

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

JOAN HOMSHER,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	NO. 04-1868
	:	
CIGNA LIFE INSURANCE COMPANY	:	
OF NORTH AMERICA, et al.,	:	
Defendants	:	

M E M O R A N D U M

STENGEL, J. **November** , **2004**

Citing Federal Rule of Civil Procedure 4(m),¹ Plaintiff seeks to reinstate an ERISA action that I dismissed without prejudice for failure to prosecute. For the reasons explained in this memorandum, I will deny the motion.

BACKGROUND

Joan Homsher filed an ERISA action on April 29, 2004, naming CIGNA Life Insurance Company and Penske Truck Leasing as defendants. Summonses were issued and forwarded to counsel on that same day. On August 12, 2004, one summons was returned as served upon Penske Truck Leasing. No such entry exists for the summons forwarded to CIGNA.

In correspondence dated August 16, 2004, the court reminded counsel for Homsher that service of the Complaint had not yet been made upon CIGNA. The letter also warned that if service were not made by August 27, 2004, the court would dismiss the Complaint without

¹Federal Rule of Civil Procedure 4(m) provides: 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.

prejudice for lack of prosecution. In separate correspondence dated the same day, the court also informed counsel for Homsher that Penske Truck Leasing had not yet filed a pleading in response to the Complaint; that if the pleading were not filed by August 27, 2004, Homsher could file a request for entry of a default judgment; and that if such a request were not filed, the court would enter an order dismissing the case for lack of prosecution.

The court's civil deputy clerk contacted Homsher's counsel by telephone on September 17, 2004 to inquire about the status of service upon CIGNA and the request for the default against Penske Truck Leasing. Counsel's secretary assured the deputy clerk that counsel for CIGNA had accepted service and that Homsher's counsel would be filing a request for default against Penske Truck Leasing shortly. On September 27, 2004, more than a month after the court's deadline, the court dismissed the case without prejudice for lack of service upon CIGNA and for failure to request default against Penske Truck Leasing.

In the motion to reinstate the civil action, Homsher's counsel indicates that he had spoken with counsel for CIGNA to inform her of the complaint; that he forwarded her a copy of it; and that the court dismissed the case because CIGNA had not filed an answer. Homsher insists that she is prepared to proceed and move forward with discovery and all necessary issues pertaining to this ERISA claim; that this matter should be reinstated so that it may move forward; that there was never any attempt on her part to delay this action; and that there has been no prejudice associated with this delay on the defendants. Homsher seeks reinstatement pursuant to Rule 4(m) "for good cause shown."

In its response, defendant Penske Truck Leasing claims that Homsher's motion is filled with distortion, fabrication, and misrepresentation. For example, Penske correctly points out that

the court dismissed the case for two reasons, i.e., lack of service and failure to request default; not because, as Homsher contends, Penske and/or CIGNA failed to file a pleading in response to the complaint. Penske also refers to Homsher's lack of response to the August 16, 2004 correspondence from the court outlining Homsher's procedural deficiencies and setting a deadline for compliance. Further, Penske stresses that, contrary to Homsher's motion, all Defendants have not been duly served with the complaint; that Homsher's indication that she is "prepared to proceed and move forward" with this case contradicts her actions to date; that Homsher does not give any reason why the court should revisit its dismissal order more than thirty days after it was issued; and that Homsher's only remedy is to file a new complaint, not to move for reinstatement of a complaint that she failed to prosecute or serve on all parties for more than six months.

In its response to the motion for reinstatement, defendant CIGNA argues that the motion should be denied because it failed to file an accompanying brief with the motion as required by Local Rule 7.1(c);² and because service was not completed within one hundred twenty days (120) of the filing of complaint. To clarify the record, CIGNA also stresses that the case was dismissed because of Homsher's failure to serve CIGNA and to request an entry of default against Penske Truck Leasing, even after two "very clear and specific" court notices.

Counsel for CIGNA indicates that she had spoken with counsel for Homsher, and explained to him that CIGNA had not yet been served, and that it was wrongly named in the suit

²Local Civil Rule 7.1(c) provides in pertinent part: Every motion not certified as uncontested, or not governed by Local Civil Rule 26.1(g)[a routine motion to compel answers to interrogatories or to compel compliance with a request for production], shall be accompanied by a brief containing a concise statement of the legal contentions and authorities relied upon in support of the motion.

because it is a non-entity. Counsel provided him with the identity of the proper party and informed him that she had learned about the suit from Penske. During that conversation, Homsher's counsel replied that he thought he had sent the complaint to her but could not find confirmation.

DISCUSSION

As shown above, Federal Rule of Civil Procedure 4(m) provides for a court to dismiss an action if service was not made upon a defendant within 120 days of the filing of the complaint. Upon plaintiff's showing of good cause why service was not completed, the court may extend the time for completion of service. Nothing in the rule contemplates reinstatement of a civil action that was dismissed for failure to prosecute. Thus, under this rule, the time to have alleged good cause for failure of service was after the August 16, 2004 notice of the court and before the September 27, 2004 dismissal of the complaint. The motion for reinstatement was filed on October 28, 2004 over a month after the case was dismissed; it is therefore untimely.

Nevertheless, if the motion were timely, it would still fail. Homsher does not attempt to show any good cause for the failure to complete service within the time allotted. She fails to explain why service was not perfected, why she did not request the entry of default against Penske Truck Leasing, and why she ignored the court notices. Instead, Homsher points the finger at the defendants, claiming their failure to file responses as the reason for the dismissal. She assures the court that all defendants have been duly served,³ that conversations are taking place between counsel, and that the case is now ready to move forward. Yet, no explanation was

³This representation is curious when no such proof of service exists in the record and when both defendants are adamant that CIGNA has not yet been served.

provided for her deficiencies.

Moreover, if I were to construe this motion for reinstatement as a motion for reconsideration of the court's dismissal order, it would also be untimely. Local Civil Rule 7.1(g) allows for such motions to be filed within ten (10) days after the entry of the judgment, order, or decree. The court's dismissal was executed and entered on September 27, 2004. This motion was filed on October 28, 2004, well beyond the ten days provided by the rule.

In conclusion, no due diligence has been shown on Homsher's part in the handling of this case. Because of the failure to serve CIGNA, the failure to request the entry of default judgment against Penske Truck Leasing, and the failure to respond to the court's notices, Homsher's motion for reinstatement of this action is denied.

An appropriate Order follows.

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ORDER

STENGEL, J.

AND NOW, this 30th day of November, 2004, upon consideration of Plaintiff's motion for reinstatement (Document # 6), and the responses thereto (Documents # 7 & 8),

IT IS HEREBY ORDERED that the motion is **DENIED**. This case is **CLOSED** for all purposes.

BY THE COURT:

LAWRENCE F. STENGEL, J.