



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ELISHA BALLARD, )  
)  
)  
) Plaintiff Below, )  
) Appellant )  
) No. 361,2017  
)  
) v. )  
) Court Below:  
) The Superior Court of  
) The State of Delaware  
) No. N16C-10-177 JRJ  
)  
) TAKEDA PHARMACEUTICALS )  
) AMERICA, INC., TAKEDA )  
) PHARMACEUTICALS U.S.A., INC., f/k/a )  
) TAKEDA PHARMACEUTICALS NORTH )  
) AMERICA, INC.; TAKEDA )  
) PHARMACEUTICAL COMPANY )  
) LIMITED; and ELI LILLY AND )  
) COMPANY, )  
)  
) Defendants Below, )  
) Appellees. )

**APPELLEES' ANSWERING BRIEF**

OF COUNSEL:

Sherry A. Knutson  
Corena G. Larimer  
TUCKER ELLIS LLP  
Willis Tower  
233 South Wacker Drive  
Suite 6950  
Chicago, IL 60606  
(312) 624-6322  
sherry.knutson@tuckerellis.com  
corena.larimer@tuckerellis.com

Philip A. Rovner (#3215)  
Jonathan A. Choa (#5319)  
POTTER ANDERSON & CORROON LLP  
Hercules Plaza  
P.O. Box 951  
Wilmington, DE 19899  
(302) 984-6000  
provner@potteranderson.com  
jchoa@potteranderson.com

*Attorneys for Defendants Below/Appellees*

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### **Nature of Proceedings**

Plaintiff Elisha Ballard appeals from the Superior Court's decision denying Plaintiff's Motion for Order Extending, for Cause, the Time Limit for Service of Process Under Rule 4(j) of the Superior Court Civil Rules and dismissing the action without prejudice.

## **Summary of Argument**

Denied. The Superior Court correctly determined that Plaintiff did not demonstrate either good faith or a reasonable basis for her failure to serve the complaint within 120 days, as required by Superior Court Civil Rule 4(j).

Plaintiff's explanation that the complaint was not timely served because Plaintiff's counsel confused this action with another case, the Jerry Ballard Action, does not establish good cause for extending the deadline in Rule 4(j).

Plaintiff's counsel missed at least four alarm bells that indicated the complaint in the Elisha Ballard Action was never served. First, Plaintiff's counsel should have noticed that writs were never issued and returns of service were never filed in the Elisha Ballard Action. Second, Plaintiff should have noticed that Defendants did not serve an answer or motion to dismiss in the Elisha Ballard Action. Third, when preparing for a scheduling conference and drafting a proposed case management order in a series of related cases filed before and after the Elisha Ballard Action, Plaintiff's counsel should have noticed that the Elisha Ballard Action was not included in the scheduling conference or proposed case management order. Fourth, Plaintiff's counsel should have noticed that a second set of writs were issued, and a second set of returns of service were filed, in the Jerry Ballard Action.

To explain the failure to serve the summons and complaint, Plaintiff's counsel referred to his firm's internal procedures and safeguards. Yet in the proceedings before the Superior Court, Plaintiff's counsel never actually identified those alleged procedures and safeguards. As the Superior Court correctly found, "[t]he record . . . demonstrates that Plaintiff's counsel failed to act as a reasonably prudent attorney should and would have acted under the circumstances. Therefore, Plaintiff's counsel has failed to show good cause, and the Elisha Ballard Action must be and is dismissed without prejudice." August 7, 2017 Superior Court Opinion, Ex. A to Appellant's Opening Brief ("Opn.") at 16-17.

## **Statement of Facts**

This action is one of over forty actions filed in the Superior Court related to Actos® (pioglitazone hydrochloride), a prescription medication used to treat type 2 diabetes mellitus. *See* Opn. at 2. On August 30, 2016, the action styled *Jerry Ballard v. Takeda Pharmaceuticals America Inc., et al.*, C.A. No. N16C-08-253, was filed. A0092. There is no relationship between the plaintiff Jerry Ballard and the plaintiff here, Elisha Ballard. *See* Opn. at 14.

On September 28, 2016, six service writs were issued in the Jerry Ballard Action. B001. On October 17, 2016, the Sheriff's Office filed two returns of service indicating service on Takeda Pharmaceuticals America Inc.'s and Takeda Pharmaceuticals USA Inc. f/k/a Takeda Pharmaceuticals North America Inc.'s registered agent in Wilmington, Delaware. B005-006.

On October 21, 2016, the same counsel filed the Elisha Ballard Action. *See* A0002, A0017, A0132. The suit alleges that Ms. Ballard suffered personal injuries as a result of ingesting the prescription drug Actos®. A0010 at ¶¶ 53-58. Writs of service were never issued and the complaint was never served. No defendant ever filed an answer or a motion to dismiss. *See* A-i to A-iii.

On January 18, 2017, a second set of six service writs were issued in the Jerry Ballard Action. B007. On January 30, 2017, the Sheriff's Office filed two more returns of service indicating service on the registered agent in Wilmington,

Delaware for Takeda Pharmaceuticals America Inc. and Takeda Pharmaceuticals USA Inc. f/k/a Takeda Pharmaceuticals North America Inc. A0116-117.

On April 11, 2017, Plaintiff's counsel filed a proposed Case Management Order ("CMO") in multiple related Actos cases.<sup>1</sup> B013-027. While the proposed CMO included cases filed before and after the Elisha Ballard Action, it did not include the Elisha Ballard Action and was not filed in that action. *Id.* That same day, the Superior Court held a scheduling conference in those same Actos cases. The Elisha Ballard Action was not included in the scheduling conference. Opn. at 13.

On April 21, 2017, Plaintiff filed her Motion For Order Extending, For Cause, The Time Limit For Service Under Rule 4(j) of the Superior Court Civil Rules and oral argument was held on May 24, 2017. Not satisfied with the explanations in the motion or at oral argument, the Court ordered Plaintiff to provide support for her motion by submitting an affidavit explaining the measures taken by her attorneys to ensure timely service of process. Opn. at 7. On August 7, 2017, after receiving that affidavit from Plaintiff's attorneys, the Court denied Plaintiff's Motion to Extend and found that "it is clear there was neglect" and that

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<sup>1</sup> The proposed CMO was filed in civil action numbers N16C-12-294, N16C-12-295, N15C-12-259, N16C-06-193, N16C-08-253, N16C-10-025 and N17C-01-320. B013-027.

“there were multiple opportunities where counsel should have figured out that something had gone awry.” *Id.* at 14. Because “Plaintiff’s counsel failed to act as a reasonably prudent attorney should and would,” the Court found that good cause to extend the service period did not exist and dismissed the Elisha Ballard Action without prejudice. *Id.* at 16.

On August 29, 2017, Ms. Ballard filed a substantially identical complaint to the complaint in this action against the same defendants. *Elisha Ballard v. Takeda Pharmaceuticals America, Inc., et al.*, C.A. No. N17C-08-342 JRJ. B028-043. That action is currently stayed pursuant to an agreement of the parties and an order of the Superior Court. B044-059.

## Argument

### **I. THE SUPERIOR COURT CORRECTLY DENIED PLAINTIFF'S MOTION FOR ORDER EXTENDING, FOR CAUSE, THE TIME LIMIT FOR SERVICE OF PROCESS UNDER RULE 4(j) OF THE SUPERIOR COURT CIVIL RULES**

#### **A. Question Presented**

Did the Superior Court correctly hold that Plaintiff failed to show good cause for not serving the complaint within the 120 days required in Rule 4(j) of the Superior Court Civil Rules, when Plaintiff's counsel missed multiple warning signs that service was not effectuated and never articulated a set of implemented policies and procedures for ensuring timely service of complaints? Preserved at A0043-0051.

#### **B. Scope of Review**

A determination that a party failed to show good cause is reviewed for abuse of discretion. *DeSantis v. Chilkotowsky*, 2005 WL 1653640, at \*1 (Del. Supr. June 27, 2005). Under the abuse of discretion standard, "where the record below demonstrates the judgment reached was directed by conscience and reason, as opposed to capricious or arbitrary action, we will affirm." *North River Insurance Company v. Mine Safety Appliances Company*, 105 A.3d 369, 382 (Del. Supr. 2014).

#### **C. Merits of Argument**

Pursuant to Superior Court Civil Rule 4(j), if a plaintiff fails to serve the

summons and complaint within 120 days, “the trial court ‘shall’ dismiss the Complaint without prejudice unless the plaintiff can show ‘good cause.’” *Doe v. Catholic Diocese of Wilmington, Inc.*, 2010 WL 2106181, at \*3 (Del. Super. May 26, 2010). “Rule 4(j) must be strictly construed unless plaintiff can establish good cause for its failure to comply.” *DeSantis v. Chilkotowsky*, 2004 WL 1790113, at \*2 (Del. Super. July 27, 2004). *See also Huelsenbeck v. Fermin-Jimenez*, 2013 WL 2481533, at \*1 (Del. Super. June 7, 2013) (granting dismissal where “the record here shows an almost complete lack of diligence by Plaintiffs”).

The Superior Court correctly found that Plaintiff’s sole excuse for failing to timely serve the complaint – that her counsel repeatedly confused the Elisha Ballard Action with the Jerry Ballard Action – did not constitute excusable neglect. Opn. at 14 (“A reasonably prudent attorney should and would have been sensitive to the possibility of confusion given the number of Actos cases and the fact that there were two Actos plaintiffs with the same last name.”).

Even if there was initial confusion, as found by the Superior Court, there were “multiple events which should have alerted [Plaintiff’s counsel] to the lack of service in the Elisha Ballard Action.” Opn. at 12. First, Plaintiff should have noticed that there was no activity for six months in the Elisha Ballard Action. No writs were issued, the Sheriff did not file any returns of service for the Delaware defendants and Plaintiff’s counsel did not file any proofs of service for the non-

Delaware defendants. Plaintiff also should have noticed that no defendant answered or moved to dismiss and that the April scheduling conference, which included Actos cases filed by the same attorneys before and after the Elisha Ballard action, did not include the Elisha Ballard Action. *Id.* at 13. Nor were the warning signs limited to the absence of docket entries in the Elisha Ballard Action. As also found by the Superior Court, Plaintiff should also have noticed that a second set of writs and returns of service were filed in the Jerry Ballard Action. *Id.*

The failure to notice that the Elisha Ballard Action was not included in the scheduling conference is particularly egregious because Plaintiff's own counsel filed a proposed CMO before the scheduling conference listing multiple cases filed by their firm. The proposed CMO, however, did not include the Elisha Ballard Action and was not filed in that action. If, as Plaintiff's counsel claims, he thought the Elisha Ballard Action was served, he would have filed the proposed CMO in that case as well.

The only explanation Plaintiff proffered to explain how her counsel missed multiple alarm bells, is that "there was [sic] internal case tracking mechanisms in place whereby case management is controlled and monitored." Appellant's Opening Brief ("Op. Br.") at 8. The Superior Court, however, already found this explanation woefully insufficient. *Opn.* at 7 ("Plaintiff's counsel agreed that there were opportunities to discover the mistake, but offered no explanation of what

efforts he, the attorney responsible for service of process, undertook to track service of process.”).

First, Plaintiff’s counsel blamed a paralegal for the error. A0038-0039 (affidavit of paralegal). Then, at the hearing, in response to questions about an institutional failure to catch the service mistake, Plaintiff’s counsel’s sole response was that “[i]t was an honest, good faith mistake, and ‘[w]e tried to make service.’” Opn. at 7. The Superior Court, “troubled by, and not satisfied with, Plaintiff’s failure to account for his own actions” ordered Plaintiff’s counsel to submit “an affidavit explaining what measures he took to ensure timely service of process.” *Id.* at 7. In that affidavit, Plaintiff’s counsel again primarily blamed a paralegal and only referred to generic “internal control processes.” A0083 at ¶ 8, 10.

Despite three attempts to explain the failure of service, Plaintiff’s counsel never articulated a set of specific procedures that were in place to detect errors in service. Thus, the Superior Court correctly found that Plaintiff’s counsel failed “to act as a reasonably prudent attorney” and, therefore, there was no good cause to extend the time for service under Rule 4(j).

Plaintiff’s attempt to distinguish *Desantis*, 2004 WL 1790113, relied upon by the Superior Court, is an exercise in self-denial. *See* Op. Br. at 9-10. In *DeSantis*, the plaintiff attempted to serve a “David Chilkotowsky” via the New Jersey Secretary of State. The defendant had the same name but was actually a

resident of Delaware. The service attempt failed, no further attempts were made, and the court ultimately denied plaintiff's request to extend the 120-day period.

Opn. at 15. Plaintiff's claim that *Desantis* is distinguishable because "[t]here was no reason for counsel to know that service was not perfected in the Elisha Ballard Action" (Op. Br. at 9) is easily disproven by the multiple warning bells, discussed above, that Plaintiff's counsel missed. Similarly, in *In re Asbestos Litigation*, the Superior Court held that lack of oversight precluded a finding of good cause. *See In re Asbestos Litigation*, 2011 WL 6400280, at \*2 (Del. Super. Nov. 22, 2011) ("Common sense would dictate following up with the Sheriff's office within the sixty-day period if counsel had not received a return of service (or a notice that service could not be completed) at or near the end of that period.").

Instead, Plaintiff claims that this situation is more analogous to *Jackson v. Minner*, 2011 WL 947069 (Del. Super. 2011) (Op. Br. at 10), where the Superior Court allowed an incarcerated inmate, appearing *pro se*, an extension of time to serve the complaint after he mistakenly attempted to serve defendants at their Sussex County office, instead of the Kent County office where they worked. *Id.* at \*4. The Superior Court correctly distinguished *Jackson* from this case, finding that

Plaintiff's counsel was an "experienced attorney" with far more resources at his disposal to correct errors in service than a "*pro se* prison inmate." Opn. at 11.<sup>2</sup>

The Superior Court's order denying an extension of time and dismissing the case without prejudice is well supported by the undisputed facts and existing case law. Rather than capricious or arbitrary, the decision is directed by conscience and reason and should, therefore, be affirmed.

### **Conclusion**

For the reasons set forth above, this Court should affirm the judgment of the Superior Court denying an extension of time to serve the complaint and dismissing the action without prejudice.

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<sup>2</sup> Plaintiff appears to have abandoned her reliance on *Fluharty v. Richeson*, 1998 WL 283467, at \*1 (Del. Super. Apr. 20, 1998), which the Superior Court properly distinguished because, in *Fluharty*, the plaintiff's counsel noticed the error in service and attempted to fix it within 120 days, which did not happen here. Opn. at 12.

POTTER ANDERSON & CORROON LLP

OF COUNSEL:

Sherry A. Knutson  
Corena G. Larimer  
TUCKER ELLIS LLP  
Willis Tower  
233 South Wacker Drive  
Suite 6950  
Chicago, IL 60606  
(312) 624-6322  
sherry.knutson@tuckerellis.com  
corena.larimer@tuckerellis.com

By: /s/ Philip A. Rovner  
Philip A. Rovner (#3215)  
Jonathan A. Choa (#5319)  
Hercules Plaza  
P.O. Box 951  
Wilmington, DE 19899  
(302) 984-6000  
provner@potteranderson.com  
jchoa@potteranderson.com

*Attorneys for Defendants Below/Appellees*

Dated: January 4, 2018  
5585996

**CERTIFICATE OF SERVICE**

I hereby certify that on January 4, 2018, a copy of the within document was served electronically by File and ServeXpress on the following attorneys:

R. Joseph Hrubiec, Esq.  
Napoli Shkolnik, LLC  
919 North Market Street  
Suite 1801  
Wilmington, DE 19801  
(302) 330-8025

*/s/ Philip A. Rovner*

\_\_\_\_\_  
Philip A. Rovner (#3215)