STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Antonio M. Adams,
Plaintiff Below, Petitioner

vs.) No. 11-0197 (Kanawha County 10-C-1180)

Charleston Lube Partners, LLC, d/b/a Quaker Steak and Lube, John Lemay, owner, manager, Robert Bolan, owner, manager, and Jennifer Stanley, manager,
Defendants Below, Respondents

FILED
September 4, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Antonio M. Adams, pro se, appeals the December 28, 2010 order of the Circuit Court of Kanawha County dismissing of his civil action without prejudice for failure to obtain service within the required 120 days. Respondents Charleston Lube Partners, LLC, its owners and managers (collectively "Charleston Lube Partners"), by Justin M. Harrison, their attorney, declined to file a formal response.[1] Petitioner filed a reply brief.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the record on appeal, and the briefs of the parties, the Court finds no substantial question of law has been presented. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

On June 29, 2010, petitioner filed a complaint charging his former employer Charleston Lube Partners with harassment, discrimination, and wrongful termination. Petitioner stated that he was seeking $1,000,000 in damages. On November 8, 2010, the circuit clerk sent petitioner a notice pursuant to Rule 4(k) of the West Virginia Rules of Civil Procedure informing him that his complaint would be dismissed without prejudice "unless Plaintiff can present a motion to extend the time for service and demonstrate good cause to the Court why such service was not made within the

[1] A letter from Mr. Harrison was received on September 15, 2011.

[required 120 days]."[2] The circuit clerk further informed petitioner that he had to file his motion and demonstrate good cause "within 10 days of the date of filing of this notice."

Petitioner wrote a letter in response to the circuit clerk's notice that was filed on December 16, 2010. Petitioner stated that he did not receive the notice until December 10, 2010, possibly due to a mistake with the post office. Petitioner further stated that he had "[a] lack of knowledge of the 120 days to obtain service." In an order entered on December 29, 2010, the circuit court dismissed petitioner's complaint without prejudice, finding that "[t]he Plaintiff, has not demonstrated good cause why such service was not made within this period, pursuant to Rule 4(k) of the Rules of Civil Procedure."

On appeal, petitioner argues that his lack of knowledge of the 120 day deadline for serving Charleston Lube Partners and the late arrival of the circuit court's notice demonstrate good cause as to why the circuit court should not have dismissed his complaint without prejudice pursuant to Rule 4(k). The circuit court's dismissal of petitioner's complaint is reviewed de novo. *See* Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995) ("Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*.").

Petitioner filed his complaint on June 29, 2010, and 120 days after that was October 27, 2010. In *Davis v. Kidd*, 198 W.Va. 205, 479 S.E.2d 866 (1996), this Court affirmed a dismissal of a case pursuant to Rule 4(k).[3] In *Estate of Hough by Lemaster v. Estate of Hough by Berkeley County Sheriff*, 205 W.Va. 537, 519 S.E.2d 640 (1999), this Court reversed a Rule 4(k) dismissal, finding that the plaintiff undertook a reasonably diligent effort to serve the defendant. The *Hough* Court contrasted the plaintiff's efforts in that case with *Davis*, "where the help of an investigator was not enlisted until after the [then-in effect] 180-day period had expired." 205 W.Va. at 543, 519 S.E.2d at 646. Like the situation in *Davis*, and in contrast with that of *Hough*, petitioner's letter to the circuit court disclosed no effort to serve Charleston Lube Partners within the 120 day period after his complaint had been filed.

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[2] In full, Rule 4(k) provides as follows:

> (k) *Time limit for service.* – If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

[3] At the time of *Davis*, Rule 4(k) was designated Rule 4(l) and provided for a 180 day deadline.

Petitioner states that he simply did know of the 120 day deadline. "[M]ere inadvertence, neglect, misunderstanding, or *ignorance of the rule* or its burden do not constitute good cause under Rule 4[(k)]." *Hough*, 205 W.Va. at 542, 519 S.E.2d at 645 (Citation omitted; emphasis in original). Therefore, after careful consideration, this Court concludes that the circuit court did not err in dismissing petitioner's complaint without prejudice pursuant to Rule 4(k).

For the foregoing reasons, we find no error in the decision of the circuit court and its dismissal without prejudice of petitioner's complaint is affirmed.

Affirmed.

ISSUED: September 4, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh