

IN THE STATE COURT OF FULTON COUNTY  
STATE OF GEORGIA

SHARHONDA KELLOGG, individually and as parent )  
and guardian for ADEN ROPER and ALIJAH ADAMS, )  
and WACKEE ADAMS, individually, )  
 )  
Plaintiffs, )  
 )  
v. ) CIVIL ACTION FILE  
 ) NO. 20EV001935H  
 )  
STEVEN SOUNDER, )  
 )  
 )  
Defendant. )

**ORDER ON DEFENDANT’S MOTION TO DISMISS**

This matter comes before the court on the motion to dismiss filed by Defendant Steven Sounder. Having considered the entire record, the court finds as follows:

Plaintiffs filed this lawsuit on May 24, 2020. Plaintiffs allege that they were injured in a motor vehicle collision involving a vehicle driven by Sounder on April 7, 2018. Sounder answered and filed his motion to dismiss on December 3, 2020. Plaintiffs oppose Sounder’s motion.

When a complaint is filed within the statute of limitation, but service is not made within five days or within the period of limitation, the plaintiff must establish that service was made in a reasonable and diligent manner in an attempt to ensure that proper service is made as quickly as possible.

*Akuoko v. Martin*, 298 Ga. App. 364, 364-65 (2009) (affirming trial court’s finding of laches and dismissing suit where plaintiff did not serve defendant until 13 days after the running of the statute of limitations (citations and punctuation omitted)).<sup>1</sup> The Court of Appeals “has consistently used the phrase ‘as quickly as possible’ to describe due diligence in perfecting service.” *Zeigler v. Hambrick*, 257 Ga. App. 356, 357 (2002) (citations omitted); *accord Van Omen v. Lopresti*, 357 Ga. App. 9, 15 (2020).

“The plaintiff has the burden of showing diligence in attempting to effect service, which must be supported by specific dates and details.” *Duffy v. Lyles*, 281 Ga. App. 377, 378 (2006)

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<sup>1</sup> See also O.C.G.A. § 9-11-4(c) (“When service is to be made within this state, the person making such service shall make the service within five days from the time of receiving the summons and complaint; but failure to make service within the five-day period will not invalidate a later service.”); *Giles v. State Farm Mut. Ins. Co.*, 330 Ga. App. 314, 317 (2014) (holding that the five-day grace period commences when the process server receives the summons and complaint, not when the complaint is filed).

(citations omitted), *overruled in part on other grounds by Giles*, 330 Ga. App. at 319 n.2; *accord Van Omen*, 357 Ga. App. at 11 (“When service is made outside the limitation period, the plaintiff has the burden of showing that due diligence was exercised.”); *Long v. Bellamy*, 296 Ga. App. 263, 268 (2009).

“The mere filing of a complaint does not commence suit unless timely service is perfected as required by law. And when such service is not timely made, the plaintiff bears the burden of showing lack of fault.” *Montague v. Godfrey*, 289 Ga. App. 552, 554 (2008) (citations omitted), *overruled in part on other grounds by Giles*, 330 Ga. App. at 319 n.2. “If reasonable and diligent efforts are not made to ensure proper service as quickly as possible, plaintiff is guilty of laches, and in such case, service will not relate back to the time of the filing of the complaint for the purpose of tolling the statute of limitation.” *Anderson v. Hughes*, 196 Ga. App. 186, 187 (1990) (citations omitted).

[T]he trial judge should look at all the facts involved and ascertain whether the plaintiff was in any way guilty of laches. If he were, of course he would be barred, but if he acted in a reasonably diligent manner then he would not be. The determination of whether the plaintiff was guilty of laches in failing to exercise due diligence in perfecting service after the running of the statute of limitations is a matter within the trial court’s discretion.

*Jackson v. Nguyen*, 225 Ga. App. 599, 600 (1997) (citations and punctuation omitted), *overruled in part on other grounds by Giles*, 330 Ga. App. at 319 n.2.

The limitations period pertaining to a personal injury claim is two years running from the date of accrual of the cause of action. *See* O.C.G.A. § 9-11-33. Plaintiffs’ purported injuries occurred on April 7, 2018. Plaintiffs filed this action on March 24, 2020, which was within the statute of limitations. However, there is no evidence of record that Plaintiffs attempted service on Sounder within the limitations period. In his brief, Sounder states that he did not receive the complaint until November 3, 2020, on which date he went to the courthouse to pick it up.

Plaintiffs defend their failure to expeditiously serve process on Sounder by citing to the March 14, 2020 Order Declaring Statewide Judicial Emergency issued by the Supreme Court of Georgia and that Court’s Orders of April 6, May 11, June 12, and July 10, 2020 extending the Statewide Judicial Emergency. The March 12, 2020 Order provides as follows:

Pursuant to O.C.G.A. § 38-3-62, during the period of this Order, the undersigned hereby suspends, tolls, extends, and otherwise grants relief from any deadlines or other time schedules or filing requirements imposed by otherwise applicable statutes, rules, regulations, or court orders, whether in civil or criminal cases or administrative matters, including, but not limited to any: (1) statute of limitation; ... [and] (9) time within which to serve a party.

The Georgia Supreme Court's July 10, 2020 Order mandates that "all other deadlines imposed on litigants shall be reimposed effective as of July 14, 2020." That Order clarifies that

[i]n cases filed between March 14 and July 13, 2020, the time for deadlines will begin running on July 14. For example, if a civil complaint was filed in June and the answer would have been due 30 days later, that 30-day period will begin on July 14 and the answer will be due on August 13.

That Order further specifies that "[t]he 122 days between March 14 and July 14, 2020, or any portion of that period in which a statute of limitation would have run, shall be excluded from the calculation of that statute of limitation." Pursuant to the Georgia Supreme Court's emergency tolling provisions, the limitations period on Plaintiffs' claims was extended to August 7, 2020. As noted, Plaintiffs filed their action on March 24, 2020, well within the extended limitations period.

The more precise issue, however, concerns Plaintiffs' efforts to serve Sounder within the context of the Georgia Supreme Court's emergency Orders. In their response brief, Plaintiffs state that they commenced attempting to serve Sounder once this court entered on October 28, 2020 a notice that this case was scheduled for a status conference to be held on November 19, 2020. However, Plaintiffs' obligation to exercise due diligence in serving Sounder recommenced as early as July 14, 2020 and certainly by August 7, 2020.

Again, there is no evidence of proper service on Sounder, other than his statement in his brief that he went and picked up the papers at the courthouse on November 3, 2020. However, on November 18, 2020, Plaintiffs filed an unauthenticated document purporting to be an "account activity transaction details" from Bank of America. Included in that document is a photocopy of a check drawn on the account of the law offices of Kimberly L. Fowler, LLC, made payable to the "Clayton County Sheriffs Dept," for "Kellogg svc." The check, in the amount of \$50.00, is dated October 29, 2020. The document reflects a "post date" of November 3, 2020.

Thus, the only inkling of any attempt to serve Sounder is Plaintiffs' counsel's check to the Clayton County Sheriff's department dated October 29, 2020. Plaintiffs have failed to tender any other facts or evidence as to their efforts to serve Sounder from July 14, 2020 to October 29, 2020 – a period of 3½ months. Similarly, there is no evidence of any efforts to serve Sounder between August 7, 2020 (the expiration of the extended limitations period) and October 29, 2020 – a period of over 2½ months.

On this record, the court finds that Plaintiffs have failed to carry their burden of factually demonstrating the requisite degree of diligence in effecting service on Sounder. Consequently, the court finds that Sounder's motion to dismiss is due to be granted. *See, e.g., Van Omen*, 357 Ga. App. at 16 (affirming dismissal where plaintiff took no action to serve defendant for 87 days after expiration of the statute of limitations); *Lipscomb v. Davis*, 335 Ga. App. 880, 880 (2016) ("a plaintiff has the burden of showing she exercised the required diligence and that there are no unexplained lapses in her attempts to serve the defendant"); *McCullers v. Harrell*, 298 Ga. App.

798 (2009) (affirming grant of defendant's motion to dismiss where plaintiff failed to attempt service for almost four months); *Parker v. Silvano*, 284 Ga. App. 278, 279 (2007) (affirming dismissal where plaintiffs failed to perfect service until eighteen days after suit was filed and ten days after the statute of limitations had run and failed to tender any evidence supporting their diligence in effecting service).

**THEREFORE, IT IS HEREBY ORDERED** that Sounder's motion to dismiss is **GRANTED**.

**SO ORDERED**, this 26<sup>th</sup> day of January, 2021.

*/s/ Wesley B. Tailor* \_\_\_\_\_  
Wesley B. Tailor, Judge  
State Court of Fulton County