IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JIMMYRICO PIGRAM, by and through his next friend (mother), LINDA PIGRAM, and LINDA PIGRAM,

Plaintiffs,

v. No. 04-2282 B

MEMPHIS CITY SCHOOLS, et al.,

Defendants.

ORDER DENYING MOTION TO DISMISS OF DEFENDANT CHAUDOIN

Before the Court is the motion of the Defendant Officer Russell Chaudoin to dismiss the claims of the Plaintiffs, Jimmyrico Pigram, by and through his next friend (mother), Linda Pigram, and Linda Pigram (collectively, "Pigram"), against him, based upon the lack of timely perfection of service on Chaudoin pursuant to Rule 4(m) of the Federal Rules of Civil Procedure. The Rule provides that "[i]f 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 . . ., 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). Chaudoin contends that, as the complaint in this case was filed on April 21, 2004, the Plaintiffs' failure to effect service upon him within 120 days thereafter militates dismissal.

Chaudoin is a police officer employed by the City of Memphis, Tennessee. The offices of the Memphis Police Department are located at 201 Poplar Avenue in Memphis and summons was

served at that address via certified mail. The mailing, specifically addressed to Office Chaudoin, was signed for by R. Cooper on April 29, 2004. At the initial scheduling conference on July 22, 2004, counsel for Chaudoin, Timothy Taylor, appeared, offering no challenge at that time to the timeliness of service of process as to his client. A second scheduling conference was conducted on August 6, 2004 and attended by Taylor, who again made no challenge to service of the complaint. At that conference, this Defendant's counsel also agreed in open court to permit the City of Memphis to be substituted as a Defendant for the Memphis Police Department. In the motion to dismiss, Taylor avers that at the initial scheduling conference and in a letter dated September 29, 2004, he in fact advised the Plaintiffs' attorney that Chaudoin had not received service of the complaint.

The essence of movant's argument is that service was not perfectly effected within the time set forth in the Rule, ergo, the case must be dismissed. While service may indeed have technically been out of time, neither the case law nor the Federal Rules of Civil Procedure support the type of mechanical application of the Rule promoted by the Defendant. According to the Advisory Committee, the Rule "explicitly provides that the court shall allow additional time if there is good cause for the plaintiff's failure to effect service in the prescribed 120 days, and authorizes the court to relieve a plaintiff of the consequences of an application of this subdivision even if there is no good cause shown." Fed. R. Civ. P. 4(m) advisory committee's note (1993 amendments). As the Rule and the comments have been interpreted by courts in this Circuit, the Court may in its discretion extend the time for service even if the Plaintiffs have failed to show good cause for the delay in service. See Stewart v. Tennessee Valley Auth., No. 99-5723, 2000 WL 1785749, at *1 (6th Cir. Nov. 21, 2000); Stanley v. Ohio Dep't of Rehab., No. C2-02-178, 2002 WL 31844686, at *2 (S.D. Ohio Dec. 12, 2002); Taylor v. Stanley Works, No. 4:01-CV-120, 2002 WL 32058966, at

*6 (E.D. Tenn. July 16, 2002); Slenzka v. Landstar Ranger, Inc., 204 F.R.D. 322, 324-26 (E.D. Mich. 2001); see also Henderson v. United States, 517 U.S. 654, 662-63, 116 S.Ct. 1638, 1643, 134 L.Ed.2d 880 (1996). In Stewart, the Sixth Circuit noted as follows:

> Rule 4(m) requires the district court to undertake a two-part analysis. First, the court must determine whether the plaintiff has shown good cause for the failure to effect service. If he has, then the court *shall* extend the time for service for an appropriate period. Second, if the plaintiff has not shown good cause, the court must either (1) dismiss the action or (2) direct that service be effected within a specified time.

Stewart, 2000 WL 1785749, at *1 (citing Byrd v. Stone, 94 F.3d 217, 219 (6th Cir. 1996) (interpreting predecessor of Rule 4(m)) (internal citations and quotation marks omitted) (emphasis in original). Good cause may be demonstrated where the plaintiff made reasonable and diligent efforts to effect service. See Habib v. General Motors Corp., 15 F.3d 72, 74 (6th Cir. 1994). On the other hand, inadvertence or half-hearted efforts at service do not establish good cause. Friedman v. Estate of Presser, 929 F.2d 1151, 1157 (6th Cir. 1991). Whether good cause has been shown lies within the sound discretion of the trial court. Byrd, 94 F.3d at 219. In Wise v. Department of Defense, 196 F.R.D. 52, 56-57 (S.D. Ohio 1999), the district court considered certain factors in determining this issue which have been used in subsequent cases, including whether (1) a significant extension of time was required; (2) an extension would prejudice the defendant beyond the inherent prejudice associated with having to defend the lawsuit; (3) the defendant had actual notice of the action; (4) a dismissal without prejudice would result in substantial prejudice to the plaintiff, for example, if the action would be time-barred; and (5) the plaintiff had made any good faith effort to effect service. See Taylor, 2002 WL 32058966, at *7; Slenzka, 204 F.R.D. at 326.

In this case, even assuming Pigram has failed to show good cause for not properly serving this Defendant within the prescribed period, by all indications the case has proceeded as if service

had been sufficient. Chaudoin's counsel has made Court appearances and has participated herein from the outset, suggesting that the Defendant had actual notice of the action and that he has suffered no prejudice. Indeed, the Defendant does not so allege. In addition, there is nothing to suggest that the Plaintiff's efforts to serve Chaudoin were inadvertent or half-hearted, or otherwise not in good faith. Based on the foregoing, the motion to dismiss is DENIED and the service of process upon Defendant Chaudoin is deemed timely.

IT IS SO ORDERED this 13th day of December, 2004.

J. DANIEL BREEN
UNITED STATES DISTRICT JUDGE