

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

THEODORE BAILEY	:	CIVIL ACTION
	:	
v.	:	
	:	
HARLEYSVILLE NATIONAL	:	No. 04-1541
BANK & TRUST. CO.,	:	
J.R. CALDWELL and EMPLOYEES	:	
	:	

**Memorandum**

**Baylson, J.**

**January 26, 2005**

**I. Introduction**

Presently before the Court is Defendants' Motion to Dismiss for Lack of Service and Service of Process and Lack of Jurisdiction, requesting dismissal of the action due to Plaintiff's failure to serve the summons and complaint upon Defendants within the 120 days required by Rule 4(m) of the Federal Rules of Civil Procedure.

**II. Factual and Procedural Background**

On April 9, 2004, pro se Plaintiff Theodore Bailey filed a complaint against Defendants Harleysville National Bank & Trust Co. and J.R. Caldwell, alleging discrimination in relation to an incident involving Plaintiff's attempt to cash a check issued by Harleysville. That same day, the Court issued summons as to Defendants which were forwarded to Plaintiff. Plaintiff served the summons and complaint on Defendants on August 23, 2004.

On September 13, 2004, Defendants filed this Motion to Dismiss for Lack of Service and Service of Process and Lack of Jurisdiction. On September 27, 2004, Plaintiff filed a responsive brief, and on September 30, 2004, Defendants filed a reply brief.

## **II. Legal Standard**

Rule 4(m) states in pertinent part:

Time Limit for Service. 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, 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.

Fed. R. Civ. P. 4(m). The Third Circuit “has developed a two-pronged inquiry to determine whether the grant of an extension of time in which to serve is proper under Rule 4(m).”

McCurdy v. American Bd. of Plastic Surgery, 157 F.3d 191, 196 (3d. Cir. 1998).

First, the district court must determine whether good cause exists for the failure to have effected service in a timely manner. If so, the extension must be granted. If good cause has not been shown, however, the court still may grant the extension in the sound exercise of its discretion.

Id.; Petrucelli v. Bohringer and Ratzinger, 46 F.3d 1298, 1304-08 (3d. Cir. 1995). Three factors courts consider in determining the existence of good cause are “(1) the reasonableness of plaintiff’s efforts to serve; (2) whether the defendant is prejudiced by the lack of timely service; and (3) whether the plaintiff moved for an enlargement of time to serve.” Steele v. HCI Direct, 2004 WL 1699611 (E.D. Pa. 2004)(citing MCI Telecomm. Corp. v. Teleconcepts, Inc., 71 F.3d 1086, 1097 (3d. Cir. 1995), cert den’d, 519 U.S. 815 (1996)). Additionally, “[e]ven if good cause does not exist, . . . the district court must consider whether to grant a discretionary extension of time.” Id.

## **III. Discussion**

From the date of the filing of the Complaint to the date upon which service was made,

approximately 137 days passed. Plaintiff never filed for an extension of the 120-day time limit for service. In relation to the reasonableness of Plaintiff's efforts to serve within the time allotted, Plaintiff argues that (1) he did not receive the summons until after the filing date of the complaint and thus the summons was in his possession less than the allotted 120 days; (2) the office of the Clerk of the Court informed him that he had 180 days to serve Defendants; and (3) he did not show any contempt or disregard for the Court.

The Court finds that none of these explanations constitute good cause for failing to effect service within the 120 days permitted. Rule 4(m) states explicitly that defendant must be served within 120 days after the filing of the complaint, and a pro se litigant's misunderstanding of Rule 4 does not constitute good cause. Shore v. Henderson, 168 F. Supp. 2d 428, 431 (E.D. Pa. 2001). Neither is the Clerk of the Court responsible for guiding pro se plaintiffs in their compliance with the Federal Rules. Veal v. U.S., 2002 WL 1971929, \*2 (D. Del. 2002)("[T]he Clerk's Office has no duty to provide *pro se* plaintiffs with step by step guidance in every case."). Similarly, the fact that Plaintiff did not demonstrate contempt or disregard for the Court does not constitute good cause for the failure to comply. While it is true the Defendants have demonstrated no prejudice caused by the delay, "absence of prejudice alone can never constitute good cause to excuse late service." MCI Telecomm. Corp., 71 F.3d at 1097.

The Court must still consider, however, whether to exercise its discretion to extend the time allotted to serve Defendants. Although litigants who choose to proceed without counsel are obligated to comply with the Federal Rules, this Court has noted that "a *pro se* plaintiff's failure to observe all of the niceties of Rule 4" is entitled to some leniency. Saunders v. Dep't of Veterans Affairs, 1997 WL 805246, \*1 (E.D. Pa. 1997)(J. Pollak). Most significantly,

Defendants' failure to demonstrate any prejudice from the delay weighs in Plaintiff's favor. In exercising the discretion to extend the time to effect service, the Third Circuit has advised district courts to consider whether any delay "may damage a defendant's ability to defend on the merits." Boley v. Kaymark, 123 F.3d 756, 759 (3d Cir. 1997)). Here, Defendants' opportunity to prepare an appropriate defense on the merits has not been impaired. As in similar cases, "[t]he absence of prejudice persuades the Court to exercise its discretion to grant an extension of time." Steele, 2004 WL 1699611 at \*3 (citing Boley, 123 F.3d at 759).

Therefore, although Plaintiff has not established good cause for the failure to serve within 120-day time limit, Defendants were not prejudiced by the delay, and the Court will exercise its discretionary power to extend the date by which service was required to August 23, 2004, the date on which service was made.

#### **IV. Conclusion**

For the foregoing reasons, Defendants' motion is denied.

An appropriate order follows.

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**ORDER**

AND NOW this \_\_\_\_ day of January, 2005 upon consideration of Defendant's Motion to Dismiss for Lack of Service and Service of Process and Lack of Personal Jurisdiction (Docket No. 4) and the responses thereto, it is ORDERED that the motion is DENIED.

**BY THE COURT:**

/s/ Michael M. Baylson  
**Michael M. Baylson, U.S.D.J.**