IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

JOSEPH SEAN DAMRON and wife, MRS. JOSEPH SEAN DAMRON,	)	
Plaintiffs/Appellants,	)	Davidson Circuit No. 92C-528
VS.	)	Appeal No. 01-A-01-9511-CV-00502
BIANKA DENISE SADLER,	)	
Defendant/Appellee.	)	

DISSENTING OPINION

The majority has vacated the dismissal of this clearly time-barred case and has remanded it for further proceedings that will inevitably result in its dismissal again. I cannot concur with this wasteful and unnecessary procedure since the record before us demonstrates beyond peradventure that the complaint was not timely filed. Considerations of judicial economy and conservation of the parties' financial resources warrant bringing this case to an end.

I.

On April 5, 1991, there was a collision at the intersection of Murfreesboro Road and Hobson Pike between vehicles being driven by Joseph Sean Damron and Bianka Denise Sadler. Mr. Damron and his wife hired a lawyer and on April 3, 1992, filed a negligence action against Ms. Sadler in the Circuit Court for Davidson County. The summons issued on the day the complaint was filed and was returned unserved with the notation "Does not live here per Apt. Mgr. Not to be found in my County."

The case languished for over one year until June 8, 1993, when the trial court dismissed it for lack of prosecution. The Damrons' lawyer moved to set

aside the order of dismissal on the ground that he "was attempting to reach a settlement and did not realize the Court would dismiss [the complaint] for lack of prosecution." The trial court reinstated the case to its docket on October 18, 1993.

Realizing that he had never obtained service of process on Ms. Sadler, the Damrons' lawyer issued another summons on October 19, 1993. This summons was also returned unserved with the notation "Not to be found in Rutherford County." When the Damrons' lawyer discovered that Ms. Sadler had moved to the Federal Republic of Germany, he attempted to serve her directly using a pluries summons mailed to her address in Stuttgart by the Tennessee Secretary of State. The return receipt card bore a signature of a person other than Ms. Sadler.

On April 27, 1994, Ms. Sadler made a special appearance to contest personal jurisdiction and the adequacy of service of process. The Damrons' lawyer again took no action on the case. On November 18, 1994, the trial court clerk again notified him that the case would be dismissed for lack of prosecution if it was not moved along. When the Damrons' lawyer did not respond to this notice in a timely manner, the trial court dismissed the case for the second time on January 20, 1995. On March 31, 1995, the trial court set aside the dismissal and set the case for trial on July 19, 1995.

Ms. Sadler renewed her motion to dismiss the complaint for lack of personal jurisdiction and for insufficient service of process, pointing out that the method the Damrons' lawyer chose to serve her with process was ineffective under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents. The Damrons' lawyer filed an untimely response to this motion. On May 25, 1995, the trial court entered an order dismissing the complaint because the process did not comply with the Hague Service Convention and because the Damrons had failed to perfect service on Ms. Sadler in a timely manner as required by Tenn. R. Civ. P. 3.

On this appeal, the Damrons assert that the trial court should have given them more time to perfect service of process on Ms. Sadler. They also assert that their lawyer should have been excused from complying with Tenn. R. Civ. P. 3

because he had mistakenly believed that the original summons had been served based on a telephone conversation with "a person" in the clerk's office. Finally, they assert that the trial court should not have relied on Tenn. R. Civ. P. 3 to dismiss their complaint since Ms. Sadler did not include this defense in her motion to dismiss.

The majority has decided to vacate the dismissal of the Damrons' complaint on several novel grounds. First, it concludes that Ms. Sadler cannot rely on the Hague Service Convention because she failed to offer "satisfactory evidence" of the Federal Republic of Germany's limiting declarations of limitations with regard to the service of judicial documents under Article 10 of the Hague Service Convention. Second, it concludes that the trial court should not have dismissed the Damrons' complaint based on Tenn. R. Civ. P. 3. However, the majority surprisingly concludes that the Damrons "cannot rely on the original commencement [of the action] to toll the statute of limitations" and invites the trial court to dismiss the Damrons' complaint again "upon proper presentation of the affirmative defense of statute of limitations."

II.

Ms. Sadler moved to dismiss the Damrons' complaint for insufficiency of service of process. She asserted that service by certified mail through Tennessee's Secretary of State was ineffective because this method of service was not allowed by the Federal Republic of Germany's reservations to the Hague Service Convention. Ms. Sadler provided the trial court with all the documents necessary to support her motion. The majority has decided to reverse the trial court because these documents were not included in the record on appeal. This reasoning is difficult to comprehend because the very same documents can be easily found in the law library of the Tennessee Supreme Court and because the deficiency in the record could have been easily cured by supplementing the appellate record in accordance with Tenn. R. App. P. 24(e).

The Hague Service Convention is a multi-lateral treaty formulated in 1965 by the Tenth Session of the Hague Conference on Private International Law.[1] Its purpose is to provide a simpler way to serve process abroad, to assure that defendants in foreign jurisdictions receive actual and timely notice of suit, and to facilitate proof of foreign service. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 698, 108 S. Ct. 2104, 2107 (1988). It is the supreme law of the land because the United States is a signatory. *See Zicherman v. Korean Air Lines Co.*, ___ U.S. ___, ___, 116 S. Ct. 629, 634 (1996); *Air France v. Saks*, 470 U.S. 392, 406, 105 S. Ct. 1338, 1346 (1989); *United States v. Rauscher*, 119 U.S. 407, 418-19, 7 S. Ct. 234, 239-40 (1886). Accordingly, the full text of the convention is included with the annotations to Fed. R. Civ. P. 4 in Title 28 of the United States Code Annotated.[2]

Thirty-two countries, including the Federal Republic of Germany, have ratified the Hague Service Convention. Article 10 of the convention permits the service of judicial documents by mail "directly to persons abroad" unless the state of destination objects to this procedure. When the Federal Republic of Germany ratified the convention, it objected to the methods of service provided for in Articles 8 and 10. The German government's declaration stated:

> Service through diplomatic or consular agents (Article 8 of the Convention) is therefore only permissible if the document is to be served upon a national of the State sending the document. Service pursuant to Article 10 of the Convention shall not be effected.[3]

As a result of this action, service of judicial documents in Germany must be accomplished through the central authorities designated by the German

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[1]Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 367. The series entitled *United States Treaties and Other International Agreements* (U.S.T.) published by the United States Department of State can be found in the Tennessee State Library and Archives.

[2]The Tennessee Supreme Court Law Library includes the United States Code Annotated in its collection.

[3]Hague Service Convention, Fed. R. Civ. 4, 28 U.S.C.A. at 222. The German government later extended the same restriction to the territory formerly comprising the German Democratic Republic. *See* Hague Service Convention, Fed. R. Civ. P. 4, 28 U.S.C.A., at 127 (West Supp. 1996).

government. *See* Hague Service Convention, arts. 3 through 6, 20 U.S.T. at 362-63.

There is no question that all these documents were provided to the trial court and to the Damrons' lawyer well in advance of the hearing on Ms. Sadler's motion to dismiss. Thus, the trial court properly exercised its discretion under Tenn. R. Evid. 202(b)(5)[4] to consider not only the text of the Hague Service Convention but also the terms of the Federal Republic of Germany's ratification of the convention. Not even the Damrons' lawyer disputes that his attempt to serve Ms. Sadler in Germany was inconsistent with the Federal Republic of Germany's reservations to the Hague Service Convention.[5] Thus, the majority's discomfort with the trial court's decision on this issue is not only mysterious but also groundless.

III.

Actions for personal injuries must be commenced within one year after the cause of action accrued. Tenn. Code Ann. § 28-3-104(a)(1) (Supp. 1995). According to the version of Tenn. R. Civ. P. 3 in effect during all times relevant to this proceeding,[6]

> All civil actions are commenced by filing a complaint and summons with the clerk of the court. An action is commenced within the meaning of any statute of limitations upon such filing of a complaint and summons, whether process be issued or not issued and whether process be returned served or unserved. If process remains unissued for 30 days or if process is not served or is not returned within 30 days from issuance, regardless of the reason, the plaintiff cannot rely upon

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[4]Tenn. R. Evid. 202(b)(5) provides that "[u]pon reasonable notice to adverse parties, a party may request that the trial court take, and the court may take, judicial notice of . . . treaties, conventions, the laws of foreign countries, international law, and maritime law."

[5]Clearly, this is true because the Damrons' attorney did not attempt to serve Ms. Sadler through the Ministry of Justice of Baden-Württemburg. *See* Hague Service Convention, Fed. R. Civ. P. 4, 28 U.S.C.A. at 221.

[6]Tenn. R. Civ. P. 3 was amended effective on July 1, 1995 to eliminate the recommencement provision and to extend the reissuance period from six months to one year. These amendments can be of no assistance to the Damrons since their claims were already time-barred by July 1, 1995. *See Yancy v. Yancy*, 52 Tenn. (5 Heisk.) 353, 363-64 (1871); *Collier v. Memphis Light, Gas & Water Div.*, 657 S.W.2d 771, 775 (Tenn. Ct. App. 1983).

> the original commencement to toll the running of a statute of limitations unless the plaintiff either:
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> > (1) Continues the action by obtaining issuance of new process within 6 months from issuance of the previous process or, if no process issued, within 6 months from the filing of the complaint and summons, or
> >
> > (2) Recommences the action within 1 year from issuance of the original process or, if no process issued, within 1 year from the filing of the original complaint and summons.

The record establishes beyond any doubt that the Damrons' lawyer did not take advantage of either of the safety net provisions in Tenn. R. Civ. P. 3[7] and, therefore, that the Damrons' claims against Ms. Sadler are barred by the statute of limitations. *See Gregory v. McCulley*, 912 S.W.2d 175, 177 (Tenn. Ct. App. 1995).

Even though they acknowledge that the Damrons' suit against Ms. Sadler will surely be dismissed because it was not commenced within the time required by Tenn. Code Ann. § 28-3-104(a)(1), the majority takes the trial court to task for basing its decision to dismiss the complaint on the failure of the Damrons' lawyer to comply with Tenn. R. Civ. P. 3. I cannot understand this reasoning.

Trial courts may, on their own motion, dismiss complaints that do not state a cause of action. *Donaldson v. Donaldson*, 557 S.W.2d 60, 62 (Tenn. 1977). They should exercise this power sparingly and with great care to protect the rights of the parties. *Harris v. Baptist Memorial Hosp.*, 574 S.W.2d 730, 731 (Tenn. 1978). Courts entertaining the possibility of dismissing a complaint *sua sponte* for failure to state a claim upon which relief can be granted should construe the pleadings liberally in the plaintiff's favor. *Huckeby v. Spangler*, 521 S.W.2d 568, 571 (Tenn. 1975).

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[7]The unsubstantiated claims of the Damrons' lawyer that he was induced not to reissue process because of a telephone conversation with someone in the trial court clerk's office do not provide grounds for Tenn. R. Civ. P. 60 or any other type of equitable relief from his failure to attend to the service of the summons and complaint.

Complaints based on claims that are barred by the statute of limitations do not state a claim upon which relief can be granted.[8] The papers before the trial court, including the complaint and the three summonses, establish that the Damrons' complaint was time-barred because their original summons was unserved and because their lawyer did not either renew the summons within six months or recommence the suit within one year.

In most circumstances, plaintiffs should be given notice of the defenses asserted against their claims in order to give them an opportunity to respond. Under the facts of this case, however, the Damrons were not prejudiced by Ms. Sadler's failure to mention Tenn. R. Civ. P. 3 in her motion to dismiss or by the trial court's decision to rely on Tenn. R. Civ. P. 3 in addition to other grounds to dismiss their complaint. Nothing could have been done at that stage of the proceedings to change the fact that their lawyer's efforts to serve Ms. Sadler did not comply with Tenn. R. Civ. P. 3.

The majority has vacated the order dismissing the Damrons' complaint and has remanded the case for further proceedings. It has also invited Ms. Sadler to amend her motion to dismiss to assert specifically that the Damrons' claims are barred by the statute of limitations and has stated that the amended motion, if permitted by the trial court, will be successful. I cannot fathom the purpose of this needless remand in light of the trial courts' acknowledged power to dismiss a complaint *sua sponte* for failure to state a claim.

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WILLIAM C. KOCH, JR., JUDGE

[8]Tenn. R. Civ. P. 12.02(6) motions may be based on any of the affirmative defenses contained in Tenn. R. Civ. P. 8.03, including a defense based on the statute of limitations. *See Anthony v. Tidwell*, 560 S.W.2d 908, 909 (Tenn. 1977) (affirmative defenses may be asserted in a Tenn. R. Civ. P. 12.02(6) motion).