

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PAUL RITTER,)
)
 Plaintiff)
) Civil Action No. 02-1435 GMS
 v.)
)
 ANTHONY COOPER, II and)
 MARY COOPER,)
)
 Defendants.)

MEMORANDUM

I. INTRODUCTION

On August 26, 2002, the plaintiff, Paul Ritter, filed a Complaint (D.I. 1) against the defendants, Anthony Cooper, II and Mary Cooper (collectively the “Coopers”), alleging that Anthony Cooper’s negligent and reckless operation of a motor vehicle registered to Mary Cooper, his mother, caused a collision which resulted in injury to Ritter. Ritter effectuated service upon Mr. Cooper on March 21, 2003. Presently before the court is the Coopers’ motion to quash service and to dismiss the action against both defendants, or alternatively, to dismiss the complaint against Mary Cooper for failure to state claim (D.I. 13). Ritter does not contest the argument made by the Coopers that Ms. Cooper should be dismissed from this action. That portion of the motion therefore will be granted. Having considered the parties’ submissions, for the following reasons, the court will deny the balance of the Coopers’ motion.

II. BACKGROUND

On August 26, 2000, Ritter and Mr. Cooper were involved in an automobile accident which resulted in Ritter’s filing of the present action. Prior to filing the Complaint, Ritter had been working with Mr. Cooper’s insurance company to settle the claim. When it appeared that the claim

would take longer than two years¹ to resolve, although he was still in the process of working with Mr. Cooper's insurance adjuster, Ritter filed the Complaint in order to toll the statute of limitations. Ritter did not attempt to effectuate personal service of process upon Mr. Cooper after filing the Complaint. Instead, Ritter sent Mr. Cooper a copy of the Summons, Complaint, Civil Cover Sheet and Waiver of the Summons/Service of Process via regular mail and also via certified mail at the address listed on the Complaint and on the police report from the accident. Ritter claims that he did not want to incur the expense associated with hiring a process service to formally serve Mr. Cooper because Mr. Cooper had not disputed liability for the accident and the parties were still attempting to resolve the claim through the adjuster. Although the copy of the Summons, Complaint, Civil Cover Sheet and Waiver of the Summons/Service of Process were not returned to Ritter as sender, Mr. Cooper contends that he never received the mailing. In addition, Ritter admits that the certified mail receipts were never returned to him, despite his repeated attempt to track the mailing. Neither of the parties dispute, however, that the address listed on the Complaint and on the police report is Mr. Cooper's correct address. Nor do the parties dispute that Mr. Cooper had actual notice that Ritter had filed the Complaint. Indeed, Mr. Cooper's attorney sent Ritter's attorney a letter on March 14, 2003 requesting an extension to answer.

After Ritter did not effectuate service within the 120 days provided for by Rule 4, the court issued an order to Ritter on February 24, 2003 to show good cause, within 30 days, as to why the action should not be dismissed. Upon receipt of the court's order, Ritter's attorney proceeded to properly effectuate personal service on Mr. Cooper on March 21, 2003. Ritter then apprised the court of that event in a letter dated March 25, 2003.

¹ The statute of limitations on Ritter's tort claim is two years under Delaware law.

The Coopers now move to quash service and dismiss the Complaint without prejudice, asserting that Ritter cannot show good cause for having failed to serve Mr. Cooper within 120 days. In his opposition, Ritter contends the lack of personal service caused no prejudice to Cooper for two reasons. First, he claims that the parties were engaged in ongoing settlement negotiations. Second, he asserts that Mr. Cooper had actual notice of the Complaint. Thus, Ritter argues that Mr. Cooper was not prejudiced by the lack of personal service, and that good cause is established for the court to extend the time limit to effect service pursuant to Rule 4.

The Coopers alternatively move to dismiss the Complaint against Ms. Cooper for failure to state a claim upon which relief can be granted. The basis for Ritter's claim against Ms. Cooper is that she is the owner of the vehicle Mr. Cooper was operating at the time of the accident. The Coopers, however, correctly point out that Delaware law does not recognize a cause of action against the mere owner of a vehicle unless the driver was a minor at the time or the plaintiff has alleged facts that give rise to a claim of negligent entrustment. Ritter has not alleged any such facts and stipulates in his reply brief that he does not have a claim against Ms. Cooper. Therefore, the court will dismiss the action against Ms. Cooper.

III. STANDARD OF REVIEW

The Coopers have moved to dismiss the Complaint because Ritter failed to effect personal service upon them in accordance with Federal Rule of Civil Procedure 4(m). Rule 4(m) states in pertinent part:

If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the

time for service for an appropriate period.

Fed. R. Civ. P. 4(m). The determination whether to extend time to effect personal service pursuant to Rule 4(m) involves a two-step inquiry. *Boley v. Kaymark*, 123 F.3d 756, 758 (3d. Cir. 1997). First, the court must determine whether good cause exists for the plaintiff's failure to effect timely service. *Id.* If good cause exists, the court must grant the extension. *Id.* If good cause does not exist, the court then must consider whether to grant a discretionary extension of time in the interest of justice. *See id.*

IV. DISCUSSION

A. Ritter has not established good cause for failing to properly effect personal service upon the Coopers within 120 days.

Courts have considered three factors in determining the existence of good cause: (1) reasonableness of the plaintiff's efforts to serve, (2) prejudice to the defendant by lack of timely service, and (3) whether the plaintiff moved for an enlargement of the time to serve. *United States v. Nuttall*, 122 F.R.D. 163, 166-67 (D. Del. 1988). In weighing these factors, the court's "primary focus" should be on the plaintiff's "reasons for not complying with the time limit in the first place." *Boley*, 123 F.3d at 758 (quoting *MCI Telecomm. Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1098 (3d Cir. 1995), *cert denied*, 519 U.S. 815, 117 S.Ct. 64, 136 L.Ed.2d 25 (1996)). Ritter's explanation for not effecting service on Mr. Cooper within the 120 days provided for by Rule 4(m) is that he attempted instead to mail the waiver of service to Mr. Cooper in hopes of saving the expense of hiring a process server. Ritter also suggests that his failure to effect service upon Mr. Cooper within 120 days is justified by the parties' ongoing settlement negotiations.

The court does not find that Ritter's explanation rises to the level of good cause. In particular, after he did not receive the return of service receipts from the waiver mailing, Ritter made

no further efforts to ensure that Mr. Cooper in fact received the waiver and/or was properly served within 120 days.² Moreover, the fact that the parties were actively trying to resolve the claim through Mr. Cooper's insurance adjuster does not excuse Ritter's failure to serve Mr. Cooper. Ritter did not move the court for an enlargement of time to serve before the expiration of 120 days. It was only after the court brought the matter to Ritter's attention that he properly served the Complaint on Mr. Cooper. Although there is no evidence that Mr. Cooper will be prejudiced by Ritter's failure to serve, given the reasons for this failure, the court cannot find good cause to extend the time period for service.

B. The court nonetheless determines that it serves the interests of justice to allow Ritter an extension beyond the 120 day period set forth in Rule 4(m) and therefore deem Mr. Cooper to have been properly served.

Even in the absence of good cause, however, Rule 4(m) permits the court discretion to extend the time for service. *Boley*, 123 F.3d at 758. "When deciding whether to exercise its discretion, a court may consider the following factors: '(1) [sic] frivolousness [of the plaintiff's complaint]; (ii) [the plaintiff's] motivation in pursuing its claims; (iii) objective unreasonableness (both in the factual and legal components of the case) and (iv) the need in particular circumstances to advance considerations of compensation and deterrence.'" *E.I. Du Pont De Nemours & Co. v. The New Press, Inc.*, No. Civ. A. 97-6267, 1998 WL 355522, *4 (E.D. Pa. June 29, 1998) (quoting *Pickens v. Interncommunity Agency, Inc.*, No. Civ. A. 96-8415, 1997 WL 727604, *7 (E.D. Pa. Nov. 21, 1997) (citing *Lieb v. Topstone Indus., Inc.*, 788 F.2d 151, 156 (3d Cir. 1986))). To the extent that these considerations apply to the present situation, the court finds them to weigh in favor of excusing

² Ritter's attorney claims that he attempted to find out through the postal system what happened to the mailing, but he never resent the papers.

Ritter's failure to personally serve Mr. Cooper within 120 days.

In making this determination, the court relies on several factors. By all accounts, Ritter's claim against Mr. Cooper is not frivolous. Neither party contests that the accident happened, nor that there is a genuine issue as to liability. Additionally, the court finds that Ritter's failure to effect personal service on Mr. Cooper was not motivated by any bad faith. Instead, Ritter genuinely sought to avoid further expense and settle the claim through the insurance adjuster, rather than being forced to litigate it in court. Furthermore, once Ritter was made aware by the court that his 120 days to serve the Complaint had expired, his counsel acted quickly and diligently to remedy the situation by properly serving the Complaint on Mr. Cooper at that time and apprising the court of his efforts.

Also significant to the court's exercise of discretion is its finding that Mr. Cooper would not be prejudiced by excusing Ritter's untimely service of the Complaint. Indeed, Mr. Cooper had actual notice of Ritter's Complaint, and "actual notice to a defendant that an action was filed militates against a finding of prejudice." *Boley*, 123 F.3d at 759. On March 14, 2003—within 120 days from Ritter's filing of the Complaint—Mr. Cooper's attorney sent Ritter's attorney a letter requesting an extension to answer. The fact that Mr. Cooper had actual notice of the Complaint precludes any finding that Mr. Cooper would be prejudiced by the court's excusal of Ritter's untimely service.

Were the court not to excuse Ritter's untimely serving of the Complaint, Ritter, on the other hand, would be prejudiced in his claim. In particular, "the running of the statute of limitations is a factor supporting the discretionary granting of an extension of time to make service under Rule 4(m)." *Id.* at 759. Although the court will not determine at this time that the statute of limitations on Ritter's cause of action will have expired if the Complaint is dismissed, there is at least a

colorable argument substantiating such a position. Given the absence of any prejudice to Mr. Cooper and the substantial risk of prejudice to Ritter, the court finds that it would be unjust to deprive Ritter of the opportunity to prove his claim by dismissing his complaint for failure to effectuate personal service.

V. CONCLUSION

Although the court does not find that Ritter has established good cause so as to require a mandatory extension of time under Rule 4(m), it nonetheless will exercise its discretion in the interests of justice and excuse Ritter's untimely service.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PAUL RITTER,)
)
 Plaintiff)
) Civil Action No. 02-1435 GMS
 v.)
)
 ANTHONY COOPER, II and)
 MARY COOPER,)
)
 Defendants.)

ORDER

For the reasons set forth in the court's Memorandum of this date, IT IS HEREBY ORDERED that:

1. The defendant Anthony Cooper, II is deemed properly served as of March 21, 2003.
2. The Complaint (D.I. 1) is dismissed with prejudice as to defendant Mary Cooper for failure to state a claim against her pursuant to Federal Rule of Civil Procedure 12(b)(6).
3. The defendant Anthony Cooper, II shall have 20 days from the date of this order to answer the Complaint (D.I. 1).

Dated: December 30, 2003

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE