

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

ELADIO DESHIELDS,)

Plaintiff,)

v.)

C.A. No. N18C-07-011 CEB

CHARLES E. BOLTON, JR.,)

TRISTATE TRUCKING, LLC,)

JAMES DONELL LIGHTY, US)

TRAILER HOLDINGS, LLC,)

BOWMAN TRAILER LEASING,)

W.B. MASON, A. DUIE PYLE,)

INC., ESTATE OF CLINTON)

PEAVY, STAPLES, INC. and)

J.B. HUNT TRANSPORT, INC.,)

Defendants.)

Submitted: November 6, 2019

Decided: January 14, 2020

Defendant Charles E. Bolton, Jr. 's Motion to Dismiss.

GRANTED

Plaintiff's Motion for Alternative Service.

GRANTED

MEMORANDUM OPINION

Gary S. Nitsche, Esquire and Joel H. Fredricks, WEIK NITSCHKE & DOUGHERTY, LLC, Wilmington, Delaware. Attorneys for Plaintiff.

David C. Malatesta, Esquire, KENT & MCBRIDE, Wilmington, Delaware. Attorney for Defendant Charles E. Bolton, Jr.

BUTLER, J.

FACTS AND PROCEDURAL HISTORY

On August 19, 2016, there was an accident at the intersection of Routes 40 and 896 near Bear, Delaware.¹ It is alleged a tractor-trailer failed to stop at a traffic light and plowed into a pickup truck occupied by three members of the Peavy family.² The pickup truck caught fire and a child in the rear seat was badly injured.³

The Plaintiff in this action was not in that pickup truck.⁴ The injured Peavy child brought a separate action against the tractor-trailer driver and others in New Jersey, where the Peavy family resides.⁵ The Plaintiff was a volunteer who stopped when he saw the accident and rendered assistance to the trapped child.⁶ He is suing for damages resulting from his own experiences in attempting to render aid.⁷

The tractor-trailer was driven by Defendant Charles E. Bolton, Jr. (“Bolton”).⁸ The tractor was owned by Tristate Trucking, LLC, (“Tristate Trucking”) which is wholly owned by Defendant James Donell Lighty (“Lighty”).⁹ The trailer being hauled by Bolton and Tristate Trucking was owned by US Trailer Leasing

¹ Complaint. D.I. 1.

² *Id.*

³ *Id.*

⁴ Plaintiff’s Motion for Alternative Service. D.I. 58.

⁵ Complaint. D.I. 1.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

(“UST”).¹⁰ UST leased the trailer to Bowman Trailer Leasing, which in turn sub-leased the trailer to Staples, Inc. (the “Trailer Defendants”).¹¹ All of them were named as Defendants, as were two companies that may have been trailer brokers, but their role in this mishap is as yet only ill defined.

The docket reflects that the Complaint in this matter was filed on July 2, 2018.¹² Service was effected on various Defendants throughout July and August. Some Defendants have been dismissed as a result of motions filed.¹³

But the docket does not reflect that service was effected on Defendants Bolton, Tristate Trucking or Lighty. On March 28, 2019, the Prothonotary sent Plaintiff’s counsel a “stall letter,” advising counsel that there had been no response from these Defendants since writs for service were issued on July 23, 2018.¹⁴ The Court gave Plaintiff’s counsel two weeks in which to respond or face a default as to those Defendants. Plaintiff’s counsel responded promptly as follows:

Plaintiff’s attempted to serve Defendants Bolton, Lighty and Tristate Trucking through certified mailing. To date, it is noted that the mailing is still in transit. We are attempting to confirm the correct addresses. In the meantime, we are attempting to serve the Defendants’ counsel in the lawsuit that is currently pending in New Jersey.¹⁵

¹⁰ Complaint. D.I. 1.

¹¹ *Id.*

¹² *Id.*

¹³ The Trailer Defendants were dismissed with consent of the plaintiff. D.I. 62, D.I. 65. Defendant Estate of Clinton Peavy was dismissed by Order of the Court on October 29, 2019. D.I. 78.

¹⁴ D.I. 48.

¹⁵ D.I. 51.

Pointedly, Plaintiff did not seek additional time to complete service under Super. Ct. Civ. R. 4(j).¹⁶

Two weeks later, Plaintiff's counsel sought appointment of Torri's Legal Services as a special process server to effect service on Defendants Tristate Trucking and Lighty.¹⁷ Torri's Legal Services sought service on these Defendants at 1550 Oak Ridge Road, Baltimore, MD and 406 Trotter Farm Drive, Rockville, MD.¹⁸

Finally, on May 23, 2019, Plaintiff filed an affidavit of service on Defendant Bolton, along with evidence that he was served via certified mail at a residence address in Maryland on May 21.¹⁹

In June, Bolton, through his counsel, moved to dismiss the Complaint.²⁰ The Court called upon Plaintiff's counsel to file with the Court an affidavit setting forth

¹⁶ "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 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."

¹⁷ Plaintiff's Motion for Alternate Service. D.I. 58.

¹⁸ *Id.*

¹⁹ Amendment to the Complaint. D.I. 56.

²⁰ Motion to Dismiss. D.I. 60. In the alternative, Bolton sought dismissal pursuant to Rule 12(b)(5), insufficiency of process and Super. Ct. Civ. R. 4(j), failure of service of the complaint and summons within 120 days.

what evidence of “good cause” counsel had undertaken to effect service within the rules.²¹ Counsel has done so and the affidavit is now a matter of record.²²

In addition to Bolton’s motion to dismiss, Plaintiff himself has moved separately to deem service effective as to Defendants Tristate Trucking and Lighty.²³ According to Plaintiff and an affidavit filed by his investigator, service was repeatedly attempted as to these Defendants in the Baltimore area and there is evidence that Lighty was actively avoiding service of process.²⁴

DISCUSSION

What both of these motions share in common is a seven month gap in Plaintiff’s counsel’s movement on getting service effected during the period between August, 2018, when the Complaint was filed and March 28, 2019, when the Court clerk notified counsel that service was not returned and the cases were in danger of being dismissed for failure to prosecute. Just how that could be so is explained as follows.

All three Defendants are residents of the Baltimore area.²⁵ Service was commenced pursuant to the long arm statute by sending certified mail, return receipt

²¹ Letter Requesting Affidavit. D.I. 72.

²² Affidavit of Counsel. D.I. 74.

²³ Plaintiff’s Motion for Alternative Service. D.I. 58.

²⁴ *Id.*

²⁵ Complaint. D.I. 1.

requested.²⁶ From all that has been shown, it appears that Plaintiff's counsel used the return receipt for certified mail as his proof that service was indeed effected.

But the electronic record of the certified mail delivery system shows the notices "in transit" even now, almost two years later. Plaintiff's counsel did not know that the service had not been effected until late March, 2019 when the Court alerted counsel via the "stall" letter. Thus, counsel essentially off-loaded the tracking of service of process on the court's staff, which routinely checks for cases that have stalled. But this stall system is not designed to do what Plaintiff's counsel had it do here.

Service of process is expected to be completed within 120 days of filing the complaint.²⁷ Extensions of the 120 day rule are not automatic and are granted only for good cause shown.²⁸

So, what are we to make of a complaint not served where there was a seven month period when absolutely nothing happened to effect service? Can the Plaintiff demonstrate "good cause" why such service was not made within 120 days?

Having surveyed the cases deciding the issue in Delaware, the Court must conclude that the answer is no. In *Ballard v. Takeda Pharmaceuticals America*,

²⁶ 10 Del. C. § 3104(d)(3).

²⁷ Super. Ct. Civ. R. 4(j) *supra*, note 16.

²⁸ *Dolan v. Williams*, 707A.2d 34, 36 (Del. 1998)(noting a trial court may permit service beyond 120 days upon a showing of good cause).

Inc.,²⁹ there were two plaintiffs named Ballard and plaintiff's counsel confused the individuals while tracking service internally. As a result, one plaintiff's complaint was served twice while the other one not at all.³⁰ Although the error was discovered only two months after the 120 window had expired, the Court found the negligence of plaintiff's counsel in effecting service unacceptable and dismissed the action under Rule 4(j).³¹ For the *Ballard* Court, there had been a showing of neglect, but it was not "excusable" under the rule. The case was therefore dismissed.

Plaintiff's effort to distinguish *Ballard* is unavailing. Whether the errors in service are by paralegals as in *Ballard*, or counsel who candidly takes the responsibility himself as here is of no consequence. As Judge Quillen wrote in *Ellis v. Davis*,³² "What happened here is unfortunate. One of the unhappy aspects of this job is rendering an opinion that neglect of counsel was not excusable, especially since we all make mistakes."³³ Alas, this is our lot, inexcusable neglect is the only finding the Court can make on the pleadings and papers presented.

Perhaps foreshadowing what is yet to come, Plaintiff has suggested that even if the matter is dismissed, he may refile under the "savings statute."³⁴ But this was

²⁹ 2017 WL 3396488, (Del. Super. Ct. Aug. 7, 2017) *aff'd*, 184 A.3d 1291 (Del.2018).

³⁰ *Id.* at *2.

³¹ *Id.* at *7.

³² 1997 WL 527941 at *5 (Del. Super. Ct. July 22, 1997).

³³ *Id.*

³⁴ 10 *Del. C.* § 8118.

a mere suggestion, made before the Court found the neglect inexcusable and Plaintiff's argument was untimely. Likewise, Bolton complained at oral argument that permitting a plaintiff to refile under the savings statute is not really relief for service beyond the statute of limitations. Neither of these arguments are fully articulated in the briefs before the Court and it is premature for the Court to speculate on whether a refiled complaint, properly served, will survive another round of motions to dismiss.³⁵

For now it is enough for the Court to find that the Plaintiff has failed to show "good cause/excusable neglect" in failing to serve Bolton within 120 days and at least this Complaint will be dismissed as to him.

As to Defendants Lighty and Tristate Trucking they still have not been "served," but Plaintiff seeks a ruling that service should be deemed effective by virtue of Lighty's active avoidance of service.

In support of Plaintiff's argument, he has produced sworn deposition testimony of Defendant Lighty in the related New Jersey litigation. In his deposition, taken January 21, 2019, Lighty testified that he resides at 1550 Oak Ridge Road, Baltimore, MD.³⁶ When Torri's Legal Services attempted service at that address on two occasions, it was met first by a youngster who said his father

³⁵ *Ellis, supra*, note 29, at *4 (addressing savings statute on motion to dismiss is premature).

³⁶ Plaintiff's Motion for Alternative Service. D.I. 58 at Ex. 3.

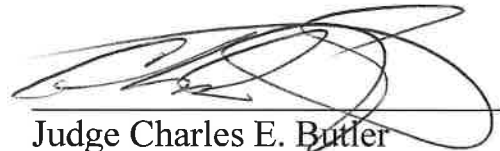
will not allow him to accept mail on behalf of his father and on the second visit by an older woman who claimed Lighty did not reside there.³⁷ That claim is belied by Lighty's own sworn testimony in January, 2019.

The Court is satisfied that Lighty and his wholly owned company Tristate Trucking should be deemed served by reason of his active avoidance of service.³⁸ This ruling will hopefully give Lighty and Tristate Trucking reason enough to come to Court and make whatever arguments they wish concerning service or the merits of Plaintiff's Complaint.

CONCLUSION

For all of the foregoing reasons, the motion of Defendant Bolton to dismiss is **GRANTED**. The motion of Plaintiff to deem service effective as to Defendants Lighty and Tristate Trucking is **GRANTED**.

IT IS SO ORDERED.



Judge Charles E. Butler

³⁷ *Id.* at 58.

³⁸ *Wang v. B'Nai B'rith Senior Citizen Housing Inc.*, 2010 WL 8250793, at * 1 (Del. Super. Ct. July 20, 2010) "Active evasion can justify relaxed service when there is clear evidence that the defendant has been notified". *Doe v. Catholic Diocese of Wilmington, Inc.*, 2010 WL 2106181, at * 5 (Del. Super. Ct. May 26, 2010) quoting *Lovelace v. Acme Markets Inc.*, 820 F.2d 81, 84 (3d. Cir. 1987) "Congress [has] provided only one example of a 'good cause' exception to the 120-day rule-when failure to timely serve is caused by the defendant's intentional evasion of service of process."