

TRIAL COURT HAS DISCRETION TO DENY MOTION TO DISMISS EVEN WHERE PLAINTIFF FAILS TO TIMELY SERVE DEFENDANT WITHOUT GOOD CAUSE

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Langevin v. Sholem

Arizona Supreme Court
March 30, 2020

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The Rules of Civil Procedure require a plaintiff to serve a complaint on the defendant within 90 days after the complaint is filed. The Arizona Supreme Court held yesterday that a trial court was within its discretion in refusing to dismiss a case even though the defendant was served more than a year after the complaint was filed, and even though the plaintiff did not have good cause for the delay in service. Indeed, the plaintiff had not even requested an extension of time to serve until months after the 90-day deadline had already expired.

In this case, the plaintiff's parents had sued the defendant doctor twenty years ago for allegedly negligently exposing the mother to radiation while she was pregnant with plaintiff. The parties completed discovery and settled the day before trial. Twenty years later, plaintiff sued the same doctor. She unsuccessfully attempted to serve him a few times during the 90-day window (at the height of the Phoenix summer when he avowed he was out of town), but she stopped attempting service with a month left in the service period. More than ten months after the service deadline expired, plaintiff conclusorily asked for and received an extension of time to serve. She did not show good cause for the delay in service. Nor did she explain why she had not sought more time to serve *before* the 90-day deadline expired. Plaintiff finally served the defendant more than a year after filing the complaint.

Defendant moved to dismiss. The trial court denied the motion, and a motion for reconsideration, without making any findings. The court of appeals declined special action jurisdiction, and the Supreme Court granted review.

After reviewing the history of the relevant rules, and the analogous federal cases, the Court held that the plain language of Rule 4(i) permits extensions of the time to serve a complaint even without a showing of good cause. If the plaintiff shows good cause, the extension is mandatory. If not, the extension is discretionary. The Court then addressed plaintiff's failure to ask for the extension before the 90-day deadline expired. It held that although Rule 6(b)(1) generally requires a party to show excusable neglect when asking for an extension after the deadline to act has already expired, Rule 6(b)(1) is inconsistent with Rule 4(i), and therefore does not apply to requests for extensions of time to serve. Rule 4(i), the more specific rule, controls. As such, a plaintiff asking for an extension of time to serve after the 90-day period has already expired need not show excusable neglect for failing to ask before the deadline.

The Court finally applied these rules to the facts of this case. The extension was not mandatory said the Court, because the plaintiff did not show good cause for an extension to serve. Plaintiff's extension request had said she was busy trying to figure out how to serve two other defendants. This was not good cause. Good cause is a circumstance outside the plaintiff's control. Nor had Plaintiff acted diligently in trying to serve the defendant. Trying six times over a period of 14 days during a 90-day period, and then abandoning the effort, is not diligent. As such, since there was no good cause for the extension, granting it was discretionary, not mandatory.

The Court then held that the trial court did not abuse its discretion in granting the extension. It reasoned that the defendant "was not prejudiced" by the delay in service. At most, said the Court, defendant lost the procedural advantage of having the case dismissed on abatement grounds, which does not qualify as a showing of prejudice. Further, because the process server noticed that a package left one day on the defendant's doorstep was missing the next time, this indicated the possibility that the defendant "may have been home when Langevin attempted service, and therefore was possibly evading service" – even

though the defendant had avowed he was out of town on vacation for most of that time and was not evading service. Indeed, plaintiff ultimately served him at the same address, where he had lived for 30 years.

After this case, it will be very difficult for defense counsel to obtain dismissal of a case on the ground that it was untimely served.

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Eileen GilBride leads the firm's [Appellate Department](#), and focuses her practice on representing clients in federal and state appellate matters and dispositive motions. She also counsels and assists trial lawyers in the substantive areas of their practices, from the answer stage through the post-trial motion stage. Eileen has handled more than 400 appeals at every level of the state and federal courts, in Arizona and other states, which have resulted in more than 80 published decisions.