

STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

GARY A. FOX,

Plaintiff,

-v-

File No. 92-10034-NP  
HON. PHILIP E. RODGERS

A. O. HARVESTORE PRODUCTS, INC.,

Defendant.

Plaintiff in Pro Per

David H. Aldrich (P29099)  
Attorney for Defendant

DECISION AND ORDER

Defendant A. O. Harvestore, Inc. filed a Motion to Quash and for Dismissal. Prior to this Court's issuance of the Pre-Hearing Order on March 9, 1994, Plaintiff filed a response to the motion. Later, Plaintiff filed a supplemental response to the motion. Defendant untimely replied to Plaintiff's response. This Court has reviewed the motion, the responses, the reply, the parties' briefs and the Court file. Pursuant to MCR 2.119(E)(3), the Court elects to dispense with oral argument.

Defendant's rationale for the motion is that Plaintiff's untimely service of the Summons renders the Summons invalid. The Summons was issued on May 7, 1992 and expired on August 6, 1992. MCR 2.102(D). Plaintiff stated in his response to the motion that he "sent again Feb 4, 1994 certified, everything pertaining to this case to A O Smith Harvestore after finding out Attorney Aldrich did not answer for A. O. Smith Harvestore Product Inc." (Punctuation as provided.) Defendant stated in its motion that on February 7, 1994 It the Defendant received by certified mail a Summons and Complaint-in this matter. The late service of the Summons is uncontested.

MCR 2.105(D) states, in pertinent part, as follows:

Service of process on a domestic or foreign corporation

may be made by

- (1) serving a summons and a copy of the complaint on an officer or the resident agent;
- (2) serving a summons and a copy of the complaint on a director, trustee, or person in charge of an office or business establishment of the corporation and sending a summons and a copy of the complaint by registered mail, addressed to the principal office of the corporation[.]

Defendant states in the motion that its address is in De Kalb, Illinois. There is no evidence before the court that an officer or resident agent of the Defendant foreign corporation was served a summons and a copy of the complaint prior to the expiration of the summons. By Plaintiff's own admission in his response to the motion he sent materials relating to this action to Defendant on February 4, 1994. Defendant was not timely served with the summons

The Michigan Court Rules set forth the pertinent provisions of Dismissal as to Defendant Not Served in MCR 2.102(E), as follows:

- 1) On the expiration of the summons as provided in subrule (D), the action is deemed dismissed without prejudice as to a defendant who has not been served with process as provided in these rules, unless the defendant has submitted to the court's jurisdiction. \* \* \*
- (2) After the time stated in subrule (E)(1), the clerk shall examine the court records and enter an order dismissing the action as to a defendant who has not been served with process or submitted to the court's jurisdiction. The clerk's failure to enter a dismissal order does not continue an action deemed dismissed.
- (3) The clerk shall give notice of the entry of a dismissal order under MCR 2.107 and record the date of the notice in the case file. The failure to give notice does not affect the dismissal. (Emphasis added.)

At the time of Defendant's filing of the instant motion, this Defendant had not submitted to this court's jurisdiction by participating in any way in this litigation. In this case, the Court Clerk did not enter an Order dismissing the action. Pursuant to MCR 2.102(E)(2) and (3), failure to enter the dismissal order

does not affect the dismissal. This matter is deemed dismissed to MCR 2.102(E).

pursuant

For the foregoing reasons, Defendant's motion is hereby granted. This action is hereby dismissed in its entirety without prejudice.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR  
Circuit Court Judge

Dated: 6/9/94

During the pendency of the motion, Defendant filed Objections to Plaintiff's Interrogatories. Defendant argued, *inter alia*, that this Court lacks jurisdiction over Defendant.