UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2349

September Term, 2014

RONALD DAWSON

v.

JOSH CROSSLEY

Graeff,
Reed,
Zarnoch, Robert A.
(Retired, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: December 17, 2015

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This appeal is from an Order issued by the Circuit Court for Baltimore City dismissing for insufficient service of process the appellant's negligence action against the appellee. The appellant presents a single question for our review, which we rephrased:[1]

> 1. Did the circuit court abuse its discretion where it granted the appellee's Motion to Dismiss for Insufficiency of Service of Process?

For the following reasons, we answer this question in the negative. Therefore, we affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On October 21, 2010, the appellant and appellee, along with a phantom vehicle, were involved in an automobile collision on the northbound side of Interstate 895 in Baltimore City, Maryland. Exactly three years later, on October 21, 2013, the appellant filed a negligence action in the Circuit Court for Baltimore City against the appellee. This action, which arose from the October 21, 2010, collision, was filed on the final day before the running of the statute of limitations for civil negligence actions.

On March 13, 2014, because service had not been made in accordance with the Maryland Rules, the circuit court issued a Notice of Contemplated Dismissal directing the appellant to file, within 30 days, a written motion showing good cause as to why dismissal should be deferred. The appellant responded on April 1, 2014, with a Motion to Defer Dismissal. In that motion, the appellant cited ongoing settlement negotiations as good

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[1] Appellant presented the following question *verbatim*:

> 1. Was the Trial Court's ruling that the case be dismissed for insufficient service appropriate?

cause for deferment and requested a reissuance of the summons. The circuit court, by Order dated June 10, 2014, granted the appellant's motion and deferred dismissal until September 8, 2014. The Order warned, however, that "[i]f service has not been made on the [appellee] by [September 8th], the clerk shall enter on the docket 'Dismissed for lack of jurisdiction without[2] prejudice' immediately[.]"

The appellant's process server attempted to serve the appellee on September 8, 2014, by posting a copy of the Summons and Complaint on the appellee's property. However, because the act of posting on one's property does not constitute service under Md. Rule 2-121, the appellee, on October 16, 2014, filed a Motion to Dismiss for Insufficiency of Service of Process. Also on October 16, 2014, the appellant sent a copy of the Summons and Complaint to the appellee by Restricted Signature Certified Mail, which is one of the three modes of service allowed under Rule 2-121(a). On October 23, 2014, the appellant filed a response to the appellee's motion to dismiss. The appellant alleged in his response that he had difficulty locating the appellee's address, that he posted the Summons and Complaint to the appellee's property upon discovering said address, and that the appellee "is not harmed due to proper service having been made [on October 16th]." The appellee filed a reply[3] to "contest[] the [appellant's] claim that he had a difficult time locating the [address]." The appellee's reply indicated that the address, which remained

[2] The appellee correctly points out that "given the posture of the case, and that it was filed on the day limitations ran, any dismissal would effectively be *with* prejudice."

[3] This reply was entitled Defendant's Reply to Plaintiff's Response to Motion to Dismiss for Insufficiency of Service of Process.

unchanged at all relevant times, is "clearly listed on the police report which was generated in response to the occurrence in question." The circuit court granted the appellee's Motion to Dismiss for Insufficiency of Service of Process by Order dated November 20, 2014, and on December 18, 2014, the appellant filed a timely Notice of Appeal.

DISCUSSION

I. DISMISSAL FOR INSUFFICIENT SERVICE OF PROCESS

A. Parties' Contentions

The appellant argues "that the dismissal of the case without prejudice was improper due to [his] stated efforts towards service." He correctly states, citing *Reed v. Cagan*, 128 Md. App. 641 (1999), that "[t]he trial court has discretion [under Rule 2-507(b)] to dismiss for lack of jurisdiction[,] and its decision will only be overturned on appeal in extreme cases of clear abuse and discretion." He also correctly points out, this time citing *Langrall, Muir & Noppinger v. Gladding*, 282 Md. 397 (1978), that "[a] prerequisite to [the] trial court's discretion in suspending automatic dismissal of [an] action for lack of prosecution is a showing of good cause which must be evidenced by a display of diligence to prosecute [the] case during [the] period of alleged inaction." The appellant asserts that just as his first request for deferral of dismissal was supported by ongoing negotiations that showed promise of resulting in a settlement, so too was his second request for deferral grounded in good cause: the fact that he had difficulty confirming the appellee's address. The appellant contends that "[s]imultaneously" with confirming the address with the appellee's property manager, service was "attempted and ultimately achieved . . . through restricted delivery." The appellant argues that the lack of an address for the appellee on the Complaint proves

it was unknown to him "at some time during the resolution of the case." Therefore, the appellant prays we reverse the judgment of the circuit court granting the appellant's Motion to Dismiss for Insufficiency of Service of Process.

The appellee argues that the circuit court did not err in granting the Motion to Dismiss because "[p]osting of property is not a permissible means of obtaining *in personam* jurisdiction [under Rule 2-121]." The appellee asserts that "the [appellant's] recognition of this failure is what gave rise to the belated attempt at service of process [by Restricted Signature Certified Mail] . . . in accordance with Rule 2-121(a)(3)." The appellee contends that because the appellant failed to meet both the March 13 and September 8, 2014, deadlines for service of process, the circuit court "implicitly concluded that the [appellant] had not acted with any diligence in attempting [service.]" The appellee argues the record is devoid of factual support for the appellant's claim of difficulty in confirming the address. In fact, the appellee asserts the existence of any such difficulty is debunked by the police report from the accident, which has written on it the address where he lived at all relevant times. Citing *Cagan*, the appellee contends that it was within the circuit court's discretion to draw an inference of prejudice, which is what statutes of limitations are designed to prevent, from the fact that there was no justification for the appellant's delay. Finally, the appellee cites *Reed v. Sweeney*, 62 Md. App. 231 (1985), in support of his argument that he did not waive service of process simply because he had notice of the action by virtue of his insurer being engaged in ongoing negotiations with the appellant. The appellee, therefore, asserts that the judgment of the circuit court should be affirmed.

B. Standard of Review

When a party appeals from a dismissal for insufficient service of process, we apply the following standard of review:

> When a party seeks dismissal of an action under Rule 2-507 ("Dismissal for lack of jurisdiction or prosecution"), the decision to grant or deny the dismissal is committed to the sound discretion of the trial court. *See Powell v. Gutierrez,* 310 Md. 302, 309-10, 529 A.2d 352 (1987). The trial court's decision will be overturned on appeal only "in extreme cases of clear abuse." *Stanford v. District Title Ins. Co.,* 260 Md. 550, 555, 273 A.2d 190 (1971). The responsibility is on the trial court to weigh and balance the rights, interests, and reasons of the parties in light of the public demand for prompt resolution of litigation. *See Langrall,* 282 Md. at 400, 384 A.2d 737. The primary focus of the inquiry should be on diligence and whether there has been a sufficient amount of it. *See Stanford v. Dist. Title Ins. Co.,* 260 Md. 550, 555, 273 A.2d 190 (1971). The Court of Appeals has announced that it "is totally committed to the proposition that 'justice delayed is justice denied.'" *Id.* at 554, 273 A.2d 190.

Cagan, 128 Md. App. at 646. In *Tung*, where expounded upon what we said in *Cagan* about Rule 2-507 dismissals being "committed to the sound discretion of the trial court," *id.*:

> "The 'abuse of discretion' standard of review is applicable to the issue of whether an appellate court should *499 reverse the Circuit Court's decision to dismiss an action for 'lack of jurisdiction.'" *Hariri v. Dahne,* 412 Md. 674, 686, 990 A.2d 1037 (2010). " '[T]here is an abuse of discretion where no reasonable person would take the view adopted by the [trial court] ... or when the court acts without reference to any guiding principles.' " *Id.* at 687, 990 A.2d 1037 (internal quotation marks omitted) (quoting *Pasteur, Inc. v. Skevofilax,* 396 Md. 405, 418, 914 A.2d 113 (2007)). "In sum, to be reversed '[t]he decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems

> minimally acceptable.'" *Id.* (quoting *Pasteur, Inc.,* 396 Md. at 419, 914 A.2d 113).

Tung, 221 Md. App. at 498-99.

C. Analysis

Relevant to this appeal is Maryland Rule 2-121(a), which states:

> **Process—Service—In Personam (a) Generally.** Service of process may be made within this State or, when authorized by the law of this State, outside of this State (1) by delivering to the person to be served a copy of the summons, complaint, and all other papers filed with it; (2) if the person to be served is an individual, by leaving a copy of the summons, complaint, and all other papers filed with it at the individual's dwelling house or usual place of abode with a resident of suitable age and discretion; or (3) by mailing to the person to be served a copy of the summons, complaint, and all other papers filed with it by certified mail requesting: "Restricted Delivery--show to whom, date, address of delivery." Service by certified mail under this Rule is complete upon delivery. Service outside of the State may also be made in the manner prescribed by the court or prescribed by the foreign jurisdiction if reasonably calculated to give actual notice.

Rule 2-507, which is also relevant to this appeal, provides:

> **Dismissal for Lack of Jurisdiction or Prosecution (a) Scope.** This Rule applies to all actions except actions involving the military docket and continuing trusts or guardianships.
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> **(b) For Lack of Jurisdiction.** An action against any defendant who has not been served or over whom the court has not otherwise acquired jurisdiction is subject to dismissal as to that defendant at the expiration of 120 days from the issuance of original process directed to that defendant.
>
> **(c) For Lack of Prosecution.** An action is subject to dismissal for lack of prosecution at the expiration of one year from the last docket entry, other than an entry made under this Rule, Rule 2-131, or Rule 2-132, except that an action for limited

> divorce or for permanent alimony is subject to dismissal under this section only after two years from the last such docket entry.
>
> **(d) Notification of Contemplated Dismissal.** When an action is subject to dismissal pursuant to this Rule, the clerk, upon written request of a party or upon the clerk's own initiative, shall serve a notice on all parties pursuant to Rule 1-321 that an order of dismissal for lack of jurisdiction or prosecution will be entered after the expiration of 30 days unless a motion is filed under section (e) of this Rule.
>
> **(e) Deferral of Dismissal.** On motion filed at any time before 30 days after service of the notice, the court for good cause shown may defer entry of the order of dismissal for the period and on the terms it deems proper.
>
> **(f) Entry of Dismissal.** If a motion has not been filed under section (e) of this Rule, the clerk shall enter on the docket "Dismissed for lack of jurisdiction or prosecution without prejudice" 30 days after service of the notice. If a motion is filed and denied, the clerk shall make the entry promptly after the denial.

The issue is whether, after a Notice of Contemplated Dismissal was issued in accordance with Rule 2-507(d), dismissal was deferred under Rule 2-507(e), and the appellant missed the September 8, 2015, deferred dismissal deadline, the circuit court erred in dismissing the case for insufficient service of process. We hold that the circuit court did not so err, and shall explain.

The appellant correctly characterizes both the infrequency with which we overturn Rule 2-507(b) dismissals and the preliminary showing that must be made by a party seeking to have the circuit exercise its Rule 2-507(e) deferral discretion:

> The trial court has discretion to dismiss for lack of jurisdiction and its decision will only be overturned on appeal in extreme cases of clear abuse of discretion[.]

> A prerequisite to [the] trial court's discretion in suspending automatic dismissal of [an] action for lack of prosecution is a showing of good cause which must be evidenced by a display of diligence to prosecute [the] case during [the] period of alleged inaction[.]

Yet, despite the highly deferential standard of review and the utter lack of evidence in the record that the appellant displayed diligence in attempting to serve the appellee prior to the deferred dismissal deadline of September 8, 2014, the appellant would like us to reverse the circuit court for abuse of discretion. As we have already indicated, however, we hold that it was well within the circuit court's discretion to dismiss for insufficient service of process.

We agree with the appellee that "[w]hile the appellant claims to have acted diligently . . . and to have made attempts at service prior to improperly posting the property, the record is devoid of factual support for those allegations." The only indicia of diligence in the record are various bare assertions by the appellant, such as this one contained in his response to the appellee's Motion to Dismiss for Insufficiency of Service of Process: "[T]he Plaintiff had difficulty locating the Defendant." In addition, the appellant argues in his corrected brief that diligence, which is a prerequisite to the circuit court's ability to defer dismissal, *see Langrall*, 282 Md. at 399-400, is evidenced by the fact that his "process server made unsuccessful attempts to serve the complaint[,] . . . later confirmed that the address was correct through communication with the property manager[,] . . . [and] [s]imultaneously . . . attempted and ultimately achieved service through restricted delivery." But there is no evidence in the record as to when the unsuccessful attempts to

serve the complaint before September 8, 2014, were made or why the process server chose to wait until after the deferred dismissal deadline had passed to confirm the appellee's address with his property manager, because after all, the address as of September 8, 2014, was the same as that listed on the police report from the date of the accident. Nevertheless, the appellant would like us to hold that the circuit court was "well removed from any center mark imagin[able]," *Tung*, 221 Md. App. at 499 (internal quotations omitted), when it implicitly determined he was not diligent in achieving service during the period of deferred dismissal.

In *Tung*, the law firm of Conwell Law LLC attempted to sue one of its former attorney employees, another law firm, and one of that firm's employees for legal malpractice. *Id.* at 485. Relevant to the present appeal is that Conwell's claim against its former attorney employee was dismissed for insufficient service of process. *Id.* at 489. After filing its initial complaint on December 16, 2011, "[t]he Firm . . . made no effort to serve the defendants in [the 120-day] time frame or for two months after the 120-day period." *Id.* at 487. Therefore, "[o]n May 24, 2012, . . . the court issued a Notification of Contemplated Dismissal[.]" *Id.* After receiving this Notification but before filing its Rule 2-507(e) response, the firm attempted to serve its former attorney employee by delivering to her an incomplete copy of the complaint. *Id.* at 488. However, because the incomplete copy did not satisfy the service requirements of the Maryland Rules, on August 28, 2012, the court ordered the firm to "re-serve a copy of the Complaint . . . upon [the former attorney employee] and submit a new affidavit of service to the Court within ten (10) days

from the date this Order is docketed. *If [the Firm] fails to comply with this Order, this action will be dismissed.*" *Id.* at 489 (emphasis in original). The firm proceeded to once again attempt service in a manner that did not comply with Rule 121(a) when it re-served the complaint on its former attorney employee's counsel rather than on her directly. *Id.* at 490. The firm was then given yet another chance to properly effectuate service, *id.* at 490-91, but its subsequent failure to do so resulted in dismissal for lack of jurisdiction. *Id.* at 495.

In neither *Tung* nor the present case was the circuit court's dismissal an abuse of discretion. The plaintiff in *Tung* and the appellant both made no efforts to effectuate service within the 120-day window of Rule 2-507(b). However, unlike the plaintiff in *Tung*, the appellant did not attempt to serve the appellee prior to filing his Motion to Defer Dismissal. Instead, the appellant filed that motion, was then given an extra 90 days to effectuate service, and waited until the final day of that 90-day window to make the slightest attempt to serve the appellee. For the circuit court to infer that the appellant was not acting diligently is hardly "beyond the fringe of what [we] deem[] minimally acceptable." *Tung*, 221 Md. App. at 499 (internal quotations omitted). Although the appellant claims to have had difficulty obtaining the appellee's address prior to September 8, 2014, there is no evidence in the record to support that.

Because posting of property is not an acceptable form of service under Rule 2-121(a), the circuit court did not obtain *in personam* jurisdiction over the appellee. *See Id.* at 498-99. The court did not obtain *in personam* jurisdiction by virtue of the appellee's

awareness of the ongoing negotiations between his insurer and the appellant. *See Sweeney*, 62 Md. App. at 237-38 ("Because service of process raises jurisdictional issues and focuses upon the power of a court to exert its authority over a particular party, it cannot be waiver or ignored simply because the defendant had actual notice of the action"). Therefore, and for the reasons stated above, we hold that the circuit court did not abuse its discretion in granting the appellee's Motion to Dismiss for Insufficiency of Service of Process.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.