

SUPERIOR COURT OF PENNSYLVANIA

Joseph Green v. Anthony Farole, D.M.D., and Anthony Farole,
D.M.D., Inc.

2025 Pa. Super. 84 (Superior Court of Pennsylvania 2025) · No. 1483 EDA 2024 · Decided April 14, 2025

SUMMARY

The Pennsylvania Superior Court affirmed dismissal with prejudice of Joseph Green’s professional-negligence complaint against Anthony Farole, D.M.D., and his corporation for failure to effect proper and timely service. The court held that forwarding the complaint to the sheriff on the limitations deadline, failing to follow up, and later using a private process server did not constitute a diligent, rule-based effort under Pennsylvania service rules. The court applied *Ferraro v. Patterson-Erie Corp.* and held that actual notice through private service did not cure the failure to serve by sheriff.

CASE DETAILS

COURT	Superior Court of Pennsylvania
WRITING FOR THE COURT	Stabile, J.; Bowes, J.; Kunselman, J.
JURISDICTION	Pennsylvania Superior Court
DECIDED	April 14, 2025
DOCKET	1483 EDA 2024
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from an order of the Montgomery County Court of Common Pleas sustaining preliminary objections based on improper service and dismissing a professional-negligence complaint with prejudice.
STANDARD OF REVIEW	The appellate court reviewed the trial court's determination that Green failed to make a diligent effort to effect service and found no error or abuse of discretion in the dismissal.
PRECEDENTIAL VALUE	Published and precedential Pennsylvania Superior Court opinion
PARTIES	Joseph Green v. Anthony Farole, D.M.D., Anthony Farole, D.M.D., Inc.

TOPICS

- service of process
- statute of limitations
- professional negligence
- personal jurisdiction
- civil procedure

PRACTICE AREAS

civil procedure

appellate procedure

professional negligence

health law

QUESTIONS PRESENTED

1. Whether the trial court could address the plaintiff's lack of diligence in effecting service within the limitations period through preliminary objections under Pennsylvania Rule of Civil Procedure 1028(a)(1), even though the statute of limitations is generally an affirmative defense.
2. Whether the plaintiff made a diligent, good-faith effort to effect timely service of original process where he filed the complaint on the last day of the alleged limitations period, submitted technically deficient paperwork to the sheriff, delayed taking further action, and ultimately used a private process server rather than the sheriff.

HOLDINGS

1. Although the statute of limitations ordinarily is an affirmative defense reserved for an answer and new matter, a plaintiff's diligent attempt or failure to attempt proper service within the limitations period is cognizable through preliminary objections alleging improper service under Pennsylvania Rule of Civil Procedure 1028(a)(1).
2. Green did not make a diligent, good-faith effort to effect timely service because he filed on the last day of the alleged limitations period, submitted technically deficient materials to the sheriff, waited more than two months without further action, and then used a private process server without ever effecting service by sheriff as required by the Pennsylvania Rules of Civil Procedure.

KEY QUOTATIONS

"For the foregoing reasons, we discern no error or abuse of discretion in the trial court's decision to dismiss Appellant's complaint with prejudice." (-7-)

FACTUAL BACKGROUND

Green alleged that Farole and the corporate dental practice committed malpractice during a dental implant procedure performed on August 14, 2020. Green alleged that he first learned of the malpractice on April 27, 2021, and filed his complaint exactly two years later. He initially forwarded the complaint and payment to the sheriff, but the sheriff did not serve it because Green had not submitted a separate form for each defendant. After waiting until June 9, 2023, to reinstate the complaint and until July 5 to learn that service had failed, Green used a private process server and never again attempted service by sheriff.

PROCEDURAL HISTORY

Green filed a professional-negligence complaint on April 27, 2023, the alleged last day of the limitations period, and forwarded it with payment to the Montgomery County Sheriff's Office for service. After the sheriff did not serve the complaint because Green submitted deficient paperwork, Green filed praecipes to reinstate the complaint and served the defendants through a private process server on July 10, 2023, but never effected service by sheriff. The trial court deferred ruling to permit discovery concerning Green's good-faith effort to

serve process, then sustained the defendants' preliminary objections and dismissed the complaint with prejudice on April 9, 2024. The Superior Court affirmed.

DISPOSITION

affirmed

CASES CITED

- Baumgart v. Keene Bldg. Prod. Corp., 633 A.2d 1189, 1192 (Pa. Super. 1993), aff'd, 666 A.2d 238 (Pa. 1995)
- Gussom v. Teagle, 247 A.3d 1046, 1048, 1058 (Pa. 2021)
- McCreesh v. City of Philadelphia, 888 A.2d 664 (Pa. 2005)
- Ferraro v. Patterson-Erie Corp., 313 A.3d 987, 999, 1007-1011 (Pa. 2024)

OPINION

Green, J. v. Farole, A. 335 A.3d 771

PER CURIAM.

J-S43029-24 2025 PA Super 84

JOSEPH GREEN : IN THE SUPERIOR COURT OF

: PENNSYLVANIA

Appellant : v. :

ANTHONY FAROLE, D.M.D., AND : No. 1483 EDA 2024

ANTHONY FAROLE, D.M.D., INC. : Appeal from the Order Entered April 9, 2024 In the Court of Common Pleas of Montgomery County Civil Division at No: 2023-07512 BEFORE: BOWES, J., STABILE, J., and KUNSELMAN, J.

OPINION BY STABILE, J.: FILED APRIL 14, 2025

Appellant, Joseph Green, appeals from the April 9, 2024 order dismissing his complaint in professional negligence against Anthony Farole, D.M.D. and Anthony Farole D.M.D., Inc. (collectively, “Appellee”), for failure of service. We affirm. Appellant alleges that Appellee committed malpractice during a dental implant procedure Appellee performed on August 14, 2020. Complaint, 4/27/2023, at ¶¶ 6-7. According to the complaint, Appellant first became aware of Appellee’s malpractice on April 27, 2021, during an appointment with another doctor. Id. at ¶ 8. Appellant filed this complaint on April 27, 2023— exactly two years after he claims he learned of Appellee’s malpractice and thus the last possible date under the statute of limitations, assuming Appellant J-S43029-24 properly invoked the discovery rule. 1 Appellant forwarded the complaint, with payment, to the Montgomery County Sheriff’s Office for service on that date. Appellant took no further action until June 9, 2023, when he filed a praecipe to reinstate his complaint. On July 5, 2023, Appellant received correspondence from the Montgomery County Sheriff’s Office informing him that his complaint was not served because of errors in the way he submitted it— because there are two named defendants, the sheriff’s office required a form for each defendant.2

Also on July 5, 2023, Appellant filed another praecipe to reinstate the complaint and engaged a private process server. Appellees were served by a private server on July 10, 2023. Appellant never effected service by sheriff, as required under Pa.R.Civ.P. 400(a). 3 On August 2, 2023, Appellee filed preliminary objections alleging, among other things, improper service of the complaint pursuant to Pa.R.Civ.P. _____ 1 42 Pa.C.S.A. § 5524; see *Baumgart v. Keene Bldg. Prod. Corp.*, 633 A.2d 1189, 1192 (Pa. Super. 1993) (noting that the discovery rule tolls the commencement of the statute of limitation to the date on which the plaintiff, through the exercise of diligence, first learned of the fact of a cause of action), affirmed, 666 A.2d 238 (Pa. 1995). 2 The correspondence from the sheriff's office was attached to Appellant's March 1, 2024 response to Appellee's request for production of documents. 3 "Except as provided in subdivisions (b) and (c) and in Rules 400.1 and 1930.4, original process shall be served within the Commonwealth only by the sheriff." Pa.R.Civ.P. 400(a). -2- J-S43029-24 1028(a)(1).4 Appellee, without conceding the applicability of the discovery rule, noted that Appellant, by his own allegations, filed his complaint on the latest possible date from his alleged discovery of his injury. Preliminary Objections, 8/2/23, at ¶ 3. Appellee also noted that Appellant failed to effect service within 30 days of the filing of the complaint, as per Pa.R.Civ.P. 401(a). *Id.* at ¶ 7. Nor did Appellant effect service by sheriff within 30 days of the June 9, 2023 reinstatement, as required by Pa.R.Civ.P. 401(b)(4). *Id.* at 10. Appellant filed an amended complaint on August 24, 2023 and Appellee filed a new set of preliminary objections on November 2, 2023, once again alleging improper service. On January 4, 2024, the trial court entered an order deferring disposition of the preliminary objections and giving the parties 60 days to take discovery on the issue of Appellant's good faith effort to serve original process. On April 9, 2024, the trial court entered the order on appeal, sustaining Appellee's preliminary objections and dismissing the complaint with prejudice. Appellant's argument on appeal is twofold. First he claims the trial court erred in entertaining Appellees' statute of limitations argument during the pleading stage. Second, he argues that the trial court was wrong in _____

4 Rule 1028(a)(1) authorizes a preliminary objection for, among other things, "improper form or service of a writ of summons or a complaint." Pa.R.Civ.P. 1028(a)(1). -3- J-S43029-24 determining that Appellant did not make a diligent effort to effect service of the complaint. Appellant's first argument does not merit relief. While he is correct that the statute of limitations is an affirmative defense which should be reserved for an answer and new matter (see Pa.R.Civ.P. 1030(a)), a party's diligent attempt (or lack thereof) to effect proper service within the limitations period is cognizable as a preliminary objection under Rule 1028(a)(1). In *Gussom v. Teagle*, 247 A.3d 1046 (Pa. 2021), for example, the plaintiff failed to effect service within the statute of limitations, and the defendant filed preliminary objections based on improper service. The trial court sustained the preliminary objections, and both this Court and our Supreme Court affirmed that order.⁵ *Id.* at 1058; see also, *McCreesh v. City of Philadelphia*, 888 A.2d 664 (Pa. 2005) (reviewing, at the preliminary objections stage, an argument that the plaintiff failed to make

a diligent effort to effect service within the limitations period). We now turn to the sufficiency of Appellant's efforts in this case. Our Supreme Court recently addressed this issue in *Ferraro v. Patterson-Erie Corp.*, 313 A.3d 987 (Pa. 2024): Service of process is a mechanism by which a court obtains jurisdiction of a defendant, and therefore, the rules concerning service of process must be strictly followed. Importantly, without

⁵ We note that we are not faced here with a challenge to the validity of Appellant's reliance on the discovery rule. That issue would be properly raised in a new matter. -4- J-S43029-24 valid service, a court lacks personal jurisdiction of a defendant and is powerless to enter judgment against him or her[.] Validity of service is essential, and failure to perfect service is fatal to a lawsuit. *Id.* at 999 (internal citations and quotation marks omitted). Service of process also notifies the defendant that it is a party to a lawsuit and must defend itself. *Id.* To that end, the purpose of the statute of limitations is to "protect defendants from stale claims." *Gussom*, 247 A.3d at 1048. Thus, in some circumstances, the trial court may dismiss a complaint where the plaintiff fails to make a diligent attempt to effect service of process. [A] trial court has discretion to dismiss a complaint when a plaintiff fails to offer proof that she diligently attempted to serve process on a defendant in a timely manner and there is no evidence to indicate that the defendant had actual notice of the commencement of the action in the relevant time frame, regardless of whether the plaintiff acted or failed to act intentionally. *Id.* The *Ferraro* Court clarified that actual notice must come from an attempt to serve process in accordance with the applicable procedural rules. "[T]here can be no question that when a plaintiff relies on actual notice to a defendant that an action has been commenced, that actual notice has to be the result of a good faith, but improper, effort at service of process under the Rules." *Ferraro* 313 A.3d at 1007 (emphasis added). "[O]ther than formal waiver of service of process, our Rules of Civil Procedure do not provide for an alternative method of notifying a defendant of the commencement of an action." *Id.* at 1008 -5- J-S43029-24 In *Ferraro*, the plaintiff suffered a slip and fall and filed her complaint on March 4, 2020, more than five months before the statute of limitations would have expired. *Id.* at 990. As in this matter, the plaintiff filed paperwork with the local sheriff's office to have the complaint filed but, for reasons unexplained, the sheriff's office did not do so. There was no dispute, however, that the plaintiff provided the proper fee, paperwork, and instructions to the sheriff. *Id.* at 994. At some point after the complaint lapsed and without filing a praecipe to reinstate it, the plaintiff had the complaint served on the defendant by a private process server. Finally, more than two months after the statute had run, the plaintiff reinstated the complaint and had the sheriff serve it on the defendant. *Id.* at 990. The trial court denied the defendant's motion for judgment on the pleadings, and this Court affirmed. Our Supreme Court reversed. The plaintiff argued that she should not be punished for technical missteps where, because of the plaintiff's efforts, the defendant had actual notice of the complaint. *Id.* at 997. The Supreme Court disagreed. Forwarding the complaint with payment to the sheriff was not a good faith effort to serve process. The plaintiff did not inquire whether the defendant

was successfully served until eight months after the filing of the complaint and more than two months after the expiration of the statute of limitations. *Id.* at 1009. The plaintiff produced no evidence that restrictions arising from the COVID-19 pandemic delayed the sheriff's services. *Id.* at 1010. One effort at service prior to the expiration of the statute and no further effort for more than two months afterward was "the opposite of diligence." *Id.* Significant for present purposes is the Ferraro Court's holding that providing a defendant with actual notice through the use of a private process server does not satisfy the plaintiff's obligation. *Id.* at 1011. Rather, as explained above, a good faith effort requires diligent but imperfect attempts at rule-based service of process. *Id.* Ferraro is controlling here. Appellant filed the complaint on April 27, 2023, the day the statute expired. As in Ferraro, Appellant forwarded the complaint and payment to the Sheriff, though this case is distinct from Ferraro in that the instant record demonstrates that Appellant's filing with the sheriff was technically deficient. Appellant took no further action until well after the statute expired, filing a praecipe to reinstate the complaint on June 9, 2023. On July 5, 2023, upon receipt of notice from the sheriff's office that service was not completed, Appellant arranged for service to be made by a private process server, but Appellant never again attempted to effect service by Sheriff in accordance with Rule 400(a). Per Ferraro, Appellant did not satisfy his obligation of diligence by using a private process server to provide actual notice to Appellee. Further, Ferraro held that filing the appropriate paperwork and fee with the sheriff's office and then waiting more than two months after the expiration of the statute of limitations to effect service by sheriff is the "opposite of diligence." Instantly, Appellant exhibited even less diligence than was evident in Ferraro. He waited until the last day of the limitations period to file the complaint, then waited more the two months after the expiration of the statute—without making any inquiries to the sheriff's office—to engage a private process server. Unlike the plaintiff in Ferraro, Appellant never served Appellee by sheriff. For the foregoing reasons, we discern no error or abuse of discretion in the trial court's decision to dismiss Appellant's complaint with prejudice. Order affirmed. Date: 4/14/2025 -8-