No. SC-CV-49-13

IN THE SUPREME COURT OF THE NAVAJO NATION

Sherl Henio,
Personal Representative of the Estate of Marie Chavez,
Plaintiff-Appellant,

v.

The Navajo Nation and
Baca/Prewitt Chapter of the Navajo Nation,
Defendants-Appellees.

OPINION

Before JAYNE, J., Chief Justice; SHIRLEY, E., Associate Justice; and BEDONIE, R., Associate Justice by designation.

Appeal from a decision of the Window Rock District Court concerning Cause No. WR-CV-326-12, the Honorable Carol K. Perry, presiding.

Nathan S. Anderson, Albuquerque, New Mexico, for Appellant; Joshua Montagnini, Gallup, New Mexico, for Appellees.

Decision delivered by BEDONIE, Associate Justice.

Appellant appeals the Window Rock District Court's dismissal of her wrongful death action against the Navajo Nation. We reverse and remand.

I

On December 12, 2010, Appellant's mother slipped and fell on a concrete slab outside a building under the control of the Baca/Prewitt Chapter and the Navajo Nation. Appellant's mother suffered a broken hip and died from complications ten days later. Appellant, as personal representative of her mother's estate, filed a complaint against Appellees on March 20, 2012, in the Window Rock District Court, WR-CV-79-12. The Window Rock District Court dismissed the complaint on January 18, 2013 for failure to serve notice to the Chief Legislative Counsel pursuant to Navajo Sovereign Immunity Act, 1 N.N.C. § 555(A).

Appellant filed a second action in the Window Rock District Court, WR-CV-326-12, on November 14, 2012, after serving notice of the claim by registered mail on the Navajo Nation President, the Attorney General, and the Chief Legislative Counsel, as required by 1 N.N.C. § 555(A). On December 11 and 12, 2012, Appellant served the summons and complaint for the second action on the President, the Attorney General, and the Chief Legislative Counsel by personal service, rather than by registered mail as specified in 1 N.N.C. § 555(C).

Appellees filed their answer on February 13, 2013. The answer did not assert insufficiency of service of process as defense. Appellees filed an amended answer on March 7, 2013, which included the defense of insufficiency of service of process. The amended answer was originally filed under the docket number of the first action, but was filed with the district court on March 12, 2013 with the correct docket number. On July 29, 2013, Appellees filed a motion to dismiss for lack of jurisdiction, arguing that personal service on the President, the Attorney General, and the Chief Legislative Counsel was improper because the Navajo Sovereign Immunity Act required service by registered mail. On August 7, 2013, the court clerk issued three new summonses and Appellant served the President, the Attorney General, and the Chief Legislative Counsel by registered mail, on August 8, 9, and 26, 2013 respectively. After hearing oral arguments on the motion to dismiss, the Window Rock District Court granted the motion to dismiss and dismissed the action for lack of subject matter jurisdiction. The Window Rock District Court found that the Navajo Sovereign Immunity Act requires service by registered mail, and Appellant's subsequent attempt to cure the defect in service nearly nine months after the complaint was filed was too late under Rule 6(f) of the Navajo Rule of Civil Procedure. This appeal followed.

II

The primary issue for this Court is whether the Navajo Sovereign Immunity Act's requirement that a complaint and summons be served on the President, the Attorney General, and

the Chief Legislative Counsel by registered mail is a jurisdictional condition precedent to an action against the Navajo Nation. Secondary issues are 1) whether the Navajo Nation waived its defense of insufficiency of service of process by failure to timely raise it; 2) whether service of the summons and complaint on the President, the Attorney General, and the Chief Legislative Counsel by personal service rather than registered mail met the requirements of the Navajo Sovereign Immunity Act; and 3) whether dismissal was proper under Rule 6(f), Nav. R. Civ. P. where subsequent service by registered mail was completed nearly nine months after the complaint was filed.

III

When we address the legal interpretations of lower courts, we apply a *de novo* standard of review. *Begay v. Navajo Engineering & Construction Authority*, 9 Nav. R. 510, 511 (Nav. Sup. Ct. 2011).

IV

The Navajo Nation is "a sovereign nation which is immune from suit." Navajo Sovereign Immunity Act, 1 N.N.C. § 553(A). However, in order to balance the interests of aggrieved parties to receive redress and the interests of the Nation in protecting the People's resources, the Navajo Nation may be sued in situations that it authorizes. Exemptions to sovereign immunity that the Nation allows suit under are listed in 1 N.N.C. § 554. The procedure for those actions authorized by the Sovereign Immunity Act are laid out in 1 N.N.C. § 555. Section 555(A) requires service of notice of claims by registered mail as a jurisdictional condition precedent, and Section 555(C) describes the procedure for service of summonses and complaints once actions are filed in court. This cause concerns interpretation of Section 555(C).

A statutory requirement of the Navajo Sovereign Immunity Act is a jurisdictional condition precedent when expressly provided in the plain language of the statute. *See* 1 N.N.C. § 555(A); *Chapo v. Navajo Nation*, 8 Nav. R. 447, 456 (Nav. Sup. Ct. 2004). Otherwise, the requirement is a

procedural mechanism that can be waived and not a jurisdictional condition precedent. *See* 1 N.N.C. § 555(D); *Judy v. White*, 8 Nav. R. 510, 533 (Nav. Sup. Ct. 2004).

In *Chapo*, this Court found that the requirements in Section 555(A) for notice of intent to sue were jurisdictional. *Chapo*, at 456. The Court in *Chapo* found that failure to include a name on a notice did not allow the district court to take jurisdiction over the case because the jurisdictional condition precedent of 1 N.N.C. § 555(A) had not been satisfied. *Id.* However, the Court limited its analysis to the explicit jurisdictional condition precedent notice requirements under Section 555(A); it did not discuss Section 555(B), (C), or (D). *Id.*

The Court examined Section 555(A) again in *Begay v. Navajo Engineering & Construction Authority*, 9 Nav. R. 510 (Nav. Sup. Ct. 2011), and again found the requirement to include the proper party's name on a notice of intent to sue and as a defendant in a complaint was jurisdictional. *Begay*, at 513. The Court in *Begay* found the complaint defective as well as the notice; however, it did not explicitly interpret Section 555(C), the section setting forth the procedures concerning complaints. Because the Court did not discuss Section 555(C) in *Begay*, it appears that the Court was only considering the requirements for the notice of intent to sue under Section 555(A), leaving the interpretation of Section 555(C) open.

The Court examined Section 555(D) in *Judy vs. White*, 8 Nav. R. at 532-533. In *Judy*, the Court found that the procedure set forth in 1 N.N.C. § 555(D), unlike the procedures for notice set forth in 1 N.N.C. § 555(A), was not a jurisdictional condition precedent. Section 555(D) concerns venue and provides that actions may be transferred to the Window Rock District Court upon the written demand of the Navajo Nation Department of Justice made at or before the time of answering. *Judy*, at 533. The Court found that the procedure in Section 555(D) is not a jurisdictional condition precedent, but rather a procedural mechanism to be used at the option of the Navajo Nation. *Id.* The Court observed that the plain language of Section 555(D) does not include

express language providing that the subsection was a jurisdictional condition precedent as Section 555(A) does. *Id.* The Court reasoned that if the Council has intended Section 555(D) to be a jurisdictional condition precedent, it should have included such language. *Id.* Further contrary to a jurisdictional condition precedent, the procedural mechanism of Section 555(D) can be waived when the Navajo Nation fails to timely seek a venue transfer. *Id.*

The Court takes this opportunity to clarify Section 555(C). In this case, notice of intent to sue was served by registered mail on the relevant officials, fulfilling Section 555(A). The complaint and summons, however, were served by personal service, which did not strictly comply with Section 555(C), which requires service by "registered mail, return receipt requested." 1 N.N.C. § 555(C). Appellees argue that strict compliance is necessary and that the requirements of Section 555(A) are a jurisdictional condition precedent.

This case is similar to *Judy*, in which the Court found that Section 555(D) was not a jurisdictional condition precedent and instead was a procedural mechanism that can be waived. The standard in *Judy* is that if a Section 555 requirement can be waived, it is not a jurisdictional condition precedent. *Judy*, at 533. In this case, Appellees could have accepted the service of process of the summons and compliant without raising an issue with the method of service. *See* Nav. R. Civ. P. 12(i)(1) (defense of insufficiency of service of process is waived if it is not made by motion or in a responsive pleading or an amendment permitted by Rule 15(a)). If Appellees had failed to raise the issue of service of process, the court would have had no issue hearing the case. As with a Section 555(D) venue transfer, it up to the discretion of the Navajo Nation, and not the court, whether to accept process that does not meet the statutory procedures of Section 555(C). The Court holds that the procedures of Section 555(C) are not a jurisdiction condition precedent. The Court also notes that service by personal service is the gold standard of the possible methods of service allowed under the Navajo Rules of Civil Procedure. Nav. R. Civ. P. 4(b)(3) (listing personal service

first in order of preference, over certified mail and publication). Personal Service is the favored method under our Rules because it is the method most likely to actually notify the person or entity being served of the suit. Indeed, Section 555(C) allows service on any "officer, employee or agent of the Navajo Nation" to be made "by any means authorized under the rules of the courts of the Navajo Nation." 1 N.N.C. § 555(C). The Court holds that personal service, by exceeding the requirement for service by registered mail, fulfills the requirement of 1 N.N.C. § 555(C).

V

We now turn to the question of whether Appellees waived their defense of insufficiency of service of process by failing to timely raise it. A party waives a defense of insufficiency of service of process when it is not made by motion or included in a responsive pleading or an amendment permitted by Rule 15(a). Nav. R. Civ. P. 12(i)(1). An amendment to a responsive pleading may be made "at any time within twenty (20) days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party except for the defenses designated in Rule 12(i)(1). Leave to amend shall be freely given when justice requires." Nav. R. Civ. P. 15(a)(1). In this case, Appellees filed their answer on February 13, 2013, and its amended answer on March 12, 2013. Appellees' answer was not timely because it was made twenty-seven days after the original answer was filed, which is outside the twenty-day deadline of Rule 15(a)(1). Appellees did not seek leave of the court to amend or the consent of the Appellant. Accordingly, Appellees waived the defense of insufficiency of service of process. Nav. R. Civ. P. 12(i)(1).

VI

The district court's second justification to dismiss the case was that service by registered mail on the President, Attorney General, and Chief Legislative Counsel, nearly nine months after the complaint was filed, was untimely. The Navajo Rules of Civil Procedure provide that an action "shall be dismissed without prejudice if the summons in not issued and service completed within six

months of the date of the filing of the complaint." Nav. R. Civ. P. 6(f). This Court has interpreted Rule 6(f) as not requiring dismissal when service has not been completed although summonses were issued. *Blackhorse v. Hale*, 7 Nav. R. 304, 305 (Nav. Sup. Ct. 1997). In *Blackhorse*, the Court ruled that Rule 6(f) mandates dismissal only when both the summons was not issued and it was not served within six months. *Id.* Moreover, to preserve necessary flexibility in the application of our rules, a trial court may order an enlargement of the six-month time period for proper service, either before the time period has expired for good cause "with or without motion or notice," or after the time period has expired upon motion and a showing of excusable neglect, under Nav. R. Civ. P. 6(b). *Lee v. Tallman*, 7 Nav. R. 246, 248 (Nav. Sup. Ct. 1996). Dismissal of this action in not mandatory under Rule 6(f), because summonses were issued, not just once, but twice. Dismissal of the case for untimely service of process in not justified in this case. First, as discussed in Section V, Appellees waived the defense of insufficiency of service of process. Second, Appellant indeed made proper service on the President, Attorney General, and Chief Legislative Counsel, once by personal service, and again in August of 2013, by registered mail.

VII

Based on the foregoing, we REVERSE the Window Rock District Court's order of dismissal and REMAND the case reinstatement of the cause of action.

Dated this 8th day of August, 2019.

Chief Justice

Associate Justice

Associate Justice