

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2708

Summary Calendar

GARY LEON MOORE, SR.,

Plaintiff-Appellant,

versus

ARCO CHEMICAL CO.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-93-1713)

(March 16, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Defendant ARCO Chemical removed this case to federal court and moved for summary judgment on limitations grounds on June 8, 1993. Plaintiff Moore made no response to the motion. On August 10th, the district court granted summary judgment for ARCO. Moore appeals, alleging lack of notice and the existence of fact questions.

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

We find no inadequacy in the notice Moore received. Local Rule 6 of the Southern District of Texas provides that "[o]pposed motions will be submitted to the judge twenty days from filing without notice from the clerk and without appearance by counsel" and that "[f]ailure to respond will be taken as a representation of no opposition." These rules gave Moore adequate notice that the judge could consider ARCO's motion twenty days after filing. Daniels v. Morris, 746 F.2d 271, 274-75 & 275 n.10 (5th Cir. 1984).

We also find no error on the merits. The parties agree that the limitations period for this suit was two years. Tex. Civ. Prac. & Rem. Code § 16.003. A plaintiff must, within the statutory period, both file suit and use due diligence in serving the defendant with process. E.g., Rigo Mfg. Co. v. Thomas, 458 S.W.2d 180, 182 (Tex. 1970). When a defendant pleads limitations and the record shows a failure to timely serve the defendant, the burden shifts to the plaintiff to explain the delay and to prove due diligence in procuring issuance and service of citation upon the defendant. Murray v. San Jacinto Agency, Inc., 800 S.W.2d 826, 830 (Tex. 1990). In this case, the record shows the plaintiff failed to serve ARCO until almost six months after filing suit. In the absence of an explanation of that delay by the plaintiff, the district court properly granted summary judgment for ARCO. Fed. R. Civ. P. 56(e).

Moore also argues that the district court should have held an evidentiary hearing to determine ARCO's citizenship. Such a hearing is not necessary at this point, because Moore admitted the

factual allegations in ARCO's removal petition by not contesting the petition or filing a motion to remand. See Albrecht v. Lund, 845 F.2d 193, 195 (9th Cir. 1988); Bobby Jones Garden Apartments, Inc. v. Suleski, 391 F.2d 172, 175-76 (5th Cir. 1968).

AFFIRMED