

**COURT OF COMMON PLEAS
FOR THE STATE OF DELAWARE**

KENT COUNTY COURTHOUSE
38 THE GREEN
DOVER, DELAWARE 19901
PHONE: (302) 735-3910

CHARLES W. WELCH, III
JUDGE

July 27, 2016

Gary W. Alderson, Esq.
Elzufon Austin Tarlov & Mondell, P.A.
300 Delaware Avenue, Suite 1700
P O Box 1630
Wilmington, DE 19899-1630

Ms. Nina Shahin
103 Shinnecock Road
Dover, DE 19904

RE: Nina Shahin v. United Parcel Service (UPS) Store, Inc.
C.A. No.: CPU5-14-000379

Decision on Defendant's Motion to Dismiss

Dear Mr. Alderson and Ms. Shahin:

As you know, the Court has performed a complete review of the file for the above-referenced matter. Included in this review is a Motion to Dismiss that was filed by the defendant, United Parcel Service (UPS) Store, Inc. ("UPS Store") on or about July 2, 2015, for the above-referenced matter. The motion was filed pursuant to Court of Common Pleas Civil Rules 12(b)(4),(5),(6) & (7), 19 and 41(b). After a careful consideration by the Court, the defendant's motion is denied for the reasons provided below.

As you are aware, on September 30, 2014, the Court released its decision on the defendant's first Motion for Summary Judgment.¹ This motion was denied by the Court.

¹ The defendant entitled its motion as a "motion to dismiss." However, since materials outside the complaint were proffered as evidence at the hearing for the motion, the motion was treated as a motion for summary judgment. *Johnson v. Redman*, 1985 W.L. 189301 (Del. Super.).

However, the plaintiff was ordered to join United Parcel Services of America, Inc. (“UPS”), as an indispensable party to the action. Pursuant to the Court’s order, the plaintiff filed a Motion for Joinder of UPS and JKMR, LLC d/b/a The UPS Store #4435 (“JKMR”) as indispensable parties to the action.²

By order contained in correspondence dated February 25, 2015, the Court granted the plaintiff’s Motion for Joinder of UPS and JKMR as indispensable parties and indicated that service needed to be effected on them as described in Court of Common Pleas Civil Rules 3 and 4. In response to the Court’s order, the plaintiff filed a motion dated February 13, 2015, in which she questioned the Court’s direction to serve the newly joined parties pursuant to Civil Rules 3 and 4. She suggested that the joinder of parties is “regulated” by Court of Common Pleas Civil Rules 18 through 21.

UPS Store has now filed this instant motion on the grounds that the plaintiff failed to effectuate service of process upon UPS as an indispensable party as ordered by the Court. In opposition, the plaintiff contends that she has acted with due diligence in her attempts to join UPS.

DISCUSSION

While the joinder of parties needed for a just adjudication in a civil matter is governed by Court of Common Pleas Civil Rule 19, the commencement of an action and the process to be used when commencing an action are governed by Court of Common Pleas Civil Rules 3 and 4. What the plaintiff has failed to recognize is that after her motion was granted to join UPS as an indispensable party, she still needed to commence

² It should be noted that JKMR, LLC d/b/a The UPS Store #4435 is the correct full name for the defendant, UPS Store. There was no need for the plaintiff to add it as a defendant as it is the original defendant.

process on it by serving it with a summons and complaint, the same as when a plaintiff commences any other action. Otherwise, the new party does not have notice of the proceeding against it and does not have a summons from the Court ordering it to file a responsive pleading to the allegations against it. It is UPS Store's contention that the plaintiff has failed to comply with Court of Common Pleas Civil Rule 4(j) by her failure to effectuate the service of the summons and complaint upon UPS. Court of Common Pleas Civil Rule 4(j) provides the time limit for service of process on new parties to an action. A plaintiff normally has one hundred twenty days to serve a summons and complaint once an action has been commenced on a party. Otherwise, the action can be dismissed without prejudice. It also provides that if a "party on whose behalf such service is required cannot show good cause why such service was not made within [the one hundred twenty day 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." See Court of Common Pleas Civil Rule 4(j).

"In Delaware, public policy favors permitting a litigant a right to a day in court." *Id.* Therefore, a trial court has discretion in permitting service beyond the 120 day limit for good cause in order to "balance the need for speedy, just and efficient litigation with a desire to provide litigants their right to a day in court." *Id.*

"'Good cause' . . . requires a showing of excusable neglect, by a demonstration of good faith on the part of the party seeking enlargement and some reasonable basis for noncompliance . . ." with the rule. *Dolan v. Williams*, 707 A.2d 34, 36 (Del. 1998). Excusable neglect is "neglect which might have been the act of a reasonably prudent person under the circumstances." *Id.*

In the instant case, the Court finds that the plaintiff has made a good faith effort to add UPS as a party to this matter. She filed a motion for the joinder of UPS as a party to this matter when ordered to do so by the Court. She failed to effectuate service on it pursuant to Court of Common Pleas Civil Rules 3 and 4 as directed by the Court. However, she then filed a document on February 13, 2015, questioning the Court's direction to serve the newly joined party, UPS, pursuant to Court of Common Pleas Civil Rules 3 and 4 as she believed that the joinder of parties is "regulated" by Court of Common Pleas Civil Rules 18 through 21.³ The Court considers the plaintiff's filing of February 13, 2015, as a request to the Court seeking direction on how she needed to proceed with the completion of the joinder of UPS. Therefore, it is evident that the delay in service on the new party, at least in some part, was caused by the Court's delay in providing such direction.

CONCLUSION

The defendant's Motion to Dismiss is **DENIED**. The plaintiff has shown good cause to extend the time to serve process upon UPS. Therefore, within 120 days of the date of this decision, the plaintiff shall serve a summons and complaint upon UPS as required by State law and rules of this Court. Failure to effectuate service within 120 days will result in a dismissal of the plaintiff's case against UPS for her failure to perfect

³ Although not specifically explained in her motion, it is the Court's belief that the plaintiff believed that she had completed the joinder of UPS and JKMR as parties to the action once her motion to join them had been granted and the attorney for UPS Store was aware of the joinder.

service on it, and against UPS Store, for her failure to complete the joinder of an indispensable party to this matter.⁴

IT IS SO ORDERED.

Sincerely,

A handwritten signature in black ink, appearing to read "Charles W. Welch, III". The signature is fluid and cursive, with the first name "Charles" being the most prominent.

Charles W. Welch, III

CWW:mek

⁴ The plaintiff should be cautioned that the service of a summons and complaint on Gary Alderson, Esquire, who is the attorney for JKMR d/b/a/ The UPS Store, may not result in the perfection of service on UPS unless Mr. Alderson has been authorized to accept service on behalf of UPS by that entity.