

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

TYRONE D. CRAFT

V.

C.A. 02-168L

MORTON INTERNATIONAL, a  
subsidiary of ROHM & HAAS, INC.,  
SPRAGUE ENERGY CORP., and  
B&B TRUCKING CORPORATION

REPORT AND RECOMMENDATION

Robert W. Lovegreen, United States Magistrate Judge

The defendant, Morton International ("Morton"), has moved to dismiss the complaint as to it pursuant to Fed. R. Civ. P. 12(b)(5)(insufficiency of service of process) as service of process was not completed upon Morton until after the expiration of the authorized period of time as set forth in Fed. R. Civ. P. 4(m). The plaintiff, Tyrone D. Craft ("Craft"), has objected and the motion was referred to a magistrate judge for preliminary review, findings, and recommended disposition. 28 U.S.C. § 636(b)(1)(B); Local Rule 32(c). A hearing was held on December 18, 2002. After review of the memoranda, consideration of the oral argument, and my independent research, I recommend that Morton's motion to dismiss be denied and that the time for Craft to serve process upon Morton be extended to October 1, 2002.

Background

On April 9, 2002, Craft filed his complaint in this court wherein he alleged that Morton was negligent in the placement of large quantities of salt at a bulk commodity terminal owned by the defendant, Sprague Energy Corp. ("Sprague"), in Providence, Rhode Island. In the complaint, Craft alleged that on September 20, 1999, while employed by Rayner Covering Systems, he was engaged in covering the salt with tarpaulins when he came in contact with an electric power line resulting in serious injuries.

Rule 4(m) provides that service of the summons and complaint must be made within 120 days of the filing of the complaint. If service does not occur timely, the court may,

upon its own initiative or upon motion, (1) dismiss the complaint without prejudice as to that defendant not timely served; (2) direct that service be effected within a designated time; or (3) if the plaintiff demonstrates good cause for the failure, the court "shall extend the time for service for an appropriate period." Fed. R. Civ. P. 4(m).

In order for Craft to meet the 120 day time limit, he must have served Morton on or before August 7, 2002. However, Morton was not served by Craft until September 26, 2002, 50 days beyond the 120 day limit. Morton now argues that its motion to dismiss should be granted with prejudice as the applicable statute of limitations has expired and Craft could not successfully refile this claim against Morton. Morton further argues that Craft cannot show the requisite good cause to overcome the lack of timely service.

Craft offers that he filed his complaint on April 9, 2002 "against defendants, Morton International, a subsidiary of Rohm & Haas, Inc.<sup>1</sup>, Sprague Energy Corp., and B&B Trucking Corporation" based upon injuries he received on September 20, 1999. See Plf.'s Response at 1. On or about August 7, 2002, service of process was attempted upon Morton through CT Corporation Systems ("CT") in Wilmington, Delaware, the then registered agent for Morton<sup>2</sup>. However, the summons indicated that the name of the defendant being served was "ROHM & HAAS (Morton Internation)" (sic) and the address used was that of CT in Wilmington, Delaware. However, CT declined to accept service for Morton apparently because the service of process was directed either to Rohm & Haas or to Morton as a subsidiary of Rohm & Haas and not as a separate and distinct entity. The summons was marked as returned non est inventus by the Chief Deputy Sheriff of New Castle County, Delaware on

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<sup>1</sup> This designation was used by Craft apparently because his counsel had written to Morton on November 29, 2001 placing Morton on notice of the injury and requesting Morton either forward the correspondence to its insurance carrier or contact counsel directly. A written response dated February 8, 2002 was received from the Manager of Claim Administration for Rohm & Haas, on Rohm & Haas stationery, stating that "We will contact you in the near future regarding this matter." See Exhibit B to Plf.'s Mem.

<sup>2</sup> Craft does not explain why he waited so long to serve the summons and complaint upon Morton when the filing occurred April 9, 2002.

November 6, 2002. Subsequent to August 7, 2002, CT notified the Sheriff's office that it would accept service of process for Morton if the summons was changed to reflect it was being served on Morton without it being a subsidiary of Rohm & Haas. The Sheriff's Office notified Craft's counsel on August 20, 2002, and on August 23, 2002, this court's Clerk's Office was requested to issue another summons naming Morton as the defendant. On August 27, 2002, a second summons issued from this court, but was not served by the New Castle County Sheriff's Office until September 26, 2002. This court has not been informed as to when the second summons was forwarded to the Sheriff's Office and why the Sheriff's Office did not serve the second summons until September 26, 2002.

#### Discussion

As previously stated, Rule 4(m) provides that the court, on motion or its own initiative after notice to the plaintiff, shall dismiss the complaint without prejudice as to that defendant; or, direct that service be effected within a specified time; or, if the plaintiff shows good cause for the delay, the court shall extend the time for service of process for an appropriate period. Here, Morton correctly argues that, if the complaint is dismissed as to it, Craft will not be able to refile as to Morton as the applicable statute of limitations would have expired. Therefore, Morton argues that the dismissal should be with prejudice.

However, there are other options open to the court. If the plaintiff demonstrates good cause for the failure to serve process within the 120 days, the court shall extend the time for service for an appropriate time. Morton argues that Craft has not and cannot show good cause for the delay. Morton argues that good cause does not include "ignorance of the rule, the absence of prejudice to the defendant, office moves or personal problems, the belief that the time requirement was only technical, the filing of an amended complaint, inadvertence of counsel, or the expenditure of efforts that fall short of real diligence by the serving party." See 4B Wright & Miller Federal Practice and Procedure Civil 3d § 1137 at 352 (2002). Some courts have found good cause where "the plaintiff's failure to complete service in timely fashion is a result of the conduct of a third person, typically the process server, the defendant has evaded service of the process or engaged in misleading conduct, the plaintiff has acted

diligently in trying to effect service or there are understandable mitigating circumstances, or the plaintiff is proceeding pro se or in forma pauperis." Id. at 342. It is impossible for this court to consider the "good cause" option because Craft has failed to provide the court with the essential information about the service of process. For example, when did Craft send the initial summons to the Sheriff for service? When did Craft send the second summons to the Sheriff for service? Why did Craft, in the first summons, name Morton only in parentheses after "Rohm & Haas"? Without a detailed explanation of Craft's actions in obtaining service of process, this portion of Rule 4(m) cannot be considered. At best, Craft argues that Morton evaded service when CT declined to accept the first summons. See Plf.'s Response at 6. This court does not agree that CT's actions amount to an evasion of service of process on behalf of Morton.

Craft is left with an argument that this court should exercise its discretion to "direct that service be effected within a specified time." Rule 4(m). Craft argues that this is the very type of claim that calls for the exercise of the court's discretion "to effect justice and ensure that plaintiff's complaint can be resolved on its merit." Plf.'s Response at 6-7. Craft relies on a 7<sup>th</sup> Circuit case, Panaras v. Liquid Carbonic Industries Corporation, 94 F.3d 338 (7<sup>th</sup> Cir. 1996).

When considering a process defect like the one involved in this case, a district court must first inquire whether a plaintiff has established good cause for failing to effect timely service. If good cause is shown, the court *shall* extend the time for service for an appropriate period. In other words, where good cause is shown, the court has no choice but to extend the time for service, and the inquiry is ended. If, however, good cause does not exist, the court may, in its discretion, either dismiss the action without prejudice or direct that service be effected within a specified time. Thus, absent a showing of good cause, a district court must still consider whether a permissive extension of time is warranted.

Id. at 340-41.

In its decision, the Panaras court stated that the district court should consider whether the applicable statute of limitations has expired and, if so, whether a dismissal would close the door as to that plaintiff. Id. at 341. Also, the Advisory Committee Note to Rule 4(m) indicates the district court should consider, *inter alia*, the effect of the statute of limitations, whether the defendant is evading service, or whether the defendant is concealing a defect in the attempted service.

Morton does not specifically address the issue of an exercise of the court's discretion.

In Ditkof v. Owens-Illinois, Inc., 114 F.R.D. 104 (E.D. Mich. 1987), the district court exercised its discretion and denied a defendant's motion to dismiss where the dismissal would result in the loss of the claim as the applicable statute of limitations had expired. Also, the defendant had waited until more than two years after the attempted service to raise the issue.

In Espinoza v. United States, 52 F.3d 838 (10<sup>th</sup> Cir. 1995), the court concurred with the language stated above in Panaras and indicated that the district court had discretion to extend the time for service of process. Id. at 840-41. The court indicated that the effect of the statute of limitations if the complaint is dismissed should be considered in determining whether discretion should be exercised. Id. at 842.

In Petrucci v. Bohringer and Ratzinger, 46 F.3d 1298 (3<sup>rd</sup> Cir. 1995), the court also concurred with the language of the Panaras court and remanded the matter for the district court to consider whether it should exercise its discretion to extend the period in which service of process must be accomplished.

Here, a number of factors lead to the conclusion that this court should exercise its discretion and extend the period for service of process beyond September 26, 2002, the date Morton was actually served. First, although at the very end of the 120 day period established by Rule 4(m), Craft did attempt to serve Morton within the 120 day period. Second, the first summons did list Morton as a party defendant, albeit

as a subsidiary of Rohm & Haas, a non-party, and did list the defendant to be served as "ROHM & HAAS (Morton Internation)"(sic). CT should have known after reviewing the first summons that the intent was to serve process upon Morton. Indeed, the fact that CT subsequently notified the New Castle County Sheriff's Office (a most unusual occurrence) that it would accept service if the name of "Morton International" and not "ROHM & HAAS" was included as the defendant on the summons suggests strongly that CT was having second thoughts about the propriety of its earlier rejection. Third, Craft acted promptly to obtain the second summons listing Morton as the intended defendant. Fourth, Craft had no control over the actions of the New Castle County Sheriff's Office and should not be held responsible for that Office's failure to act before September 26, 2002. Fifth, Morton can show no prejudice to its defense if the time for service is extended. Sixth, if the court does not exercise its discretion and extend the time for service of process, Craft loses his claim for damages as the applicable statute of limitations has expired.

#### Conclusion

For all these reasons, Morton's motion to dismiss should be denied and that the time for Craft to serve process upon Morton be extended to October 1, 2002.

Any objection to this Report and Recommendation must be specific and must be filed with the Clerk of Court within ten (10) days of its receipt. Rule 32, Local Rules of Court; Fed.R.Civ.P. 72(b). Failure to file specific objections in a timely manner constitutes a waiver of the right to review by the district court and the right to appeal the district court's decision. United States v. Valencia-Copete, 792 F.2d 4 (1<sup>st</sup> Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603 (1<sup>st</sup> Cir. 1980).

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Robert W. Lovegreen  
United States Magistrate Judge  
January 10, 2003