



defendant. A writ was issued in January.”<sup>1</sup> Service was perfected as to 4520 on May 31, 2011.<sup>2</sup> The docket does not reflect any efforts by the Plaintiff to seek an extension of time in which to serve 4520 filed within the original time period for service of process.

3. In his brief opposing 4520’s Motion to Dismiss, Plaintiff explains that his counsel’s procedure for ensuring proper service of process was triggered by a return showing either that service had been made or that service could not be completed and that his counsel had used this procedure in the asbestos litigation in Delaware for many years without incident. Furthermore, Plaintiff argues, when it came to his counsel’s attention on May 13, 2011 that a return of service on 4520 was missing, counsel promptly contacted the New Castle County Sheriff’s office. Counsel learned that the Sheriff had a record of receiving the writ but had no record of service having been made on 4520, which indicated that the Sheriff’s office had probably misplaced process to be served on 4520. On May 20, 2011, Plaintiff issued a second writ to the New Castle County Sheriff’s office for service of process on May 20, 2011 and service of process was completed.

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<sup>1</sup>*In re: Asbestos Litig. (Carmin)*, C.A. No. N10C-10-281 ASB (Del. Super. May 20, 2011) (WRIT).

<sup>2</sup> The parties have provided conflicting information regarding the date service was completed. 4520 asserted in its brief that service was completed on May 31, 2011 and Plaintiff asserted in its brief that service was completed on May 26, 2011. In any event, the record is clear that a second writ for service upon 4520 was issued on May 20, 2011, well after the deadline for service of process upon 4520 under Standing Order No. 1 had expired.

4. Paragraph 6 of the Court’s Standing Order No. 1 governing the asbestos litigation, as amended on April 29, 2011, requires plaintiff’s counsel to “do whatever is necessary to secure service of process upon all defendants within 60 days of the filing of the complaint.”<sup>3</sup> Standing Order No. 1 further provides, “Motions seeking to extend time for service of process will be granted only when accompanied with a showing of good cause and diligent efforts to comply with this provision of this Order.”<sup>4</sup>

5. The Court must determine whether Plaintiff had good cause for failing to complete service within the 60-day period prescribed by Standing Order No. 1. The Court is not aware of any Delaware cases interpreting the “good cause and diligent efforts” provision of Standing Order No. 1. However, Delaware courts have interpreted “good cause” under Superior Court Civil Rule 4(j) as requiring a showing of “excusable neglect.”<sup>5</sup> Excusable neglect, in turn, is a showing of “neglect which might have been the act of a reasonably prudent person under the circumstances.”<sup>6</sup> Delaware courts have found good cause exists where (1) there was a typographical error in the original complaint, (2) the plaintiff was unable to

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<sup>3</sup> Standing Order No. 1, C.A. No. 77C-ASB-2 (Del. Super. Apr. 29, 2011) (ORDER). The Court notes that the requirements for service of process in the current Standing Order No. 1 are identical to the version in effect at the time of the filing of the Amended Complaint.

<sup>4</sup> *Id.*

<sup>5</sup> *See, e.g., Dolan v. Williams*, 707 A.2d 34, 36 (Del. 1998) (holding that the 120-day requirement to perfect service under Super. Ct. Civ. R. 4(j) is only excused by good cause).

<sup>6</sup> *Cohen v. Brandywine Raceway Ass’n*, 238 A.2d 320, 325 (Del. Super. 1968).

locate the defendant after a genuine effort, and (3) the defendant purposefully avoided service of process.<sup>7</sup>

6. Plaintiff contends that good cause existed for the delay in service because Plaintiff's counsel was following its usual procedure to ensure proper service and promptly acted to correct the error, which appears to have originated in the New Castle County Sheriff's office, once it was discovered. In support of his argument, Plaintiff relies upon this Court's decision in *Miller v. State, Dept. of Public Safety*,<sup>8</sup> in which the Court held that plaintiff's counsel's failure to open the LexisNexis docket item incorrectly showing that service had been completed constituted excusable neglect.<sup>9</sup> Plaintiff argues that his counsel's failure to discover that the Sheriff's office had misplaced the process to be served upon 4520 until after the filing deadline had passed also constitutes excusable neglect on the Plaintiff's part.

7. The Court disagrees. Although it may have been the Sheriff's office that originally misplaced the papers to be served on 4520, the Sheriff's alleged negligence does not excuse counsel's own negligence in failing to discharge its responsibility to ensure that service of process was completed within sixty days, as required by Standing Order No. 1. The absence of a return of service of process at

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<sup>7</sup> *Cord v. Menendez*, 2002 WL 1162285, \*2 (Del. Super. Jun. 3, 2002).

<sup>8</sup> 2009 WL 1900394 (Del. Super. June 16, 2009).

<sup>9</sup> *Id.* at \*5.

or near the end of the sixty-day window should have put Plaintiff's counsel on notice to investigate whether service had been properly completed. If, for example, Plaintiff's counsel had learned on March 19, 2011, the original date by which service upon 4520 was to be completed, that the Sheriff's office had misplaced the papers and it would be impossible to serve process upon 4520 within the 60-day period, an extension of time might have been appropriate.

8. However, Plaintiff's counsel did not even discover the oversight until nearly two months later, on May 13, 2011, and made no efforts to rectify the situation until May 20, 2011. Plaintiff's counsel's efforts hardly amount to doing "whatever is necessary to secure service of process upon all defendants within 60 days of the filing of the complaint," as required by Standing Order No. 1. It is of no importance that Plaintiff's counsel has successfully relied on the Sheriff's office to complete service of process for several years. Plaintiff's counsel had a responsibility to ensure that service would be completed within sixty days of filing the Amended Complaint.

9. Common sense would dictate following up with the Sheriff's office within the sixty-day period if counsel had not received a return of service (or a notice that service could not be completed) at or near the end of that period. Plaintiff's counsel failed to take this simple step to ensure that process would be

timely served upon 4520. This is not excusable neglect. Accordingly, Defendant 4520's Motion to Dismiss will be GRANTED.

**IT IS SO ORDERED.**

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**Peggy L. Ableman, Judge**

Original to Prothonotary  
cc: All counsel via File & Serve