

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert D. Heckman, :
Appellant :
v. : No. 1229 C.D. 2014
: Submitted: February 13, 2015
William Sanchez and Rush Township :
Board of Supervisors :

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE PELLEGRINI FILED: March 11, 2015

Robert D. Heckman (Heckman) appeals the order of the Schuylkill County Court of Common Pleas (trial court) granting the summary judgment motion of William Sanchez (Sanchez) and Rush Township (Township) Board of Supervisors (Township Board) and dismissing Heckman's complaint with prejudice. We affirm.

On June 25, 2007, the Township Board voted to terminate Heckman's employment as a CDL Driver and Laborer for the Township. On June 25, 2009, Heckman initiated a civil action against the Township Board and one of its

members, Sanchez, by filing a Praecipe for a Writ of Summons.¹ In February 2010, Heckman filed a Praecipe to Reinstate the Writ of Summons and the Township was served with the writ by the Schuylkill County Sheriff in March 2010. In March 2011, the Township moved to dismiss for lack of prosecution which was denied by the trial court in May 2011.

In August 2011, Heckman filed a Complaint to bring an action under 42 U.S.C. §1983 (Section 1983) by claiming that the events surrounding his discharge have “stigmatized” him and have “caused him to be the object of scorn and ridicule,” “thereby violating [his] liberty interest in his good name in violation of the Fourteenth Amendment to the United States Constitution.” (Reproduced Record (RR) at b7). In September 2011, the Township filed Preliminary Objections seeking to dismiss the Complaint for lack of subject matter jurisdiction under 28 U.S.C. §1331 (Section 1331)² that the trial court overruled, noting that state courts have concurrent jurisdiction over Section 1983 actions. In March 2012, Sanchez and the Township Board filed an Answer with New Matter³

¹ Pa. R.C.P. No. 1007 states that “[a]n action may be commenced by filing with the prothonotary (1) a praecipe for a writ of summons, or (2) a complaint.” Pa. R.C.P. No. 401(a) states that “[o]riginal process shall be served within the Commonwealth within thirty days after the issuance of the writ or the filing of the complaint.” Pa. R.C.P. No. 401(b)(1) states that “[i]f service within the Commonwealth is not made within the time prescribed by subdivision (a) of this rule . . . , the prothonotary upon praecipe and upon presentation of the original process, shall continue its validity by reissuing the writ or reinstating the complaint....”

² Section 1331 states that “[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”

³ This Court has noted:

(Footnote continued on next page...)

alleging, *inter alia*, that the claim raised in Heckman’s Complaint is barred because it was not brought within the two-year statute of limitations.⁴

After discovery was completed, the Township Board filed a Motion for Summary Judgment alleging, *inter alia*, that the Section 1983 action is time-barred because Heckman did not make a good faith attempt to effectuate service of the Writ of Summons within 30 days of its issuance which was needed to toll the running of the statute and to preserve the cause of action within the two-year period. On the merits, Sanchez and the Township Board alleged that the matter must be dismissed because: Heckman failed to request a name-clearing hearing; there is no evidence that they published false and stigmatizing comments about him or did so through implementing an official policy, custom or practice; and

(continued...)

Pa. R.C.P. No. 1030(a) provides that “all affirmative defenses including ... statute of limitations ... shall be pleaded in a responsive pleading under the heading of ‘New Matter’.” A statute of limitations defense must “be raised as an affirmative defense by filing new matter and not as a preliminary objection.” Thus, the City properly raised its statute of limitations defense in its new matter.

Daniel v. City of Philadelphia, 86 A.3d 955, 958 (Pa. Cmwlth. 2014) (citation omitted).

⁴ “With respect to claims pursuant to [Section] 1983, the Supreme Court has concluded that such claims are best characterized as personal injury actions for purposes of state statutes of limitations. *Wilson v. Garcia*, 471 U.S. 261 (1985). As such, claims which are brought pursuant to [Section] 1983 are also subject to a two-year statute of limitations in Pennsylvania. *See* 42 Pa. C.S. §5524.” *Burger v. Borough of Ingram*, 697 A.2d 1037, 1041 (Pa. Cmwlth. 1997).

Sanchez has qualified immunity from liability because his actions were limited to voting for Heckman's discharge.

In January 2014, Heckman filed a Motion to Amend Complaint to add an additional Section 1983 count based on a violation of his Fourteenth Amendment procedural due process rights and a claim under Section 510 of the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1140 (Section 510), because he was terminated to prevent him from vesting and obtaining retirement and severance benefits owed him under an ERISA retirement plan.⁵ (RR at c6-c9, c11-c12). At argument on the Motion for Summary Judgment, Heckman withdrew the Section 510 ERISA claim. (SRR at 55b).

⁵ As explained by a federal District Court:

The statute of limitations for claims under [Section] 510 of ERISA “is determined by reference to the state statute of limitations governing cases most analogous to the cause of action asserted by the plaintiffs.” In *Anderson v. Consolidated Rail Corp.*, 297 F.3d 242, 252 (3d Cir. 2002), the Third Circuit applied a two-year statute of limitations to a [Section] 510 claim on the ground that the claim was “most analogous to a wrongful discharge” under Pennsylvania law. In *Anderson* and in this case, “the ‘gravamen’ of the alleged violation is that the plaintiff[] ‘[was] singled out for adverse treatment’ so as to prevent [him] from receiving retirement-related benefits.” Thus, the two-year statute of limitations applied in *Anderson* governs plaintiff’s [Section] 510 claim.

Grosso v. Federal Express Corporation, 467 F.Supp.2d 449, 457 n.5 (E.D. Pa. 2006) (citations omitted).

The trial court granted the Motion for Summary Judgment and dismissed Heckman's Complaint with prejudice, finding that it was without jurisdiction due to the running of the applicable two-year statute of limitations because Heckman failed to make a good-faith effort to timely serve the Praecipe for a Writ of Summons within the two-year limitations period.⁶ The trial court also

⁶ The trial court found:

The original writ was issued to Heckman on June 25, 2009. The record is devoid of activity until February 25, 2010, eight months later, when Heckman had the writ reissued.... Heckman asked the sheriff to serve the writ on March 18, 2010, some nine months after the original writ was issued. The writ was served on the [Township Board] on March 25, 2010 and on [] Sanchez on March 26, 2010. The Complaint containing the cause of action against the Defendants was not filed until August 25, 2011, after the Prothonotary praeciped Heckman to file a complaint.

[]The Complaint alleges that Heckman was fired on June 25, 2007. Heckman argues that there was no inordinate delay in this case and that [he] "certainly exercised reasonable efforts to complete service on his complaint[.]" Heckman does not state what those efforts were, and the docket reflects a complete lack of activity for eight months after filing the initial writ. It strains belief to imagine that Heckman made any reasonable effort to serve the Defendants, one of whom is the Board of a local municipality with its offices within Schuylkill County. Rather, it appears that Heckman believed that by filing the writ, and then reinstating it eight months later, he preserved his action and the statute of limitations would toll, regardless of lack of service. Unfortunately for Heckman, the record is devoid of any evidence of a good faith effort to serve the writ until March 18, 2010, long after the statute of limitations had run on his action.

(RR at f6-f7). The trial court properly relied on the docket entries and was not required to conduct an evidentiary hearing because Heckman never requested one, and he has never alleged that he attempted or served the initial writ within 30 days of its issuance or within the limitations period or that Sanchez or the Township Board had actual knowledge of its existence. *Miller v. (Footnote continued on next page...)*

denied his Motion to Amend Complaint as moot because it was without jurisdiction over the action.

On appeal,⁷ Heckman claims that the trial court erred in dismissing the Complaint because there was no inordinate delay and he exercised reasonable efforts to effectuate service so the two-year limitations period was tolled until service was ultimately perfected nine months after it had run.⁸ He also asserts that because leave to amend pleadings is to be liberally granted,⁹ the trial court erred in denying his request to amend the Complaint to add the Section 510 ERISA claim because it has a four-year statute of limitations.

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Klink, 871 A.2d 331, 335-36 (Pa. Cmwlth. 2005); *Moses v. T.N.T. Red Star Express*, 725 A.2d 792, 797 (Pa. Super.), *appeal denied*, 739 A.2d 1058 (Pa. 1999).

⁷ When reviewing the trial court's order granting summary judgment, this Court's scope of review is limited to determining whether the trial court committed an error of law or an abuse of its discretion. *Dwight v. Girard Medical Center*, 623 A.2d 913 (Pa. Cmwlth. 1993). Summary judgment may be granted only in the clearest of cases and is appropriate only where there are no genuine issues of material fact and the movant clearly establishes that it is entitled to judgment as a matter of law. *Id.*

⁸ As a corollary to this claim, Heckman argues that the trial court's denial of Sanchez's and the Township Board's Motion to Dismiss for lack of prosecution somehow translates into a determination that he made a good-faith effort to serve them with the writ. To the contrary, the trial court made no such determination and denied the motion in a four-line order, (SRR at 3b), and Heckman does not allege or demonstrate what good-faith effort was made after the writ was initially issued in June 2009 and within the two-year statute of limitations or that Sanchez or the Township Board had any notice of the commencement of the action before March 2010 when they were served with the reissued writ.

⁹ *See* Pa. R.C.P. No. 1033 ("A party ... by leave of court, may at any time change the form of action ... or amend his pleading....").

As noted above, Pa. R.C.P. No. 401(a) requires service “within the Commonwealth within thirty days after the issuance of the writ or the filing of the complaint,” and Pa. R.C.P. No. 401(b)(1) provides that if service is not made within the required time, “the prothonotary upon praecipe and upon presentation of the original process, shall continue its validity by reissuing the writ or reinstating the complaint....” While there is no mechanical approach to be applied in determining what constitutes a good-faith effort to serve process, for purposes of tolling the statute of limitations, it is a plaintiff’s burden to demonstrate that his or her efforts were reasonable. *Englert v. Fazio Mechanical Services, Inc.*, 932 A.2d 122, 125 (Pa. Super.), *appeal denied*, 938 A.2d 1053 (Pa. 2007) (citation omitted).

In *Lamp v. Heyman*, 366 A.2d 882, 889 (Pa. 1976), the Supreme Court held that “a writ of summons shall remain effective to commence an action only if the plaintiff then refrains from a course of conduct which services to stall in its tracks the legal machinery he has just set in motion.” As a result, “*Lamp* requires of plaintiffs a good faith effort to effectuate notice of commencement of the action.” *Farinacci v. Beaver County Industrial Development Authority*, 511 A.2d 757, 759 (Pa. 1986).

As this Court has recently explained:

[I]n *Lamp*, our Supreme Court ... require[d] a plaintiff to promptly serve the complaint [and] not to prevent or delay service. The Supreme Court stated that failure to promptly notify the defendants results in nullification of the commencement of the action. *Lamp*, [366 A.2d at 889; see also *Farinacci*, 511 A.2d at 759] (requiring plaintiff to make “a good-faith effort to effectuate notice of commencement of the action”); *Moses*, [725 A.2d at

797] (finding a plaintiff's failure to make a good-faith effort to serve the defendant will nullify both the commencement of the action and the tolling of the statute of limitations). Therefore, in order to toll the statute of limitations, the plaintiff must make a good-faith effort to serve the complaint in a timely manner. *Devine v. Hutt*, 863 A.2d 1160, 1167-68 (Pa. Super. 2004); *see also Miller*[, 871 A.2d at 336] (holding that a "single attempt to serve ... did not constitute a good faith effort").

Daniel, 86 A.3d at 957.¹⁰

The record in this case shows that Heckman made no attempt to serve the first writ on Sanchez or the Township Board of the commencement of the action within the 30-day period required by Pa. R.C.P. No. 401(a) or within the two-year statute of limitations that expired in June 2009. Heckman only made a single attempt to serve Sanchez and the Township Board with the writ after it was reissued under Pa. R.C.P. No. 401(b)(1) in March 2010, nine months after the limitations period had expired. Even though the Writ of Summons was filed within the limitations period, Heckman's failure to make a good-faith effort to serve Sanchez and the Township Board with the writ did not toll the statute of

¹⁰ *See also Watts v. Owens-Corning Fiberglass Corp.*, 509 A.2d 1268, 1270-71 (Pa. Super. 1986), *appeal denied*, 522 A.2d 559 (Pa. 1987) (holding that the statute of limitations was not tolled where the plaintiff did not deliver the writ to the sheriff for service within 30 days of its issuance, even though the plaintiff's inaction was not due to bad faith or an overt attempt to delay and the defendants did not allege any prejudice caused by the delay). *But cf. McCreesh v. City of Philadelphia*, 888 A.2d 664, 674 (Pa. 2005) (holding that a plaintiff satisfies his or her obligation to make a good-faith effort to give notice of the commencement of an action when the defendant has actual notice of its commencement and is not otherwise prejudiced).

limitations and the trial court did not err in granting summary judgment and dismissing the Complaint with prejudice on that basis.¹¹

Likewise, the trial court did not err in denying Heckman's Motion to Amend Complaint to add the Section 510 ERISA claim because Heckman withdrew this cause of action at the hearing on the Motion for Summary Judgment. Moreover, as outlined above, the Section 510 ERISA claim had the same two-year statute of limitations as his Section 1983 claims, *Grosso*, and Heckman sought leave to amend the Complaint after the limitations period had expired in June 2009. "[A]n amendment to the pleadings introducing a new cause of action will not be permitted after the statute of limitations has run in favor of [the] defendant." *M.R. Mikkilineni v. Amwest Surety Insurance Co.*, 919 A.2d 306, 313 (Pa. Cmwlth.), *appeal denied*, 932 A.2d 1290 (Pa. 2007) (citation omitted).

Accordingly, the trial court's order is affirmed.

DAN PELLEGRINI, President Judge

¹¹ See *Daniel*, 86 A.3d at 957 ("Daniel validly commenced her action when she filed her complaint on May 22, 2012, just within the two-year limit. However, Daniel concedes that she did not attempt to serve this complaint on the City. As such, Daniel failed to toll the statute of limitations. Daniel reinstated the complaint on January 29, 2013, after the statute of limitations had expired.") (citation to record omitted).

