

COURT OF APPEALS OF VIRGINIA

Record No. 1425-25-4

WATERFORD DOWNS, LLC
v.
BOARD OF SUPERVISORS OF LOUDOUN COUNTY, VIRGINIA

Present: Judges Malveaux, Bernhard and Senior Judge Annunziata

Opinion Issued September 22, 2026*

FROM THE CIRCUIT COURT OF LOUDOUN COUNTY
Brett A. Kassabian, Judge Designate

(Philip Carter Strother; Strother Law Offices, PLC, on briefs), for appellant.

(Nicholas J. Lawrence, Senior Assistant County Attorney, on brief), for appellee.

MEMORANDUM OPINION BY JUDGE DAVID BERNHARD

Waterford Downs, LLC (“Waterford”), was one of nine plaintiffs that filed a complaint challenging a zoning ordinance amendment adopted by the Board of Supervisors of Loudoun County (“the Board”). Process was not served within one year of filing. On the Board’s motion, the circuit court declined to conclude as a matter of fact that due diligence had been exercised during that year, and it dismissed the action with prejudice under Code § 8.01-277(B).

Waterford assigns error to that ruling, contending that the circuit court imposed a stricter diligence standard than the statute supplies, that it did so despite its own statements about good faith and prejudice, and that it left a pending motion to extend the time for service unresolved.

We affirm the circuit court. Code § 8.01-275.1 and Rule 3:5(e) commit the diligence determination to the circuit court as a finding of fact, and on this record—where the first step

* This opinion is not designated for publication. *See* Code § 17.1-413(A).

directed at service came 355 days into a 365-day period, and where the defendant was present and available for service throughout—that determination is neither plainly wrong nor without evidence to support it. Neither the absence of bad faith nor the difficulty of identifying prejudice supplies the diligence the statute requires, and the circuit court had no authority to enlarge the statutory period.¹

BACKGROUND

The Board adopted the ordinance amendment on June 12, 2024. On July 11, 2024, nine plaintiffs,² among them Waterford, filed a complaint for declaratory and injunctive relief challenging the amendment.³ The one-year period for service ran through July 11, 2025.

The first step directed at service came on July 1, 2025, when counsel for Waterford emailed a copy of the complaint and exhibit to a Senior Assistant County Attorney, gave notice of the suit, and asked the County to accept service. Counsel acknowledged at the hearing that this was an informal effort made ten days before the deadline. The recipient, who was traveling, replied on July 3 that he had not been able to respond and would try the following week. No waiver was given. Counsel then engaged a private process server, having been concerned about delay if service were attempted through the clerk's office and the sheriff.

¹ The panel unanimously holds that oral argument is unnecessary because “the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.” Code § 17.1-403(ii)(c); Rule 5A:27(c).

² The other eight plaintiffs were seven limited liability companies and a trust, each alleging that it owned or operated land in Loudoun County affected by the amendment.

³ The complaint pleaded nine counts, including that the amendment exceeded the Board's statutory authority, effected an unlawful regulatory taking under Article I, § 11 of the Virginia Constitution, violated 42 U.S.C. § 1983, and denied the plaintiffs equal protection and due process.

On July 8, 2025, the server delivered a copy of the complaint and exhibit to the County Attorney without a summons. Both parties agreed below that what was delivered was not process, because it did not include a summons.

The Board moved to dismiss on July 16, 2025, and counsel for Waterford stated that he learned of the missing summons that day. On July 17 counsel wrote to the clerk requesting that a summons be prepared and sent the request by overnight delivery, which was received on July 18. The clerk's office was thereafter unable to locate that package, and a second complete copy was sent on July 23 and delivered on July 24. The clerk issued a summons dated July 22, 2025, and the County Attorney was served with the summons and a copy of the complaint on or about July 24, 2025. On July 28, 2025, Waterford moved for an extension of time to perfect service nunc pro tunc, asking the circuit court to find that due diligence had been exercised and to treat service as timely, and filed a brief in support that also opposed the motion to dismiss. It moved for leave to file an amended complaint on July 30, 2025.

At the hearing on August 15, 2025, the circuit court proposed to take the motion to dismiss first, observing that a finding of no due diligence would moot the remaining motions; the parties proceeded in that order without objection. No witnesses testified, and both counsel stated that the facts were not in dispute. Counsel for Waterford represented that during the year following filing, effort had been devoted to coordinating nine limited liability companies, addressing potential conflicts of interest among them, and allocating resources, and that this work was itself pursued diligently. He explained that Waterford did not intend to take a nonsuit because refiling would fall outside the 30-day period for challenging a land use decision, Code § 15.2-2285(F),⁴ and he argued that the diligence inquiry should take account of efforts made both before and after the one-year mark.

⁴ Code § 15.2-2285(F) requires that an action contesting a decision of the governing body

The circuit court granted the motion to dismiss. It stated that it did not find bad faith by counsel, and that because the conduct at issue occurred within roughly two weeks of the one-year mark, prejudice to the defense was difficult to find. It nonetheless declined to conclude as a matter of fact “that due diligence was exercised between the date of the filing of this case and one year thereafter.” In explaining that conclusion, the court observed that some 355 or 356 days passed after filing before any action was taken toward service on a defendant that was not moving and was present and able to be served properly; that what was delivered on July 8 was not proper service because the summons was missing; that although the omission was not counsel’s fault, the delay did not constitute due diligence; and that a defendant is not required to accept service, and the Code does not require a party to waive its service arguments. Having granted the motion, the court found it unnecessary to rule on the remaining motions, and it acknowledged the harshness of the result. Waterford appealed.

ANALYSIS

I. The diligence determination is reviewed as a finding of fact.

Code § 8.01-275.1 provides that service within 12 months of commencement is timely and that “[s]ervice of process on a defendant more than [12] months after the suit or action was commenced shall be timely upon a finding by the court that the plaintiff exercised due diligence to have timely service made on the defendant.” Rule 3:5(e) bars entry of judgment against a defendant served more than one year after institution of the action unless the court “finds as a fact that the plaintiff exercised due diligence to have timely service on that defendant.” Code § 8.01-277(B) supplies the consequence: upon finding that the plaintiff did not exercise due diligence and sustaining a motion to dismiss, the court “shall dismiss the action with prejudice.”

adopting or failing to adopt a proposed zoning amendment be filed within 30 days of the decision.

Each provision frames the question as one of fact, and the Supreme Court has said so: “[t]he determination whether diligence has been used is a factual question to be decided according to the circumstances of each case.” *Dennis v. Jones*, 240 Va. 12, 19 (1990). This Court therefore views the evidence in the light most favorable to the Board as the prevailing party below and will not disturb the finding unless it is plainly wrong or without evidence to support it. *Zelnick v. Adams*, 269 Va. 117, 123 (2005).

Waterford argues that because the parties agreed the facts were not in dispute, the diligence question becomes one of law reviewed without deference. The premise does not carry the conclusion. Undisputed facts are still facts, and the General Assembly and the Supreme Court have committed this determination to the trial court in the language of factfinding. We need not mark the outer limits of that principle. Taking Waterford’s own account of its efforts as given—which is how the circuit court took it, no witnesses having testified—the result is the same under either standard.

II. The finding that Waterford did not exercise due diligence is supported by the record.

“‘[D]iligence’ means ‘devoted and painstaking application to accomplish an undertaking.’” *Dennis*, 240 Va. at 19 (quoting *Diligence*, *Webster’s Third New International Dictionary* (1981)). The undertaking the statute names is timely service of process on the defendant.

The efforts Waterford recounts were directed elsewhere. Coordinating nine plaintiff entities, addressing conflicts of interest among their members, and allocating the resources to fund the litigation are activities directed at prosecuting the suit, not at accomplishing service. In *Bowman v. Concepcion*, 283 Va. 552, 563-64 (2012), the plaintiff, unable to request service until she obtained the expert certification that Code § 8.01-20.1 required, urged that her diligent search for that expert satisfied the service statute. The Supreme Court held that the effort she

expended to obtain the certification did not constitute part of the due diligence effort to obtain service of process required by Code § 8.01-275.1 and that treating it otherwise would extend the service period indefinitely. *Id.* The principle reaches the showing made here: like the search for an expert in *Bowman*, the work Waterford describes went to its readiness to prosecute the suit, not to getting process into the defendant's hands. Measured against the undertaking the statute identifies, the record discloses a single informal request for waiver on day 355, a single delivery on day 362 that omitted the summons, and nothing before that.

Whether the July 8 delivery was itself process bears only on diligence, not on timeliness, because both parties agreed below that it was not process and that service was not perfected within the year. A complaint delivered without a summons is not process; the summons and a copy of the complaint are served together as a single paper. *Cf. Lifestar Response of Md., Inc. v. Vegosen*, 267 Va. 720, 724 (2004) (construing former Rule 3:3(c) and holding that both constituent parts are required to constitute process). The circuit court was entitled to weigh a single attempt in the closing days of the period for what it was.

Waterford's remaining efforts came after the period had run. We do not discount them. The record reflects that counsel requested a summons the day after learning it had been omitted, that the request reached the clerk on July 18, that the clerk's office was unable to locate it, and that a second request was required before the summons was issued. But Code § 8.01-275.1 asks whether the plaintiff exercised due diligence "to have timely service made," and service is timely under the statute when made within the 12-month period. Conduct after that period has expired may explain how a plaintiff came to be late; it cannot supply the diligent effort the statute requires during the period in which timely service was still possible. The circuit court framed its finding to that period, and it was right to do so.

Waterford's principal submission is that the circuit court's statements about good faith and prejudice foreclose its conclusion. They do not. The statutory question is whether the plaintiff exercised due diligence, not whether the plaintiff behaved badly; Code § 8.01-277(B) conditions dismissal on the absence of the former and does not require a finding of bad faith or culpable negligence. A plaintiff may, in complete good faith, simply not attend to service, and that is what the circuit court found. The purpose of the one-year requirement is "to provide for timely prosecution of lawsuits and to avoid abuse of the judicial system." *Gilbreath v. Brewster*, 250 Va. 436, 441 (1995) (construing former Rule 3:3, the predecessor of Rule 3:5(e)). That purpose is not served by a rule under which a year of inaction is excused whenever the defendant cannot show harm. We note in addition that the circuit court did not find an absence of prejudice; it said that prejudice was difficult to find on these facts, which is a narrower statement than the one Waterford attributes to it.

The treatise passage on which Waterford relies—describing the one-year requirement as administrative and quasi-penal, and dismissal as unwarranted absent bad faith or culpable negligence—is a secondary source. It may illuminate a governing Virginia rule; it cannot displace the statutory text or the Supreme Court's construction of it.

The decisions Waterford marshals do not supply a contrary rule. *Waterman v. Halverson*, 261 Va. 203, 208 (2001), held that Code § 8.01-275.1 did not limit a circuit court's authority to grant a nonsuit where process had not been served within one year and that the refiled action took the benefit of the tolling provisions; it did not address whether a plaintiff had exercised due diligence. *Collins v. Shepherd*, 274 Va. 390, 399 (2007), held invalid under Code § 8.01-4 a local rule under which a circuit court dismissed an unserved case on its own motion a year after filing, and held the resulting order void ab initio. The Court there observed that a case not served within the year is nonetheless subject to dismissal under Rule 3:5(e) upon a defendant's motion.

Id. at 397-98. That is this case: the Board moved for dismissal under Code § 8.01-277(B), and *Collins* says nothing about the diligence question that motion presented. The circuit court decisions on which Waterford relies are not binding on this Court.

Finally, the record does not support the contention that the circuit court adopted a stricter standard for institutional defendants. The court reached its diligence conclusion on the timing of Waterford's efforts and then observed that the defendant was present and able to be served properly throughout the period, that a defendant is not obliged to accept service, and that the Code does not require a party to waive its service arguments. Those observations are correct, and they go to whether routine means of service were readily available to Waterford—a consideration the Supreme Court has treated as pertinent to the same inquiry. *See Bowman*, 283 Va. at 562, 564; *Dennis*, 240 Va. at 19. Ease of service is a circumstance within the fact-specific inquiry the statute prescribes, not a second and higher standard grafted onto it.

Waterford asks in the alternative that this Court articulate the meaning of “due diligence” for future cases. The standard is settled, and its application is committed to the trial court on the circumstances of each case. No further articulation is necessary to resolve this appeal.

III. The motion for an extension of time was resolved by the diligence finding.

Waterford's remaining assignment of error faults the circuit court for declining to find diligence while its motion for an extension of time went undecided. The record confirms that the motion was not separately ruled upon; having granted the motion to dismiss, the court found it unnecessary to reach the other motions. That course was proper, for two reasons.

First, the two motions posed the same question. Waterford's motion asked the circuit court to find that it had exercised due diligence and, on that footing, to extend the time for service nunc pro tunc to the date the corrected summons was served and to treat service as

timely. The Board's motion asked the court to find that due diligence had not been exercised. A single finding disposed of both, and the court identified that sequence at the outset.

Second, to the extent the motion sought an enlargement of the statutory period as such, the Supreme Court has observed that no statutory authority permits a court to grant prospectively an extension of time beyond one year from commencement for service of process on a defendant. *Bowman*, 283 Va. at 561. The only mechanism by which service after one year becomes timely is a finding of due diligence under Code § 8.01-275.1, and the circuit court made the opposite finding. Once it did so and sustained the Board's motion, Code § 8.01-277(B) left it no discretion as to the form of dismissal.

Waterford characterizes that result as draconian, and the circuit court acknowledged its harshness. Waterford was aware of the nonsuit option preserved by Code § 8.01-277(B) and declined to pursue it, having concluded that refiling would fall outside the 30-day period for challenging the ordinance, Code § 15.2-2285(F). We express no view on whether that conclusion was correct; it does not bear on the question before us. Where the statute directs dismissal with prejudice upon a finding that due diligence was not exercised, the severity of the consequence is not a ground for setting the finding aside.

CONCLUSION

The circuit court's determination that Waterford did not exercise due diligence to have timely service made on the Board is supported by the record and is not plainly wrong. Dismissal with prejudice followed as a matter of statutory command. The judgment is therefore affirmed.

Affirmed.