

IN THE SUPREME COURT OF THE STATE OF IDAHO

RENCHER/SUNDOWN, LLC,

Rencher-Appellant,

vs.

BUTCH PEARSON,

Defendant-Respondent,

and

FARMERS INSURANCE COMPANY OF  
IDAHO,

Defendant.

Docket No. 46474-2018

Bonneville County District Court  
CV-2017-3073

**RESPONDENT'S BRIEF**

**Appealed from the District Court of the Seventh Judicial District of the State of Idaho,**

**In the for the County of Bonneville**

**Honorable Jon Shindurling, District Judge, presiding**

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## **STATEMENT OF THE CASE**

### **A. NATURE OF THE CASE**

This is an appeal by Rencher/Sundown, LLC from the Judgment Dismissing Butch Pearson with Prejudice. The Judgment was entered after the district court entered an Order Granting Motion to Dismiss because Rencher/Sundown, LLC had not served Butch Pearson with the Summons and Complaint before the six-month deadline imposed by Rule 4(b)(2) of the Idaho Rules of Civil Procedure had expired and good cause was not demonstrated for the failure to timely effect service.

### **B. COURSE OF PROCEEDINGS**

Appellant Rencher/Sundown, LLC filed the Verified Complaint against Butch Pearson and Farmers Insurance on May 25, 2017, in Bonneville County, Idaho. R. p. 7. Pursuant to a stipulation, Farmers Insurance was dismissed as a party on September 15, 2017. R. p. 30. Butch Pearson filed a Motion to Dismiss Complaint on June 11, 2018. R. p. 32. After briefing was filed, a hearing was held on September 5, 2018, on the Motion to Dismiss Complaint. R. p. 54. The Order Granting Motion to Dismiss was entered on September 5, 2018, and dismissed all claims against Butch Pearson. Rencher/Sundown, LLC then filed a notice of appeal on October 18, 2018. R. p. 59.

### **C. STATEMENT OF FACTS**

Appellant Rencher/Sundown, LLC (“Rencher”) owns and operates apartments located at 2001 Broadway in Idaho Falls. R. p. 8, Complaint, ¶ 5. Butch Pearson was a tenant in the apartments. R. p. 8, Complaint, ¶ 6. Rencher alleged in the Complaint that Pearson started a fire and that the fire resulted in damage to the apartment complex and Rencher’s property. R. p. 8,

Complaint, ¶¶ 6-9. The Complaint was filed on May 25, 2017. R. p. 7. Butch Pearson was never personally served with the Summons or Complaint and only appeared before the district court to file the Motion to Dismiss Complaint on June 11, 2018, for failure to serve him within the six-month time frame required by Rule. R. p. 32.

Butch Pearson filed for Bankruptcy on November 22, 2017, in Bankruptcy Case No. 17-41037. R. p. 37. Rencher was listed as a creditor. R. p. 37. Butch Pearson was granted an Order of Discharge by Judge Pappas on February 26, 2018. R. p. 38. Rencher was served with notice of the Order of Discharge by the bankruptcy court. R. p. 40. Butch Pearson's address was contained in the bankruptcy paperwork that was provided to Rencher. R. p. 40. At the hearing on the motion to dismiss, the district judge referenced an affidavit from Rencher's counsel that is not part of the record on appeal that stated that he had communicated with Pearson's bankruptcy attorney. Tr. p. 15:24-16:16. Counsel for Rencher stated that Rencher did not provide him with the bankruptcy documents that contained Butch Pearson's address. Tr. p. 17:6-16. The district judge stated on the record:

THE COURT: Well, apparently, your client received those. You state in your affidavit that you contacted counsel that represented Mr. Pearson in the bankruptcy proceedings.

And I assume that that was a result of your client having referred the issue to you as to the \$1,500 to be discharged. And you say that your client said, Go ahead and let him discharge that.

Well, they had to have received those documents prior to the expiration of the six months. And, in those documents, they listed -- was listed Mr. Pearson's current address.

Now, your client had notice prior to the expiration of the time for service of the place Mr. Pearson could be located and didn't -- didn't act upon it.

I know that's -- you say they didn't refer that to you, but that's not what's at issue. What's at issue is what your client had.

Tr. p. 15:24-16:16. The following exchange then occurred between the district judge and counsel for Rencher:

MR. RASMUSSEN: Your Honor, the issue regarding good cause, I guess, falls back on my client and -- and their failure to submit all the documentation to me.

I, again, had not received any of the bankruptcy filings and was unaware that there was a different address, and my client did not inform me of an updated address for the Defendant in this case.

THE COURT: Well, how is that good cause under the case law?

MR. RASMUSSEN: Your Honor, I -- I will admit that I -- it probably is not good cause.

Tr. p. 17:6-16.

Rencher states at page 4 of its appeal brief that attempts were made to serve Pearson that were unsuccessful because no one was ever home. Rencher also states that the Bingham County Sheriff was retained to effect service. Although not stated in the brief, the Sheriff's office was unable to serve Pearson. Finally, Rencher states that an order was entered allowing Rencher to serve Pearson by publication on June 7, 2018, and that "Service by Publication was effectively complete on July 7<sup>th</sup>, 2018, prior to the hearing on the Motion to Dismiss." However, there is no evidence in the record on appeal that supports that any attempts were made to serve Pearson at any time. The documents, including affidavits, that are referred to in the hearing transcript are not part of the record on appeal. There is no evidence in the record that establishes what attempts were made by Rencher, or others on its behalf, before the six-month deadline imposed by IRCP 4(b)(2) to serve the Summons and Complaint had expired.

Rencher states in its appeal brief that service was not effected until July 7, 2018, when service was achieved by publication.<sup>1</sup> That is more than a year after the Complaint was filed and seven months after the six-month deadline to serve the Summons and Complaint had expired. There is no dispute that service was no accomplished within six months of the filing of the Complaint.

### **ISSUE PRESENTED ON APPEAL**

The issue presented by this appeal is:

Whether the district court was correct when it determined that Pearson had not been served with the Summons and Complaint within six months and dismissed the action as required by IRCP 4(b)(2).

### **ATTORNEY FEES ON APPEAL**

Respondent Butch Pearson requests that attorney fees be awarded on appeal based on Idaho Code sections 12-121, 12-123 and Rule 54(e)(1) of the Idaho Rules of Civil Procedure on the grounds that Rencher has pursued this appeal unreasonably and without foundation in law or fact. Rencher has failed to identify a specific error in the decision rendered by the district court judge and ignored the controlling case law cited extensively in the briefing by Pearson in support of the motion to dismiss. Rencher is merely asking the appellate court to second guess an unfavorable decision by the district court.

### **STANDARD OF REVIEW**

The trial court evaluated the evidence presented but did not hold an evidentiary hearing. Thus, the summary judgment standard is applicable and the record should be liberally construed in the light most favorable to the non-moving party. *Hansen v. White*, 163 Idaho 851, 853, 420 P.3d 996, 998 (2018). “Additionally, when a party appealing an issue presents an incomplete

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<sup>1</sup> Again, there is no evidence in the record on appeal that service by publication was ever actually accomplished, let alone on the same day as the Court issued the order allowing service by publication.

record, this Court will presume that the absent portion supports the findings of the district court.”  
*Id.*

## ARGUMENT

Rule 4(b)(2) of the Idaho Rules of Civil Procedure requires service of the summons and complaint within six months of the filing of the complaint. *Elliott v. Verska*, 152 Idaho 280, 287, 271 P.3d 678, 685 (2012); *Hansen v. White*, 163 Idaho 851, 853, 420 P.3d 996, 998 (2018). If service is not accomplished within the six month time period specified in IRCP 4(b)(2), dismissal is mandatory unless good cause is demonstrated by the Plaintiff for the failure to timely serve. *Elliott*, 152 Idaho at 288, 271 P.3d at 686. “The inquiry into good cause must focus on the six-month time period from the filing of the complaint, and the trial court must consider the totality of the circumstances to ‘determine whether the plaintiff had a legitimate reason for not serving the defendant’ within that period.” *Hansen*, 163 Idaho at 853, 420 P.3d at 998. There are several factors the Court is not to consider as “good cause” when deciding a motion to dismiss under IRCP 4(b)(2). They include the following:

- The Plaintiff’s claim would be barred by the statute of limitations;
- That the failure to serve does not prejudice the Defendant;
- That settlement negotiations are ongoing;
- That the Defendant has notice of the pending litigation through other means; and
- The timing of the motion to dismiss.

*Elliott*, 152 Idaho at 287-290, 271 P.3d at 686-88.

In *Elliott*, the Idaho Supreme Court explained the good cause analysis that the Court is to conduct when evaluating a motion to dismiss pursuant to IRCP 4(b)(2):

C. Good cause analysis. “[T]he determination of whether good cause exists is a factual one.” *Sammis v. Magnetek, Inc.*, 130 Idaho 342, 346, 941 P.2d 314, 318 (1997). “The burden is on the party who failed to effect timely service to demonstrate good cause.” *Martin v. Hoblit*, 133 Idaho 372, 375, 987 P.2d 284, 287 (1999). When deciding whether there was good cause, the court “must,



considering the totality of the circumstances, determine whether the plaintiff had a legitimate reason for not serving the defendant with a copy of the state complaint during the relevant time period.” *Nerco Minerals Co. v. Morrison Knudsen Corp.*, 132 Idaho 531, 534, 976 P.2d 457, 460 (1999). “Courts look to factors outside of the plaintiff’s control including sudden illness, natural catastrophe, or evasion of service of process.” *Harrison v. Bd. of Prof’l Discipline of Idaho State Bd. of Med.*, 145 Idaho 179, 183, 177 P.3d 393, 397 (2008). In deciding whether there were circumstances beyond the plaintiff’s control that justified the failure to serve the summons and complaint within the six-month period, the court must consider whether the plaintiff made diligent efforts to comply with the time restraints imposed by Rule 4(a)(2). *Martin*, 133 Idaho at 377, 987 P.2d at 289.

*Id.* IRCP 4(b)(2) and the above cited case law establish that a district court must dismiss a complaint if it has not been served within six months of the filing of the complaint.

In this case, Rencher is claiming on appeal that service was completed on July 7, 2018, before the Motion to Dismiss was filed. Rencher argues that because service was completed before the Motion to Dismiss was filed that the district court improperly dismissed the case against Pearson. Thus, Rencher’s argument is based on the timing of the Motion to Dismiss. This is an improper consideration. “Whether or not the defendant promptly moves for dismissal under Rule 4(a)(2) is irrelevant to the issue of good cause for the plaintiff’s failure to comply with that rule.” *Elliott*, 152 Idaho at 289, 271 P.3d at 687.<sup>2</sup> When a rule such as IRCP 4(b)(2) is mandatory, “the time at which dismissal is sought is irrelevant.” *Id.* It is undisputed that Rencher did not serve the Summons and Complaint within the six months as required by IRCP 4(b)(2). Even if service were effected by publication before the Motion to Dismiss Complaint as alleged in Rencher’s brief, that is not a factor that is applicable to the good faith analysis and Rencher does not cite to any case law that supports its argument.

The record on appeal does not include any evidence that service by publication was actually accomplished on July 7, 2018, or that Rencher made diligent efforts to complete service

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<sup>2</sup> Rule 4(a)(2) as cited in *Elliott* has been renumbered and is now Rule 4(b)(2) in the applicable version of the Idaho Rules of Civil Procedure.

before the expiration of the six months. Because the record on appeal is incomplete, this appellate court must presume that the missing record supports the findings of the district court.

*Hansen*, 163 Idaho at 853, 420 P.3d at 998. The district court in this case held:

Publication wasn't even effected -- I think the dates of publication were the summer this year, well past a year from the filing of the complaint.

And -- and, again, nothing to -- to explain what the supreme court has designated as good cause in -- in the failure to serve.

The burden is upon the Plaintiff here to bring evidence to the Court of what constitutes good cause to serve. And that simply has not been done. So I have an obligation under Rule 4(b)(2) to dismiss the case.

There's just no justification for the case continuing to proceed without that rule having been met. So, based upon that, this matter shall be dismissed ....

Tr. p. 23:2-15. The district court considered the fact that service may have been accomplished by publication, but that it was not within the six month requirements of the IRCP 4(b)(2). The district court also noted that it was Rencher's obligation, "if you can't find the opposing party to serve, to get the publication underway and done prior to the ending of the six months." Tr. p. 22:20-22. Rencher has not demonstrated how the district judge's decision was either a factual or legal error.

The burden is on Rencher to demonstrate good cause for the failure to timely effect service. However, Rencher cannot show good cause because Butch Pearson named Rencher as a creditor in his bankruptcy proceedings. As such, Rencher knew where Butch Pearson would be during hearings in the bankruptcy proceedings but did not serve him. The documents from the bankruptcy proceedings also included Pearson's address where he was then living. Tr. 15:24-16:16. Rencher did nothing with this information. Rencher did not provide the bankruptcy documents to its attorney. At the hearing on the Motion to Dismiss, counsel for Rencher affirmatively stated that the failure by Rencher to provide the address for Pearson, which was in

the bankruptcy documents, established that there was NOT good cause for the failure to timely serve Pearson. Tr. 17:6-16.

The Idaho Court of Appeals case of *Hincks v. Neilson*, 137 Idaho 610, 612, 51 P.3d 424, 426 (Ct. App. 2002) is instructive. In *Hincks*, the Idaho Court of Appeals determined that Hincks did not demonstrate good cause for failure to timely serve even though an affidavit submitted by a process server indicated the process server was unable to find the defendants because the defendants moved after the accident in that case. The process server stated in his affidavit that he checked local directories, researched on the Internet, asked former neighbors for forwarding addresses, and made more than ten attempts at unspecified times to locate the defendants. *Id.* The Court of Appeals held that the process server's affidavit was not sufficient to establish good cause as there was no specific information about what attempts were made within the six-month period for service. More importantly, the Court of Appeals noted that Hincks "failed to exercise the two options available to her when locating the defendants proved difficult—filing a motion to extend time or completing service of process by publication—the district court found that under a totality of the circumstances, Hincks had not shown good cause to explain why service did not occur within six months." *Id.* The Court of Appeals agreed that Hincks had not shown good cause to excuse the failure to serve the summons and complaint within the six-month period and affirmed the dismissal of the complaint.

In this case, Rencher has not identified any evidence in the record demonstrating that service could not be completed within the six-month period or even what attempts were made prior to the expiration of that time period. No affidavits from counsel or a process server indicate what attempts were made or why they failed. Rencher concludes that Pearson was attempting to evade service but there is no evidence in the record that supports that conclusion. The mere fact

that Pearson moved after the incident giving rise to this case does not establish that he was evading service. *Hincks*, 137 Idaho at 612-13, 51 P.3d at 426-27. Rencher made no attempt to file a motion to extend the time to serve the Summons and Complaint or to effect service by publication before the six months expired. Rencher claims it obtained an order of service by publication, but that is not included in the record on appeal. Regardless, that order was not entered until June 7, 2018, more than a year after the Complaint in this case had been filed and more than six months after the six-month service deadline had passed. Rencher indicates that service by publication has been completed but there is no proof of publication in the record. There is no basis for finding the district judge erred because the record on appeal does not contain the information that the district judge considered and what is in the record does not support Rencher's arguments on appeal. As such, the decision by the district judge should be affirmed.

## CONCLUSION

Rencher did not serve the Summons and Complaint on Pearson before the six-month deadline expired as required by IRCP 4(b)(2). Rencher never requested an extension for additional time to effect service. Rencher did not request permission to serve by publication until six months after the deadline had already passed. Rencher did not provide any evidence to the trial court demonstrating good cause for why service was not accomplished within the six-month time frame. There is no evidence in the record on appeal that establishes good cause or that demonstrates an error by the district judge. In fact, counsel for Rencher admitted that there was not good cause because Rencher had access to Pearson's actual address through bankruptcy filings but did not provide them to the attorney representing Rencher in this case. Thus, the district judge did not err in dismissing all claims against Pearson based on IRCP 4(b)(2).

DATED this 9<sup>th</sup> day of April, 2019.

/s/ J.D. OBORN  
J.D. OBORN

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 9th day of April, 2019, I electronically filed the foregoing with the Clerk of the Court using the Idaho I-Court E-File system and requested that a Notice of Filing be sent to the following persons:

Troy E. Rasmussen  
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/s/ J.D. OBORN  
J.D. OBORN