

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NOEL KENT, et al. : CIVIL ACTION
v. :
HOWELL ELECTRIC MOTORS, et al. : NO. 96-7221

MEMORANDUM AND ORDER

J. M. KELLY, J.

SEPTEMBER 14, 1998

Presently before the Court are Third-Party Plaintiff Howell Electric Motors' ("Howell") Motion for Leave to Serve Process Beyond 120 Days Nunc Pro Tunc (Document No. 54) and Third-Party Defendant Black & Decker Manufacturing Company's ("Black & Decker") Motion to Dismiss Howell's Third-Party Complaint (Document No. 49). A hearing was held on these motions on September 11, 1998. For the reasons stated below, Howell's motion is granted, and Black & Decker's Motion to Dismiss is denied.

I. Howell's Motion for Leave to Serve Process Beyond 120 Days Nunc Pro Tunc

On June 18, 1997, Howell served its third-party complaint on "Black & Decker" and RTE Corporation ("RTE") through CT Corporation System ("CT"), which is the registered agent for several of Black & Decker's corporate entities and RTE. On June

27, 1997, CT returned those complaints and requested further information from Howell regarding exactly which Black & Decker entity Howell intended to sue. Howell apparently conducted some investigation and on April 15, 1998, served the third-party complaint on the Black & Decker Manufacturing Corporation.¹ Howell now requests that this Court affirm its later services.

In support of its request, Howell urges the Court to extend the time limit for service under Fed. R. Civ. P. 6(b).² Under Rule 6(b), "the court for cause shown may at any time in its discretion . . . (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect. . . ." The Third Circuit has interpreted "excusable neglect" to require a showing that the party moving for an enlargement acted in good faith and had some reasonable basis for noncompliance with the applicable time period. MCI Telecomm. Corp. v. Teleconcepts, Inc., 71 F.3d 1086, 1097 (3d Cir. 1995), cert. denied, 117 S. Ct. 64 (1996). Further, the Third Circuit has equated "excusable neglect" with "good cause" under Rule 4, and therefore seems to require district courts to consider what prejudice the movant's failure has visited on the party to be served.³ See id. The primary

¹Howell served its complaint on RTE on May 20, 1998.

²Rule 4(m) fixes the period in which service must be accomplished at 120 days.

³The other "good cause" factor, whether the party has moved for an extension of time to serve, obviously is addressed (continued...)

focus of the inquiry, however, is on the movant's reasons for not complying with the time limit. Id.

In consideration of the parties' memoranda of law and the hearing today, the Court concludes Howell reasonably and in good faith failed to serve the complaint on the proper Black & Decker entity within 120 days and Black & Decker has not suffered any undue prejudice. In accordance with Rule 4(h)(1), Howell served the complaint and summons on Black & Decker's registered agent within the time period prescribed by Rule 4(m), and CT accepted service. Although CT eventually did attempt to return the complaint and sought some clarification on which Black & Decker entity Howell intended to sue, it was reasonable for Howell initially to believe its service had been effective and allow the 120 days under Rule 4(m) to elapse. Further, there has been no suggestion either in Black & Decker's memorandum of law or at the hearing that Howell failed to act in good faith when it attempted to serve its complaint on "Black & Decker" and not "Black & Decker Manufacturing Corporation." Finally, Black & Decker has not been prejudiced by Howell's error. Counsel for Black & Decker agreed at the hearing that it will have sufficient time, under this Court's Scheduling Order, to accomplish its discovery objectives. Accordingly, the Court will grant Howell's motion.

II. Black & Decker's Motion to Dismiss

³(...continued)
by a Rule 6(b) motion.

Because the Court has granted Howell's motion to affect its earlier service on Black & Decker, Black & Decker's motion to dismiss based upon Howell's misnomer in its original complaint and its untimely service is denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NOEL KENT, et al. : CIVIL ACTION
v. :
HOWELL ELECTRIC MOTORS, et al. : NO. 96-7221

O R D E R

AND NOW, this 14th day of September, 1998, in consideration of Third-Party Plaintiff Howell Electric Motors' Motion for Leave to Serve Process Beyond 120 Days Nunc Pro Tunc and Third-Party Defendant Black & Decker Manufacturing Corporation's Response thereto, it is hereby **ORDERED**:

1. Third-Party Plaintiff's Motion for Leave to Serve Process Beyond 120 Days Nunc Pro Tunc is **GRANTED** (Doc. No. 54);

2. Third-Party Defendant Black & Decker Manufacturing Corporation's Motion to Dismiss Howell Electric Motors' Third-Party Complaint is **DENIED** (Doc. No. 49); and

3. Third-Party Aerovox's Motion to Compel (Doc. No. 53) is **WITHDRAWN**.

BY THE COURT:

James McGirr Kelly, J.