UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Albert L. PEIA,	:
Plaintiff,	:
	:
v.	: Civ. No. 3:00cv2310 (PCD)
	:
U.S. BANKR. COURTS, et al.,	:
Defendants.	:

RULING ON MOTIONS PERTAINING TO DEFENDANT COAN

Defendant Coan moves to dismiss or, in the alternative, to set aside the default. The motion to dismiss is denied without prejudice. The motion to set aside the default is granted. Plaintiff moves for default judgment. His motion is denied.

I. DEFENDANT'S MOTION TO DISMISS

A. Background

Plaintiff, acting pro se, filed suit on December 4, 2000. He mailed, by certified mail return-receipt requested, a copy of the summons and complaint to the Connecticut residence of Defendant, Richard M. Coan. Defendant acknowledges he received them. A notice of action and request to waive service of process were not included. No waiver of service of process appears in the record. No returned and executed summons appears in the record.

B. Standard

Rule 12(b)(5) allows for dismissal for insufficiency of service of process. The defendant bears the burden of proof when challenging sufficiency of service of process. Bally Export Corp. v. Balicar, Ltd., 804 F.2d 398, 404 (7th Cir. 1986). Objections to the service of process "must be specific and point out in what manner the plaintiff has failed to

satisfy the service provision utilized." O'Brien v. R.J. O'Brien & Assocs., Inc., 998 F.2d 1394, 1400 (7th Cir. 1993) (quoting Photolab Corp. v. Simplex Specialty Co., 806 F.2d 807, 810 (8th Cir. 1986).

Rule 4(m) provides that if service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time. Furthermore, if a 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).

As a pro se party, Plaintiff is entitled to some deference in meeting pleading requirements. See Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam). This deference does not extend to satisfying service of process requirements.

C. Discussion

The federal rules provide for service of process in a number of ways. Plaintiff has not complied with any of them.

1. Plaintiff has not complied with FED. R. CIV. P. 4(d)

Rule 4(d) provides an option for a defendant to waive formal service of process. Plaintiff did not include a notice of action and request to waive service of process when he mailed Defendant a copy of the summons and complaint, as would be required by Rule 4(d)(2). Defendant has not waived service of process by filing a waiver of service. Defendant's actual knowledge of the lawsuit, if his receipt of the copy of the summons

and complaint were construed as such,[1] is not sufficient to substitute for service of process. See Dahl v. Kanawha Inv. Holding Co., 161 F.R.D. 673, 681 (N.D. Iowa 1995).

Since Defendant is an individual, lives in the United States, and is not an infant or an incompetent, to effectuate service Plaintiff therefore must comply with Rule 4(e).

2. Plaintiff has not complied with FED. R. CIV. P. 4(e)(2)

Plaintiff asserts delivery of a copy of the summons and complaint by certified mail only. This is insufficient to satisfy Rule 4(e)(2), which allows for service of process in three ways: (1) by delivering a copy of the summons and complaint to the individual personally; (2) by leaving copies at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; or (3) by delivering copies to an agent authorized by appointment or by law to receive service of process.

Plaintiff argues that since a similar California suit against Defendant was dismissed for lack of personal jurisdiction, Defendant should have expected the present suit against him in Connecticut, where personal jurisdiction is not an issue. Whether this would have been a "reasonable inference for a reasonable person" is irrelevant to whether service of process was sufficient.

3. Plaintiff has not complied with FED. R. CIV. P. 4(e)(1) through CONN. GEN. STAT. § 52-57(a)

Rule 4(e)(1) allows for service of process in the same manner Connecticut law provides for service of a summons upon a defendant in an action brought before Connecticut's courts of general jurisdiction. The statute governing general service of

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[1] Defendant asserts that it is not novel or unusual for him to receive papers in the mail from Plaintiff.

process before Connecticut's courts of general jurisdiction is CONN. GEN. STAT. § 52-57. Only two provisions of this statute are relevant, CONN. GEN. STAT. §§ 52-57(a), (f).

CONN. GEN. STAT. § 52-57(a) provides that "process in any civil action shall be served by leaving a true and attested copy of it, including the declaration or complaint, with the defendant, or at his usual place of abode, in this state." CONN. GEN. STAT. § 52-50(a) provides that "[a]ll process shall be directed to a state marshal, a constable or other proper officer authorized by statute, or [under certain conditions] to an indifferent person."[2] No such officer served the summons and complaint on Defendant personally or by leaving it as his place of abode. Plaintiff's mere mailing of a copy of the summons and complaint to Defendant's residence is insufficient.

4. Plaintiff has not complied with FED. R. CIV. P. 4(e)(1) through CONN. GEN. STAT. § 52-57(f)

CONN. GEN. STAT. § 52-57(f) provides an alternative means of service of process. It is applicable when "other methods of service of process provided under this section or otherwise provided by law cannot be effected," to certain actions concerning child support, and to certain actions to enforce garnishments for support. When one of these three conditions is met, service by certified mail to a defendant's employer is permissible.

Plaintiff fails to comply in that he makes no showing, nor does he even conclusorily assert, that the other methods of service of process could not be effected. Nor is this an action for child support or for garnishment. Furthermore, Plaintiff mailed a copy of the summons and complaint to Defendant's residence, not to his employer.

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[2] Borough bailiffs also may execute all legal process within their respective boroughs which sheriffs or constables may execute. CONN. GEN. STAT. § 52-50(e).

5. Applicability of FED. R. CIV. P. 5(a)

Defendant asserts that he never received a copy of Plaintiff's motion for default. Plaintiff counters that he is not required to send one under Rule 5(a). Such assertions are irrelevant to whether Defendant was properly served with a copy of the summons and complaint. Since Defendant was not in default at the time of the mailing of the copy of the summons and complaint, Rule 5(a) is not applicable to the present motion to dismiss.

6. Dismissal under FED. R. CIV. P. 12(b)(5)

The 120-day deadline lapsed on April 3, 2001. The court must inquire whether Plaintiff has shown good cause for the failure. While prejudice to the plaintiff because the statute of limitations has already run and a lack of prejudice to the defendant are not irrelevant factors to a good cause determination, they cannot by themselves provide good cause for the failure to make service within the 120-day period. Tso v. Delaney, 969 F.2d 373, 377 (7th Cir. 1992).

Moreover, this court rejects a plaintiff's mere subjective belief as to sufficient service as sufficient to show good cause. It appears Plaintiff believed that he had effectuated service. He stated so in his affidavit in support of his previous motion for default. While "Rule 4 is to be construed liberally," McGann v. New York, 77 F.3d 672, 674 (2d Cir. 1996) (per curiam), Plaintiff's mere subjective belief that he had effectuated service should not be enough to prevent his case from being dismissed. "[T]here must be compliance with the terms of the rule, and absent waiver, incomplete or improper service will lead the court to dismiss the action . . . ." Id. (quoting Grammenos v. Lemos, 457 F.2d 1067, 1070 (2d Cir. 1972).

There is an additional factor here which together with the above factors shows sufficient good cause. Defendant acknowledges he received a copy of the summons and complaint. Therefore, he was arguably on notice of the lawsuit.

It appears that proper service may be obtainable. See id. Plaintiff shall have until June 18th to effectuate service or his case is subject to dismissal. Defendant's motion to dismiss is denied without prejudice.

II. DEFENDANT'S MOTION TO SET ASIDE DEFAULT

Plaintiff moved for default against Defendant on February 22, 2001. His motion was granted on March 14, 2001. Plaintiff in his affidavit in support of his motion for default asserted that service had been effectuated on Defendant. On this basis, default had been granted. Now under the light of opposition, Plaintiff's assertion is unfounded. While Defendant may have been mailed a copy of a summons and complaint, he has not been served. With service not having been effectuated, a default should not have entered against Defendant. The default is set aside. See FED. R. CIV. P. 55(c).

III. PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT

On March 23, Defendant, through counsel, made a limited appearance. On March 28, 2001, Plaintiff moved for default judgment. Defendant opposes. As default has been set aside, Plaintiff's motion for default judgment is denied.

IV. CONCLUSION

Defendant's motion to dismiss, (Dkt. No. 16-1), is **denied without prejudice**. Plaintiff shall have until June 18th to effectuate service or his case is subject to dismissal. Defendant's motion to set aside default, (Dkt. No. 16-2), is **granted**. Plaintiff's motion for default judgment, (Dkt. No. 13), is **denied**.

SO ORDERED.

Dated at New Haven, Connecticut, May __, 2001.

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Peter C. Dorsey
Senior United States District Judge