

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

JOHN A. THOMPSON	:	CIVIL ACTION
	:	
v.	:	
	:	
SEARS, ROEBUCK AND CO.	:	NO. 04-5342

**MEMORANDUM**

**Baylson, J.**

**March 3, 2006**

**I. Introduction**

On November 15, 2004, Plaintiff John A. Thompson (“Plaintiff” or “Thompson”) filed a Complaint in this Court against Defendant Sears, Roebuck and Company (“Defendant” or “Sears”) alleging that he suffered discrimination during his employment with Sears. Plaintiff alleged that Defendant discriminated against him on the basis of race in violation of the Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. §§ 951–963 (“PHRA”), Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., Section 1981 of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and on the basis of age in violation of the Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. §§ 621–634.

Plaintiff, who is acting pro se in this matter, was issued a summons for Sears on November 15, 2004. However, service was not effected upon Sears until March 22, 2005, when the company was served with an Amended Complaint and an alias summons. Unaware that service had already been achieved, this Court issued an Order on March 29, 2005 providing Plaintiff with an additional thirty days to serve Defendant.

By Order dated March 29, 2005 (Doc. No. 6), the Court required Plaintiff to file an

additional copy of the Amended Complaint signed by Plaintiff, which was done on April 7, 2005 (Doc. No. 7). After receiving a new “Amended Complaint” from Plaintiff on April 13, 2005, the Court issued an Order dated April 22, 2005 (Doc. No. 9) which allowed it to be docketed but required Plaintiff to properly serve Defendant with this latest Amended Complaint and to discuss with defense counsel what document will be the operative document moving forward in this case.

Presently before the Court is Defendant’s Motion to Dismiss the Complaint Pursuant to F.R. Civ. P. 12(b)(5) and for Reconsideration of the Court’s March 29, 2005 Order Granting Plaintiff an Extension to Serve the Amended Complaint (Doc. No. 8). Plaintiff responded on January 24, 2006 and a reply brief was filed on February 1, 2006.<sup>1</sup>

## **II. Parties’ Contentions**

In its Motion to Dismiss, Defendant argues that failure to properly serve process with 120 days results in the service being rendered defective and insufficient, and, if good cause for the delay is absent, the Court may dismiss the action pursuant to F.R. Civ. P. 12(b)(5). Def’s Br. at 3. Defendant contends that because service was not achieved until March 22, 2005, 127 days after the filing of the original Complaint, Plaintiff has not complied with the requirements of F.R. Civ. P. 4(m). Defendant next asserts that Plaintiff is required to affirmatively produce evidence of good cause for failure to effect service of process within the prescribed time period. Moreover, Defendant argues that Plaintiff’s pro se status does not excuse any lack of knowledge

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<sup>1</sup> The delay in the filing of a response was a result of Plaintiff’s motion for appointment counsel and subsequent problems in obtaining review of his case by the Employment Discrimination Review Panel. This Court issued an Order on December 23, 2005 removing the case from suspense and requiring Plaintiff to file and serve a response to Defendant’s Motion to Dismiss within thirty days.

of the deadline.

As for the Court's determination of whether to dismiss the case without prejudice or extend the time for service, Defendant contends that as a national retail chain, Sears should not have been difficult for Plaintiff to locate and that the company made no attempt to evade service. Therefore, Defendant requests that the Court use its discretion to refuse an extension of time for service and dismiss the case with prejudice for failure to properly serve process.

In his response, Plaintiff argues that due to "material misidentifications and omissions in the original complaint" he should have been allowed to utilize the additional time provided by the Court in its March 29, 2005 Order so that the Amended Complaint could be filed and served. Pl's Resp. at 1.

Defendant, in its reply, argues that Plaintiff's justification for the delay in service is entirely inadequate, as the filing of an amended complaint does not begin a new service period for defendants previously named in the complaint. Def's Reply at 2. Defendant argues that Plaintiff's response implicitly concedes that he made no attempt to serve Sears within the 120-day period and therefore no extension of time is warranted.

### **III. Legal Standard**

F.R. Civ. P. 12(b)(5) states "the following defenses may at the option of the pleader be made by motion . . . (5) insufficiency of service of process." A defendant may object to the plaintiff's failure to comply with the procedural requirements for proper service of the summons and complaint as set forth in or incorporated by F.R. Civ. P. 4(m). See 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, § 1353 (3d ed. 2004). Under F.R. Civ. P. 4(m) a plaintiff has 120 days from the date of filing the original complaint to serve defendant

with the summons and complaint. In resolving a motion under Rule 12(b)(5), the party making the service has the burden of demonstrating its validity when an objection to service is made.

Reed v. Weeks Marine, Inc., 166 F. Supp. 2d 1052, 1054 (E.D. Pa. 2001) (citing Grand Entertainment Group, Ltd. v. Star Media Sales, Inc., 988 F.2d 476, 488 (3d Cir. 1993)).

#### **IV. Discussion**

Rule 4(m) states in relevant 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 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.

F.R. Civ. P. 4(m).

The Third Circuit has required courts to extend time for service under Rule 4(m) where the plaintiff demonstrates good cause. McCurdy v. Am. Bd. of Plastic Surgery, 157 F.3d 191, 196 (3d Cir. 1998). “Good cause” has been equated with the concept of “excusable neglect,” as defined in F.R. Civ. P. 6(b)(2), which “requires a demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance within the time specified in the rules.” MCI Telecoms. Corp. v. Teleconcepts, 71 F.3d 1086, 1097 (3d Cir. 1995) (citing Petrucelli v. Bohringer & Ratzinger, 46 F.3d 1298, 1312 (3d Cir. 1995) (Becker, J., concurring in part and dissenting in part)). If good cause exists, the extension must be granted. Boley v. Kaymark, 123 F.3d 756, 758 (3d Cir.1997); see also F.R. Civ. P. 4(m). Courts have considered three factors in determining the existence of good cause: (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. See MCI, 71 F.3d at 1097. However, the MCI court noted that “absence of prejudice alone can never constitute good cause to excuse late service.” Id.

Extension of time under Rule 4(m), however, requires a two-step inquiry, and even if good cause does not exist, the district court must consider whether to grant a discretionary extension of time. See Petrucelli, 46 F.3d at 1307–08 (noting that under Rule 4(m) “the district court *must* consider whether any other factors warrant extending time even though good cause was not shown” (emphasis added)).

Here, Plaintiff effected service 127 days after the initial Complaint was filed in this Court on November 15, 2004.<sup>2</sup> The Third Circuit has held that reliance on a third party or process server is an insufficient basis to constitute good cause for failure to serve, Petrucelli, 46 F.3d at 1307, and the fact that Plaintiff is acting pro se and is “untrained in the law” does not excuse violations of the deadline. Steele v. HCI Direct, 2004 WL 1699611, at \*2 (E.D. Pa. July 29, 2004) (citing Veal v. United States, 84 Fed. Appx. 253, 256 (3d Cir. 2004) (non-precedential)). There is nothing on the record indicating that Plaintiff made any attempt to serve Defendant, and in response to the Motion to Dismiss, Plaintiff asserted only that the extra time provided by the Court in its March 29 Order was needed in order to properly amend the complaint so that “the pleadings could be so construed as to do substantial justice.” Pl’s Resp. at 2. With no other basis for the delay, the Court holds that Plaintiff has not established good cause sufficient to excuse his failure to serve process in a timely manner.

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<sup>2</sup> Though the Court granted a thirty-day extension for service of process in its March 29, 2005 Order, service had in fact been achieved eight days earlier. The Court will therefore examine the situation as it existed when service was first achieved on March 22, 2005.

Turning to the second phase of the inquiry under Rule 4(m), the Court will next decide whether to exercise its discretion to grant an extension of time. Two factors, though insufficient on their own to constitute good cause, weigh in favor of granting Plaintiff additional time to serve process in this case. First, there is no specific evidence that Defendant has suffered prejudice due to the delay in service. The deadline was missed by only seven days, and prejudice has been defined in the context of service as “involv[ing] impairment of defendant's ability to defend on the merits, rather than foregoing . . . a procedural or technical advantage.” Boley, 123 F.3d at 759 (quoting Nat'l Union Fire Ins. Co. v. Barney Assocs., 130 F.R.D. 291, 294 (S.D.N.Y. 1990)). Here, Defendant made no showing that its ability to defend on the merits has been impacted by the slight delay in service of the Amended Complaint.

The second factor to be considered is Plaintiff's pro se status. While insufficient to constitute good cause, Plaintiff's apparent lack of understanding of the rules of service counsels in favor of the Court exercising its discretion to grant an extension. See HCI, 2004 WL 1699611, at \*3. In his Motion to Request Appointment of Attorney (Doc. No. 3) dated March 14, 2005, Plaintiff stated that he had hired an attorney to assist with the drafting and filing of his Complaint in this case. He also states that did not receive a copy of said Complaint until March 1, 2005 and subsequently learned that the attorney had filed the document without a signature. PI's Motion to Request Appointment of Attorney at 1. On March 11, 2005 Plaintiff was told to find other counsel in this case.<sup>3</sup> Id. Though reliance on a third party is insufficient to meet the good cause standard for an extension, the fact that any assistance of counsel which Plaintiff might have had

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<sup>3</sup> Though Plaintiff apparently received assistance from counsel in drafting and filing the Amended Complaint in this case, no attorney ever entered an appearance on his behalf, and, according to the docket, Plaintiff has been a pro se litigant throughout the course of this suit.

in this case was terminated a mere four days before the deadline for service of process also weighs in favor of the Court using its discretion to grant an extension.

The Court therefore finds that though Plaintiff has failed to show good cause for failing to serve his original complaint within the 120 days permitted, the circumstances surrounding the delay in service and the lack of prejudice to Defendant resulting therefrom favor a discretionary extension of time. For purposes of clarification, the Court will treat the Amended Complaint dated April 22, 2005 as the operative document moving forward in this case.

#### **V. Conclusion**

For the reasons stated above the Court will deny Defendant's Motion to Dismiss and will uphold the extension of time originally granted in its Order of March 29, 2005.

The Plaintiff is urged to familiarize himself with the Federal Rules of Civil Procedure and the Local Rules and procedures of this Court, or the Court may not be so forgiving if further issues arise from Plaintiff not following all applicable rules.

An appropriate Order follows.

