IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

EASTLAND FOOD MANAGEMENT, INC. T/A PASTA BELLA,	:	May Term 2002
Plaintiff,	:	No. 2116
v.	:	
ONE BEACON INSURANCE CO., F/K/A CGU, ET. AL.,	:	COMMERCE PROGRAM
Defendants.	:	Control Number 031357

ORDER and OPINION

AND NOW, this 30th day of June, 2005, upon consideration of Defendants Jacques Mann, Esquire and the Law Offices of Richard R. High's Motion for Reconsideration of this court's order dated March 10, 2005, Memoranda, all matters of record, after oral argument and in accord with the contemporaneous Memorandum Opinion to be filed of record, it hereby is **ORDERED** and **DECREED** that said Motion is **Granted** and Plaintiff's complaint is dismissed with prejudice against Defendants Jacques Mann, Esquire and the Law Offices of Richard R. High.

BY THE COURT,

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C. DARNELL JONES, II, J.

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OPINION

JONES, II, J.

This matter arises from legal services provided by Defendants Jacques Mann and the Law Offices of Richard R. High with respect to a defense of a personal injury lawsuit filed against Plaintiff Eastland Foods ("Eastland Foods" or "Plaintiff") in the action captioned Arnold v. Eastland Food Management, Inc, File No. 1999-C-1242 filed in Lehigh County. Presently before the court is Defendant Jacques Mann, Esquire and Defendant Law Offices of Richard R. High's Motion for Reconsideration in part of this court's order dated March 10, 2005 which overruled the Preliminary Objections regarding improper and defective service.[1] For the reasons discussed, Defendants' Motion is granted and Plaintiff's complaint is dismissed against Defendants Jacques Mann, Esquire and the Law Offices of Richard High with prejudice.

BACKGROUND

On May 20, 2002, Eastland Food filed a writ of summons against Defendants. On May 23, 2002 the statute of limitations expired on the Eastland Food claim. On June 13, 2002, the process server attempted to serve process upon Mann and the High firm. The

[1] Defendants also filed Preliminary Objections concerning the legal sufficiency of the complaint which the court overruled. This part of the order is not the subject of Defendants' Motion for Reconsideration.

process server noted that the Defendants were not found. On October 16, 2002, Plaintiff's counsel forwarded to Fred Buck, Esquire from Rawle and Henderson a copy of the court's scheduling order for a case management conference to be conducted on December 23, 2002. On December 23, 2002, an associate with Rawle and Henderson appeared at the case management conference and provided Plaintiff with a case management memo identifying him as the attorney for One Beacon and Mann. According to the parties, Counsel was prohibited from participating in the conference since he failed to enter an appearance. Thereafter, the case was placed in deferred status pending resolution of the underlying claim at Plaintiff's request. On March 18, 2004, the case was removed from deferred status.

Upon removal from deferred status, on April 29, 2004 Plaintiff forwarded a letter to attorney Buck inquiring as to whether he would accept service on behalf of Mann.[2] On May 19, 2004, counsel for Plaintiff reissued the writ of summons. On May 25, 2004, the process server's attempt to serve Mann was unsuccessful. On June 3, 2004 a complaint was filed. On June 8, 2004, Plaintiff served a copy of the complaint on One Beacon and Fred Buck, Esquire by certified mail. On August 11, 2004, Buck advised Plaintiff that June Gilson, Esquire was now involved with the case and that she would be entering her appearance for both Defendants.

According to the parties' papers, Plaintiff, awaiting a response to the complaint, served upon One Beacon a notice of intention to take a default for failure to answer the complaint. As a result, One Beacon contacted Allan C. Molotsky, Esquire at Post & Schell to obtain an extension of time in which to respond. On November 5, 2004,

[2] Other than the first attempt of service in June 2002, no other attempt at service has been made on the Law Offices of Richard R. High.

Molotsky confirmed in a letter that an extension of time to respond to the complaint was provided, that One Beacon waived the issue of service[3] and that Mann and the Law Offices of Richard R. High had not been served. (Letter dated November 5, 2004). Thereafter, on November 8, 2004, Susan Gilson, Esquire and Christopher Young, Esquire entered their appearances on behalf of One Beacon. In a letter dated November 8, 2004, Ms. Gilson confirmed that the issue of service would be waived by One Beacon. The letter further confirmed that service had not been made as to Jacques Mann or the Law Offices of Richard R. High. (Letter dated November 8, 2004).

One Beacon answered the complaint and filed a notice of program management dispute. As such the case was transferred to the Commerce Program and a revised case management order was issued.

On December 6, 2004, June Gilson and Christopher Young entered their appearances for Mann and the Law Offices of Richard R. High and filed preliminary objections for defective services and legal insufficiency of the complaint. The court overruled the objections on March 10, 2005. Thereafter, on March 21, 2005, Defendants Mann and the Law Offices of Richard R. High filed a Motion for Reconsideration of this court's order dated March 10, 2005. The court ordered oral argument on April 5, 2005. Thereafter, April 7, 2005, the court vacated its March 10, 2005 order and granted Defendants Motion for Reconsideration. To date Mann and the High office have not been served.

DISCUSSION

In Lamp v. Heyman, 366 A.2d 882 (Pa. 1976), the Supreme Court determined that "a writ of summons shall remain effective to commence an action only if the plaintiff

[3] The docket fails to reflect service upon One Beacon.

then refrains from a course of conduct which serves to stall in its tracks the legal machinery he has just set in motion." Id. The court further stated that "a plaintiff should comply with local practice as to delivery of the writ to the sheriff for service." Id. Subsequently, in Farinacci v. Beaver County Industrial Dev. Authority, 510 A.2d 757 (Pa. 1986), the Supreme Court reiterated and refined its decision in Lamp by stating that "Lamp requires of plaintiff a good-faith effort to effectuate notice of commencement of the action." Id.

What constitutes a good faith effort to serve legal process is a matter to be determined by the court in its sound discretion on a case-by-case basis. Id. 511 A.2d at 759. The plaintiff has the burden of showing that his or her efforts were reasonable. At a minimum, the requirement that the plaintiff make a good faith effort to effect service mandates compliance with the rules of civil procedure and local practice. The thrust of the inquiry is whether plaintiff engaged in a course of conduct forestalling the legal machinery put in motion by plaintiff. Simple neglect in carrying out the responsibility to identify and comply with the requirements for service may be sufficient to constitute a lack of good faith. Rosenberg v. Nicholson, 597 A.2d 145 (Pa. Super. 1991). However, where the defendant is afforded actual notice of the claim, strict compliance with the rules of local practice to assure, in so far as the plaintiff is able, prompt service of process is not necessarily required. Id.

While it appears that Plaintiff did not intentionally delay service of process on Defendants Mann and the Law Offices of Richard R. High, it also it clear that Plaintiff neglected to keep the legal machinery in motion with respect to notifying these Defendants of the commencement of an action against them. Plaintiff failed to comply

with the applicable rules of procedure. *See* Moses v. T.N.T. Red Star Express, 725 A.2d 792 (Pa. Super. 1999). Although Plaintiff made the initial effort at service within the thirty (30) days from the filing of the original writ in May 2002, service was not perfected. Thereafter the only other attempt at service reflected in the docket entries was on May 25, 2004 after the case was removed from deferred status. At that time Plaintiff reinstated the writ and on June 3, 2004 filed a complaint. Once again Plaintiff failed to perfect service within the life of the writ and the complaint. *See* Pa. R. Civ. P. 401. Upon receiving the returns of service indicating that the Defendants were "not found", the record fails to evidence any attempts by Plaintiff to ascertain the correct addresses for these Defendants, such as request to post masters, review of phone directories and/or requests for alternative service.[4] Indeed, Plaintiff acknowledges that additional attempts of service were not made.

Timeliness is also a factor to be considered in the good-faith analysis. *See* Ramsay v. Pierre, 822 A.2d 85, 91 (Pa. Super. 2003)(*citing* Bigansky v. Thomas Jefferson Univ. Hosp., 658 A.2d 423 (Pa. Super. 1995)(two-year period between the filing of the writ and service was unreasonable and demonstrated a lack of good faith) *cf.* Shackelford v. Chester County Hosp., 690 A.2d 732 (Pa. Super. 1997)(twelve-month period between filing of the writ and service was reasonable in light of plaintiff's five attempts to serve defendants)).

In this regard, the focus of the inquiry is the nineteen month period between the dates Plaintiff filed the writ of summons to the present, excluding the time in which the case was placed on deferred status. Plaintiff argues that the delay is justified because

[4] According to Defendants, Mann and the High Offices addresses were easily accessible from the legal directory.

various affirmative acts to deceive were taken by Defendants causing counsel to believe that service was not in issue. Plaintiff's brief in opposition p. 12. Taking the evidence relied upon by Plaintiff into consideration, the court finds that the record fails to evidence any affirmative acts by Defendants which would justify Plaintiff's belief that service was a non issue. On the contrary, as late as April 29, 2004, Plaintiff's counsel continued to question whether service would be accepted on behalf of Mann. (April 29th Letter from Mr. Lea to Mr. Buck). Thereafter, Plaintiff was specifically informed that the issue of service was waived with respect to One Beacon only and that service on Mann and the High Offices was not made. (Letter dated November 5, 2004 from Allan Molotsky, Esquire to Lea; Letter dated November 8, 2004 from June Gilson, Esquire to Lea).

Rather than take the necessary steps to effectuate service as required by the rules of court, Plaintiff sat idly by awaiting a response by Defendants as to whether they would accept service on behalf of Defendants. Given these circumstances, the court finds that Plaintiff failed to demonstrate a good faith effort to serve Defendants.

Nonetheless, Plaintiff argues that the procedural defects with regard to service should be overlooked because Defendants Mann and the Law Offices of Richard R. High have actual notice of the lawsuit. As discussed supra., Plaintiff's failed to make a good faith effort at service. As such the rules of civil procedure should not be circumvented. *See* Moses v. T.N.T. Red Star Express, 725 A.2d 792 (Pa. Super. 1999)(The record failed to demonstrate a good faith attempt by plaintiff to make service of the original writ filed on October 19, 1995 and the subsequently issued writ and complaint on March 15, 1996.). *Cf.* Leidich v. Franklin, 575 A.2d 914 (Pa. Super. 1990)(Defect in service, mailing the writ by first class mail on the date the writ was issued which began the

communication with and submission of documents to the liability carrier, did not constitute a course of conduct which served to stall the legal machinery of justice.). Procedural rules relating to service of process must be strictly followed because jurisdiction of the person of the defendant cannot be obtained unless proper service is made. Beglin v. Stratton, 816 A.2d 370, 373 (Pa. Cmwlth. 2003). Service of process upon the defendant is designed to provide him with notice of the lawsuit. Notice is extremely important, as it is the constitutional touchstone for the power of the court to act. Rosenberg v. Nicholson, 597 A.2d 145 (1991)(*citing* Hoeke v. Mercy Hospital of Pittsburgh, 386 A.2d 71 (Pa. Super. 1978)).

The Pennsylvania courts have consistently held that in order for personal jurisdiction to attach the rules relating to service of process must be strictly followed and there is no presumption as to the validity of service. Personal jurisdiction over a defendant is dependent upon proper service having been made. *See e.g*. Commonwealth v. Stewart, 543 A.2d 572 (Pa. Super. 1988); Sharp v. Valley Forge Medical Center and Heart Hospital, Inc., 221 A.2d 185 (Pa. 1966); Neff v. Tribune Printing Co., 218 A.2d 756 (Pa. 1966); McCall v. Gates, 47 A.2d 211 (Pa. 1946). Without valid service, a court lacks personal jurisdiction of a defendant and is powerless to enter judgment against him or her. Thus, improper service is not merely a procedural defect that can be ignored when a defendant subsequently learns of an action against him or her. Cintas Corp. v. Lee's Cleaning Serv., Inc., 700 A.2d 915, 917-18 (Pa. 1997).

Accordingly, Plaintiff's action against Defendants Mann and the Law Offices of Richard R. High, which was otherwise timely commenced by filing a Praecipe for a Writ

of Summons within the statutory period, is dismissed for Plaintiff's lack of good faith in serving the writ in accordance with the rules of court.

CONCLUSION

For the reasons discussed Defendants' Motion for Reconsideration is Granted and the complaint filed against Jacques Mann, Esquire and the Law Offices of Richard R. High is dismissed with prejudice. An order consistent with this Opinion will follow.

BY THE COURT,

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C. DARNELL JONES, II, J.