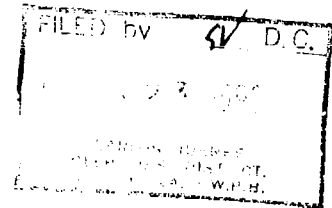


UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO.97-10092-CIV-PAINE

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,
Plaintiffs,
vs.

OCEAN REEF CLUB etc.,
Defendant,



_____/

ORDER DENYING DEFENDANT'S MOTION TO DISMISS
AND GRANTING PLAINTIFF'S MOTION TO EXTEND TIME TO
SERVE THE COMPLAINT

This matter is before the court upon the Defendant's Motion to Dismiss this action for Plaintiffs' failure to timely effect service of process and upon the Plaintiff's Motion for Extension of Time to Effect Service of Process. Upon consideration of the facts of this case and the applicable authority, this court finds that good cause exists to excuse Plaintiffs' failure to timely serve the Defendant and that the time to effect service of process should be extended.

Factual Background

The Plaintiffs filed this age discrimination action on September 30, 1997, naming as the sole Defendant, Key largo Group,

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f/k/a/ Ocean Reef Club. The corporate Defendant was identified through a search with the Florida Department of Corporations. After the lawsuit had been filed, the Plaintiff discovered, through media coverage, that the Key Largo Group no longer owned the subject establishment and that, rather, the establishment was owned by a corporate entity known as the Ocean Reef Club Inc. The Plaintiff promptly filed an Amended Complaint, naming all of the corporate entities who have or had an ownership interest in the establishment. The registered agent for the original Defendant, Key largo, and the added Defendant, Ocean Reef Club, is the same individual, Kenneth A. Luban, whose registered office was located on the Ocean Reef Club premises.

On December 8, 1997, the Clerk of the Court issued a summons for service. The next day, the Plaintiff received the summons and forwarded a copy of it along with the Amended Complaint to Litigation Services, a bonded and certified process server, and directed that the summons and the Amended Complaint be immediately served upon the Defendants through the registered agent, Kenneth A. Luban. On December 29, 1997, the Plaintiff called Litigation Services to learn the status of service and was informed that the process server ad been ill over the holidays and that service had not yet been effected. The Plaintiff demanded that service take

place without further delay.

On January 8, 1998, the Plaintiff again contacted Litigation Services and was advised that the process server was having difficulty contacting the registered agent by phone and that he was denied access to the Ocean Reef property where the registered agent was located.

On January 12, 1998 and January 13, 1998, the process server made attempts to serve the registered agent was advised that private process servers were not permitted access to the private community and that he should contact Mr. Luban by telephone to obtain clearance for entry onto the premises. Mr. Luban was repeatedly unavailable to take the process servers telephone calls and, therefore, the process server was denied access to the private property.

On January 14, 1998, the Plaintiff again diligently contacted Litigation Services and was advised of the continued problem in obtaining access to the registered agent. The Plaintiff then advised that the Summons and Amended Complaint should be released to the Monroe County Sheriff's Office so that service of process could be promptly effected. Due to a clerical error in the Sheriff's office, the Summons and Amended Complaint was not received by them until January 22, 1998. The Plaintiff continued

to call and inquire as to the status of the requested service. On January 28, 1998, the Sheriff attempted to serve Mr. Luban but was advised that he was unavailable. On January 30, 1998, the Sheriff continued to attempt to serve the Defendant but was continually advised that Mr. Luban was unavailable. Finally, on February 3, 1998, the Sheriff was able to effect service of process upon the Defendant through Mr. Luban, the registered agent.

Analysis

Rule 4(m) of the Federal Rules of Civil Procedure currently states:

If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

Prior to the December 1, 1993 amendment to Rule 4, dismissal for failure to effect timely service was mandatory unless the plaintiff could demonstrate good cause for the delay. Petrucci v. Bohringer & Ratzinger, GmbH, 46 F.3d 1298, 1304 (3d Cir.1995). Rule 4(m), however, which replaces former Rule 4(j) as the

effective provision governing time limits for service, substantially broadens the discretion of the district court to allow an extension of time for service even absent a showing of good cause. Id.; Thompson v. Brown, 91 F.3d 20, 21 (5th Cir.1996).

Interpreting Rule 4(m), the appellate courts have determined that the new rule establishes a two-step procedure that district courts must follow in deciding whether an extension is appropriate:

As a result of the rule change, when a district court entertains a motion to extend time for service, it must first determine whether good cause exists. If good cause is present, the district court must extend time for service. If good cause does not exist, the court may, in its discretion, decide whether to dismiss the case without prejudice or extend time for service.

Thompson, 91 F.3d at 21 (citing Petrucci, 46 F.3d at 1305-06). Accordingly, after expiration of the 120-day time limit, as here, Rule 4(m) affords the plaintiff two safety hatches to escape dismissal of the complaint and those are through a showing of "good cause" or by convincing the court that it should exercise its discretion and extend the time for service even absent a showing of good cause. Adams v. AlliedSignal General Aviation Avionics, 74 F.3d 882, 887 (8th Cir.1996); MCI Telecommunications Corp. v. Teleconcepts, Inc., 71 F.3d 1086, 1098 (3rd Cir.1995); Petrucci v. Bohringer & Ratzinger, 46 F.3d 1298, 1305 (3rd Cir.1995).

Contra, Zachery v. Thigpen, 895 F.Supp. 1472, 1474 (M.D.Ala.1995)

(a showing of good cause is the only safety hatch available to escape dismissal).

[T]he plain language of the rule itself explains that in all cases, the court has the option of dismissing the action or extending time for service. The fact that the word "shall" is used along with the disjunctive "or" in the first clause indicates that the court has discretion to choose one of these options. As an exception to this general provision, the second clause notes that if good cause exists, the district court has no choice but to extend time for service. Thus, the logical inference that can be drawn from these two clauses is that the district court may, in its discretion, extend time even absent a finding of good cause.

Petrucelli, 46 F.3d at 1305; see also Adams, supra, 74 F.3d at 887; Fed.R.Civ.P. 4(m) advisory committee's note (1993) ("The new subdivision explicitly provides that the court shall allow additional time if there is good cause for the plaintiff's failure to effect service in the prescribed 120 days, and authorizes the court to relieve a plaintiff of the consequences of an application of this subdivision even if there is no good cause shown").

The burden of establishing good cause for untimely service rests with the plaintiff, who must show "at least as much as would be required to show excusable neglect, as to which simple inadvertence or mistake of counsel or ignorance of the rules

usually does not suffice." Systems Signs Supplies v. United States Dep't of Justice, 903 F.2d 1011, 1013 (5th Cir.1990) (quoting Winters v. Teledyne Movable Offshore, Inc., 776 F.2d 1304, 1306 (5th Cir.1985)). In addition, the plaintiff must demonstrate that he was acting in good faith and had some reasonable basis for his noncompliance with the service requirements of Rule 4.

We must first determine whether good cause exists for an extension of time. If good cause exists we must extend the time for service; however, if good cause is not found to exist the undersigned will then consider whether this court, in its discretion, should dismiss the case without prejudice or extend time for service. See Petrucelli, 46 F.3d at 1305. This analysis of the new Rule 4(m) in no way impacts any prior court decisions which articulate the standard for good cause. See Id. at 1307, n. 11. "Rather, the change which exists in Rule 4(m) modifies the procedure employed by the district court after a determination as to whether good cause has been made." Id.

Good cause is equated with the concept of "excusable neglect" outlined in Fed.R.Civ.P. 6(b)(2), "which requires 'a demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance within the time specified in the rules.'" MCI Telecommunications Corp., supra, 71 F.3d at

1097; see also Adams, 74 F.3d at 887 ("A showing of good cause requires at least 'excusable neglect'--good faith and some reasonable basis for noncompliance with the rules"); Kersh v. Derozier, 851 F.2d 1509, 1512 (5th Cir.1988) (" '[G]ood cause ... would appear to require at least as much as would be required to show excusable neglect, as to which simple inadvertence or mistake of counsel or ignorance of the rules usually does not suffice, and some showing of "good faith on the parties seeking enlargement and some reasonable basis for noncompliance within the time specified" is normally required' "); Lowe v. Hart, 157 F.R.D. 550, 553 (M.D.Fla.1994) (same as Kersh). The undersigned recognizes that "courts have found that factors outside a plaintiff's control, such as sudden illness, natural catastrophe or evasion of service of process," will satisfy this requirement. Zachery, supra, 895 F.Supp. at 1474 (citations omitted); see also Quann, supra, 112 F.R.D. at 659 (evasion of service in the face of plaintiff's attempts to effect service constitutes good cause). However, absence of prejudice alone can never constitute good cause to excuse late service, nor will inadvertent error, or ignorance or unfamiliarity with the rule governing service, excuse a litigant's failure to effect timely service. MCI Telecommunications Corp., 71 F.3d at 1097; Zachery, 895 F.Supp. at 1474-1475 (citations

omitted); Quann, 112 F.R.D. at 661; Petrucelli, 46 F.3d at 1307 (delay resulting from inadvertence of counsel need not be excused); Hamilton v. Endell, 981 F.2d 1062, 1065 (9th Cir.1992) (inadvertent error is not good cause); Prisco v. Frank, 929 F.2d 603, 604 (11th Cir.1991) (inadvertence or negligence does not establish good cause); Quann, supra, 112 F.R.D. at 659 (counsel's inadvertence is precisely the factor the rule is aimed at); Coleman v. Greyhound Lines, Inc., 100 F.R.D. 476, 477 (N.D.Ill.1984) (inadvertence of counsel does not establish good cause); Tuke v. United States, 76 F.3d 155, 156 (7th Cir.1996) (ignorance may be an explanation but is not an excuse); Hamilton, 981 F.2d at 1065 (ignorance of governing rules is no excuse); Kersh, 851 F.2d at 1512 (a pro se plaintiff's ignorance of the law is no excuse); Zachery, 895 F.Supp. at 1476 n. 5 (an attorney's unfamiliarity with the federal rules does not warrant a finding of good cause); Lowe, 157 F.R.D. at 553 (a pro se plaintiff's ignorance of the law, that is, the fact that she is confused and uninformed regarding the rule governing service, is no excuse).


In the present case, the court finds that the Plaintiff made good faith efforts to effect service of process on the Defendant and that the failure to timely effect service of process was due to circumstances outside of its control, i.e. constant unavailability

of the registered agent who was apparently insulating himself from service of process by denying the process server access to his private property. There was nothing further the Plaintiff could have done to timely effect service of process. Plaintiffs have established that the delay in effecting service of process was the result of circumstances wholly outside of its control and that there exists a good faith, reasonable basis for the failure to timely serve the Complaint once the action was commenced.

The finding of good cause for the failure to serve the Defendant within 120 days of the formal filing of the complaint makes it unnecessary for this Court to consider whether it should, in its discretion, dismiss the case without prejudice or extend the time for service. Accordingly, it is

ORDERED and ADJUDGED that Defendant's Motion to Dismiss is DENIED and Plaintiff's Motion for Extension of Time is GRANTED. The Defendants shall file an Answer to the Amended Complaint within ten days of the date of this order.

DONE and ORDERED at West Palm Beach, Florida, this 22nd day of June, 1998.


UNITED STATES DISTRICT JUDGE

c:
C. Gregory Stewart
James C. Polkinghorn