IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CARLOS LAMONTE JOHNSON, Plaintiff, v. MEDICAL DEPARTMENT, DR. IVENS, DR. BAILEY, and DR. TWYVEDDI Defendant.	)	Civil Action No. 02-369-KAJ

MEMORANDUM ORDER

I. INTRODUCTION

Presently before the court is a Motion to Dismiss the Complaint (Docket Item ["D.I."] 32; the "Motion") filed by the Medical Department, more properly known as Correctional Medical Services, Inc. ("CMS"). For the reasons that follow, CMS's Motion is denied.

II. BACKGROUND

Plaintiff Carlos Lamonte Johnson is a *pro se* litigant who, at the time he filed his Complaint, was incarcerated at the Delaware Correctional Center ("DCC") in Smyrna, Delaware. (D.I. 2) On May 15, 2002, after being permitted to proceed *in forma pauperis*, Mr. Johnson commenced this action against CMS[1], then the medical provider for the DCC, under 42 U.S.C. §1983. (*Id.*) On August 27, 2002, this court ordered Mr. Johnson, pursuant to Fed. R. Civ. P. 4(c)(2) and (d)(2), to "complete and return to the Clerk of the Court an original 'U.S. Marshal - 285' form ["285 form"] for each

[1] Dr. Ives, Dr. Bailey and Dr. Twyveddi were also named as defendants in the Complaint. (D.I. 2.)

defendant[.]"[2] (D.I. 16 at 1.) The court also informed Mr. Johnson that "[f]ailure to submit this form may provide grounds for dismissal of the lawsuit pursuant to Fed. R. Civ. P. 4(m)." (*Id.*) In response, on September 8 and September 12, 2002, Mr. Johnson completed and returned to the Clerk of the Court 285 forms for CMS, Dr. Ives, Dr. Bailey, and Dr. Twyveddi. (D.I. 23, 26, 30, 31.)

On April 16, 2003, CMS filed this Motion for insufficiency of process and insufficiency of service of process pursuant to Fed. R. Civ. P. 12(b)(4) and 12(b)(5). (D.I. 32.) In support of the Motion, CMS argues that it was never properly served because service of process was, instead, effected upon Kathy S. English[3], who was not an employee or agent of CMS. (*Id.* at 1-2.) CMS asserts that Ms. English, without its knowledge or consent, waived service on behalf of CMS and, therefore, process and service of process was insufficient under Fed. R. Civ. P. 4(h)(1)[4] [5]. (*Id*. at 2, Ex. A.) CMS also argues that service of process was insufficient because it was not made

[2] U.S. Marshal - 285 forms allow a plaintiff to request that the court direct that service of the summons and complaint "be effected by a United States marshal, deputy United States marshal, or other person or officer specially appointed by the court for that purpose. Such an appointment must be made when the plaintiff is authorized to proceed in forma pauperis[.]" Fed. R. Civ. P. 4(c)(2).

[3] Ms. English is believed to be an employee of the Department of Corrections. (D.I. 32.)

[4] Ms. English signed the waiver of service on September 23, 2002 and indicated it was "for DOC Medical." (D.I. 32 at Ex. A.) I assume this to mean the Medical Department for the Department of Corrections. However, as indicated in its Motion, CMS ceased to operate in Delaware prisons as of July 1, 2002. (*Id.* at 2.)

[5] Fed. R. Civ. P. 4(h)(1) provides, in part, that "service upon a ... corporation ... shall be effected ... by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process[.]"

within 120 days of the filing of Mr. Johnson's Complaint, as required under Fed. R. Civ. P. 4(m)[6]. (*Id.* at 2.)

III. DISCUSSION

It is a well settled principle that district courts, upon determining that process or service of process was insufficient, have broad discretion in dismissing a plaintiff's complaint. *Umbenhauer v. Woog,* 969 F.2d 25, 30 (3d Cir. 1992); *Mettle v. First Union Nat'l Bank*, 279 F. Supp. 2d 598, 604 (D.N.J. 2003). In determining whether to dismiss a complaint, or grant a plaintiff an extension of time to serve a defendant, the court must follow a two step procedure. *McCurdy v. Am. Bd. Of Plastic Surgery*, 157 F.3d 191, 196 (3d Cir. 1998); *Mettle*, 279 F. Supp. 2d at 604.

> First, the district court should determine whether good cause exists for an extension of time. If good cause is present, the district court must extend time for service and the inquiry is ended. If, however, good cause does not exist, the court may in its discretion decide whether to dismiss the case without prejudice or extend time for service.

Petrucelli v. Bohringer & Ratzinger, 46 F.3d 1298, 1305 (3d Cir. 1995).

"Good cause" exists if the plaintiff made a good faith effort to comply with the rule and there is a reasonable justification for the plaintiff's noncompliance. *Momah v. Albert Einstein Med. Ctr.*, 158 F.R.D. 66, 69 (E.D. Pa 1994) (citing *Dominic v. Hess Oil V.I. Corp.*, 841 F.2d 513, 517 (3d Cir. 1988)). In addition, the Third Circuit has identified the

[6] Fed. R. Civ. P. 4(m) provides: "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. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1)."

following factors to consider when determining whether "good cause" exists[7]: "1) whether the inadvertence reflected professional incompetence such as ignorance of rules of procedure, 2) whether an asserted inadvertence reflects an easily manufactured excuse incapable of verification by the court, 3) counsel's failure to provide for a readily foreseeable consequence, 4) a complete lack of diligence or 5) whether the inadvertence resulted despite counsel's substantial good faith efforts towards compliance." *Dominic*, 841 F.2d at 517.

Here, although service of process was insufficient, Mr. Johnson clearly made a good faith effort to comply with Fed. R. Civ. P. 4. First, Mr. Johnson timely complied with this court's August 27, 2002 order by submitting the 285 forms within two weeks of the court's order. Next, Mr. Johnson's indication of "Medical Dept" on his 285 form was apparently a good faith effort to apprise the Marshal's office that he was trying to serve CMS, who had been the medical provider for DCC at the time of Mr. Johnson's alleged injuries. *See Sellers v. U.S.*, 902 F.2d 598, 602 (7th Cir. 1990) (stating that because inmates are limited in their ability to obtain information regarding defendant's locations for service of process, a plaintiff inmate need only provide information necessary to identify the defendant on the 285 form; "once that information has been provided, the Marshal should be able to obtain a current business address and complete service."). Moreover, while the date of service was September 23, 2002, Mr. Johnson submitted the 285 form on September 12, 2002, which is within the 120 day requirement of Fed.

[7] The factors to evaluate "good cause" are the same as the factors to evaluate "excusable neglect" under Fed. R. Civ. P. 6(b). *Dominic*, 841 F.2d at 517; *see Mettle*, 279 F. Supp. 2d at 604 ("The Third Circuit has defined 'good cause' as being tantamount to 'excusable neglect' under Rule 6(b).").

R. Civ. P. 4(m). (D.I. 23). Therefore, in exercising my discretion under Fed. R. Civ. P. 4(m), I conclude that Mr. Johnson should be granted an extension of time within which service of process can be effected upon CMS.

IV. CONCLUSION

Accordingly, IT IS HEREBY ORDERED that Defendant's Motion (D.I. 32) is DENIED. IT IS FURTHER ORDERED that Plaintiff must effectuate proper service upon defendant CMS in accordance with Federal Rule of Civil Procedure 4 within thirty (30) days from the date of this order.

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

March 31, 2004
Wilmington, Delaware