

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

**BETTY LEUNG and KEVIN LEUNG**

v.

**SHK MANAGEMENT, INC. t/a  
KORMAN COMMUNITIES, INC.**

**CIVIL ACTION  
NO. 98-3337**

**MEMORANDUM**

**Broderick, J.**

**October , 1999**

Plaintiffs Betty and Kevin Leung ("Plaintiffs") filed a pro se complaint against Defendant SHK Management, Inc. t/a Korman Communities, Inc. ("Defendant") on June 29, 1998 alleging employment discrimination. Before the complaint was served upon Defendant, Plaintiffs, through counsel, filed an amended complaint on October 22, 1998. The amended complaint contains five counts on behalf of Plaintiff Betty Leung under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e et seq., under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., under the Civil Rights Act of 1866, 42 U.S.C. § 1981, under the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 et seq., and under the Pennsylvania Human Relations Act ("PHRA"), 43 P.S. § 951 et seq. The amended complaint also contains two counts on behalf of Plaintiff Kevin Leung under Title VII and the PHRA alleging discrimination on the basis of national origin. Both Plaintiffs are former employees of Defendant.

Presently before the Court is Plaintiffs' motion to recover the cost of serving the amended complaint. Defendant has filed a response thereto. For the reasons stated below, Plaintiffs'

motion will be denied.

Pursuant to Federal Rule of Civil Procedure 4(d) a plaintiff may seek a waiver of service from an "individual, corporation or association that is subject to service under subdivision (e), (f), or (h)." Fed. R. Civ. P. 4(d)(2). In order to bring the waiver provisions into effect, the plaintiffs must "notify the defendant of the commencement of the action and request that the defendant waive service of a summons." Fed. R. Civ. P. 4(d)(2). The notice and request sent to the defendant "shall be in writing and shall be addressed ... to an officer or managing or general agent (or other agent authorized by appointment or law to receive service of process) of a defendant subject to service under subdivision (h)[.]" Fed. R. Civ. P. 4(d)(2)(A). Subdivision h of Rule 4 provides the manner in which service shall be effected upon corporations and associations. Rule 4(d) also provides, inter alia, that the notice and request "shall inform the defendant, by means of a text prescribed in an official form promulgated pursuant to Rule 84, of the consequences of compliance and of a failure to comply with the request[.]" Fed. R. Civ. P. 4(d)(2)(D), and shall provide the defendant with an extra copy of the notice and request, as well as a prepaid means of compliance in writing." Fed. R. Civ. P. 4(d)(2)(G). If the requirements for requesting a waiver of service provided by Rule 4(d)(2) are met and "a defendant located within the United States fails to comply with a request for waiver made by a plaintiff located within the United States, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown." Fed. R. Civ. P. 4(d)(2). "The costs to be imposed on a defendant under paragraph (2) for failure to comply with a request to waive service of summons shall include the costs subsequently incurred in effecting service under subdivision

(e), (f), or (h), together with the costs, including a reasonable attorney's fee, of any motion required to collect the costs of service." However, no costs will be imposed on the defendant if the plaintiff's request to waive service is defective. See 1 Moore's Federal Practice § 4.13[1][a] (Matthew Bender 3d Ed.).

Plaintiffs' initial pro se complaint was filed on June 29, 1998 but was never served. On October 13, 1998 the Court notified Plaintiffs that the action would be dismissed for lack of prosecution if service of the complaint was not made in accordance with Rule 4 of the Federal Rules of Civil Procedure or good cause shown by October 27, 1999. On October 22, 1998 Plaintiffs, through counsel, filed an amended complaint. On November 25, 1998 Defendant filed a motion to dismiss the amended complaint based on the fact that neither the original complaint nor the amended complaint had yet been served. That same day, Plaintiffs sought additional time to make service. By Order dated December 4, 1998 this Court denied Defendant's motion to dismiss and granted Plaintiffs' motion for an enlargement of time, ordering Plaintiffs to make service and file proof thereof with the Court on or before December 15, 1998. Plaintiffs served Defendant with the amended complaint on December 7, 1998.

Plaintiffs' motion for costs of service pursuant to Federal Rule of Civil Procedure 4(d) alleges that a copy of the amended complaint and a waiver of service were sent to Defense Counsel and no response was received. Plaintiffs assert that Defense Counsel was authorized to accept service and, therefore, that Defendant is liable for the costs of service for failing to waive service when asked to do so. Plaintiffs rely on a July 16, 1998 letter from Defense Counsel asking that a copy of the complaint be served upon her. Pls.' Mot. at Ex. C. Plaintiffs' counsel responded that she intended to amend the complaint before serving it on Defense Counsel. Pls.

Mot. at Ex. D. A copy of the amended complaint, along with a Notice of Lawsuit and Waiver of Service of Summons, was sent to Defense Counsel on or about October 22, 1998. Pls.' Mot. at Ex. E.

Defendant responds that Plaintiffs never asked Defendant to waive service of the amended complaint. Defendant also asserts that Defense Counsel was not authorized to accept service of the amended complaint on behalf of Defendant, nor did Defense Counsel suggest that she was so authorized. Defendant therefore argues that Plaintiff has not complied with the dictates of Federal Rule of Civil Procedure 4(d)(2) and, thus, is not entitled to recover the costs of service under that rule.

Plaintiffs have not shown that they are entitled to recover costs of service under Federal Rule of Civil Procedure 4(d). Plaintiffs have failed to demonstrate that the notice and request to waive service was addressed to "an officer or managing agent or general agent (or other agent authorized by appointment or law to receive service of process)." Fed. R. Civ. P. 4(d)(2)(A). There is nothing in the record before the Court from which the Court can conclude that Defense Counsel was authorized to receive service of the amended complaint as required by Rule 4(d)(2)(A). The Court cannot find that the requirements of Rule 4 are met simply because Defense Counsel, several months prior to being sent the waiver and amended complaint, asked that a copy of the original complaint be provided to her. Defense Counsel has asserted that she was not authorized to accept service of the amended complaint and Plaintiffs have not come forward with any evidence to the contrary. In addition, the Court cannot determine whether or not the waiver and notice of lawsuit comply with the dictates of Rule 4(d) because they have not been provided to the Court.

For the foregoing reasons, the Court has determined that Plaintiffs are not entitled to recover the costs of service of the amended complaint upon Defendant pursuant to Federal Rule of Civil Procedure 4(d). Defendant's response also purports to seek attorney's fees against Plaintiffs for the filing of this motion. However, Defendant has not made a motion for such fees nor cited any authority pursuant to which it believes it is entitled to such fees. The Court will not, therefore, consider Defendant's request.

An appropriate Order follows.

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**ORDER**

**AND NOW**, this        day of October, 1999; Plaintiffs having filed a motion to recover the costs of service of the amended complaint on Defendant pursuant to Federal Rule of Civil Procedure 4(d); Defendant having filed a response in opposition thereto; for the reasons stated in this Court's Memorandum of this same date, the Court having determined that Plaintiff has not demonstrated compliance with the dictates of Rule 4(d) and is, therefore, not entitled to recover the costs of service;

**IT IS ORDERED** that Plaintiffs' motion for costs of service of summons and complaint (Document No. 24) is **DENIED**.

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**RAYMOND J. BRODERICK, J.**