two months later, the plaintiff reissued the writ of summons and properly served the defendant three months after the expiration of the statute of limitations. *Id.* at 215-216, 888 A.2d at 666-667. Although the trial court overruled the defendant's preliminary objections which alleged that the claim was time-barred due to the failure to properly serve initial process within the limitations period, the Commonwealth Court reversed based upon *Teamann*. *Id.* at 217-219, 888 A.2d at 667-669. In reversing the Commonwealth Court ruling, the Supreme Court reviewed the relevant appellate precedent discussing *Lamp* and held:

Upon review of these cases, we conclude that the rigid compliance requirement of the *Teamann* line of cases is incompatible with the plain language of [Rule 401](#), the spirit of *Lamp*, and the admonition of [Rule 126](#) to construe liberally the rules of procedure so long as the deviation does not affect the substantial rights of the parties. In *Lamp*, we sought to alleviate the hardships caused by plaintiffs who exploited the rules of civil procedure to make an end run around the statutes of limitations.

Neither our cases nor our rules contemplate punishing a plaintiff for technical missteps where he has satisfied the purpose of the statute of limitations by supplying a defendant with actual notice. Therefore, we embrace the logic of the *Leidich* line of cases, which, applying *Lamp*, would dismiss only those claims where plaintiffs have demonstrated an intent to stall the judicial machinery or where plaintiffs' failure to comply with the Rules of Civil Procedure has prejudiced defendant.

Id. at 227, 888 A.2d at 674.

Following *McCreesh*, a defendant seeking to dismiss an action for untimely service of original process “must establish that either (1) the plaintiff intentionally acted in a manner designed to delay service of process and stall the judicial machinery, or (2) the defendant was prejudiced by the plaintiff's failure to comply with [Pa.R.C.P. 400](#).” *Watkins v. Baron*, 2010 WL 8388296, at *4 (Lacka. Co. 2010). The type of prejudice required to warrant a dismissal based upon improper service of process involves a “substantial diminution of the defendant's ability to present factual information in the event of trial which has been brought about by plaintiff's delay” in the proper service of original process. *Id.* (quoting *Reyes v. City of Reading*, 2010 WL 2996959, at *4 (E.D. Pa. 2010)).

The court record reflects that the complaint which was filed by Mandarano on April 4, 2018, was hand-delivered to Zacharellis Gardens' officer on April 23, 2018, well within the 30-day period prescribed by [Pa.R.C.P. 401\(a\)](#) requiring “[o]riginal process [to] be served within the Commonwealth within thirty days after...the filing of the complaint.” Plink's liability insurer retained counsel to represent her in this matter, and that counsel promptly entered an appearance and filed a responsive pleading on Plink's behalf. After Mandarano served a 10-day notice upon Zacharellis Gardens of his intent to enter a default judgment against it for failure to timely answer the complaint, defense counsel entered an appearance for Zacharellis Gardens on June 20, 2018, and has been defending its interests in this case since that date. Upon discovering his non-compliance with [Rule 400\(a\)](#) via Zacharellis Gardens' preliminary objection, Mandarano reinstated the complaint in accordance with [Pa.R.C.P. 401\(b\)\(1\)](#) and properly and timely served it upon Zacharellis Gardens' officer, Plink, in compliance with [Pa.R.C.P. 400\(a\)](#) and [401\(b\)\(4\)](#).

*5 Zacharellis Gardens' officer, Plink, was supplied with actual notice of this lawsuit on April 23, 2018, thereby satisfying the purpose of the statute of limitations. There is no suggestion in the record that Mandarano intended to stall the judicial machinery by erroneously using a detective agency, rather than the Sheriff of Lackawanna County, to personally serve the complaint. Nor has Zacharellis Gardens identified any prejudice that it has allegedly suffered as a result of Mandarano's initial failure to comply with [Rule 400\(a\)](#). To the contrary, Zacharellis Gardens' counsel averted the possible entry of a default judgment against it by entering an appearance and filing the instant preliminary objection within 10 days of Mandarano's service of his notice pursuant to [Rule 237.1\(a\)\(2\)\(ii\)](#) and [237.5](#).

Based upon the standard articulated in *McCreesh*, Mandarano's initial defective service of process by a detective agency instead of the sheriff, which error was later remedied via personal service by the sheriff, does not warrant the dismissal of Zacharellis Gardens since Mandarano did not demonstrate an intent to stall the judicial machinery and his original failure to comply with [Rule 400\(a\)](#) did not prejudice Zacharellis Gardens. Accordingly, Zacharellis Gardens' preliminary objection will be overruled. An appropriate Order follows.

ORDER

AND NOW, this 8th day of January, 2019, upon consideration of the "Preliminary Objection of Defendant Zacharellis Gardens, LLC to Plaintiff's Complaint," the memoranda of law submitted by the parties, and the oral argument of counsel, and based upon the reasoning set forth in the foregoing Memorandum, it is hereby ORDERED and DECREED that:

1. The preliminary objection of defendant, Zacharellis Gardens, LLC, to plaintiff's complaint is OVERRULED; and
2. Within the next twenty (20) days, defendant, Zacharellis Gardens, LLC, shall file a responsive pleading to the complaint.

BY THE COURT:

<<signature>>J.

Terrence R. Nealon

cc: *Written notice of the entry of the foregoing Memorandum and Order has been provided to each party pursuant to [Pa. R. C. P. 236 \(a\)\(2\) and \(d\)](#) by transmitting time-stamped copies via electronic mail to:*

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Footnotes

- 1 In *Lamp*, the Supreme Court addressed what “ha[d] become a relatively common practice throughout the Commonwealth for attorneys to file a praecipe [for writ of summons] with the prothonotary to toll the statute of limitations, but then, whether because settlement negotiations are in progress or because more time is needed to prepare the case, to delay or prevent service upon the defendant.” *Lamp*, 469 Pa. at 472, 366 A.2d at 886. The intentional delay in service was “accomplished by instructing either the prothonotary or the sheriff to hold the writ, by personally retaining the writ and not delivering it to the sheriff for service, or by neglecting to pay the sheriff his fee.” *Id.* Remarking “that there is too much potential for abuse in a rule which permits a plaintiff to keep an action alive without proper notice to a defendant merely by filing a praecipe for a writ of summons and then having the writ reissued in a timely fashion without attempting to effectuate service,” *Lamp* held that the filing of original process under Rule 1007 (i.e., either a praecipe for a writ of summons or a complaint) “shall remain effective to commence an action only if the plaintiff then refrains from a course of conduct which serves to stall in its tracks the legal machinery he has just set in motion.” *Id.* at 477-478, 366 A.2d at 888-889.
- 2 Unless an affirmative defense is clear on the face of the pleadings, that defense is properly raised in new matter pursuant to Pa.R.C.P. 1030 rather than by way of preliminary objections. *Scavo v. Old Forge Borough*, 978 A.2d 1076, 1078 (Pa. Cmwlth. 2009); *Devine v. Hutt*, 863 A.2d 1160, 1167 (Pa. Super. 2004); *Brennan v. Durso*, 2011 WL 2262484, at *2 (Lacka. Co. 2011). The proper method for challenging the propriety of a defendant's preliminary objections raising the statute of limitations is by filing preliminary objections to defendant's preliminary objections. *Farinacci v. Beaver County Ind. Development Authority*, 510 Pa. 589, 593, 511 A.2d 757, 759 (1986); *Corman v. NCAA*, 74 A.3d 1149, 1167 (Pa. Cmwlth. 2013). Mandarano did not file preliminary objections to Zacharellis Gardens' preliminary objections, and instead simply argued in his opposing brief that “Zacharellis [Gardens] has improperly raised the statute of limitations argument in the form of the preliminary objection.” (Docket Entry No. 22 at p. 8). If the opposing party neglects to file preliminary objections to the defective preliminary objection, and instead merely asserts that procedural infirmity in the party's response or brief, the party waives the procedural defect of asserting a statute of limitations defense in preliminary objections, and the trial court has the authority to rule on the statute of limitations issue. *Hvizdak v. Linn*, 190 A.3d 1213, 1228 (“Pa. Super. 2018”); *Preiser v. Rosenzweig*, 418 Pa. Super. 341, 346-347, 614 A.2d 303, 305 (1992). Hence, the merits of Zacharellis Gardens' preliminary objection raising the statute of limitations will be considered.