

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

GREGORY L. MOOLENAAR, by his)
next friend, AHLEEN H.)
MOOLENAAR,)

Plaintiff,)

v.)

RITA MARTIN AND VERNE E.)
FORBES,)

Defendants.)

CIVIL NO. 603/1984

ACTION FOR DAMAGES

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PETERSEN, Judge

MEMORANDUM OPINION

May 3, 1985

This matter comes before the Court during pretrial conference on defendant Forbes' Motion to Dismiss, pursuant to Rule 41(b) Fed. R. Civ. P. For the reasons set forth below, this motion will be denied.

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I.

On May 15, 1984, plaintiff filed a complaint alleging that a six year old boy was injured while playing among the rubble of a "large burned-out building" on defendants' property. On May 21, 1984, service of summons and complaint was attempted on defendant Forbes through Attorney Rosskopf. On May 23, 1984, Attorney Rosskopf, by letter, notified plaintiff's attorney that he was not authorized to accept service on behalf of the defendants. After 120 days had elapsed, on September 21, 1984, plaintiff completed service on defendant Forbes. Defendant Forbes now moves that this action be dismissed for failure to prosecute a claim, in that service was not completed within 120 days. F. R. Civ. P. 41(b) and 4(j). Plaintiff's attorney avers that since he took steps to ascertain the whereabouts of defendant Forbes, dismissal at this point would be an extreme sanction.

II.

Subdivision (j) of Rule 4 of the Federal Rules of Civil Procedure provides in pertinent part:

If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such

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service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

Thus, absent a showing of good cause for failure to serve a defendant within 120 days of filing the complaint, the Court must dismiss the complaint without prejudice.

The Rules have not defined "good cause", "See, "Practice Commentary on Amendment of Federal Rule 4 (Eff. Feb. 26, 1983) with Special Statute of Limitations Precautions", 96 F.R.D. 81 (1984). Its definition has been left to judicial interpretation. For example, in Federal Deposit Insurance Corp. v. Sims, 100 F.R.D. 792, 797 (N.D. Ala. 1984), the Court liberally interpreted Rule 4(j) and held that plaintiff's abortive efforts to obtain service constituted good cause and plaintiff was granted time to perfect service. However, in Coleman v. Greyhound Lines, Inc. 100 F.R.D. 476 (N.D. Ill. 1984) the Court held that there was no showing of good cause when a defendant was not served until sixty days after the 120 day deadline. Even though newly appointed counsel discovered only eight days before the expiration of the deadline that a party had not been served, the Coleman Court noted that the sixty-nine days of inaction due to the new counsel's

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inadvertence was exactly the action that the Rule seeks to avoid. Its focus is "to force plaintiffs' (more realistically their lawyers') diligence in order to preserve causes of action against limitations problems". Id., citing 128 Cong. Rec. H9849, 9851.

Some reason for the delay in service must be given. In Burke v. Griffith, 100 F.R.D. 491 (N.D.N.Y 1984), plaintiff filed a complaint with only two days remaining under the statute of limitations; however, no defendant was served until four months after the expiration of the 120-day requirement. Even though a dismissal would have barred any attempt to begin anew, the trial court granted the dismissal, observing that the plaintiff failed not only to provide any reason for the delay but also to seek an extension of time to complete service under Rule 6(b) F. R. Civ. P.

In the present case, service was not completed within the 120-day period. Moreover, plaintiff did not seek an extension of time to complete such service. Plaintiff has the burden of showing good cause for his failure to serve the defendants within the 120-day period. Burke, supra; Moorehead v. Miller 102 F.R.D. 834 (D.C.V.I. 1984); See also, Sanders v. Marshall, 100 F.R.D. 480 (D. Colo. 1984). Plaintiff's attorney has advanced as good cause his unsuccessful attempts to find the defendant within the prescribed 120 days. He

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resorted to a search of the deeds in the Office of the Recorder of Deeds for the defendant's address. Service was finally completed by mail eleven (11) days after the expiration of the 120-day period.

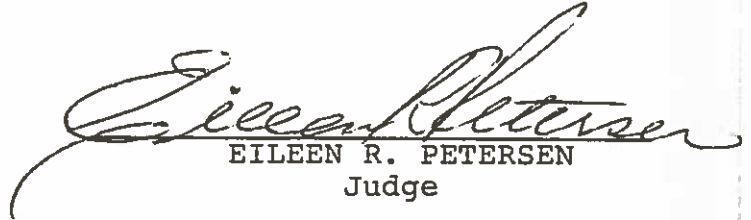
Although the plaintiff has failed to follow Rule 6(b) requiring a motion to extend the time for obtaining service, the Court will liberally construe the plaintiff's abortive efforts of obtaining service within the time period as constituting good cause shown and will deny defendant's motion to dismiss at this time.

The defendant's argument for dismissal is somewhat persuasive; however, this Court remains reluctant to deprive a plaintiff of the right to have his claim adjudicated on the merits. Moreover, there is nothing in the record to indicate that defendant Forbes has been unduly prejudiced by the delay in service. In fact, the defendant has already filed his Demand for Production and two Sets of Interrogatories on the Plaintiff.

Today's decision represents the outermost limits of this Court's interpretation of good cause. As the actions of plaintiff's attorney were dilatory and he has failed to indicate the basis for his failure to file a Rule 6(b) Motion to extend the time period, the Court will consider any

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appropriate sanctions somewhat less extreme than dismissal. 1/
Accordingly, the defendant's motion to dismiss is
hereby denied.


EILEEN R. PETERSEN
Judge

1/ It is familiar law that even the most drastic consequences may be visited on a party for his lawyer's inaction. Coleman v. Greyhound Lines, Inc., 100 F.R.D. 476, 479 (1984) citing Link v. Wabash Railroad Co., 370 U.S. 626, 633-34 (1962).