

1. Plaintiff's motion to deem service waived or, alternatively, to make substituted service outside of time;
2. Plaintiff's Supplement to motion to deem service waived;

3. Defendants' motion to dismiss and response to motion to deem service waived or alternatively, to make service outside of time;
4. Plaintiff's reply to defendants' opposition to plaintiff's motion regarding service waived and opposition to dismiss; and
5. Defendants' response to plaintiff's reply to defendants' opposition to plaintiff's motion regarding service and opposition to motion to dismiss.¹

STATEMENT OF FACTS AND RELEVANT PROCEDURAL HISTORY

1. On December 22, 1995, plaintiff filed a complaint against the following defendants:

- a. Danested Associates
- b. Amerimar St. Croix Corporation
- c. Amerimar St. Croix Associates, Limited Partnership
- d. Alan Jovinelly
- e. Daniel M. Lamkin

2. On the same day, the Clerk issued a summons to all of the above named defendants.

3. On January 30, 1996, an affidavit of Thomas F. Dunn, Jr. was filed with this Court indicating that he served the resident agent, Mary Beth Cassidy, of Amerimar St. Croix Associates, Limited Partnership on January 23, 1996.

4. David Verbit, a process server in the State of Pennsylvania, attempted service upon Danested Associates, Amerimar St. Croix Corporation, Alan Jovinelly, and Daniel M. Lamkin at

¹ The Court shall disregard *defendants' response to plaintiff's reply to defendants' opposition to plaintiff's motion regarding service and opposition to motion to dismiss* as the defendants were never granted leave by this court to file a further response. See LRCi 7.1(g)(1997).

6361 Meetinghouse Road, New Hope, Pennsylvania on January 25, 1996 at 8:00 a.m., January 26 at 10:00 a.m., January 27 at 6:00 p.m. and January 30 at 8:00 p.m. During each of these attempts, he was refused access to enter the premises and thus, *never perfected personal service on these defendants.*²

5. On February 20, 1996, nearly 60 days before the expiration of the 120 day time limit for service, the defendants moved for an extension of time within which to answer or otherwise plead to plaintiff's complaint. The motion was granted on February 23, 1996.

6. On February 21, 1996, defendants filed an answer to plaintiff's complaint. The answer asserted in their second affirmative defense that "Plaintiff's cause of action should be dismissed as service of process upon these defendants was and is insufficient, and this Court, therefore lacks personal jurisdiction over defendants herein."

7. On April 22, 1996, the 120 day time limit for service of process expired.

8. On or about May 9 or 10, 1996, plaintiff delivered a request for waiver of service of process to defendants.

9. On January 29, 1997, plaintiff filed a motion to deem service waived or, alternatively, to make substituted service outside of time.

10. On February 21, 1997, plaintiff filed a supplement to motion to deem service waived.

11. On February 28, 1997, defendants filed a motion to dismiss and response to motion to deem service waived or alternatively, to make service outside of time.

² See Counterstatement of Material Facts, Exhibit G, Affidavit of David Verbit.

12. On March 19, 1997, plaintiff filed a motion for extension of time to file opposition to defendant's motion to dismiss and reply to defendants' opposition to motion to deem service waived.

13. On March 21, 1997, defendants filed a motion to deem defendants' motion to dismiss as conceded and response to plaintiff's motion for extension of time.

14. On March 25, 1997, defendants filed an amended motion to deem defendants' motion to dismiss as conceded.

15. On April 2, 1997, plaintiff filed a reply to defendants' opposition to plaintiff's motion regarding service waived and opposition to dismiss.

16. Finally, on April 14, 1997, defendants filed a response to plaintiff's reply to defendants' opposition to plaintiff's motion regarding service and opposition to motion to dismiss.

DISCUSSION

A. Defendants' Motion to Dismiss

On February 28, 1997, defendants filed a motion to dismiss and response to plaintiff's motion to deem service waived. Defendants assert that plaintiff's complaint should be dismissed since plaintiff failed to properly perfect service on all defendants and alternatively, that this Court does not have personal jurisdiction over the defendants.

Federal Rule of Civil Procedure 12(b) provides as follows:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (2) lack of jurisdiction over the person,

. .(4) insufficiency of process, (5) insufficiency of service of process. . .A motion making any of these defenses shall be made before pleading if a further pleading is permitted.

Rule 12(b) provides the pleader with the option of raising seven specific defenses by motion prior to the service of a responsive pleading, rather than deferring them to the responsive pleading. Wright & Miller, FEDERAL PRACTICE AND PROCEDURE: Civil 2d § 1349 (1990). Thus, a motion asserting a defense of lack of jurisdiction over the person or challenging service of process must be made before the responsive pleading is served. Wright & Miller, at §§ 1351 and 1353.

In the instant matter, defendants filed on February 21, 1996, an answer to plaintiff's complaint. The answer asserted in their second affirmative defense that "Plaintiff's cause of action should be dismissed as service of process upon these defendants was and is insufficient, and this Court, therefore lacks personal jurisdiction over defendants herein." Defendants now move to dismiss plaintiff's complaint pursuant to Fed.R.C.P 12(b)(2) and (5). However, Fed.R.Civ.P. 12(b) precludes the filing of defendants' motion to dismiss since defendants already asserted these defenses in a responsive pleading, specifically their answer. Since defendants combined their motion to dismiss and response to plaintiff's motion to deem service waived, the Court shall deny defendants' motion to dismiss. Accordingly, the Court shall disregard section A and B of defendants' motion/response as they concern defendants' Rule 12(b) service of process/personal jurisdiction arguments and treat section C, which concerns Fed.R.Civ.P. 4 arguments, as a responsive pleading to plaintiff's motion regarding service deemed or alternatively, motion to serve outside of time.

B. Plaintiff's Motion to Deem Service Waived or Alternatively, to Make Substituted Service Outside of Time.

Plaintiff, in its motion, claims that pursuant to 5 V.I.C. § 115, the Court should deem the answer of defendants' Danested Associates, Amerimar St. Croix Corporation, and Alan Jovinelly to plaintiff's complaint as a voluntary appearance resulting in the waiver of service. Plaintiff had originally included Daniel Lamkin but has since asked the Court to disregard its motion regarding service as to Daniel M. Lamkin.³ Defendants allege that the record is clear that there has been no individual service of process upon the above named defendants within 120 days of the filing of the plaintiff's complaint. As no service of process was perfected within that time, the case is ripe for dismissal without prejudice under Fed.R.Civ.P. 4(m), 12(b)(2) and (5).

With the dismissal of defendants motion to dismiss, the sole remaining issue in this matter is whether defendants' filing of their answer on February 20, 1996 constituted a voluntary appearance on their part thus waiving the requirement of personal service of the summons upon them. Fed.R.Civ.P. 4 governs service of process in the Territorial Court. In addition, the Legislature of the Virgin Islands has enacted Title 5 V.I.C. § 115 which states:

From the time of service of the summons or the allowance of a provisional remedy the court shall be deemed to have acquired jurisdiction and to have control of all the subsequent proceedings. **A voluntary appearance of the defendant shall be equivalent to personal service of the summons upon him.**

Absent any caselaw interpreting 5 V.I.C. § 115, the Court cites the statutory construction language found in Hartford Accident & Indemnity Co. v. Sharp, 34 V.I. 383, 386 (3d Cir. 1996):

We begin with the familiar canon of statutory construction that the starting point for

³ See Supplement to Motion to Deem Service Waived.

interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.

Following this rule, the statute is clear on its face that this Court may acquire personal jurisdiction over a defendant who voluntarily appears before the court without actually being summoned. However, the Court cannot disregard the caselaw which holds that a defendant who simultaneously enters an appearance and raises as an affirmative defense service of process and/or lack of personal jurisdiction does not impliedly consent to the personal jurisdiction of the Court. See Orange Theater Corp. v. Rayherstz Amusement Corp., 139 F.2d 871 (3d Cir. 1944); Martin v. N.Y. State Dept. Of Mental Health Hygiene, 588 F.2d 371 (2d Cir. 1978). Additionally, "notice to a defendant that he has been sued does not cure defective service." Grand Entertainment Group, Ltd. v. Star Media Sales, Inc., 988 F.2d 476, 492 (3d Cir. 1993); See also Friedman v. Estate of Presser, 929 F.2d 1151, 1155 (6th Cir. 1991).

In the instant matter, it is clear that Amerimar St. Croix Associates, Limited Partnership is the only defendant who was personally served with the complaint and summons.⁴ There also appears to be no dispute among the parties that the remaining defendants have not been personally served as of this date. Despite this lack of service on defendants, on February 20, 1996, an answer was filed on behalf of all defendants. The answer asserted that plaintiff's complaint should be dismissed as service of process upon these defendants was and is insufficient. Additionally, defendant Danested Associates asserted a counterclaim against the plaintiff. Since defendants Amerimar St. Croix Corporation and Alan Jovinelly asserted an affirmative defense of insufficient

⁴ See Affidavit of Thomas F. Dunn, Jr., Process Server.

service of process in their answer and there is no proof that they were personally served with a summons and complaint, the Court concludes that Amerimar St. Croix Corporation and Alan Jovinelly's answer did not constitute a voluntary appearance under 5 V.I.C. § 115 and the Court shall dismiss these defendants without prejudice pursuant to Fed.R.Civ.P. 4(m).⁵ Additionally, plaintiff, despite being on notice that the defendants were challenging the service of process, has not shown good cause to warrant an enlargement of time pursuant to Fed.R.Civ.P. 4(m) to perfect or make substituted service by publication on these defendants. Specifically, plaintiff waited nearly nine months after the expiration of the 120 day period to file any type of motion regarding a request for extension of time. Additionally, as defendants have stated, there were other methods of service that plaintiff could have attempted on these defendants and "that reliance upon a third party or on a process server is an insufficient basis for granting an extension of time to perfect service⁶." Thus, the Court shall deny plaintiff's motion to make substituted service outside of time. Finally, with regards to defendant Danested Associates, the Court concludes that its filing of a counterclaim constituted a voluntary appearance before this Court pursuant to 5 V.I.C. §115 in that it has shown a willingness to have this Court hear its claim against the plaintiff. Accordingly, plaintiff's motion

⁵ Fed.R.Civ.P. 4(m) (1997) provides

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 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.

⁶ See Petrocelli v. Bohringer, 46 F.3d 1298, 1307 (3d Cir. 1995).

to deem service waived shall be granted with respect to Danested Associates.

CONCLUSION

Pursuant to the aforementioned, the Court shall deny defendants' 12(b) motion to dismiss since defendants had already filed an answer asserting the affirmative defenses of lack of personal jurisdiction and insufficient service of process. Furthermore, the Court shall grant plaintiff's motion to deem service waived only with respect to defendant Danested Associates and shall dismiss without prejudice defendants Amerimar St. Croix Associates and Alan Jovinelly as these defendants have not been personally served nor have they voluntarily appeared before this Court. Finally, the Court shall deny plaintiff's alternative motion to make substituted service outside of time due to plaintiff's failure to show good cause for an enlargement of time.



MARIA M. CABRET
Territorial Court Judge