

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 94-10710
Summary Calendar
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SUSAN B. LYLE,

Plaintiff-Appellant,

versus

ART INSTITUTE OF DALLAS, INC.,

Defendant-Appellee.

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Appeal from the United States District Court for the
Northern District of Texas
(3:94-CV-0402-R)
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(December 13, 1994)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.*

PER CURIAM:

On June 27, 1994, the district court, *sua sponte*, dismissed this cause for failure to obtain service within 120 days and failure to obtain default judgment within 90 days, pursuant to Local Rule 3.1(g) & (h), respectively, Northern District of Texas. The district court did not give plaintiff notice as required for

* 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

sua sponte dismissal under Local Rule 3.1(g) and as required by FED. R. CIV. P. 4(m). Had the court done so, the dismissal doubtless would not have been entered. Although the dismissal was denominated as being without prejudice, it was effectively with prejudice because by the time it was entered limitations had run. The suit had been filed on February 25, 1994, and summons on the defendant was issued that date. The summons was served on June 24, 1994, the 118th day or 119th day after the suit was filed. However, the return of service was not filed until June 30, 1994. Under the circumstances, the dismissal was an abuse of discretion. Service was effected within 120 days, and the time for answer did not arrive until sometime in July 1994, so there was no failure to take a default judgment. *Cf. Berry v. Cigna/RSI-Cigna*, 975 F.2d 1188 (5th Cir. 1992). Accordingly, the judgment is reversed and the cause is remanded.

REVERSED and REMANDED