Roger Williams University Law Review

Volume 2 | Issue 2 Article 8

Spring 1997

1996 Survey of Rhode Island Law: Cases: Civil Procedure

Mark B. Watson

Roger Williams University School of Law

Civil Procedure. *May v. Penn T.V. & Furniture Co.*, 686 A.2d 95 (R.I. 1996). Joint answer by counsel for employer, in action against employer and employee, did not waive employee's defect of service of process defense, since employee was not client of counsel, and lacked actual knowledge of the action.

Under Rule 4 of the Superior Court Rules of Civil Procedure,[1] service of a summons and complaint "shall be served together" and made:

> [u]pon an individual from whom a waiver has not been obtained . . . by delivering a copy of the summons and complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode . . . or by delivering a copy of the summons and complaint to an agent authorized . . . to receive service . . . .[2]

The rule is to be "followed and construed strictly since jurisdiction of the court over the person of a defendant is dependent upon proper service having been made."[3] Failure to follow the specific procedure set forth in Rule 4 ultimately may result in the dismissal of a complaint for lack of service of process.

FACTS AND TRAVEL

In November of 1989, Thomas May was involved in an automobile accident with an individual whom he later learned was one Joseph Merolla III, an employee of the Penn T.V. & Furniture Company.[4] In February 1991, May filed suit against Penn T.V. for personal injuries suffered in the accident.[5] May later amended his complaint to include Merolla as an additional defendant.[6] Before May was able to serve process on Merolla, counsel for Penn T.V. filed and served a *joint* answer on behalf of Penn T.V. *and* Merolla.[7] Nowhere in this responsive pleading did Penn T.V.'s counsel raise the affirmative defense of insufficient service of process on

---

1. R.I. Super. Ct. R. Civ. P. 4.
2. *Id.*
3. Shannon v. Norman Block, Inc., 256 A.2d 214, 218 (R.I. 1969) (citing Geyer v. Callan Constr. Co., 101 A.2d 876, 877 (R.I. 1954); Home Sav. Bank v. Rolando, 189 A. 27, 29 (R.I. 1937)).
4. May v. Penn T.V. & Furniture Co., 686 A.2d 95, 96 (R.I. 1996).
5. *Id.*
6. *Id.*
7. *Id.* at 96-97.

Merolla.[8] May treated the joint answer as a general appearance by both defendants, and the omission of the insufficient service defense as a waiver of that affirmative defense.[9] Consequently, May never attempted to serve Merolla as required by Rule 4.[10]

Unbeknownst to May or his counsel, sometime after the accident Merolla left Penn T.V.'s employ and departed to an unknown location.[11] At no time was Merolla made aware of the pending lawsuit, nor did he ever authorize Penn T.V.'s attorney to accept service, represent him, or file an answer on his behalf.[12] It was not until May filed a motion for default judgment against Merolla two years later that Penn's attorney, unable to locate his purported client, moved to amend the joint answer to include the earlier omitted affirmative defense of insufficient service of process.[13] Additionally, the attorney moved to dismiss the complaint against Merolla for lack of service of process.[14] Both motions were granted.[15]

BACKGROUND

Other jurisdictions confronting the issue raised in *May* have ruled in a fashion similar to the Rhode Island Supreme Court. The Supreme Court of Vermont has held that, "[a]lthough a general appearance by an attorney cures all defects of service of process . . . when the purported clients have never been given any notice of the pendency of the suit, as is the case here, no unauthorized appearance binds them."[16] Similarly, in a case with a slight variation on the *May* fact pattern, the District of Columbia Court of Appeals rejected a suit where service was made to an attorney who served as counsel in prior litigation, but who was not authorized to bind

8. *Id.*
9. *Id.* at 97.
10. *Id.* Specifically, May relied on *Mack Construction Co. v. Quonset Real Estate Corp.*, 122 A.2d 163 (R.I. 1956). "Inasmuch as it is well settled that by a general appearance a defendant submits himself to the jurisdiction of the court, any failure to serve him with process becomes immaterial." *Id.; see also* 1 Kent, R.I. Civ. Prac. § 12.2, at 109 (1969) ("[A] defendant who simply answers to the merits of a claim thereby consents to the jurisdiction of the court.").
11. *May*, 686 A.2d at 97.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. Batcheder v. Mantak, 392 A.2d 945, 948-49 (Vt. 1978).

his principal by the acceptance of process in the pending suit.[17] As a result, it is important to secure proper authority or consent before representing a client, and to follow the established procedure for service of process as articulated in Rule 4 of the Superior Court Rules of Civil Procedure.

ANALYSIS AND HOLDING

In a colorful opinion replete with literary allusions, the court in *May*, speaking through Justice Flanders, stressed the fact that it was reviewing only the grant of the motion for dismissal.[18] Review of the motion to amend the joint answer was not properly before the court.[19] The court noted, however, that the disposition of the case would be the same whether either motion was at issue.[20]

The court began by reiterating that although Rule 4 provided no specific time limit for completing service of process, it "must be effectuated within a reasonable time following the filing of the complaint, unless a plaintiff can demonstrate that a longer delay was excusable."[21] Since May did not effectuate service of process on Merolla, the court stated that it would have been error for the trial court not to dismiss the action.[22] Even if the case had proceeded to judgment against Merolla, the result would not have been binding

17. McLaughlin v. Fidelity Sec. Life Ins., 667 A.2d 105, 106 (D.C. 1995); *see also* Sington v. Allen, 431 So. 2d 547 (Ala. 1983) (judgment reversed where attorney appeared on behalf of clients who later claimed they never authorized the attorney to receive service, to represent them in a lawsuit or to waive service of process); Schneider v. Buckman, 412 N.W.2d 787 (Minn. Ct. App. 1987), *rev'd on other grounds*, 433 N.W.2d 98 (1988) (implying a duty on the plaintiff's attorney to inquire as to representation when a possible conflict of interest appears to exist between two defendants purportedly represented by the same attorney); Grimsley v. Nelson, 451 S.E.2d 336, 339 (N.C. 1994) (answer filed by an insurer's attorney does not constitute a "general appearance" by the insured, thus preserving affirmative defenses).

18. *May*, 686 A.2d at 97.

19. Review of the motion to amend the joint answer was not requested in the petition for certiorari, nor was a transcript of the proceedings below on that issue provided to the supreme court. *Id.*

20. *Id.*

21. *Id.* (quoting Catone v. Multimedia Concepts, Inc., 482 A.2d 1081, 1083 (R.I. 1984)). Rule 4 was amended during the course of the case. Under the current rule, the court will dismiss an action without prejudice after 120 days if the plaintiff cannot show good cause why service of process was not made within that period. R.I. Super. Ct. R. Civ. P. 4(1).

22. *May*, 686 A.2d at 98.

because, "the court would have been duty bound to correct the situation no matter when or how it learned of the truth."[23]

The court acknowledged that no employment contract, nor any other relationship, existed between Merolla and Penn T.V.'s attorney.[24] Since the attorney is essentially "an agent employed by a party to a case to manage the same for him," the attorney's acts in representing his client "must be regarded as the acts of his client."[25] Merolla had done nothing, however, "to clothe Penn's lawyer with any apparent authority to represent him, to appear on his behalf, or to waive service of process."[26] Therefore, the Rhode Island Supreme Court held that "fundamental due-process considerations—and bedrock principles of agency law—prevent . . . punishing an unserved party defendant for the misdeeds of a lawyer he never engaged in a lawsuit about which he was never notified."[27]

CONCLUSION

The result in *May* serves as a caution flag to those lawyers relying on mere pleadings prepared by opposing counsel as proof that an unserved defendant is duly represented in the lawsuit. Plaintiffs will be unable to obtain or enforce any judgment against such a defendant. The court did not necessarily fault May or his counsel for relying on the pleading, especially in light of the failure to raise the lack of service of process defense. The warning in *May*, however, is clear; a plaintiff should properly serve all parties defendant before falling for such "alluring bait as was presented here."[28]

Mark B. Watson

---

23. *Id.* at 99 (quoting Lamarche v. Lamarche, 348 A.2d 22, 23 (R.I. 1975)); *see* R.I. Gen. Laws § 9-21-2(a)(4) (1985) (granting courts the power to relieve a party or his legal representative from a void final judgment, order, decree or proceeding); R.I. Super. Ct. R. Civ. P. 60(b)(4).

24. *May*, 686 A.2d at 99.

25. *Id.* (quoting Cohen v. Goldman, 132 A.2d 414, 416 (R.I. 1957)).

26. *Id.*

27. *Id.* (citations omitted).

28. *Id.*