

U

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

WILLIAM R. BRENNER,  
Plaintiff

v.

C.A. No. 92-0157L

CITY OF WOONSOCKET, A MUNICIPAL  
ENTITY; SERGEANT RAYMOND LEMOINE,  
IN HIS INDIVIDUAL AND OFFICIAL  
CAPACITY AS SERGEANT OF THE  
WOONSOCKET POLICE DEPARTMENT;  
SGT. OSCAR P. SEVIGNY INDIVIDUALLY  
AND IN HIS CAPACITY AS AN OFFICER  
OF THE WOONSOCKET POLICE  
DEPARTMENT and JOHN AND JANE DOES  
1-50

Defendants

MEMORANDUM AND ORDER

RONALD R. LAGUEUX, Chief Judge.

This matter is now before the Court on defendants' motion to dismiss pursuant to Rule 4(j) of the Federal Rules of Civil Procedure. Defendants move to dismiss on the grounds that service of the summons and complaint was not made upon them within one hundred and twenty (120) days after the filing of the complaint. The Court concludes that plaintiff has not shown good cause why service was not timely made, and therefore, grants the motion to dismiss.

Background

The instant complaint was filed on March 18, 1992. In the complaint, plaintiff alleges that defendants City of Woonsocket, Sgt. Raymond Lemoine and Sgt. Oscar Sevigny violated his civil rights under 42 U.S.C. § 1983 and the First, Fourth, Eighth and Fourteenth Amendments of the United States Constitution by

wrongfully arresting him, beating him severely and destroying his personal property. The complaint also alleges state law claims for battery, false imprisonment, and reckless infliction of emotional distress. According to plaintiff's counsel, notice of the claim was given to the City as required by state law before the complaint was filed.

On February 17, 1993, the Court issued a show cause order, demanding that plaintiff appear and show cause why the case should not be dismissed for want of prosecution. At the show cause hearing on February 26, 1993, plaintiff's attorney informed the Court that even prior to filing the complaint in March of 1992, he had lost contact with his client. On the advice of the Ethics Advisory Board, the complaint was filed to avoid the running of the statute of limitations. However, counsel failed to effectuate service and remained out of contact with plaintiff until, upon receipt of the Court's order, he made a concerted effort to locate him. He succeeded in finding plaintiff in Massachusetts, where he had moved in order to obtain cancer treatment at Boston General Hospital. Apparently, plaintiff's illness had caused him to drop all other business, including interest in this suit. However, shortly before the show cause hearing he informed counsel that he would like to pursue this matter.

Upon receipt of this information at the show cause hearing, the Court issued an order requiring plaintiff to serve the summons and complaint and file a return with the Court within ten

days of February 26, 1993. All defendants were served on March 1, 1993. Thereafter, defendants filed this motion under Rule 4(j) to dismiss the complaint for failure to serve within 120 days after filing. Plaintiff objected, arguing that the Court had already found that good cause existed when it allowed service at the show cause hearing. The parties engaged in oral argument on April 28, 1993 and the matter was taken under advisement. It is now in order for decision.

#### Discussion

Rule 4(j) provides:

**Summons: Time Limit for Service.** 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.

The Rule is mandatory: if "good cause" is not shown, the court must dismiss the complaint.

Plaintiff contends that the Court has already determined that good cause existed for failure to serve. The Court made clear at the hearing that its order requiring service was not a finding that plaintiff had shown good cause. The show cause hearing was ex parte, and it was obvious then that defendants would be given an opportunity to argue the point.

What constitutes good cause under Rule 4(j) is left to the substantial discretion of the district judge. See United States v. Ayer, 857 F.2d 881, 885 (1st Cir. 1988). Such a determination, by its nature, is fact-specific. Id. On the one

extreme, it is widely recognized that a defendant's efforts to evade service will constitute good cause. D'Amario v. Russo, 750 F.Supp. 560 (D.R.I. 1990). See also West Coast Theater Corp. v. City of Portland, 897 F.2d 1519, 1528 (9th Cir. 1990). On the other extreme, it is clear that mere inadvertence by the plaintiff does not constitute good cause. Wei v. Hawaii 763 F.2d 370, 372 (9th Cir. 1985). The Ninth Circuit has defined good cause as involving, "[a]t a minimum, . . . excusable neglect." Boudette v. Barnette, 923 F.2d 754 (9th Cir. 1991). Among the factors courts have considered are whether the plaintiff has made reasonable and diligent efforts to effect service, Woolfolk v. Thomas, 725 F.Supp. 1281 (N.D.N.Y. 1989); Quann v. Whitegate-Edgewater, 112 F.R.D. 649 (D.Md. 1986); Geller v. Newell, 602 F.Supp. 501, 502 (S.D.N.Y. 1984); Arroyo v. Wheat, 102 F.R.D. 516, 518 (D.Nev. 1984), and whether the excuses for not making service were of a type easily manufactured and incapable of verification by the court. Szarejko v. Great Neck School Dist., 795 F.Supp. 81 (E.D.N.Y. 1992). However, the First Circuit has made it clear that Rule 4(j) is not to be applied in a harsh and inflexible manner. Ayer at 885 ("Congress, we believe, intended Rule 4(j) to be a useful tool for docket management, not an instrument of oppression."). The Court rejects defendants' contention that only evasion of service by a defendant may constitute good cause under the Rule.

In the instant case, the Court determines that plaintiff has not shown good cause for his failure to make service within 120

days after filing. The Court sympathizes with the situation of plaintiff, who has been struggling with cancer since before this case was filed. Evidently, the disease has caused him to leave his employment, relocate his residence to another state and drop all other business in order to concentrate on his treatment. However, plaintiff's situation does not establish the kind of excusable neglect contemplated under the Rule. However compelling his reasons, plaintiff made a choice to abandon this action to concentrate on his treatment. Illness may constitute good cause when it actually prevents the effecting of service within the 120 day limit. See LeMaster v. City of Winnemucca, 113 F.R.D. 37 (D.Nev. 1986) (illness of counsel good cause for seventeen day delay in service). Where it is used merely to show the motivation for abandoning a cause of action for over a year, good cause has not been shown.

Plaintiff's cause of action is not saved by the conduct of his lawyer, who filed the complaint in order to toll the statute of limitations. Although counsel paid the filing fee to get this action started, he did not fully protect his client's interest. He should have spent a few more dollars and made service on defendants. He could have at least tried the "acknowledgement" method of making service by mail.

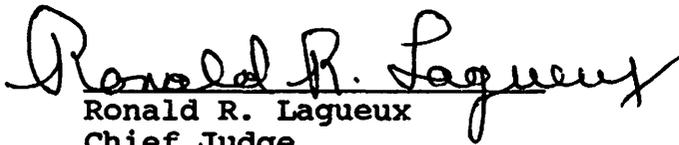
His only excuse for not making service within the 120 day period is that he could not engage in good faith discovery without his client. It is true that once defendants answered, counsel would have been forced to locate plaintiff in order to

pursue this action. But, that is not an acceptable excuse for failure to serve in this case. Counsel managed to locate his client when he received the show cause order, and offers no reason for his failure to do so at an earlier time.

### III. Conclusion

For the reasons given above, defendants' motion to dismiss is granted.

It is so ordered.



Ronald R. Lagueux  
Chief Judge  
July 6, 1993