

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

BISHNU C. BORAH, M.D., P.C.,	:	
and BISHNU BORAH, M.D.,	:	
Plaintiffs,	:	CIVIL ACTION
	:	
v.	:	
	:	
MONUMENTAL LIFE INSURANCE	:	
COMPANY, et al.,	:	NO. 04-3617
Defendants.	:	

MEMORANDUM AND ORDER

Schiller, J.

January 14, 2005

Plaintiffs Bishnu Borah (“Borah”) and Bishnu C. Borah, M.D., P.C. (“Borah, M.D.”) bring this fourteen-count complaint alleging RICO violations, violations of the New Jersey Racketeering Act and the New Jersey Consumer Fraud Act, fraud, negligent misrepresentation, breach of fiduciary duty, respondeat superior, and conspiracy. Now before the Court is Defendants’ Monumental Life Insurance Company (“Monumental”) and AEGON USA, Inc. (“AEGON”), motion to dismiss under Rule 12(b)(5) for insufficiency of service of process and under Rule 12(b)(6) for the failure to state a claim upon which relief can be granted. For the reasons below, this Court denies the motions in their entirety.

I. BACKGROUND

Borah practices medicine through Borah, M.D. Defendants are insurance companies, insurance salespersons, financial services companies, and financial planners. According to Plaintiffs’ complaint, Defendants have engaged in a long-running scheme to induce Plaintiffs to participate in a program of life insurance known as Continuous Group (“C-Group”) life insurance.

Various Defendants marketed this “C-Group” life insurance through Voluntary Employee Benefit Associations (“VEBA”). (Compl. ¶ 1.) Although these VEBA plans were presented as tax-deductible options in which medical corporations, like Borah, M.D., could participate, Plaintiffs claim Defendants knew that contributions to the plan were not tax-deductible. (*Id.*) According to Plaintiffs, although the IRS expressly took no position on the issue, Defendants deceived employers into believing that the IRS had ruled that contributions to VEBAs were tax deductible. (*Id.* ¶ 48.) Beginning in 1990, Plaintiffs claim Defendants engaged in deceptive conduct that led Plaintiffs to contribute over \$100,000 to the VEBA program, contributions that have subsequently been lost. (*Id.* ¶¶ 90, 94, 96-97.) Plaintiffs assert that Monumental and AEGON created, issued and sold the relevant life insurance policies knowing and participating in the deceptive conduct that is the subject of this action. (*Id.* ¶ 12.)

Plaintiffs filed suit on July 30, 2004, but did not initiate service on Monumental and AEGON until November 22, 2004. Monumental was served via certified mail addressed to Henry Hagan, Monumental’s President and CEO, at Monumental’s offices in Baltimore, Maryland. (V.S. of Stephen J. Fram ¶ 3.) AEGON was also served by certified mail addressed to Eric Goodman, President and Chief Investment Officer, at AEGON’s offices in Cedar Rapids, Iowa. (*Id.* Ex. B.)

II. STANDARD OF REVIEW

The fundamental purpose for requiring proper service of process is to ensure that the defendant receives notice of the commencement of a legal action and is afforded an opportunity to present his objections. *Perlberger v. Caplan & Luber, LLP*, 152 F. Supp. 2d 650, 653 (E.D. Pa. 2001); *see also Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (“An

elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”) The plaintiff bears the burden of burden establishing proper service. *See Kumar v. Temple Univ. Cancer Ctr.*, Civ. A. No. 95-7832, 1996 WL 363915, at *2 (E.D. Pa. July 1, 1996) (citing *Grand Entm’t Group v. Star Media Sales*, 988 F.2d 476, 488 (3d Cir. 1993)). A court may look outside of the pleadings to determine whether service was proper. *See Cooper v. The Frankford Hosp.*, Civ. A. No. 99-0292, 1999 WL 600536, at *1 (E.D. Pa. Aug. 10, 1999) (holding party could satisfy burden through an affidavit of service).

III. DISCUSSION

1. Proper Service on a Domestic Corporation

Domestic corporations may be validly served by either (1) delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process; or (2) pursuant to the law of the state in which the district court is located, or in which the service is effected under Federal Rule of Civil Procedure 4(e)(1). FED. R. CIV. P. 4(h)(1). Service on out-of-state corporations under Pennsylvania law is covered by Pennsylvania Rules of Civil Procedure 403 and 404. Rule 404 permits service outside the Commonwealth by mail in the manner provided by Rule 403. PA. R. CIV. P. 404(2). In turn, Rule 403 provides that “a copy of the process should be mailed to the defendant by any form of mail requiring a receipt signed by the defendant or his authorized agent.” PA. R. CIV. P. 403. Finally, Rule 424 provides for hand delivery of service upon an executive officer, person in charge, or agent

authorized by the corporation to receive process. PA. R. CIV. P. 424. Although Rule 424 appears to require hand delivery of service on a corporation, certified mail is a proper method of service on out-of-state corporations under Pennsylvania law. *McKinnis v. Hartford Life*, 217 F.R.D. 359, 361 (E.D. Pa. 2003) (citations omitted); *see also Morton v. F.H. Paschen, Inc.*, Civ. A. No. 96-7179, 1997 WL 381777, at *3 (E.D. Pa. June 27, 1997) (concluding that a Pennsylvania corporation may serve a foreign corporation by mail); *Reichert v. TRW, Inc. Cutting Tools Div.*, 385 Pa. Super. 416, 561 A.2d 745, 754 (Pa. 1992) (holding that Rule 424 did not abolish the option of serving foreign corporations by mail but simply specified those individuals who may be served on behalf of a corporation when service of process is made by hand delivery).

A plaintiff has one hundred and twenty days from the filing of a complaint to serve the summons and complaint; the failure to serve within that time frame leaves the plaintiff open to dismissal of the complaint. FED. R. CIV. P. 4(m).

The procedural thicket described above directs that Plaintiffs in this case may, pursuant to the Federal Rules of Civil Procedure, properly serve Monumental and AEGON either under the Federal Rules, the laws of Pennsylvania or the laws of Maryland (in the case of Monumental) or the laws of Iowa (in the case of AEGON). It is also clear that Plaintiffs have one hundred and twenty days to serve.

2. *Service on Monumental*

Monumental asserts that Plaintiffs failed to properly serve it for two reasons.¹ First, although addressed to Hagan, the President and CEO of Monumental, the service was signed for by a mail

¹ Monumental supported its arguments with an affidavit from its General Counsel, H. Stacey Boyer.

clerk and then delivered to a secretary assigned to Hagan. According to Monumental, neither of these people was authorized to accept service of process on behalf of Monumental. Second, Monumental states that Pennsylvania law requires that plaintiffs serving by mail on an out-of-state corporation must do so within 90 days of filing the complaint. Neither of these arguments is persuasive.

Although Plaintiffs did not provide any affidavits in support of their position that service was proper, the verification of Steven J. Fram indicates that the certified mail was addressed to the President and CEO of Monumental and was signed for Dan Brooks. (Fram V.S. Ex. B) There is no indication whether Brooks is an agent of Monumental, but I still find service proper under Pennsylvania law. Service was addressed to the President and CEO of Monumental; certainly Hagan qualifies as an executive officer under Pennsylvania law. Simply because mail sent to him must first pass through a mail clerk and his secretary does not render that service improper. *See Thomas v. Stone Container Corp.*, Civ. A. No. 89-1537, 1989 WL 69499, at *1 (E.D. Pa. June 21, 1989) (holding service sufficient when sent via certified mail and addressed to defendant corporation's office was even when mail was signed for by defendant's employee, whose position was secretary to vice president). Monumental cannot evade service by erecting barriers to its executive officers' receipt of their mail.

Defendants also argue that service was insufficient because Plaintiffs failed to serve process within 90 days of the filing of the complaint, as required by Rule 404 of the Pennsylvania Rules of Civil Procedure.² Monumental's argument is flawed because it renders meaningless the one hundred

² That Rule provides: "Original process shall be served outside the Commonwealth within ninety days of the issuance of the writ or the filing of the complaint . . ." PA. R. CIV. P. 404.

and twenty day time limit set out in Rule 4(m) of the Federal Rules of Civil Procedure. Rather, the appropriate way to harmonize Rule 4(m) with the clause in the Federal Rules allowing for service to be made on a corporation “pursuant to the law of the state in which the district court is located” is to allow service to be made in the *manner* permitted by the relevant state law while allowing for service to be effectuated within the one hundred and twenty day time period allotted by the Federal Rules. This result is commanded by *Henderson v. United States*, 517 U.S. 654, 656 (1996). The question presented in *Henderson* was whether the Federal Rule pertaining to time limits superseded the Admiralty Act, which instructed that actions brought under the Act be served “forthwith.” *Henderson v. United States*, 517 U.S. at 656. The Court held that the Federal Rules applied because “the 120-day provision operates not as an outer limit subject to reduction, but as an irreducible allowance.” *Id.* at 661. Accordingly, I reject Monumental’s suggestion that service in this case was required to be made within 90 days rather than 120 days. Plaintiffs’ complaint was filed on July 30, 2004 and service was completed on November 29, 2004, within the period allowed by the Federal Rules. *See* PA. R. CIV. P. 403 (“Service is complete upon delivery of the mail.”) Therefore, Monumental was properly served under Pennsylvania law.³

3. *Service on AEGON*

Plaintiffs also properly served AEGON under Pennsylvania law. Neither side has submitted affidavits pertaining to service on AEGON, but the verification of service indicates that on November 26, 2004, Michael E. Trout of Premar Security signed for the certified mail and checked the box indicating that he was an agent of AEGON. (Fram V.S. Ex. B). The verification also

³This finding obviates any need to examine whether the manner of service was proper under either Federal law or Maryland law.

indicates that the certified mail was addressed to Eric Goodman, President and Chief Investment Officer at AEGON, at AEGON's offices in Cedar Rapids, Iowa. As President and CIO, Mr. Goodman clearly falls within the list of corporate officers who may be served under Pennsylvania law. And, it is reasonable to believe that an agent hired by AEGON to handle the company's mail would transmit that mail to Mr. Goodman. Because the manner of service comports with Pennsylvania law and service on AEGON was also made within 120 days, it was proper.⁴

IV. CONCLUSION

Because the manner of service was proper under Pennsylvania law and Plaintiffs served both Monumental and AEGON within the time period permitted by the Federal Rules, Defendants' 12(b)(5) motion is denied. I am also denying Defendants' motion under 12(b)(6). An order follows.

⁴ This finding obviates any need to examine whether the manner of service was proper under either Federal law or Iowa law.

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COMPANY, et al.,	:	NO. 04-3617
Defendants.	:	

ORDER

AND NOW, this 14th day of **January, 2005**, upon consideration of Defendants Monumental and AEGON's Motion to Dismiss (Document No. 5), Plaintiffs' Response thereto (Document No. 8), Defendants' Reply thereon (Document No. 10), and for the foregoing reasons, it is hereby **ORDERED** that:

1. Defendants' Motion to Dismiss under Rule 12(b)(5) is **DENIED**.
2. Defendants' Motion to Dismiss under Rule 12(b)(6) is **DENIED WITHOUT PREJUDICE** to raise these issues at the appropriate time in a motion for summary judgment.

BY THE COURT:

/s/ Berle M. Schiller
Berle M. Schiller, J.