

STATE OF NORTH DAKOTA

IN THE SUPREME COURT

John M. Hughes,)	
)	Supreme Court No. 20190143
Appellant,)	
)	Stark County No. 45-20185-CV-00495
vs.)	
)	
Olheiser Masonry, Inc., Curt Olheiser,)	
and Harley D. Rapp,)	
)	
Appellee.)	

APPELLANT’S OPENING BRIEF

Appeal from Order Granting Motion to Dismiss – February 22, 2019

The Honorable James Gion, Judge of the District Court
Southwest Judicial District

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STATEMENT OF THE ISSUES

¶1 Whether the District Court erred in granting the Motion to Dismiss filed by the Defendants/Appellee, Olheiser Masonry, Inc., Curt Olheiser and Harley D. Rapp (hereinafter, collectively, “Olheiser”), dismissing the case on the grounds that the applicable statute of limitations was not met. The District Court should have ruled that the applicable Statute of Limitations was satisfied because, pursuant to N.D.C.C. §28-01-38, the Complaint and Summons were timely delivered to the Stark County Sheriff’s Department, which, in turn

STATEMENT OF THE CASE

¶2 The Plaintiff/Appellant, John Hughes (hereinafter “Hughes”), brought a negligence action against the Olheiser Defendants, and which resulted from an automobile accident that occurred on the 24th day of May, 2012 in the City of Dickinson, Stark County, North Dakota. [see App. Pg. 6] The Complaint was filed with the Stark County District Court on the 22nd day of May, 2018. [See App. Pg., 3, Dkt. #1] On the same day, the Complaint and Summons were mailed to the Stark County Sheriff for service on the Defendants. [see App. Pg. 3, Dkt. #5]

¶3 The Defendants were each served personally by the Stark County Sheriff. The service documents on file indicated receipt of the Summons and Complaint on the 31st day of May, 2018, and that both Olheiser Masonry, Inc. and Curt Olheiser were served on the 1st day of June, 2018, while Harley Rapp was served on the 2nd day of June, 2018. [see App. Ppg. 20, 21 and 22]

¶4 On June 14, 2018, a Notice of Appearance was filed on behalf of the Olheiser Defendants, [see App. Pg. 3, Dkt.#9] and shortly thereafter, an Answer was filed on their behalf. [See App. Pg. 3, Dkt. #11] On the 11th day of October, 2018, Olheiser filed its Motion to Dismiss pursuant to Rule 12 of the North Dakota Rules of Civil Procedure. [see App. Pg. 4, Dkt. #'s 20-24] The matter was briefed by the parties and a hearing was held on the 20th day of February, 2019,

following which the Court took the matter under advisement. [see App. Pg. 4, Dkt.#41] Shortly thereafter, the Court issued its Memorandum Opinion dismissing the Complaint. [see App. Pg. 16] Judgment was entered on the 28th day of February, 2019 [see App. Pg. 19], and the Notice of Entry of Judgment was filed and served on the 6th day of March, 2019. [see App. Pg. 4, Dkt. #'s 49 and 49] This appeal was initiated by the filing of the Notice of Appeal, dated May 3, 2019, was timely filed the same day.

STATEMENT OF THE FACTS

¶5 The underlying cause of action resulted from an automobile accident occurred on May 24, 2012. The accident occurred o at the intersection of 6th Avenue SE, at its intersection with East Broadway in Dickinson, North Dakota. Hughes was driving north on 6th Avenue, SE when he was struck by a forklift owned by Olheiser Masonry, Inc. and/or Curt Olheiser, and which was operated by Harley Rapp, an employee of Olheiser Masonry, Inc. [see App. Pg. 6-7, ¶¶5, 6, and 8]

¶6 Hughes raised a negligence claim, alleging injuries as a result of the accident. [see App. Pg. 7, ¶¶9, 10, 11 and 12]

¶7 Hughes filed the Summons and Complaint with the Court on the 22nd day of May, 2018. [see App. Pg. 3, Dkt. #1 and 2] On the same date, he mailed those documents to the Stark County Sheriff for service. [see App. Pg. 4, Dkt. #'s 5, 31 and 32]

¶8 The Sheriff's Return of Service on file with the Court states that the Stark County Sheriff acknowledged receipt of the Summons and Complaint on the 31st day of May, 2018. Olheiser Masonry, Inc. and Curt Olheiser were served on June

¶9 Personal service of the Summons and Complaint was made on Olheiser Masory, Inc. and Curt Olheiser were personally served on June 1, 2018. Harley Rapp was served on June 2, 2018. [see App. Ppg. 20, 21 and 22]

STANDARD OF REVIEW

¶10 The Motion to Dismiss was brought pursuant to Rule 12 of the North Dakota Rules of Civil Procedure. It states, in part, as follows: “If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.” N.D.R.Civ.P. 12(d) In the instant case, matters outside the pleadings were submitted the Court for consideration. These items included the Sheriff’s Return of Service and the Police Report. [see App. Ppg. 20, 21 and 22] Because of that, the standard of review of the Court’s order to dismiss should be the same as with a Motion for Summary Judgment. When appealing a decision on a Motion for Summary Judgment, “[w] hether the district court properly granted summary judgment is a question of law which we review de novo on the entire record.” *Hageness vs. Davis*, 2017 ND 132, 896 N.W.2d 251; ¶19

ARGUMENT

¶11 This is a negligence case. In North Dakota, negligence actions have a six year statute of limitations. See N.D.C.C. §28-01-16. It is undisputed that the Complaint herein was filed with the District Court prior to the expiration of the statute of limitation s date on the 24th day of May, 2018.¹ More particularly, those documents were filed two days prior to the expiration of the applicable statute of limitations. At the same time, the Summons and Complaint were mailed to the Stark County Sheriff for service.

¶12 In North Dakota, “[a] civil action is commenced by the service of a summons.” N.D.R.Civ.P. 3. [see also N.D.C.C. §28-01-38] Merely filing it with the Court is insufficient to commence a civil action. In this case, two of the Defendants were served with the Summons on

¹ A typographical error was made in the complaint, listing the accident date as the 124th day of May, 2012. [see App. Pg. 7, ¶6] Olheiser filed the Police Report along with their Motion, and it correctly lists the date of the accident as May 24, 2012. [see App. Pg. 23]

June 1, 2018, while the third, Harley Rapp, was served on the 2nd day of June, 2018. [see App. Ppg. 20, 21 and 22] Those service dates, obviously, occurred after the expiration of the applicable limitations period of six years. However, the District Court erred by dismissing the action because an exception exists that is applicable in this case.

¶13 N.D.C.C. §28-01-38 sets forth that exception, and it reads as follows:

An attempt to commence an action is equivalent to the commencement thereof within the meaning of this chapter when the summons, with the intent that it shall be actually served, is delivered:

1. To the sheriff or other officer of the county in which the defendants or one of them usually or last resided; or
2. To the sheriff or other officer, if a corporation is defendant, of the county in which was situated the principal place of business of such corporation, or in which its general business was transacted, or in which it kept an office for the transaction of business.

Such an attempt must be followed within sixty days by the first publication of the summons or the service thereof. N.D.C.C. §28-01-38.

The statute requires an “attempt”, and in this case, the statute was satisfied in a manner sufficient to comply with the applicable statute of limitations. Specifically, Hughes delivered the Summons and Complaint to the Sheriff, so that they could be served, when those documents were placed in the mail, addressed the Stark County Sheriff. [see App. Pg. 29] The statute requires that the Summons and Complaint be delivered to the appropriate Sheriff with the “intent that it shall be actually served’. N.D.C.C. §28-01-38. According to the terms of the letter, and the Affidavit, it is clear that the intention was for the Sheriff to serve the Summons and Complaint. Furthermore, it was served as the statute requires.

¶14 By mailing the Summons and Complaint to the Stark County Sheriff, that constituted deliver under N.D.C.C. §28-01-38 so as to be in compliance with the statute of limitations, even though the Defendants did not physically receive the Summons and Complaint until shortly after the May 24, 2018 deadline. A situation similar to the one before the Court in this matter is was

addressed in *Am. Family Ins. & Prairie W. Apts I, L.P. vs. Waupaca Elevator Co.*, 2012 ND 13, 809 N.W.2d 337 (ND). Specifically, in *Am. Family Ins.*, on the last day for the statute of limitations to run, the Plaintiff faxed the Summons and Complaint to the Sheriff and then placed it in the mail the same day. *Am. Family Ins.* at ¶2. In that case, an officer of the Defendant was served several days later, which was after the statute of limitations had run. *Id.* However, the clear import of the Court’s decision is that because the Plaintiff had taken steps to send the Summons and Complaint to the Sheriff’s office by the statute of limitations deadline, and because the clear intent was that the Sheriff was to deliver within 60 days, that constituted delivery within the meaning of the statute. *Am. Family Ins.* at ¶31.

¶15 In the Order Granting Motion to Dismiss, the District Court ruled that the factor distinguishing the situation in *Am. Family Ins.* from the facts in this case is that in the former case, by faxing the Summons and Complaint to the Sheriff on the last day before the statute of limitations expired, that constituted “delivery” as contemplated. The key was that a copy of the documents were in the hands of the Sheriff prior to the expiration of the statute of limitations. However, the Court did not take into account that the Rules of Civil Procedure contemplate that mailing, in a situation such as this, constitutes “delivery” so as to comply with N.D.C.C. §28-01-38, even though it does not constitute deliver so as to comply with the service of process requirements under Rule 4 of the North Dakota Rules of Civil Procedure. Specifically, Rule 5(b)(3) reads: “A document that is not required to be filed, or that will be served on a person exempt from electronic service, is served under this rule by:...(C) mailing it to the person’s last known address, in which service is complete upon mailing.” N.D.R.Civ.P.5(b)(3)(C). Under that Rule, delivery was accomplished when the Summons and Complaint were placed in the mail to the Stark County Sheriff.

¶16 The District Court cited *Sanderson vs. Walsh County*, 2006 ND 83; 712 N.W.2d 842, as support for its determination that the “delivery” requirement set forth in N.D.C.C. §28-01-38, cannot be satisfied merely by placing the Summons and Complaint in the mail. However, that case is distinguishable from the facts of this case. In *Sanderson*, the Supreme Court stated: “The record reflects Sanderson’s only attempted service on Walsh County and the State was the mailing of the summons and complaint by certified mail.” *Sanderson* at ¶15 There, the Plaintiff was attempting to effectuate service by mail, directly, and delivery did not occur until after the applicable limitations period ran. In the instant case, placing the Summons and Complaint in the mail to the Sheriff, prior to the expiration of the limitations period, constitutes delivery so as to comply with the requirements of N.D.C.C. §28-01-38, when read in conjunction with N.D.R.Civ.P. 5, as cited above. The distinguishing factor is that the Summons and Complaint were not mailed directly to the Defendants for the purpose of effecting service directly. Instead, they were mailed to the Stark County Sheriff for service. Under Rule 5, placing the Summons and Complaint in the mail constituted delivery, and the subsequent personal service on Defendants by the Sheriff fell within the applicable limitations period in accordance with N.D.C.C. §28-01-38

CONCLUSION

¶17 The District Court erred in granting Olheiser’s Motion to Dismiss. Because the Summons and Complaint were mailed to the Sheriff of Stark County prior to the expiration of the statute of limitations which applies in this case, and because the Defendants were personally served pursuant to N.D.C.C. §28-01-38, within sixty (60) days after the running of the statute of limitations, the action was timely initiated and should proceed on the merits. For the reasons stated herein, Hughes requests that the Court reverse the District Court decision and allow the case to proceed on the merits.

Dated: June 17, 2019.

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CERTIFICATE OF ELECTRONIC SERVICE

¶18 I certify that on the 17th day of June, 2019, I served the Appellant's Brief and Appellant's Appendix via electronic mail upon the following:

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