SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURT HOUSE
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Re: ***Donnette F. Plummer, individually, and as parent of Quincy Plummer and Loxlie Plummer, and Loxlie M. Plummer v. Susan A. Sherman, as Personal Representative of the Estate of Mark Fose***
C.A. No. 99C-08-010 RRC

Submitted: December 23, 2003
Decided: January 14, 2004

Upon Motion for Reargument of Plaintiffs Donnette F. Plummer, individually, and as parent of Quincy Plummer and Loxlie Plummer, and Loxlie M. Plummer. DENIED.

Dear Counsel:

Before this Court is a motion for reargument filed by plaintiffs Donnette F. Plummer, individually and as parent of Quincy Plummer and Loxlie Plummer, and Loxlie M. Plummer ("Plaintiffs"). Pursuant to Superior Court Civil Rule 59(e), Plaintiffs filed this motion for reargument of the Court's December 9, 2003 decision and order granting defendant Susan A. Sherman's ("Sherman") motion to

dismiss.[1] The Court finds that this motion for reargument has inappropriately advanced a new argument not previously asserted that could have been made before the Court dismissed this case. Accordingly, Plaintiffs' motion is **DENIED**.

CONTENTIONS OF THE PARTIES

Following the Court's December 9, 2003 decision and order dismissing Plaintiffs' complaint due to their failure to perfect service upon Mark Fose under Delaware's nonresident motorist "long-arm" statute (title 10, section 3112 of the Delaware Code),[2] Plaintiffs submitted a motion for reargument. Plaintiffs' argument in their motion is two-pronged. First, Plaintiffs argue that Sherman waived the alleged deficiency in the long-arm service because Sherman had not pled the affirmative defenses of lack of personal jurisdiction and insufficiency of service of process in Sherman's answer.[3] This argument had not been previously asserted. Second, Plaintiffs argue that service of process was effected on the representative of Mark Fose's estate, thereby waiving any alleged deficiency in service of process pursuant to Delaware's long-arm statute. This argument had been previously asserted.

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[1] Plummer v. Sherman, 2003 Del. Super. LEXIS 423 (Del. Super. Ct.).

[2] Id.

[3] Superior Court Civil Rule 15(h)(1) states that "A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived … (B) if it is neither made by motion under this Rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course."

Sherman responds by arguing that her motion to dismiss was filed within a month after serving her answer, and that the motion was Sherman's "first defensive move," thereby complying with Superior Court Civil Rule 12. As part of this argument, Sherman argues that Plaintiffs were not prejudiced by Sherman's motion to dismiss being filed less than a month after serving her answer. Further, Sherman argues that Plaintiffs never raised this Rule 12 issue in oral arguments or the supplemental briefing after the motion and now raise it for the first time in their motion for reargument. Second, Sherman argues (as was argued by her in the original motion to dismiss) that Plaintiffs failed to comply with Delaware's long-arm statute by not sending Mark Fose notice by registered mail within seven days after the filing of the return of service upon the Secretary of State.

DISCUSSION

Under Superior Court Civil Rule 59(e), a party may file a motion for reargument following the Court's opinion or decision and "[t]he Court will determine from the motion and answer whether reargument will be granted."[4] The issue presented in this case is whether the Plaintiffs may raise a new argument in a motion for reargument that could have been raised in the prior briefing on the motion to dismiss. Specifically, the issue is whether Plaintiffs could have raised their new Rule 12(h) argument in their response to Sherman's motion to dismiss or

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[4] Delaware Superior Court Civil Rule 59(e).

in their supplemental briefing after the motion. Superior Court Civil Rule 59(e) tracks Federal Rule of Civil Procedure 59(e).[5] Therefore, federal case law, as well as Delaware case law, can be looked to for guidance in resolving this issue.

Under Delaware law, parties cannot use Rule 59(e) to raise new arguments.[6] Under federal case law, a Rule 59(e) motion may not be used to relitigate old matters or to raise arguments that "could" have been raised prior to the Court's opinion or decision.[7] Plaintiffs could have raised their Rule 12(h) argument either

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[5] Family Court of the State of Delaware v. Reeves, 1997 Del. Super. LEXIS 552, *9 (Del. Super. Ct.) (citing McCloskey v. McKelvey, 174 A.2d 691 (Del. Super. Ct. 1961)).

[6] Bd. of Managers of the Del. Crim. Justice Info. Sys. v. Gannett Co., 2003 Del. Super. LEXIS 27, *3-4 (Del. Super. Ct.) (holding that a motion for reargument is not a device for raising new arguments or stringing out the length of time), rev'd on other grounds Gannett Co. v. Bd. of Managers of the Del. Crim. Justice Info. Sys., 2003 Del. LEXIS 644 (Del. Supr.); Carlozzi v. Fidelity and Casualty Company, 2001 Del. Super. LEXIS 217, *3-4 (Del. Super. Ct.) (holding that motions for reargument will be denied where they rely on grounds not raised in the original proceeding or where they merely advance the same matters that were already considered in the original proceeding).

[7] FDIC v. World University, Inc., 978 F.2d 10 (1st Cir. 1992) (holding that parties should not use Rule 59(e) motions to raise arguments which "could, and should," have been made before a judgment is issued); Moro and Kahuna, Inc. v. Shell Oil Company, 91 F.3d 872 (7th Cir. 1996) (holding that Rule 59(e) does not allow a party to advance new arguments that "could and should" have been presented to the district court prior to judgment); Steele v. Young, 11 F.3d 1518 (10th Cir. 1993) (holding that Rule 59(e) cannot be used to expand a judgment to encompass new issues which "could" have been raised prior to issuance of the judgment). See also Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2810.1 ("The Rule 59(e) motion may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment"); cf. 12 Moore's Federal Practice, § 59.30 (Matthew Bender 3d ed.) ("[A] motion to alter or amend [i.e., a motion for reargument] may not be used to raise arguments, or to present evidence, that could reasonably have been raised or presented before the entry of judgment"). The cases cited by Wright, Miller & Kane, and Moore in support of the principle of law at issue contain two lines of language in their

in their response to Sherman's motion to dismiss, or in their supplemental submissions following that motion. Because Plaintiffs did not raise their Rule 12(h) argument in those pleadings, they are barred from raising this new argument in their motion for reargument.[8] This procedural maneuver does not promote the efficient use of judicial resources, is unfair to the defendant and does not promote an orderly process of reaching closure on the issues raised by the motion to dismiss. The Court will therefore not reach the merits of this argument, but will note, in *dicta*, that if Sherman had timely moved to formally amend her answer, pursuant to Superior Court Civil Rule 15(a), to include lack of personal jurisdiction and insufficiency of service of process as affirmative defenses, the Court likely would have granted it, thereby mooting this issue.

Plaintiffs' second argument regarding service of process being completed by serving the representative of Mark Fose's estate, and thereby waiving any alleged deficiency in service of process pursuant to Delaware's long-arm statute, was addressed and rejected by the Court in its opinion granting Sherman's Motion to Dismiss.[9] Accordingly, Plaintiffs' Motion for Reargument is **DENIED**.

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holdings: "could and should [have raised]," or just "could [have raised]." This Court believes that the standard is best expressed by the phrase "could have raised," which phrase is also used in the text of the two above treatises.

[8] See id.

[9] Plummer v. Sherman, 2003 Del. Super. LEXIS 423 (Del. Super. Ct.); see Weston Investment Inc. v. Domtar Industries, Inc., 2002 Del. Super. LEXIS 512 (Del. Super. Ct.)

IT IS SO ORDERED.

Very truly yours,

oc: Prothonotary

(denying plaintiff's Motion for Reargument on the merits because the issue raised by plaintiff had been raised and considered by the Court in its earlier decision and order).