

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

DEAN CAMACHO,	)	
	)	
Plaintiff,	)	CIVIL NO. SX-09-CV-230
	)	
v.	)	ACTION FOR WRONGFUL DISCHARGE
	)	AND FOR DAMAGES
DELIVER IT, INC. and LEONARD MATTHEWS,	)	
	)	JURY TRIAL DEMANDED
Defendants.	)	
_____	)	

MEMORANDUM OPINION

MOLLOY, Judge.

THIS MATTER comes before the Court *sua sponte*. Under Federal Rule of Civil Procedure 4(m), Plaintiff was required to serve Defendant Deliver It, Inc. ("DII") by September 1, 2009. To date, Plaintiff has not provided sufficient proof to the Court that he has properly effectuated service on DII. Accordingly, for the reasons stated below, the Court will dismiss this action due to Plaintiff's failure to effectuate service upon Defendant DII.

I. PROCEDURAL BACKGROUND

Plaintiff commenced this action by filing a complaint on May 4, 2009. Under Federal Rule of Civil Procedure 4(m), Plaintiff was required to serve DII by September 1, 2009. On May 20, 2009, Plaintiff issued a summons directed to Adrienne Talmer as resident agent for DII, but the record does not indicate that he ever effectuated service on Ms. Talmer. Subsequently, on July 15, 2009, a new summons was issued designating Kenneth Huskey as resident agent for DII. An affidavit filed on August 3, 2009, indicates that Plaintiff served an individual named Steve Vasaturo with the summons addressed to Kenneth Huskey. Plaintiff

filed a motion for default judgment on February 20, 2014, attaching the proof of service to Steve Vasaturo.

On February 25, 2014, the Court issued an Order requiring that Plaintiff serve DII or show good cause as to why the Court should extend time for service pursuant to Fed. R. Civ. P. 4(m). Pursuant to copies of the proof of service on Steve Vasaturo submitted by Plaintiff, on April 15, 2014, the Court issued an Order requiring that Plaintiff provide proof to the Court that service upon Steve Vasaturo constitutes service upon DII. On July 17, 2014, Plaintiff filed an Informative Motion indicating that Plaintiff is trying to procure a copy of the ownership documents of DII from the Lieutenant Governor's Office and that Plaintiff is procuring an affidavit from the process server in reference to his alleged service upon DII. Over nine months have since elapsed, and Plaintiff has taken no further action on this case.

II. LEGAL STANDARD

For actions brought in the Superior Court of the Virgin Islands, "[t]he summons and process shall be served in the same manner as required to be served by Rule 4 of the Federal Rules of Civil Procedure[.]" Super. Ct. R. 27(b). Under Rule 4(m), when a plaintiff fails to serve a defendant within 120 days of the filing of the complaint, "the court – on motion or on its own after notice to the plaintiff - must dismiss the action without prejudice against the defendant or order that service be made within a specified time." Fed. R. Civ. P. 4(m). The St. Thomas and St. John Division of the Superior Court has made it clear that, "[t]he Federal Rules provide a timeline for service that plaintiffs should respect as they would respect a 'time bomb.'" *Carty v. Mason*, 2010 V.I. LEXIS 34, *8 (V.I. Super. May 6, 2010), quoting *Braxton v. U.S.*, 817 F.2d 238, 241 (3d Cir. 1987).

However, “[i]f the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.” Fed. R. Civ. P. 4(m). The plaintiff bears the burden of showing good cause to extend the time for service. *Beachside Associates, LLC v. Fishman*, 53 V.I. 700, 713 (V.I. 2010). Good cause under Rule 4(m) requires a demonstration of good faith and a reasonable basis for failure to timely serve. *Id.* This Court considers three factors in determining whether good cause is shown: (1) reasonableness of plaintiff's efforts to serve; (2) prejudice to the defendant by lack of timely service; and (3) whether plaintiff moved for an enlargement of time to serve prior to the expiration of the period prescribed by the rule. *Bryant v. Caribbean Sun Airlines*, 49 V.I. 93, 95 (V.I. Super. 2007); *Charles v. Woodley*, 47 V.I. 202, 210 (V.I. Super. 2005). The primary inquiry, however, shall focus on the reasonableness of a plaintiff's efforts; “[w]hile the prejudice may tip the ‘good cause’ scale, the primary focus is on the plaintiff's reasons for not complying with the time limit in the first place.” *Charles*, 47 V.I. 202 at 210, quoting *MCI Telecomms. Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1097 (3d Cir. 1995). If plaintiff fails to demonstrate good cause, the Court must consider whether other factors warrant a permissive extension of time to effectuate service. *Beachside Associates*, 53 V.I. 700 at 717-18.

III. DISCUSSION

A. Good Cause

1. *Reasonableness of Plaintiff's Efforts to Serve*

To decide whether Plaintiff has shown good cause for his failure to serve, the Court first determines the reasonableness of his efforts to serve. In doing so, the Court must examine the Plaintiff's reason, if any, for failing to serve within the time limit. A defendant's

evasion of service is a quintessential example of good cause for plaintiff's failure to serve. *Charles*, 47 V.I. 202 at 210. The Supreme Court of the Virgin Islands has held that repeated, improper attempts do not constitute a reasonable basis when these attempts were made after the 120-day period. *Beachside Associates*, 53 V.I. 700, at 713. This Court has held that making "several efforts" to obtain a defendant's address does not excuse failure to serve, particularly when these efforts occurred after the 120-day period and include a "glaring" oversight such as the failure to contact the United States military regarding an enlisted defendant. *Charles*, 47 V.I. 202 at 212. Additionally, a "mistaken assumption," resulting from a skip trace investigation, that a defendant lived with his mother and that serving her satisfied the need to serve the defendant did not excuse the failure to properly serve. *Id.* at 213. This Court has also held that pregnancy, health problems, lack of access to a telephone or a vehicle and other personal issues do not comprise reasonable bases for failure to serve. *Bryant*, 49 V.I. 93, at 95. Further, this Court has made it clear that effectuating service within the time limit is a party's responsibility: "[A] party's misplaced reliance on representations by a process server, or even a court clerk, does not constitute good cause." *Id.* at 96.

In this matter, Plaintiff has provided the Court with no explanation as to why he did not effectuate service, despite the Court's orders of February 25, 2014 and April 15, 2014. As the case law demonstrates, this jurisdiction takes a plaintiff's responsibility to effectuate service within the 120-day time period very seriously. Judging by Plaintiff's Informational Motion filed in July 2014, Plaintiff seems to have served Mr. Vasaturo believing that doing so constituted service upon DII. This service occurred within the 120-day timeframe. However, this mistaken service occurred over five years ago, and Plaintiff's Informational Motion was

filed nearly ten months ago. Plaintiff has since failed to follow-up with the Court. This situation likens itself to *Charles* in that it appears that Plaintiff served the incorrect individual pursuant to a mistaken belief. As *Bryant* makes clear, it is the Plaintiff's sole responsibility to effectuate service within the time limit, and any error made by the process server does not excuse failure to timely effectuate service. Accordingly, Plaintiff has not demonstrated that his efforts to serve DII were reasonable, and this factor does not favor a finding of good cause.

2. Prejudice to Defendant

Next, the Court examines whether DII has been prejudiced by Plaintiff's failure to timely serve. In examining this aspect of good cause, the Third Circuit has pointed out that delay caused by failure to effectuate timely service, "may damage a defendant's ability to defend on the merits." *Boley v. Kaymark*, 123 F.3d 756, 759 (3d Cir. Pa. 1997). The Third Circuit has also emphasized that, "actual notice [of the claim against them] 'is crucial' to determining prejudice." *Id.* (internal citations omitted). In *Beachside Associates*, the Supreme Court of the Virgin Islands held that the defendant was not prejudiced by untimely service because he had actual notice of the action against him vis-à-vis the plaintiff's first attempt to serve him¹. 53 V.I. 700, 713.

In this matter, there is no indication that DII has any actual notice of the five-year-old action against it. Indeed, the complete lack of any filing or appearance from DII likely

¹ The defendant in *Beachside Associates* moved to quash the first service of process, which was attached to the door of his residence and mailed to him, on the grounds that it did not comport with New York law. 53 V.I. 700, 704-705.

indicates that DII is unaware of this action against it. Accordingly, due to this lack of actual notice, this factor does not favor a finding of good cause.

3. Motion for Enlargement of Time

Finally, the Court considers whether the plaintiff moved for an enlargement of time to serve prior to the expiration of the period prescribed by the rule. In *Beachside Associates*, the Supreme Court of the Virgin Islands indicated that “good faith” on the part of the party seeking an enlargement is necessary, and found that this aspect of good cause was not satisfied when the plaintiff did not offer any excuse for failing to move for an extension of time until approximately nine months after [the defendant] filed his first motion to quash and dismiss. 53 V.I. 700, at 713.

In this matter, Plaintiff did not move for an enlargement of time; however, the July 2014 Informational Motion indicates that this is likely because Plaintiff believed he served DII within the time limit, but failed to exercise the diligence necessary to effectuate service upon the correct agent for DII. Accordingly, this factor weighs neutrally towards a finding of good cause.

B. Whether a Discretionary Extension is Warranted

Even if Plaintiff has not shown good cause, the Court must consider whether other factors warrant a permissive extension of time to effectuate service. *Beachside Associates*, 53 V.I. 700 at 717-18; *see also Ross v. Hodge*, 58 V.I. 292, 300 (V.I. 2013). However, the Supreme Court of the Virgin Islands has made it clear that, while this Court must consider whether a permissive extension is warranted, it is ultimately up to this Court’s discretion to grant or deny a permissive extension. *Beachside Associates*, 53 V.I. 700 at 717-18. While not an

exhaustive list, some factors that may warrant an extension include: (1) whether the applicable statute of limitations would bar the refiled action; (2) whether the defendant is evading service; or (3) whether the defendant is concealing a defect in attempted service. *Id.* at 718 (*referring to the Advisory Committee Notes to Fed. R. Civ. P. 4(m)*).

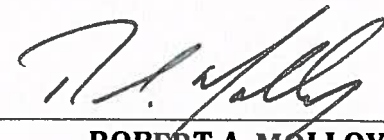
For breach of contract claims in the Virgin Islands, the statute of limitations mandates that an action must be brought within six years of when the action accrued. 5 V.I.C. § 31(3)(A). Accordingly, as Plaintiff's cause of action accrued when he was terminated on October 1, 2008, the statute of limitations ran on October 1, 2014. Although the statute of limitations has now run, this factor does not favor a permissive extension. While the trial court must consider this factor, the trial court may still deny a permissive extension of time if the statute of limitations has run. *Beachside Associates*, 53 V.I. 700 at 717. Plaintiff still had over five months within the statute of limitations after the Court's April 15, 2014 Order requiring proof that service upon Steve Vasaturo constituted service upon DII and over two months following Plaintiff's Informative Motion. Accordingly, Plaintiff was on notice that he needed to effectuate service upon an agent of DII. Additionally, nothing on the record indicates that DII is evading service or concealing a defect in attempted service. Finally, nothing else on the record indicates to this Court that a discretionary extension is warranted in this case. Accordingly, this Court will not grant Plaintiff a discretionary extension to effectuate service upon DII.

IV. CONCLUSION

Plaintiff, after repeated notice, has failed to prove service of process upon an agent of DII. As two factors weigh against a finding of good cause and one factor weighs neutrally,

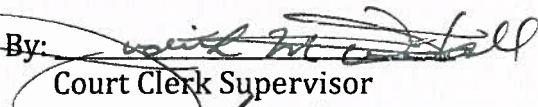
Plaintiff has also failed to show good cause as to why the time for service should be extended. The Court does not find that other factors merit a permissive extension. In the nearly six years that this litigation has been ongoing against Defendant Leonard Matthews,² Plaintiff has failed to provide proof that Steve Vasaturo was the correct person to serve for DII, despite indication through his Informative Motion that he intended to do so. Under Federal Rule of Civil Procedure 4(m), service should have been performed five-and-a-half years ago. Plaintiff has been given several opportunities to avoid dismissal, but has failed to effectively serve DII. An appropriate Order follows.

Dated: May 20, 2015



ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:
ESTRELLA GEORGE
Acting Clerk of the Court

By: 
Court Clerk Supervisor

Dated: 5/20/15

CERTIFIED TO BE A TRUE COPY
This 20th day of May 20 '15

CLERK OF THE COURT

By  Court Clerk "

² On April 8, 2015, the Court issued a Memorandum Opinion and Judgment in favor of Defendant Leonard Matthews on Plaintiff's claim for breach of contract.