IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ANDREA C. O'BRIEN and STEPHEN O'BRIEN, wife and husband,	)	
Plaintiffs,	)	
v.	)	
	)	C.A. No. N14C-11-010 MMJ
SUPERVALU, INC., d/b/a ACME MARKETS, INC., a Delaware Corporation, F & N SHOPPING VILLAGE, c/o R.J. WATERS & ASSOCIATES, a foreign corporation, and LAKESIDE CULTURAL CARE INC., a foreign corporation,	)	
Defendants.	)	

Submitted: September 8, 2015
Decided: September 23, 2015

Upon Defendants' Motion to Dismiss or in the Alternative Motion to Quash Service
DENIED

MEMORANDUM OPINION

Gary S. Nitsche, Esquire, Weik, Nitsche & Dougherty, Attorneys for Plaintiffs

Cynthia G. Beam, Esquire, Law Office of Cynthia G. Beam, Attorney for Defendant Lakeside Cultural Care Inc.

Sarah B. Cole, Esquire, Marshall, Dennehey, Warner, Coleman & Goggin, Attorney for Defendant F&N Shopping Village

JOHNSTON, J.

PROCEDURAL CONTEXT

On November 3, 2014, Plaintiffs Andrea C. O'Brien ("Andrea") and Stephen O'Brien ("Stephen") filed the underlying Complaint against Defendants Supervalu, Inc., d/b/a Acme Markets, Inc. ("Acme"), F & N Shopping Village, c/o R.J. Waters & Associates ("F & N"), and Lakeside Cultural Care, Inc. ("Lakeside") alleging personal injuries from a slip and fall.

Plaintiffs attempted to effectuate service on Lakeside by certified mail on November 24, 2014. However, notice was deemed undeliverable on December 6, 2014. On January 29, 2015, this Court granted Acme's Motion for a More Definite Statement. On February 18, 2015, Plaintiffs filed an Amended Complaint in accordance with the Court's order. The amended long arm writ for service of the Amended Complaint on Lakeside then was issued on April 15, 2015.

On June 1, 2015, Plaintiffs filed a Rule 4(h) Amendment, confirming that a second notice was sent to Lakeside by certified mail on April 16, 2015, but it was again deemed undeliverable. On June 30, 2015, Lakeside filed a Motion to Dismiss or in the alternative Motion to Quash Service. On July 6, 2015, Plaintiffs filed a second Rule 4(h) Amendment, confirming that a third notice was sent to Lakeside by certified mail on June 1, 2015, and that it was delivered to Lakeside on June 9, 2015. F & N filed a Response to Lakeside's Motion to Dismiss on July 10, 2015, and Plaintiffs filed a Response on September 1, 2015.

FACTS

On November 7, 2012, Andrea slipped and fell on black ice while she was a business invitee on the premises of F & N and Acme, located at 2098 Naamans Road, Wilmington, Delaware 19810. Lakeside, which conducts business at 131 South Ship Road, Exton, Pennsylvania 19341, allegedly was responsible for snow and ice removal for the premises.

Plaintiffs contend that as a proximate result of Defendants' negligence, Andrea suffered injuries and damages in the form of: personal injuries all of which may be permanent; pain and suffering; medical expenses in the amount of $ 10,412.00, plus future medical expenses; and loss of consortium, society, aid and comfort of Andrea by Stephen. Plaintiffs demand judgment against Defendants, jointly and severally, for personal injuries, pain and suffering, past and future medical expenses, loss of consortium, interest pursuant to 6 *Del. C.* § 2301(d), and Court costs.

STANDARD OF REVIEW

When reviewing a motion to dismiss pursuant to Rule 12(b)(6), the Court must determine whether the claimant "may recover under any reasonably conceivable set of circumstances susceptible of proof."[1] The Court must accept as

[1] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

true all non-conclusory, well-pleaded allegations.[2] Every reasonable factual inference will be drawn in favor of the non-moving party.[3] If the claimant may recover under that standard of review, the Court must deny the motion to dismiss.[4] Dismissal is granted only when "under no reasonable interpretation of the facts alleged could the complaint state a claim for which relief might be granted."[5]

ANALYSIS

Rule 4(j)

The sole basis of Lakeside's dismissal claim is Plaintiffs' failure to effectuate service of process of the underlying Complaint. Delaware Superior Court Civil Rule 4(j) provides:

> 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.[6]

To establish good cause for an extension of time to serve, a plaintiff must show "good faith … and some reasonable basis for noncompliance within the time

---

[2] *Id.*
[3] *Wilmington Sav. Fund. Soc'y, F.S.B. v. Anderson*, 2009 WL 597268, at *2 (Del. Super.) (citing *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005)).
[4] *Spence*, 396 A.2d at 968.
[5] *Thompson v. Medimmune, Inc.*, 2009 WL 1482237, at *4 (Del. Super.).
[6] Super. Ct. Civ. R. 4(j).

specified in the rules."[7] If a plaintiff's noncompliance resulted from its own neglect, "good cause exists only if the neglect was excusable, or such as 'might have been the act of a reasonably prudent person under the circumstances.'"[8] It is up to the Court's discretion to determine if a party's failure to act constitutes excusable neglect.[9]

The Court must consider six factors before dismissing a case for a procedural default: "(1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the opponent's failure to meet court orders; (3) a history of dilatoriness; (4) whether the lapse was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, including alternative sanctions; and (6) the claim's merit."[10]

Parties' Contentions

Plaintiffs contend that the filing of the Amended Complaint restarted the 120 day statutory period to effectually serve Lakeside. If Rule 4(j) were to be interpreted this way, Plaintiffs contend that they served Lakeside within the statutory time period. If the Court finds otherwise, Plaintiffs assert that good cause

[7] *Stoppel v. State, Dep't of Health & Soc. Servs.*, 2011 WL 3558120, at *6 (Del. Super.) (quoting *Dominic v. Hess Oil V.I. Corp.*, 841 F.2d 513, 517 (3rd Cir. 1988)).
[8] *Stoppel*, 2011 WL 3558120, at *6 (quoting *Cohen v. Brandywine Raceway Ass'n*, 238 A.2d 320, 325 (Del. Super.)).
[9] *Doe v. Catholic Diocese of Wilmington, Inc.*, 2010 WL 2106181, at *2 (Del. Super.) (citing *Franklin v. Millsboro Nursing & Rehab. Ctr., Inc.*, 1997 WL 363950, at *7 (Del. Super.)).
[10] *Doe v. Colonial Sch. Dist.*, 2011 WL 7063682, at *2 (Del. Super) (quoting *Drejka v. Hitchens Tire Services, Inc.*, 15 A.3d 1221, 1224 (Del. 2010)).

exists for their failure to perfect service on Lakeside. Specifically, Plaintiffs contend that good cause is shown by their filing of the Amended Complaint before the filing of Lakeside's Motion to Dismiss. Plaintiffs also assert that if this Court were to grant Lakeside's motion, it would reward Lakeside's behavior in avoiding long arm service while simultaneously punishing Plaintiffs for their efforts to properly serve Lakeside.

Lakeside argues that it has done nothing to avoid service of process. Further, if this Court were to find that the 120 day period to effectually serve Lakeside were restarted upon the filing of the Amended Complaint, the date of service is when service was ***perfected*** as opposed to when service was ***made***. If Rule 4(j) were to be interpreted this way, Lakeside argues that Plaintiffs did not effectually serve the Amended Complaint. Lakeside further argues that Plaintiffs have not demonstrated good cause for their failure to effectuate service.

Acme relies on *Stop & Shop Companies, Inc. v. Gonzales,*[11] contending that Lakeside had a duty to give prompt and timely written notice to Plaintiffs of the statute of limitations regarding their action for damages. Specifically, Acme asserts that Lakeside was subject to the notice requirement of 18 *Del. C.* § 3914 and that Lakeside's failure to specifically notify Plaintiffs of the expiration of the statute of limitations tolled the statute.

[11] 619 A.2d 896 (1993) (discussing 18 *Del. C.* § 3914).

Discussion

The Court finds that Rule 4(j) makes no reference to restarting the 120 day period after the filing of an amended complaint to effectually serve a defendant. Additionally, Plaintiffs did not cite any authority in support of this contention, and neither Delaware case law nor statutory authority support or contradict Plaintiff's position.

However, the Court finds that good cause exists for Plaintiffs' failure to effectuate service on Lakeside. The record indicates that Plaintiffs were notified that service of the underlying Complaint on Lakeside was deemed undeliverable on December 6, 2014. On January 29, 2015, this Court granted Acme's Motion for a More Definite Statement. On February 18, 2015, in accordance with the Court's order, Plaintiffs filed an Amended Complaint. Notice then was sent to Lakeside by certified mail on June 1, 2015, and it was delivered on June 9, 2015.

Recognizing the efforts that Plaintiffs made to comply with the Court's order and to effectually serve Lakeside, the Court exercises its discretion and finds that Plaintiffs have made a showing of excusable neglect and good cause for noncompliance within the time specified under Rule 4(j). Nevertheless, the Court notes that this is a close case and that Plaintiffs could have exercised greater diligence in determining whether service had been perfected.

Additionally, the Court finds the holding in *Stop & Shop* to be distinguishable. In *Stop & Shop*, the Delaware Supreme Court held that a self-insurer had the same obligation as an independent insurer to give notice to a claimant of the expiration of the statute of limitations.[12] Lakeside is not a self-insurer. The duty to give prompt and timely written notice to Plaintiffs of the statute of limitations is upon Lakeside's insurer, and is not imputed to Lakeside under the circumstances.

Plaintiffs also assert that Lakeside was not prejudiced by the failure to effectuate service. The Court need not address the issue of prejudice. There is nothing in Rule 4(j) that "excuses noncompliance when it is alleged that a defendant is not prejudiced by a failure of service."[13] The purpose of Rule 4(j) is to prevent a party from being dilatory in effectuating service of process. Further, public policy strongly favors deciding actions on the merits, instead of dismissal for procedural default.[14]

CONCLUSION

Viewing the facts in the light most favorable to Plaintiffs, the Court denies Lakeside's Motion to Dismiss. Plaintiffs failed to effectually serve Lakeside as required by Rule 4(j). However, in this close case, Plaintiffs have demonstrated

[12] *Id*.
[13] *DeSantis v. Chilkotowsky*, 2005 WL 1653640 at *2 (Del. 2005).
[14] *McMartin v. Quinn*, 2004 WL 249576, at *5 (Del. Super.).

excusable neglect and a good faith basis for noncompliance within the time specified.

THEREFORE, Defendant's Motion to Dismiss is hereby **DENIED**.

IT IS SO ORDERED.

/s/ *Mary M. Johnston*
The Honorable Mary M. Johnston