

The Illinois Supreme Court has ruled that in determining whether plaintiff was reasonably diligent under Rule 103(b), the trial court is not to consider the time when the case is voluntarily dismissed. Lawyers are nonetheless discouraged from taking any action that would demonstrate a lack of reasonable diligence, such as withholding summons upon filing a lawsuit.

Recent Supreme Court Ruling Clarifies That Time A Case Is Voluntarily Dismissed Is Not Calculated In Determining Reasonable Diligence Under Rule 103(b), But Plaintiffs Should Be Careful Not To Take Any Action That Demonstrates A Lack Of Reasonable Diligence, Such As Withholding Summons At Time Of Filing Lawsuit

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In the recent case of *Case v. Galesburg Cottage Hospital*, 227 Ill.2d 207, 880 N.E.2d 171 (2007), the Illinois Supreme Court clarified that the time period while a case is voluntarily dismissed is not to be calculated in determining whether plaintiff has exercised reasonable diligence in service of process under Rule 103(b). Nonetheless, instead of simply reversing and remanding the case, the Court reversed and remanded “with instructions to reconsider defendants’ motion to dismiss plaintiffs’ complaint” under Rule 103(b). Thus, this case is an important reminder of the need to exercise reasonable diligence in service and to avoid taking action that may be construed as a lack of diligence.

In *Case*, on April 25, 2003, plaintiffs filed a medical malpractice complaint against Galesburg Cottage Hospital and other medical providers for treatment rendered on May 1, 6 and 14, 2001. *Case*, 227 Ill.2d at 209, 880 N.E.2d at 173. The complaint did not have an attached medical report as required by 735 ILCS 5/2-622(a), but did attach an attorney’s affidavit requesting 90 days to file a report per section 2-622(a)(2). At the time plaintiffs filed their complaint, plaintiffs instructed the clerk not to issue summons. Consequently, no summons was issued on any defendant. *Id.*, 227 Ill.2d at 209-10, 880 N.E.2d at 173.

On May 20, 2003, plaintiffs voluntarily dismissed their lawsuit pursuant to 735 ILCS 5/2-1009. *Id.*, 227 Ill.2d at 210, 880 N.E.2d at 173. Thus, the case was pending only 25 days prior to being voluntarily dismissed.

Approximately eleven (11) months later, on April 12, 2004, plaintiffs refiled their complaint pursuant to 735 ILCS 5/13-217. Plaintiffs effected service on all defendants by April 26, 2004 or within 14 days of the refiling. *Case*, 227 Ill.2d at 210, 880 N.E.2d at 173. When defendants learned that plaintiffs had previously filed their complaint and had purposely withheld issuing summons, defendants moved to withdraw their previously filed answer to the complaint and filed a motion to dismiss pursuant to Illinois Supreme

Court Rule 103(b) for lack of reasonable diligence in serving process. *Id.*, 227 Ill.2d at 211, 880 N.E.2d at 174.

The trial court concluded that plaintiffs had violated Rule 103(b) and dismissed with prejudice plaintiffs' complaint. *Id.* In reaching its decision the trial court calculated the time period while the case was dismissed in determining whether plaintiffs exercised reasonable diligence in service of process. The trial court further relied on dicta in the First District decision in *Lewis v. Dillon*, 352 Ill.App.3d 512, 816 N.E.2d 715 (1st Dist. 2004), in which the appellate court affirmed a trial court's Rule 103(b) dismissal where plaintiff's attorney had withheld summons and then voluntarily dismissed the case due to the inability to obtain a section 2-622 report. *Case*, 227 Ill.2d at 211-12, 880 N.E.2d at 174.

In a Rule 23 Order, the Third District Appellate Court affirmed the trial court's decision. *Case*, 227 Ill.2d at 212, 880 N.E.2d at 174. Justice Lytton dissented stating: "In order to accomplish the purpose of both *Supreme Court Rule 103(b)* and *section 13-217* of the Code, courts must consider a plaintiff's diligence prior to dismissal and after refileing but not the period in between when no complaint exists." *Id.* The supreme court accepted plaintiffs' petition for leave to appeal and reversed the appellate and trial court's decisions.

The supreme court held "that the time that elapses between the dismissal of a plaintiff's complaint and its refileing pursuant to *section 13-217* is not to be considered by a court when ruling on a motion to dismiss for violation of *Rule 103(b)*. In this case, the circuit court improperly included this passage of time in reaching its conclusion that plaintiffs did not serve defendants with reasonable diligence." 227 Ill.2d at 222, 880 N.E. 2d at 180.

With that said, although the supreme court preserved a plaintiffs' absolute right to refile within one year of a voluntary dismissal, the plaintiffs' duty to exercise reasonable diligence in effecting service per the dictates of Rule 103(b) was not lessened. The Court by no means excused Plaintiffs' decision to withhold the issuance of summons at the inception of the case. Instead, the Court noted that the length of time used to obtain service of process on defendants is only one factor the court is to consider on a Rule 103(b) motion to dismiss, and reiterated that circuit courts are to consider the passage of time in relation to all the other facts and circumstances of the case. Thus, the supreme court reversed and remanded the case "with instructions to reconsider defendants' motion to dismiss plaintiffs' complaint without including the period of time between its dismissal and its refileing." 227 Ill.2d at 222, 880 N.E.2d at 180.

Clearly then, the *Case* decision, although favorable to plaintiffs, provides a warning about the consequences of taking any action, such as withholding of summons, which may be construed as a lack of reasonable diligence in service of summons under Rule 103(b). We must be mindful that there is no bright line rule on the length of time a party may delay in issuing summons and effecting service of summons and still be considered to have exercised reasonable diligence under Rule 103(b). The trial court is

invested with enormous discretion in determining if the plaintiff exercised reasonable diligence in light of all the relevant facts and circumstances. Given the *Case* decision, plaintiff attorneys should no longer consider the option of withholding summons no matter how short the delay. The more prudent course would be to simply file suit and then shortly thereafter voluntarily nonsuit.