



IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANT'S REPLY BRIEF

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Dated: January 19, 2018

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Introduction and Summary of Argument

This case involves the lack of service of process in the instant case within 120 days as directed by Rule 4(j), and duplicate service of process in a case involving the same injuries, the same defendants and a plaintiff with the same surname. Contrary to Defendants' assertions, at no time would alarm bells have rang in this case as no writs were issued in the instant matter, service of process was not returned as *non est inventus*, and the defendants were actually served albeit with service documents associated with a different case. The service issue in this case was the result of a good faith mistake despite the reasonable efforts and management by plaintiff's counsel. Upon the realization of the mistaken service, plaintiff promptly moved to extend the time in which to serve defendants. The Trial Court's denial of plaintiff's requested relief was an abuse of discretion.

Argument

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFF'S REQUEST FOR AN EXTENSION OF TIME TO SERVE DEFENDANTS

A. The Applicable Rule And The Standard On Appeal

Superior Court Civil Rule 4(j) requires that service of the summons and complaint needs to be made on the defendant(s) within 120 days after the filing of the complaint.¹ Delaware has a strong policy of deciding cases on the merits and giving parties to litigation their day in court,² and the Court may extend the 120 days for good cause shown.³ Good cause has been interpreted as showing “excusable neglect” by demonstrating good faith on the party seeking an enlargement and some reasonable basis for noncompliance with the time specified in the rules.⁴ Mere negligence with a valid reason will constitute excusable neglect⁵ and when evaluating whether excusable neglect existed all surrounding circumstances may be considered.⁶

¹ Super. Ct. Civ. R. 4(j).

² *Jackson v. Minner*, 2011 Del. Super. LEXIS 115 (2011) (*internal citations omitted*).

³ Super. Ct. Civ. R. 4(j).

⁴ *Dolan v. Williams*, 707 A.2d 34, 36 (Del. 1998) (*internal citations omitted*).

⁵ *See, Wass v. Calloway*, 1999 WL 190020, at *3 (Del. Super. Feb. 21, 1996) (*internal citations omitted*).

⁶ *DiSabatino v. DiSabatino*, 2007 WL 812766, at *3 (Del. 2007) (*internal citations omitted*).

Appellate courts review the trial court's determination that a party failed to show good cause to extend the time limit for service of process for abuse of discretion.⁷ An abuse of discretion occurs when the trial judge has exceeded the bounds of reason in view of the circumstances or so ignored recognized rules of law or practice so as to produce injustice.⁸

B. Plaintiff's actions constitute excusable neglect based on the surrounding circumstances and the Trial Court abused its discretion when it denied Plaintiff's request for additional time in which to serve Defendants.

1. Counsel acted as a reasonable prudent attorney under the circumstances

The Trial Court improperly concluded that counsel did not act as a reasonable prudent attorney in this matter, despite counsel's representations contained in affidavits and during oral argument.

Per the affidavits, there were internal case tracking mechanisms in place whereby case management was controlled and monitored.⁹ Contrary to Defendants' assertions, the affidavit did not generically reference the tracking mechanisms, but instead explained that "the tracking mechanisms included the tracking of service events and regular meetings between the managing partner and the paralegal to discuss service tracking issues to ensure that service was made in a

⁷ *DeSantis v. Chilkotowsky*, 844 A.2d 52 (Del. 2005).

⁸ *Gillen v. Cont'l Power Corp.*, 2014 Del. LEXIS 548, *7 (Del. 2014) (*internal citations omitted*).

⁹ *See generally*, A0082-A0084; Trans. ID. 60744707.

timely matter according to the rules of civil procedure.”¹⁰ These internal case tracking mechanisms demonstrate counsel’s diligence with regarding to the management of cases as well as the management and supervision of non-attorneys.

Additionally, during oral argument, counsel explained that new systems had been implemented to track cases better, but counsel had checked the cases well before.¹¹

Finally, the “alarm bells” would not have sounded in the Elisha Ballard Action. Although counsel reasonably believed that writs were requested and issued in the Elisha Ballard Action, they were actually requested and issued in the Jerry Ballard Action. At most, the earliest “alarm bell” would have rang when defendants did not answer the complaint in the Elisha Ballard Action on or before February 21, 2017 (120 days after the complaint was filed). However, at that point a number of Actos® cases had been consolidated and a scheduling conference was set for April 2016. It was only when counsel was preparing for the scheduling conference that it was realized that the Elisha Ballard Action was not included and counsel promptly filed the motion for enlargement of time.

Based on the affidavits and representations, reasonable measures were in place to track cases and to comply with the Delaware Lawyers’ Rules of Professional Conduct. Counsel acted as a reasonable and prudent attorney with

¹⁰ A0082-A0084, ¶¶ 8-9; Trans. ID 60744707.

¹¹ A0065-A0066, May 24, 2017 Hearing Transcript at pgs. 3:23-4:2.

regard to the service of complaints and oversight of non-attorneys. As such, counsel's explanations for failure to timely perfect service in the Elisha Ballard Action amount to excusable neglect and the trial court abused its discretion in denying Plaintiff's request to enlarge time to serve the complaint.

2. *DeSantis* is not applicable in the instant matter.

The Trial Court relied on *DeSantis* to conclude that counsel's failure to timely discover that service had not occurred precluded a finding of good cause.¹² However, the Trial Court's reliance was misplaced as *DeSantis* is distinguishable from the case at hand.

First, this case is one of many that includes the same injuries and the causes of actions against the same defendants. *DeSantis* involved a single plaintiff that filed suit against a single defendant and there were no similar or related actions.¹³

Second, in *DeSantis*, writs were issued for that case and service was attempted on defendant.¹⁴ However, there were several failed attempts at service, and plaintiff was aware of the insufficiency of process but never requested an enlargement of the time frame within which to perfect service of process.¹⁵ In contrast, while writs were issued for service on Defendants the writs were

¹² Exhibit A to Opening Brief at 15.

¹³ *DeSantis v. Chilkotowsky*, 2004 WL 1790113 (Del. Super. July 27, 2004), *aff'd*, 877 A.2d 52 (Del. 2005).

¹⁴ *DeSantis v.*, 2004 WL 1790113 (Del. Super. July 27, 2004).

¹⁵ *Id.* at * 3-4.

associated with a different case with a difference civil action number. Defendants were properly served. However, counsel would not have been aware that service was not perfected in the Elisha Ballard Action as the writs and corresponding affidavits of service were associated with the Jerry Ballard Action. The return of service, whether established or not, could not have been an “alarm bell” as to the Elisha Ballard Action because, due to the mistake, there was a good faith, albeit erroneous belief that service had been made.

In light of these circumstances, the Trial Court’s reliance on *DeSantis* was misplaced, and the Trial Court abused its discretion in denying Plaintiff’s request to enlarge the time to serve the complaint.

3. The Trial Court Erroneously Concluded That *Jackson* Was Not Applicable.

This case is most similar to *Jackson v. Minner*. There, service was made however it was at defendant’s wrong address, and the court granted plaintiff’s request for additional time to serve defendant once the mistake was realized.¹⁶ The Trial Court distinguished the instant case from *Jackson* by concluding that Plaintiff had more resources and ability to verify that each stage of service had been made.¹⁷ However, the court in *Jackson* did not focus on plaintiff’s lack of resources but instead focused on the plaintiff’s mistaken belief as to the proper address for

¹⁶ *Jackson v. Minner*, 2011 Del. Super. LEXIS 115, *11-12 (Del. Super. March 17, 2011).

¹⁷ Exhibit A to Opening Brief at 11.

service.¹⁸ Likewise, here, service was not perfected within 120 days due to a good faith mistaken belief that service had been perfected in the proper case on the proper defendants. Based on *Jackson*, the Trial Court should have granted Plaintiff's request for additional time to serve Defendants. The Trial Court abused its discretion in failing to follow *Jackson* and denying Plaintiff's request.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Honorable Court reverse the decision of the Trial Court and permit Plaintiffs additional time to serve Defendants and remand the case to the Trial Court for further proceedings.

Respectfully Submitted,

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¹⁸ *Jackson*, 2011 Del. Super. LEXIS at *12.