

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

ROLAND SMITH AND EDNA SMITH,

Plaintiffs,

vs.

CIVIL NO. 721/1992

ACTION FOR DAMAGES

HESS OIL VIRGIN ISLANDS CORP.
AMERADA HESS CORPORATION;
OWENS-CORNING FIBERGLASS
CORPORATION,

Defendants,

HESS OIL VIRGIN ISLANDS CORP.
AND AMERADA HESS CORPORATION

Third-Party Plaintiffs,

vs.

BORINQUEN INSULATION COMPANY,
KEENE CORPORATION, INDIVIDUALLY
AND AS SUCCESSOR IN INTEREST TO
BALDWIN EHRET-HILL CO., KEENE
BUILDING PRODUCTS AND EHRET
MAGNESIA MANUFACTURING CO.,
OWENS-CORNING FIBERGLASS
CORPORATION, FIBERBOARD
CORPORATION, PABCO INDUSTRIAL
PRODUCTS DIVISION, BABCOCK &
WILCOX, INC., MANVILLE PERSONAL
INJURY SETTLEMENT TRUST, CLAIMS
RESOLUTION FACILITY FOR JOHN-
MANVILLE CORPORATION, PREDECESSOR
TO MANVILLE SALES CORPORATION
K/n/a SCHULLER INTERNATIONAL,
INC., EAGLE Picher INDUSTRIES,
INC., PITTSBURGH CORNING CORP.,
PPG INDUSTRIES, INC., JOHN CRANE
PACKING, STATE INSULATION
CORPORATION, CERTAIN TEED
CORPORATION, PHOENIX ASBESTOS
MANUFACTURING CORPORATION AND
XYZ ASBESTOS MANUFACTURING AND
DISTRIBUTING CORPORATION,

Third-Party Defendants,

SMITH AND SMITH V. HESS OIL VIRGIN ISLANDS
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PETERSEN, Senior Sitting Judge

MEMORANDUM OPINION AND ORDER
(January 22, 1993)

This matter is before the Court on Third-Party Defendant Boringen Insulation Company's Motion to Dismiss. For the reasons stated herein, the Motion to Dismiss will be granted.

FACTS

On July 30, 1992, Hess Oil Virgin Islands Corporation (hereinafter "HOVIC") and Amerada Hess Corporation (hereinafter

"Amerada Hess") filed a Third-Party Complaint against Third-Party Defendant Boringuen Insulation Company (hereinafter "Boringuen"). On August 13, 1992, Carol A. Acevedo, a legal assistant with the law firm of Bryant, White and Associates, P.C., Attorneys for the Third-Party Plaintiffs, mailed by United States certified mail, return receipt requested, a summons and Third-Party complaint to Third-Party Defendant Boringuen. On December 21, 1992, the Law Office received the returned envelope. On December 31, 1992, Ms. Acevedo again served the summons and third-party complaint upon Boringuen. The United States Postal Service returned to Bryant, White and Associates the Law Office, the United States mail certified return receipt addressed to Boringuen and received by Defendant on January 4, 1993.

Third-Party Defendant Boringuen filed a Motion to Dismiss on November 19, 1992. The motion argued that the action should be dismissed because the Third-Party Plaintiffs failed to serve the third-party complaint and summons within Fed.R.Civ.P. 4(j) 120-day time limit. Third-Party Plaintiffs contend that Boringuen intentionally avoided service of process. Third-Party Plaintiffs also argue that Third-Party Defendant Boringuen had actual notice of the complaints and was not prejudiced by the delay in service.

DISCUSSION

Federal Rule of Civil Procedure 4(j) requires dismissal without prejudice if a plaintiff fails to serve the summons and complaint upon the defendant within 120 days unless good cause is shown. The purpose of the rule is to encourage parties and their attorneys to be diligent in pursuing their cause of action. See Geller v. Newell, 602 F.Supp. 501 (S.D.N.Y.1984). The burden to ensure proper and timely service rests on the plaintiff. Fed.R.Civ.P. 4(a). The plaintiff also bears the burden of showing good cause for failure to serve the summons and complaint within the prescribed 120-day time period. Woods v. Partenreederei M.S. Yankee Clipper, 112 F.R.D. 115 (A.C. Mass. 1986).

The "good cause" required to excuse the plaintiff's failure to serve the defendant within this 120 day period is not defined by the rule. The Third Circuit has stated that the good cause posited by the plaintiff should require "at least as much as would be required to show excusable neglect." Braxton v. HHS, 817 F.2d 238 (3rd Cir. 1987). Excusable neglect "seems to require a demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for non-compliance within the time specified in the rules." Wright and Miller, Federal Practice and Procedure, §1165 (1987). Various factors considered in determining whether there was excusable

neglect for failure to timely serve process include whether the inadvertence reflected professional incompetence such as ignorance of rules, whether asserted advertence reflects easily manufactured excuse incapable of verification the court, counsel's failure to provide for readily foreseeable consequence, complete lack of diligence, whether inadvertence resulted despite counsel's substantial good faith efforts towards compliance and whether enlargement of time will prejudice opposing party. Consolidated Freightways Corporation of Delaware v. Larson, 827 F. 2d 916 (3rd Cir. 1987). Dominic v. Hess Oil Virgin Islands Corporation, 841 F. 2d 513 (3rd Cir. 1988).

The Third Circuit has strictly applied Fed.R.Civ.P.4(j)'s 120 day limit to effect service of process. Lovelace v. Acme Markets, Inc., 820 F.2d 81 (3rd Cir. 1987); Braxton, supra; Dominic, supra. The Third Circuit has held that lack of due diligence and inadvertence of counsel will not excuse compliance with Rule 4(j). In Lovelace, supra, the trial court dismissed the plaintiff's racial discrimination suit without prejudice based on plaintiff's failure to make timely service of process upon defendant. The plaintiff had relied upon the process server's bill as proof that process had been served upon the defendant. The attorney had only requested adequate proof of service on the 120th day of the prescribed time period. The

Third Circuit Court found that plaintiff's attorney inadvertently permitted the 120 day period to lapse. The Court also found that the plaintiff failed to act diligently. Consequently, the Third Circuit Court of Appeals affirmed the decision. In Braxton, supra, plaintiff's counsel knew that service had not been made but failed to take steps to insure timely service of process. The court found that the inadvertence of counsel did not constitute good cause under Rule 4(j). The trial court's dismissal of the action was upheld.

The 120-day limit is not "absolutely inflexible". Braxton, supra. The legislative history of Rule 4(j) notes that intentional evasion of service of process constitutes good cause for an extension of time to serve process. 128 Cong. Rec. H9848, 9852 N. 25 (daily ed. Dec. 15, 1982), reprinted in 1982 U.S. Code Long. and Admin. News 4434, 4446 N. 25. The Third Circuit has stated that good cause might be shown if the defendant intentionally evades service of process. Lovelace, supra, Dominic, supra. The Court in Ruiz Varela v. Sanchez Valez, 814 F.2d 821 (1st Cir. 1987) found that the defendant intentionally evaded service of process where codefendants had failed to provide address in plaintiff's interrogatories and both defendants had met after one defendant was served with amended complaint. Similarly, good cause to extend time to serve was found in Hibernia National Branch v. Carner, 758 F.

Supp. 382 (M.D. LA 1991) where a process server stated that defendant was home but refused to answer.

Applying the foregoing principles to this case, the Court notes that the plaintiff herein mailed the summons and complaint by United States certified mail, return receipt requested 30 days after the filing of the complaint date. For the following 110 days, the Third-Party Plaintiffs' attorneys did nothing to ensure that the defendant had received the summons and complaint. It was only on December 21, 1992, 20 days after the end of the prescribed time period, that Third-Party Plaintiff attorney's legal assistant resolved to contact the Postal Service. Coincidentally, this was the same day that the firm received the returned envelope. Third-Party Plaintiff attorney's failure to properly monitor the service of process over the 120 day period amounted to a lack of due diligence or inadvertence. The legal assistant stated that the envelope was stamped "reason checked unclaimed" indicating that the Third-Party Defendant chose not to accept the envelope. This stamp alone, however, does not indicate an intentional evasion of process sufficient to constitute good cause for delay of service. Consequently, Third-Party Plaintiff has not provided this Court with "good cause" for the extension of the time to serve process.

Third-Party Plaintiff argues that Boringuen's appearance in

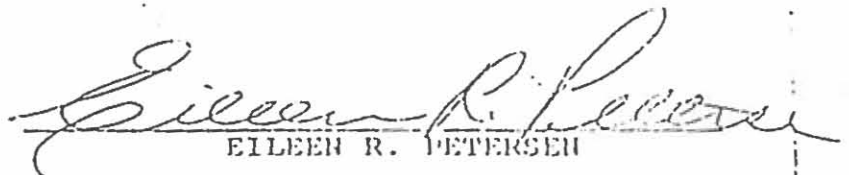
this action by counsel evidences a lack of prejudice. The Third Circuit in Dominic, *supra*, addressed actual notice and absence of prejudice within the context of a Rule 4(j) motion to dismiss. In Dominic, a worker brought a product liability suit against the supplier of a solvent. When Dominic first filed his complaint against Hess Oil, he named a John Doe Corporation as a codefendant on grounds of strict liability. A year later, after Hess Oil had crossclaimed against Shell on an indemnity agreement, Dominic amended his complaint to include Shell. The Third Circuit Court of Appeals held that the trial court did not abuse its discretion in allowing Dominic additional time to complete service of process. The Court found that Shell had actual notice of the plaintiff's claim and suffered no undue prejudice. It noted that Hess Oil had served Shell with the original complaint and a claim for indemnification. The Court also noted that Shell had appeared before the district court at approximately the same time that the amended complaint was filed. . Finally, the Court noted that there was no evidence indicating lack of diligence or inadvertence of counsel. Consequently, the Court affirmed the trial court's decision to extend the time limit to serve process. Unlike Dominic, there is some evidence here indicating lack of due diligence of counsel. Third-Party Plaintiffs attorney's failure to monitor the service of process overwhelms any claim of actual notice and

absence of prejudice. Unfortunately for Plaintiffs, the core issue in service of process disputes is plaintiff's diligence, not concerns about notice and prejudice. In re City of Philadelphia Litigation, 123 F.R.D. 515 (E.D. PA 1988).

Third-Party Plaintiffs also argue that the Third-Party Defendant should not benefit by having withheld its objection to service until after the 120 day period had elapsed. However, Third-Party Defendant is under no obligation to help Third-Party Plaintiffs preserve their claims. Philadelphia Litigation, supra.

This Court realizes that the dismissal of the Third-Party complaint against Boringuen might seem rather harsh. However, Rule 4(j) will not permit this Court to ignore counsel's lack of due diligence or inadvertence. Moreover, Rule 4(j)'s primary concern is the due diligence of the plaintiff, not the severity of the consequences. See Friedman v. Estate of Presser, 929 F.2d 1151 (6th Cir. 1991) (complaint dismissed under Rule 4(j) despite fact that dismissal may render suit time barred).

For the foregoing reasons, the Court will grant the Third-Party Defendant's Motion to Dismiss without prejudice.


EILEEN R. PETERSEN

CERTIFIED A TRUE COPY,
THIS 25th DAY OF April, 1993
VIOLA E. SMITH
CLERK OF THE COURT
BY [Signature] DEPUTY