By Steve Sowell

Service of Process and the Statute of Limitations©

Tuning the Standards

Recent developments in case law, statute, and court rule have all combined to fine tune the standards for service of process. Changes to MCR 2.102 may have increased the standards for issuance of a second summons and a recent case clarifies that a third summons may not be issued. On a separate but related topic, long-standing case law interpreting MCL 600.5856 has been overruled, while a recent amendment to the statute has the practical effect of overruling the overruling. These developments portend a need for litigators to pay more attention to the mechanics of service of process.

Obtaining a Second Summons

MCR 2.102(D) currently provides that a summons expires 91 days after the date the complaint is filed, but that "on a showing of due diligence by the plaintiff in attempting to serve the original summons" the judge may order a second summons to issue for a definite period not exceeding one year from the date the complaint was filed. Prior to 2004, the rule allowed the judge to order a second summons "on a showing of good cause." Prior to 1991, the rule provided that an initial summons was good for up to 182 days from the date of filing of the complaint. While the 1991 amendment shortened the life of the initial summons, neither amendment shortened the potential duration of a second summons; the maximum length remains one year from the date the complaint was filed.

Two summonses are it; a third summons may not issue.[1] Upon expiration of the second summons, the case is deemed dismissed without prejudice as to a defendant not served, unless he has submitted to the court's jurisdiction.[2] It is the judge's order that allows a second summons to issue. As long as the order is granted within the initial 91 days, the court clerk may issue a summons based upon that order even if the summons is not issued until after the initial 91 days has run.[3]

Is the change from "a showing of good cause" to a "showing of due diligence by the plaintiff in attempting to serve the original summons" a substantive change? Probably not; the staff comments to the 2004 amendment indicate that the change makes the court rule consistent with *Bush v Beemer*[4] in contrast to *Richards v McNamee*,[5] two cases that considered the circumstances under which a second summons should be issued.

In *Bush,* the plaintiff sued for medical malpractice, but made no attempt to serve the defendants within the initial 91 days. Upon ex-parte motion, the court granted second summonses 10 days before the initial summons expired. The plaintiff thereafter served the defendants, who all filed motions for summary disposition on the basis that there was no good cause for issuance of the second summonses and (since the case was not served within the initial 91 days) the case was deemed dismissed pursuant to MCR 2.102(E). The motions were granted, the case was dismissed, and the court of appeals affirmed.

The plaintiff argued her attorneys needed additional time after the filing of the complaint to determine whether she had a meritorious claim, thus delaying service.[6] The court rejected this argument: "due diligence under MCR 2.102(D) means diligent efforts in trying to serve process, not diligence in matters logically preceding the decision to serve process." Determining the merit of the plaintiff's claim should have been done before the case was filed, not after. Once a case is filed, the plaintiff must actually try to serve the defendants, or a second summons should not issue.

In *Richards,* the issue was identical. The plaintiff sued her former lawyers on a theory of malpractice, but failed to serve within the initial 91 days. A second summons was issued and served improperly, and the case was dismissed by the clerk for lack of service. The plaintiff filed a motion to reinstate the case and the defendants filed opposing briefs, arguing that the second summons should not have been issued. The trial court upheld the dismissal and the court of appeals affirmed. Curiously, however, this panel of the court of appeals indicated that it would have reversed had it not been bound by MCR 7.215(H)(1) to follow *Bush.*

Fast Facts

The more general good cause requirement has been eliminated, and the new rule explicitly requires due diligence in attempting to serve as a precondition to the issuance of a second summons.

Once the decision is made to file suit, the court rule dictates the plaintiff demonstrate to the judge he has attempted to serve the defendant before a second summons will be issued.

In *Richards,* the delay in service of process was due to both settlement negotiations with the defendant attorneys and because a ruling on a summary disposition motion in the action underlying the malpractice claim had not been issued as of the expiration of the summons. The *Richards* panel indicated it believed good cause could be more than simply due diligence in attempting to serve process, and the reasons advanced by the plaintiff would have been sufficient had the panel not been bound by *Bush.*

The change in the court rule should lay to rest any hope that the *Richards* view might someday prevail: the more general good cause requirement has been eliminated, and the new rule explicitly requires due diligence in attempting to serve as a precondition to issuance of a second summons.

Clearly, the failure to make any attempt at service is not due diligence, but what efforts must a plaintiff make in order to demonstrate due diligence? In an unpublished opinion, *Palmer v Asta Credit Corp,*[7] the plaintiff attempted not only to serve the defendant but to skip-trace the defendant when the initial address turned out to be invalid prior to requesting a second summons. The trial court denied the motion and the case was dismissed. In overturning the trial court decision, the court of appeals quoted approvingly from Michigan Court Rules Practice:[8] "common sense, the realities of legal practice, and MCR 1.105 . . . all dictate that, under ordinary circumstances, a party's request that a second summons issue should be granted by the court on only a minimal showing of good cause, and that the court should focus its discretion more on the question of what will be the expiration date of the second summons." The efforts of the plaintiff in *Palmer,* however, were significantly more than minimal; the plaintiff filed an 18 paragraph affidavit detailing extensive efforts to locate and serve the defendant, an out of state corporation.

Once the decision is made to file suit, the court rule dictates that the plaintiff demonstrate to the judge that he has attempted to serve the defendant before a second summons will be issued. It would behoove the prudent attorney not to become the test case that determines the bare minimum of due

diligence; if initial attempts at service are unsuccessful, the attorney should make some extra effort to locate and serve the defendant.

Filing, the Summons, and the Statute of Limitations

What effect does the filing of a complaint and the issuance of a summons have on a statute of limitation? MCL 600.5856(a), as amended effective April 22, 2004, provides:

> *The statutes of limitations or repose are tolled in any of the following circumstances:*
>
> *(a) At the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules.*

Under (a), the statute of limitations is tolled upon the filing of the complaint *IF* the complaint is subsequently served on the defendant within the time set forth in the supreme court rules. Thus, if the complaint is filed on the last day of the statute of limitations, the plaintiff still has that time provided by MCR 2.102 to serve the defendant. As noted above, a summons is good for 91 days from the date of filing of the complaint and may be extended for up to one year from the date of filing if the plaintiff can establish due diligence in attempting to serve the complaint. As long as the defendant is served prior to expiration of the summons, the complaint is not barred by the statute of limitations even though service may occur after the statute would have otherwise expired.

The law was not always so clear-cut. Prior to amendment, MCL 600.5856 provided:

> *The statutes of limitations or repose are tolled:*
>
> *(a) At the time the complaint is filed and a copy of the summons and complaint are served on the defendant.*
>
> . . .
>
> *(c) At the time the complaint is filed and a copy of the summons and complaint in good faith are placed in the hands of an officer for immediate service, but in this case the statute is not tolled longer than 90 days after the copy of the summons and complaint is received by the officer.*

Under this prior version, the statute of limitations was tolled only if the summons and complaint were actually served before the limitation expired or if the summons and complaint were placed in the hands of an officer for service, but then only for an additional 90 days. However, the Michigan Supreme Court had a unique interpretation of this statute.

The new version of MCLA 600.5856 also has the effect of promoting judicial economy.

In deciding whether an action is timely, the court need only look at objective facts: the date the cause of action accrued, the appropriate limitation period, and the date the complaint was filed.

In *Buscaino v Rhodes,*[9] the Michigan Supreme Court eviscerated this prior version, holding that a statute of limitation is tolled upon the filing of the complaint, regardless of when the summons is served. MCL 600.5856(c) applied, in the court's view, only to cases previously filed, which were dismissed on other than the merits. While this ruling had the effect of establishing fundamentally the same rule as the new statute, *Buscaino* was overruled in *Gladych v New Family Homes.*[10] *Gladych* held that the statute means what it says: the running of the statute of limitations continues notwithstanding the filing of a complaint, unless the plaintiff either actually serves the defendant before the limitation expires or the plaintiff both places the summons and complaint in the hands of a process server for service (in good faith) and the summons and complaint are actually served within 90 days of filing.

The new version of MCLA 600.5856 has the practical effect of reinstating *Buscaino;* the statute is tolled when a timely complaint is filed, as long as the complaint is served prior to the expiration of the summons. The new version also has the effect of promoting judicial economy. In deciding whether an action is timely, the court need only look at objective facts: the date the cause of action accrued, the appropriate limitation period, and the date the complaint was filed. If the complaint was filed prior to the expiration of the limitation (and assuming it is served before the summons expires), the complaint is timely. Under the prior version, a court might, if service is made after the statute has run, need to make a more subjective determination of whether the plaintiff used good faith in forwarding pleadings.

These recent developments are evolutionary rather than revolutionary, clarifying some basic concepts regarding service and the statute of limitations. When viewed from a historical perspective, they continue an identifiable trend of shifting investigation of the validity of a claim, the applicable statute of limitations, and the whereabouts of the defendants to the pre-filing phase of a lawsuit and concentrating the efforts of the attorney post-filing on the mechanics of the suit itself. ✦

Steve Sowell is an attorney practicing in Mount Clemens, concentrating on real estate and creditors' rights. In his free time (and with five children there isn't much of that) he enjoys photography.

Footnotes

1. *Hyslop v Wojjusik,* 252 Mich App 500, 652 NW2d 517 (2002).
2. MCR 2.102(E)(1).
3. *Moriarity v Shields,* ___ Mich App___, ___ NW2d ___, 2004 WL 241528 (2004).
4. 224 Mich App 457, 569 NW2d 636 (1997).
5. 240 Mich App 444, 613 NW2d 366 (2000).
6. The complaint was filed on the last day before PA 78 of 1993 (tort reform) took effect.
7. 1997 WL 33344735 (Mich App).
8. 1 Martin, Dean & Webster, Michigan Court Rules Practice, 1996 pocket part, p 28.
9. 385 Mich 474, 189 NW2d 20 (1971).
10. 468 Mich 594, 664 NW2d 70 (2003).