

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TINA DESANTIS,	§	
	§	No. 547, 2004
Appellant/	§	
Plaintiff-Below,	§	Court Below: Superior Court
	§	of the State of Delaware, in and
v.	§	for Kent County
	§	
WENDY CHILKOTOWSKY,	§	No. 02C-12-029
DAVID CHILKOTOWSKY, and	§	
D.C. WINDOWS AND DOORS,	§	
a business entity,	§	
	§	
Appellees,	§	
Defendants-Below.	§	

Submitted: May 11, 2005

Decided: June 27, 2005

Before **STEELE**, Chief Justice, **HOLLAND** and **RIDGELY**, Justices.

ORDER

This 27th day of June 2005, upon consideration of the briefs of the parties and the record below, it appears to the Court that:

(1) The plaintiff-appellant, Tina DeSantis, appeals from the Superior Court's decision to dismiss her complaint, without prejudice, against the defendants-appellees, Wendy Chilkotowsky, David Chilkotowsky and D.C. Windows and Doors (collectively, the "Defendants"), for failure to properly affect service of process. We conclude that it was within the trial court's

discretion to dismiss the complaint and that the trial court correctly ruled that the amended complaint was not properly served. Accordingly, we affirm.

(2) On December 20, 2002, DeSantis filed suit against David Chilkotowsky and D.C. Windows and Doors for injuries suffered in a motor vehicle accident almost a year earlier. After several failed attempts at service of process, David Chilkotowsky and D.C. Windows and Doors were served on August 11, 2003. The Defendants filed an answer on September 2, 2003, asserting the affirmative defense of failure of service. The Defendants also filed a response to Form 30 interrogatories and entered into a stipulation for arbitration with DeSantis, after which a defense verdict was awarded. DeSantis then filed a demand for a trial *de novo*. Thereafter, DeSantis filed a motion to amend her complaint. The Defendants notified the trial court that they did not oppose the motion, but reserved the right to raise the issue of proper service. The amended complaint, which was approved, added Wendy Chilkotowsky as a defendant. The amended complaint was served on all three defendants on June 17, 2004.

(3) The Defendants filed a motion to dismiss the complaint for failure to affect service within the prescribed time period. On July 27, 2004, the trial court granted the motion to dismiss. DeSantis moved for re-argument, but that

motion was rejected on November 18, 2004.

(4) DeSantis first argues that the trial court abused its discretion in dismissing her complaint for failure to properly affect service of process. In addressing this argument, we begin by noting that under Delaware Superior Court Civil Rule 4(j), when service is not made within 120 days after the filing of the complaint, the trial court shall dismiss the complaint without prejudice unless the plaintiff can show “good cause.”¹ We review a trial court’s determination that a party failed to show good cause for abuse of discretion.²

(5) We find that the trial court did not abuse its discretion in determining that DeSantis failed to show good cause for her failure to affect service of process within the statutorily mandated time period. The present record demonstrates that the trial court properly reviewed the evidence regarding the issue of good cause and properly determined that DeSantis failed to show “good faith and excusable neglect.”³ The trial court correctly noted that DeSantis was aware of the insufficiency of service of process, never requested an enlargement of the time frame within which to perfect service of process and

¹ DEL. SUPER. CT. CIV. R. 4(j).

² *Dolan v. Williams*, 707 A.2d 34, 36 n.14 (Del. 1998).

³ *Larimore v. Stella*, 2003 Del. Super. LEXIS 312, at *4.

never obtained court permission to use a special process server.

(6) Rather than attempting to show good cause, DeSantis merely argues that the Defendants were not prejudiced by the failure of service of process. This line of reasoning, however, does not help her case because there is nothing in the rule that excuses noncompliance when it is alleged that a defendant is not prejudiced by the failure of service. Proper service is a jurisdictional requirement. DeSantis also argues that the Defendants purposely misled her as to whether service had been successful and therefore good cause has been shown.⁴ This argument is contradicted by the record which indicates that the Defendants consistently informed her of the insufficiency of service of process. Based on the foregoing, we find no abuse of discretion by the trial court.

(7) DeSantis next challenges the trial court's determination that her amended complaint was not timely served. Superior Court Civil Rule 15(c) allows, in certain circumstances, for the date of an amended complaint to relate back to the date of the original complaint.⁵ DeSantis argues that because the amended complaint relates back to the date of the original complaint and the Defendants were served within 120 days of the amended complaint, service was

⁴ *Ditkoff v. Owens-Illinois, Inc.*, 114 F.R.D. 104, 105 (E.D. Mich. 1987).

⁵ DEL. SUPER. CT. CIV. R. 15(c).

proper. This argument is without merit and DeSantis has provided no authority to support it. Delivery of an amended complaint to counsel does not correct defects in the service of the original complaint. DeSantis also argues that the Defendants should not have been able to challenge the sufficiency of process because they did not object to the amended complaint. While the Defendants did not object to the amendment of the complaint, they expressly preserved their objection to the sufficiency of process.

NOW, THEREFORE, IT IS HEREBY ORDERED that the judgment of the Superior Court is ***AFFIRMED***.

BY THE COURT:

/s/Henry duPont Ridgely
Justice