

DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

IDA SMITH,)
)
Plaintiff,)
)
v.)
)

ALL PERSONS CLAIMING A PRESENT OR)
FUTURE INTEREST IN ESTATE 13,)
FRIIS, LINDA V. SMITH-FRANCIS,)
WILLIAM E. SMITH, ELOISE V. SMITH-)
HENDRICKS, BAB FRIIS NO. 1, PAUL)
HOFFMAN, JANE HOFFMAN-WALKER,)
ELEANOR ADAMS HOFFMAN, MAXWELL)
ADAMS HOFFMAN, GLORIA FRANCOIS)
MCGOWAN, DAVID A. BORN AS TRUSTEE)
TO THE GAF TRUST ESTATE 14 JOHN'S)
FOLLY EXCLUDING ALL HEIRS AT LAW,)
ESTATE 15 CONCORDIA A, CORAL BAY)
QUARTER, ST JOHN UNITED STATES)
VIRGIN ISLANDS, NATIONAL PARK)
SERVICE, LAND RESOURCES DIVISION,)
DEPARTMENT OF INTERIOR, THE UNITED)
STATES OF AMERICA, STANLEY)
SELENGUT, WILLIAM B. POPPELTON,)
LORRAINE A. POPPELTON, KEVIN M.)
WALSH, MARIA K. STURATIS, SCOTT E.)
WILMOSKI, CHARLES M. PERDUE,)
MONICA PERDUE, JOZSEF NEMETH,)
NANCY NEMETH, FRED S. PATTERSON,)
MARGARET D. PATTERSON, JOHN R.)
PERGOLIZZI, TREASURE VIEW LLC,)
GEORGE PILLORGE, DEBORAH PILLORGE,)
SCOTT L. HARTSHORN, CLAUDETTE C.)
HARTSHORN, HEINZ G. FISHER, LINDA)
G. BURDET TRUSTEES OF THE HEINZ G.)
FISHER TRUST, DONALD DURANTE,)
SAFIA B. DURANTE, CRAIG E.)
MITCHELL, ALAN MARTIN KAUFMAN,)
RACHELLE KAUFMAN, JEFFREY J.)
McCRAVE, ANN McCRAVE, DOROTHY K.)
JANOSKO, WILLIAM R. KINCER, SUSAN)
B. KINCER, SUSAN GREER)
LITTLEFIELD, WAYNE CHESTERFIELD,)
MONIQUE FRANCOIS, PEDRITO)

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FRANCOIS, SALT POND VISTA LLC,)
V.I. JOSEPH PALMINTERI, CARRIE)
GLENN, MARC KAVE, EMILY J.)
BRATTON, RICK HATHAWAY, RENE A.)
SERVANT aka RENE H. SERVANT, MARIE)
THERESE L. SERVANT, LORI JANE)
SNACK, BRIAN K. WALDEN,)
MINISTER ISHMAEL R. MUHAMMED,)
MICHAEL CARPER, REUBEN WHEATLEY,)
et al.,)
Defendants.)
_____)

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MEMORANDUM OPINION

GÓMEZ, J.

Before the Court are three motions to dismiss for failure to effectuate timely service. The first motion was filed by Treasure View, LLC, and Kevin Walsh. The second motion was filed by Salt Pond Vista, LLC; Carrie Glenn; Lori Jane Snack; William Poppelton; Lorraine A. Poppelton; Charles M. Perdue and Monica Perdue; Heinz G. Fischer and Linda G. Burdet, Trustees of the Heinz G. Fischer Family Trust; Maria K. Struraitis; Donald Durante; and Safia B. Durante. The third motion was filed by Stanley Selengut. The several defendants are referred to herein collectively as the "Dismissal Movants."

FACTUAL AND PROCEDURAL HISTORY

In March of 2011, Ida Smith ("Smith") initiated this action to determine boundaries and to quiet title to various parcels of property in St. John, United States Virgin Islands. Shortly

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afterwards, Smith Filed an amended complaint ("First Amended Complaint").

Smith moved for leave to file a second amended complaint on July 18, 2011. Smith attached a proposed second amended complaint (the "July 18 Proposed Complaint") to her motion. The proposed complaint named more than thirty additional defendants, but did not allege the citizenship of those defendants. Before the Court could rule on Smith's motion, the Clerk of Court issued more than thirty summonses for the defendants Smith sought to add.

On November 4, 2011, the Magistrate Judge issued a Report and Recommendation that recommended denying Smith's motion for leave to amend her complaint as futile. Specifically, the Magistrate stated that the "plaintiff does not allege the citizenship of any of the parties. As such, it would be futile to grant plaintiff's motion as the proposed Second Amended Complaint does not allege sufficient facts to support subject matter jurisdiction in this Court." (ECF No. 184.) The Court adopted the Magistrate's Report and Recommendation.

Smith filed another motion for leave to file a second amended complaint on November 26, 2011. Smith attached to her motion a proposed second amended complaint (the "November 26th Proposed Complaint"). Smith again named more than thirty

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defendants which she sought to add. On February 1, 2012, the Court again denied Smith's motion to file a second amended complaint. The Court also instructed the parties to file briefs addressing whether the Court had subject-matter jurisdiction over this action.

On February 29, 2012, the Court dismissed the action for lack of subject-matter jurisdiction. Smith then moved for reconsideration and filed a notice of appeal. On February 8, 2013, the Court granted Smith's motion for reconsideration and reopened the case. The Court then designated the case as a suspense matter pending the Third Circuit's resolution of the appeal. On July 1, 2013, the Third Circuit dismissed Smith's appeal for lack of jurisdiction.

Subsequently, on October 17, 2013, the Magistrate Judge granted Smith leave to file a Second Amended Complaint on or before October 31, 2013. On November 1, 2013, Smith filed her amended complaint (the "Second Amended Complaint"), which again named more than thirty defendants. (ECF No. 268.) Thereafter, the Court *sua sponte nunc pro tunc* granted Smith an extension of time to file her amended complaint until November 1, 2013. Summonses were issued and executed for certain defendants. No summonses, however, were issued or executed for any of the Dismissal Movants.

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Between September 30, 2014, and November 7, 2104, each of the Dismissal Movants (with the exception of Donald Durante and Safia B. Durante) moved to dismiss for failure to timely serve the complaint. On September 28, 2015, the Court denied the motions to dismiss. The Court first held that the summonses issued for, and executed with, the July 18th Proposed Complaint were “notice of a legal nullity” because that complaint was never the operative complaint, and thus, were insufficient notice. The Court next held that, because more than 120 days had passed since Smith filed the operative complaint—the Second Amended Complaint—she had failed to timely serve the Dismissal Movants in accordance with Rule 4(m).

The Court determined, however, that dismissal was not the appropriate relief. Smith had not demonstrated good cause for failing to serve the Dismissal Movants. Nonetheless, the Court noted that several factors weighed in favor of granting Smith an extension of time to effect service of process: (1) the Dismissal Movants probably had actual notice of the legal proceeding; (2) nothing in the record indicated that the Dismissal Movants had been prejudiced; and (3) Smith’s status as a pro se litigant. Accordingly, the Court granted Smith until October 12, 2015, to effect service of process and ordered her

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to file the necessary proof of service no later than October 15, 2015.

On October 8, 2015, Smith moved for an extension of time to serve her complaint. The Court granted the motion, and ordered Smith to serve the Dismissal Movants no later than October 16, 2015, and to file all necessary proof of service no later than October 19, 2015.

On October 13, 2015, the Clerk issued summonses for most of the Dismissal Movants. Summonses were not issued for Safia Durante or Donald Durante, who were not parties to the first set of motions to dismiss, nor for Lori Jane Snack.

On October 19, 2015, Smith filed proof of service on Lori Jane Snack, though no summons had been issued for her. The Docket entry indicates that Smith served Lori Jane Snack with the summons issued for Treasure View, LLC. On October 20, 2015, Smith filed proof of service on Treasure View, LLC; Kevin Walsh; Salt Pond Vista, LLC; Carrie Glenn; William Poppelton; Lorraine A. Poppelton; Charles M. Perdue; Monica Perdue; Heinz G. Fischer; Linda G. Burdet; and Maria K. Struraitis.

Each proof of service filed by Smith indicated that the date of service was October 19, 2015. The proof of service form did not specify the method of service. Rather, with respect to

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method of service, Smith indicated only "other" on the proof of service form.

With each proof of service form, Smith included a certified mail receipt from the U.S. Postal Service dated October 19, 2015. Finally, in every proof of service, Smith indicated that she herself was the process server.

On October 22 and November 12, 2015, the Dismissal Movants moved to dismiss the claims against them under Federal Rule of Civil Procedure 12(b)(4) and (5).

DISCUSSION

Rule 12(b)(4) of the Federal Rules of Civil Procedure permits a motion to dismiss for "insufficiency of process." Rule 12(b)(5) of the Federal Rules of Civil Procedure permits a motion to dismiss for "insufficiency of service of process." A dismissal for insufficient service of process is without prejudice. See *Bann v. Ingram Micro, Inc.*, 108 F.3d 625, 626-27 (5th Cir. 1997) ("The dismissal with prejudice can never be based on Rule 4(m)'s [time to effect service] requirement."). In a 12(b)(5) motion, "the party asserting the validity of service bears the burden of proof on that issue." *Grand Entm't Grp., Ltd. v. Star Media Sales, Inc.*, 988 F.2d 476, 488 (3d Cir.1993).

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ANALYSIS

The Dismissal Movants argue that Smith's latest efforts at service were untimely under Federal Rule of Civil Procedure 4(m) ("Rule 4(m)"). The Dismissal Movants also assert that dismissal is the appropriate remedy because Smith's failure to comply with Federal Rule of Civil Procedure 4 ("Rule 4") is not excused by good cause.

I. Compliance with Rule 4

Rule 4 outlines the requirements for service of process. Rule 4(m) dictates the timing of service. When Smith's complaint was filed, Rule 4(m) provided in pertinent part:

If a defendant is not served within 120 days after the complaint is filed, the court--on motion or on its own after notice to the plaintiff--must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if 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) (2011).

In its September 28, 2015, order,¹ the Court held that Smith failed to serve her complaint within the time allotted by Rule 4(m). Smith was granted an extension to serve process by October 12, 2015. That extension was subsequently extended to October

¹ When the Court issued the September 28, 2015, order, Rule 4(m) required service within 120 days. The current version of Rule 4(m) requires service within 90 days.

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16, 2015. Smith indicates that she mailed summonses to the Dismissal Movants on October 19, 2015. Smith's efforts on their face seem at odds with the applicable rules.

Indeed, Rule 4(c)(2) addresses who may serve process. That rule provides that "[a]ny person who is at least 18 years old and not a party may serve a summons and complaint." Fed. R. Civ. P. 4(c)(2). The plain language of Rule 4(c)(2) makes it clear that "a party is not permitted to serve process, even by mail. There is no exception for pro se litigants." *Avdeef v. Royal Bank of Scotland, P.L.C.*, 616 Fed. App'x 665, 672 (5th Cir. 2015) (citations omitted); see also *Constien v. United States*, 628 F.3d 1207, 1213 (10th Cir. 2010) (holding that "even when service is effected by use of the mail, only a nonparty can place the summons and complaint in the mail" and noting that "the courts to consider the matter have ruled that even when service by mail is proper, it cannot be a party who mails it").

Here, the proof of service provided by Smith indicated that she attempted to serve each of the Dismissal Movants by mailing the summonses and complaints herself. Thus, Smith's attempt to serve the Dismissal Movants herself was invalid. See *Shabazz v. City of Houston*, 515 Fed. App'x 263, 264 (5th Cir. 2013).

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II. Appropriate Relief

The Court's finding that Smith failed to comply with Rule 4(m) does not necessarily require the Court to dismiss the claims against the movants. Even after a district court finds that the plaintiff failed to comply with Rule 4(m), the

District Court must extend the time for service . . . where a plaintiff demonstrates good cause for the failure to timely serve the defendant. See *McCurdy v. Am. Bd. of Plastic Surgery*, 157 F.3d 191, 196 (3d Cir.1998). Even if a plaintiff fails to show good cause, the District Court must still consider whether any additional factors warrant a discretionary extension of time. See *Petrucelli v. Bohringer & Ratzinger, GMBH*, 46 F.3d 1298, 1305-06 (3d Cir.1995).

Maltezos v. Giannakouros, 522 Fed. App'x 106, 108 (3d Cir. 2013).

A. Good Cause

In determining whether good cause exists for an extension, the Court considers (1) the reasonableness of the plaintiff's efforts to effect service; (2) prejudice to the defendant because of untimely service; and (3) whether the plaintiff has moved for an enlargement of time. See *MCI Telecommunications Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1097 (3d Cir. 1995). Ultimately, good cause 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

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the rules.” *Id.* (quoting *Petrucelli*, 46 F.3d at 1312 (Becker, J., concurring in part and dissenting in part)).

Considering the first factor, in Smith’s opposition to the Dismissal Movants motion, she offers no reasons for her untimely attempts at service or her failure to comply with the other requirements of Rule 4. *See Braxton v. United States*, 817 F.2d 238, 242 (3d Cir. 1987) (explaining that “unexplained delinquency” does not constitute good cause). Rather, Smith argues that each defendant was properly served by publication, and that the Durantes waived any defect in service by filing an answer to Smith’s first complaint. The Court explicitly rejected both of these arguments in its order denying the Dismissal Movants earlier motion to dismiss and need not revisit them.

Smith also appears to argue that the Federal Rules of Civil Procedure do not apply in her case. Smith cites no authority for this proposition. The Court is unaware of any such authority.

Moreover, “disregard for . . . the technical niceties of service of process does not constitute good cause.” *See Ayres v. Jacobs & Crumplar, P.A.*, 99 F.3d 565, 568 (3d Cir. 1996) (citation and internal quotation marks omitted). Accordingly, the Court finds that Smith’s efforts to effect service were not reasonable.

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As for the second factor, the Dismissal Movants argue they have been prejudiced in their ability to defend the case on the merits. The Court agrees. "[J]ustice . . . requires that the merits of a particular dispute be placed before the court in a timely fashion so that the defendant is not forced to defend against stale claims." *McCurdy*, 157 F.3d at 196-97. For this reason, "[t]here comes a time when delay in proper service is prejudicial to the opposing party. An elapse in time results in witness unavailability, events forgotten and documentation lost." *Okagbue-Ojekwe v. Fed. Bureau of Prisons*, No. 03-CV-2035-NLH-JS, 2010 WL 3947528, at *3 (D.N.J. Oct. 7, 2010). Here, over five and a half years have elapsed since the inception of this case and nearly three years have passed since Smith filed her Second Amended Complaint. The Dismissal Movants have never been properly served during this time. The Court finds such a lengthy period of time without proper service is prejudicial.

Finally, considering the third factor, Smith moved for an enlargement of time to serve before her original deadline to serve expired. That motion was granted. Smith was ordered to serve the Dismissal Movants no later than October 16, 2016. Yet, Smith made no attempt to serve any defendants until October 19, 2015. After her first motion, Smith did not move for additional time again. Moreover, after the Dismissal Movants brought the

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defects in Smith's attempted service to her attention, Smith did not move for an enlargement to remedy those errors. Under these circumstances, Smith's earlier motion for an enlargement does not weigh in favor of a finding of good cause. See *Shabazz*, 515 Fed. App'x at 264 (upholding dismissal where plaintiff "presented no evidence that someone other than himself served the defendants, and did not seek to correct deficient service despite having ample opportunity after being alerted to the mistake"); *Ackerman v. Beth Israel Cemetery Ass'n of Woodbridge, N.J.*, No. CIVAO9-1097 (GEB), 2010 WL 2651299, at *4 (D.N.J. June 25, 2010) ("Finally, although Plaintiff moved for an enlargement of time to serve . . . , Plaintiff failed to effect proper service in the time period granted.").

Considering these three factors together, the Court holds that Smith has not demonstrated good cause justifying an extension of time to serve the Dismissal Movants.

B. Discretionary Extension

Although Smith has failed to demonstrate good cause for her failure to serve the Dismissal Movants, this does not end the Court's analysis. A "district court must consider whether any other factors warrant extending time even though good cause was not shown." *Petrucelli*, 46 F.3d at 1307. In assessing whether

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the Court should grant a discretionary extension, the Court must consider the following factors:

actual notice of the legal action; prejudice to the defendant; the statute of limitations on the underlying causes of action; the conduct of the defendant; and whether the plaintiff is represented by counsel, in addition to any other factor that may be relevant when deciding whether to grant an extension or dismiss the complaint.

Chiang v. U.S. Small Bus. Admin., 331 Fed. App'x 113, 116 (3d Cir. 2009).

The first factor the Court considers is actual notice. *Id.* Here, it is not entirely clear whether the Dismissal Movants had actual notice of the legal action. For each of these defendants (with the exception of the Durantes), Smith submitted proof of service of the Second Amended Complaint. However, each proof of service document shows only that Smith sent the summons by certified mail and does not indicate whether it was received. On the other hand, each of the Dismissal Movants are currently represented by counsel and have filed multiple motions in this matter and/or a responsive pleading to an earlier, inoperative complaint. Accordingly, the Court finds it is likely that the Dismissal Movants had actual notice of the lawsuit, and the first factor weighs in Smith's favor. *See Hairston v. Green Tree Servicing LLC*, No. CV 14-6810, 2015 WL 9302865, at *1 n.2 (E.D. Pa. Dec. 22, 2015) (finding defendant had actual notice despite

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not receiving summons or complaint because defendant's counsel had entered an appearance in the matter); *Sloan v. Sobina*, No. CIV.A. 10-221, 2013 WL 1289402, at *5 (W.D. Pa. Mar. 26, 2013); ("[T]here can be no dispute that [the defendant] had actual notice of the lawsuit, since his counsel filed a Motion to Dismiss on the basis of improper service.").

Next, the Court considers whether the granting of an extension would prejudice the defendant. *See Chiang*, 331 Fed. App'x at 116. As the Court discussed above, the Dismissal Movants have been prejudiced in their ability to defend this case on the merits by the great length of time this case has persisted during which with these defendants have not received proper service. Accordingly, this factor weighs in favor of dismissal.

The third factor the Court considers is whether the statute of limitations on the plaintiff's claim has run. *See id.* "The running of the statute of limitations may be a factor supporting the discretionary granting of an extension of time to make service under Rule 4(m), but it does not require the district court to extend time for service of process[.]" *Id.* (citations and internal quotation marks omitted).

Title 5, section 31 of the Virgin Islands Code ("Section 31") sets forth a twenty-year limitations period for:

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Actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it shall appear that the plaintiff, his ancestor, predecessor, or grantor was seized or possessed of the property in question within twenty years before the commencement of the action.

5 V.I.C. § 31(A). Furthermore, "[a]n action for the determination of any right or claim to or interest in real property shall be deemed within the limitations provided for actions for the recovery of the possession of real property." 5 V.I.C. § 32(b); see also *Club Comanche, Inc. v. Gov't of the V.I.*, 278 F.3d 250, 260 (3d Cir.2002) ("[T]here appears to be a twenty-year statute of limitations on quiet title actions.").

The twenty-year limitations period begins to run when the party's cause of action accrues. 5 V.I.C. § 31. "A cause of action for the recovery of real property accrues when a party—or a predecessor in interest to that party—has notice that another party has asserted an interest in his or her property." *Peter Bay Owners Ass'n v. Stillman*, 39 V.I. 432, 440 (D.V.I.1998); see also *Zelevnik v. United States*, 770 F.2d 20, 23 (3d Cir.1985) ("[A] claim accrues when the injured party learns of the injury and its immediate cause.").

Here, there is no indication that Smith's claims became barred by the statute of limitations after she initiated this

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action. Moreover, Smith has never made that assertion. This factor, therefore, favors the Dismissal Movants.

The fourth factor the Court considers is the behavior of the Dismissal Movants. *See Chiang*, 331 Fed. App'x, at 116. Based on the record, this does not appear to be a case in which the Dismissal Movants were evasive and uncooperative. *Cf. United States v. Nuttall*, 122 F.R.D. 163 (D.Del.1988) (permitting an extension of time to serve because the failure to serve was excusable neglect when the defendant informed the Marshals attempting to serve him that he would not make it easy for them, stated that he would refuse service, and could not be served at his residence despite eighteen attempts). This factor, therefore, favors the Dismissal Movants.

The fifth factor the Court considers is whether the plaintiff was represented by counsel. *See Chiang*, 331 Fed. App'x at 116. Smith is a *pro se* litigant, and accordingly, this factor favors her. Smith, however, has already been given two extensions of time to serve the Dismissal Movants, has been given explicit instructions to follow the Federal Rules of Civil Procedure, and after over five years of litigation, is an experienced *pro se* litigant. Under these circumstances, the Court finds the weight of this factor greatly diminished. *See Dash v. Chasen*, 503 Fed. App'x 791, 795-96 (11th Cir. 2013)

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(holding dismissal proper where statute of limitations would bar further litigation because district court's "order gave [the plaintiff] clear directions on how to properly serve the government" and the plaintiff "had already received one extension of time to effect service"); *Snyder v. Swanson*, 371 Fed. App'x 285, 287 (3d Cir. 2010) (noting that district court properly accorded the fifth factor less weight because, "although [the plaintiff] [wa]s proceeding *pro se*, by his own account, he [wa]s an experienced litigant"); *Carter v. Keystone*, 278 Fed. App'x 141, 142 (3d Cir. 2008) (holding dismissal proper where plaintiff "was given two opportunities to properly effect service of process" but "failed to comply with the requirements of Rule 4 on either occasion").

CONCLUSION

In the Court's September 28, 2015, order denying the Dismissal Movants first motion to dismiss, "the Court h[ad] some pause in granting a further extension" in light of the "extensive time period" that had elapsed and the other factors the Court was required to weigh. ECF No. 386 at 16. Since that order, another year has passed and the Dismissal Movants have still not been properly served. Considering this length of time, the two extensions Smith has already been granted to serve the Dismissal Movants, and the other factors the Court must weigh

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when considering a discretionary extension, the Court will not grant Smith additional time to effect service. Accordingly, the Dismissal Movants motion to dismiss will be granted.

An appropriate judgment follows.

S\ _____
Curtis V. Gómez
District Judge