

STATE OF MICHIGAN
COURT OF APPEALS

PATRICIA A. REDDING,

Plaintiff-Counterdefendant-
Appellant,

v

LEONARD K. KITCHEN,

Defendant-Counterplaintiff-
Appellee,

and

EDWARD H. KOSTER,

Defendant-Appellee.

UNPUBLISHED

January 29, 2002

No. 222997

Washtenaw Circuit Court

LC No. 97-004226-NM

Before: Bandstra, C.J., and Doctoroff and White, JJ.

PER CURIAM.

Plaintiff appeals of right from two orders granting defendants' motions for summary disposition. We reverse and remand.

Defendant Kitchen represented plaintiff in a divorce action in 1993, in which defendant Koster subsequently acted as plaintiff's co-counsel and guardian ad litem. Defendants' actions in the divorce proceedings led to the entry of an allegedly inequitable judgment of divorce over plaintiff's objection, and on November 17, 1995, plaintiff filed an action against defendants alleging negligence, intentional infliction of emotional distress, breach of fiduciary duty, and slander [hereinafter referred to as *Redding I*].

At the time the *Redding I* complaint was filed, an appeal by plaintiff of the underlying divorce action was pending before this Court. The summons in *Redding I* was due to expire on February 16, 1996, and plaintiff sought an extension of the summons on February 13, 1996. On December 28, 1995, this Court issued a published opinion reversing and setting aside the judgment of divorce and remanding the case for trial. *Redding v Redding*, 214 Mich App 639; 543 NW2d 75 (1996). The basis for plaintiff's ex parte motion to extend the summons in *Redding I* was that plaintiff wished to resolve the remanded divorce proceedings and ascertain damages resulting from the alleged malpractice of defendants. Plaintiff made no attempt to

actually serve complaints on defendants before filing the motion to extend the summons because of the divorce proceedings.

The trial court granted plaintiff's motion to extend the summons on February 13, 1996, in *Redding I*, and defendants were subsequently served within the time frame of the extended summons. Kitchen filed an answer, affirmative defenses, and a counterclaim in response to the *Redding I* complaint. Koster did not answer the complaint, filing instead a limited appearance and a motion for summary disposition pursuant to MCR 2.116(C)(2) and (3) challenging the sufficiency of process and the order extending the summons. Kitchen did not challenge the sufficiency of process or the order extending the summons in his responsive pleadings or by motion. The trial court denied Koster's motion for summary disposition, and *Redding I* proceeded on the merits until the parties entered into a tolling agreement on February 11, 1997. The tolling agreement provided, in pertinent part:

The parties have agreed to dismiss the referenced lawsuit and counter-complaint without prejudice and without costs, pursuant to this Agreement which will preserve the rights of the parties with respect to the statute of limitations, as those rights were in effect on the date the referenced lawsuit was originally commenced, November 17, 1995.

In consideration of the mutual promises, agreements, and covenants of the parties, IT IS AGREED as follows:

1. The parties will each authorize their respective counsel to sign a Stipulation and Order of Dismissal without prejudice and without costs. A copy of the proposed Stipulation and Order of Dismissal is attached to this Agreement as an exhibit.
2. The parties agree that, with respect to the statute of limitations . . . claims . . . , the statute of limitations shall be tolled from the date the referenced Stipulation and Order of Dismissal is entered by the Court; and, in the event the referenced lawsuit is refiled or reinstated pursuant to the provisions of this Agreement, November 17, 1995 shall be considered the date of commencement for purposes of determining the applicable period of limitations.
3. The parties agree that this Agreement shall terminate thirty (30) days after the date the applicable appeal period expires relevant to the final order and/or judgment entered in the Washtenaw County Circuit Court case of *Donald D. Redding v Patricia A. Redding*, Case No. 92-44750-DM.
4. Nothing contained in this Agreement, or the proposed Stipulated Order of Dismissal, shall be deemed to renew, revive, or resurrect any claim which, on November 17, 1995, was already time-barred.

* * *

6. The purpose of this Agreement, and the Stipulation and Order of Dismissal, is to: allow Patricia A. Redding to mitigate her alleged damages through continuation of the underlying, and referenced, divorce action; to allow the parties to explore ways in which to resolve their dispute without litigation; and, minimize the litigation costs of the parties.

* * *

9. This Agreement constitutes the entire agreement between the undersigned parties with respect to the referenced subject matter, and any prior oral or written statements concerning same are merged into this document for all purposes and shall be of no force and effect.

Pursuant to the terms of the tolling agreement, *Redding I* was dismissed without prejudice.

Subsequently, plaintiff filed the present action [hereinafter referred to as *Redding II*]. In *Redding II*, the trial court granted defendants' separate motions for summary disposition brought pursuant to MCR 2.116(C)(2) and (3) on the ground that there was error in extending the summons in *Redding I*. The trial court concluded that plaintiff did not establish good cause for an extension under MCR 2.102(D) in light of *Bush v Beemer*, 224 Mich App 457; 569 NW2d 636 (1997). The holding of *Bush, supra*, which was issued by this Court after *Redding I* was dismissed, requires due diligence in attempting to serve a defendant in order to establish good cause under MCR 2.102(D). *Id.* at 464.

Plaintiff argues that the trial court erred when it granted defendants' motion for summary disposition. We review rulings on motions for summary disposition de novo. *Van v Zahorik*, 460 Mich 320, 326; 597 NW2d 15 (1999). When ruling on a motion brought pursuant to MCR 2.116(C)(2) seeking dismissal for reasons under MCR 2.102, the trial court must consider the pleadings, affidavits, and other documentary evidence submitted by the parties. *Richards v McNamee*, 240 Mich App 444, 448; 613 NW2d 366 (2000).

MCR 2.102(D) provides, in part:

A summons expires 91 days after the date the complaint is filed. However, within that 91 days, on a showing of good cause, the judge to whom the action is assigned may order a second summons to issue for a definite period not exceeding 1 year from the date the complaint is filed. If such an extension is granted, the new summons expires at the end of the extended period.

MCR 2.102(E)(1) provides, in part:

On the expiration of the summons as provided in subrule (D), the action is deemed dismissed without prejudice as to a defendant who has not been served with process as provided in these rules, unless the defendant has submitted to the court's jurisdiction.

Under MCR 2.116(C)(2), summary disposition is appropriate where the process issued in the action is insufficient. MCR 2.116(C)(3) allows summary disposition where the service of process is insufficient. However, MCR 2.116(D)(1) requires that the grounds listed in subrule (C)(1), (2), and (3) “be raised in a party’s first motion under this rule or in the party’s responsive pleading, whichever is filed first, or they are waived.”

Plaintiff claims that Kitchen waived his right to challenge the sufficiency of process by failing to properly raise the issue in his first pleading. In addition to the requirement of MCR 2.116(D)(1) stated above, MCR 2.111(F)(2) states that a party against whom a complaint has been filed must assert in a responsive pleading the defenses the party has against the claim. The rule further states that a

defense not asserted in the responsive pleading or by motion as provided by these rules is waived, except for the defenses of lack of jurisdiction over the subject matter of the action, and the failure to state a claim on which relief can be granted. However,

(a) a party who has asserted a defense by motion filed pursuant to MCR 2.116 before filing a responsive pleading need not again assert that defense in a responsive pleading later filed[.]

Here, Kitchen timely filed a verified answer to complaint, affirmative defenses, and verified counterclaim in *Redding I*, but his affirmative defenses did not assert any defense based on insufficient process related to the extension of the summons, and he did not file any motion challenging the summons before filing his answer. Although Kitchen challenged the sufficiency of process in his affirmative defenses in *Redding II*, it is undisputed that both defendants were properly served with a valid summons in *Redding II*. Because Kitchen waived any objection to the sufficiency of process in *Redding I*, his objection in *Redding II* is meaningless, and he cannot circumvent MCR 2.111(F)(2) and (3) and MCR 2.116(D)(1) by claiming that he objected in *Redding II*. Clearly, Kitchen waived any defense based on the sufficiency of process.

By contrast, Koster complied with the requirements of the court rules by filing a limited appearance and a motion for summary disposition pursuant to MCR 2.116(C)(2) and (3) challenging the sufficiency of process before filing a responsive pleading in *Redding I*. Therefore, Koster did not waive objection to process in *Redding I*. However, we do not agree with Koster’s claim that the provisions of the tolling agreement in *Redding I* permitted him to raise in *Redding II*, and the trial court to rule upon, an argument concerning the sufficiency of process in *Redding I*.

The tolling agreement in *Redding I* was, in essence, a form of settlement agreement. A settlement agreement is a contract governed by the legal principles applicable to the interpretation and construction of contracts. *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 349; 605 NW2d 360 (1999). Where a contract is clear and unambiguous, it is to be enforced as written. *Parker v Nationwide Mutual Ins Co*, 188 Mich App 354, 356; 470 NW2d 416 (1991). Here, the tolling agreement specifically stated it would “preserve the rights of the parties with respect to the statute of limitations, as those rights were in effect on the date the referenced lawsuit was originally commenced, November 17, 1995.” However, the tolling

agreement says nothing about preserving issues regarding sufficiency of process. We conclude that the tolling agreement is clear and unambiguous and did not preserve any rights regarding sufficiency of process.¹

Koster claims that because the statute of limitations is inextricably intertwined with process issues, the preservation of rights regarding the statute of limitations included preservation of process issues by implication. This argument lacks merit.

Generally, the limitation period in a civil action is tolled when a complaint is filed and a copy of the summons and complaint are served on the defendant. MCL 600.5856(a); *Scarsella v Pollak*, 461 Mich 547, 549; 607 NW2d 711 (2000). Here, the period of limitation was tolled when plaintiff filed the complaint in *Redding I* on November 17, 1995. Because plaintiff received an extension to her summons and served the defendants within the extended period of the summons, the statute of limitations continued to be tolled until *Redding I* was dismissed without prejudice.

Under defendants' theory, no extension should have been granted, resulting in dismissal of plaintiff's complaint without prejudice pursuant to MCR 2.102(E) after February 16, 1996.² The result of the dismissal would be that the period of limitation would begin to run again until a new complaint was filed and defendants were served with that new complaint. However, the language of the tolling agreement not only fails to specifically preserve defendants' rights to renew a challenge to the sufficiency of process in *Redding I*, the language implicitly waived any argument concerning process. First, the tolling agreement allowed plaintiff to refile a complaint without limitation, which would necessarily entail the issuance of a new summons and the service of the summons. Second, the tolling agreement specifically stated that "November 17, 1995 shall be considered the date of commencement for purposes of determining the applicable period of limitations." Therefore, both defendants accepted the date of filing the *Redding I* complaint, November 17, 1995, as the date for a court to consider in any future action regarding whether the period of limitation had expired.

Because the language of the tolling agreement simply does not support a finding that the issue regarding the sufficiency of process in *Redding I* was preserved after the dismissal of the action, the issue could not be presented in *Redding II* where process and service were sufficient, and the trial court erred in granting defendants' motions for summary disposition.

¹ Plaintiff also argues that Koster waived any defense concerning the sufficiency of process by filing a general appearance, requesting a number of extensions from plaintiff to file a response, and by being involved in a scheduling conference and order in *Redding II*. Because we conclude that the tolling agreement in *Redding I* did not permit Koster to raise the sufficiency of process issue in *Redding II*, we decline to address this argument.

² This assumes that plaintiff would not have served defendants by February 16, 1996, if her motion to extend the summons had been denied. We believe that scenario to be highly unlikely.

We need not address the remaining issues presented on appeal, including the retroactive applicability of *Bush, supra*, because defendants waived or failed to preserve objections to the sufficiency of process.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Martin M. Doctoroff
/s/ Helene N. White