

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

MORGAN T. ZURN
MASTER IN CHANCERY

LEONARD L. WILLIAMS JUSTICE CENTER
500 NORTH KING STREET, SUITE 11400
WILMINGTON, DE 19801-3734

Final Report: September 18, 2017
Date Submitted: July 11, 2017

Shirley Harley Brown
1024 Walnut Street
Wilmington, DE 19801

Sandra H. Smithers
466 Bethune Drive
Wilmington, DE 19801

Re: *IMO Last Will and Testament of Rachel D. Harley, deceased;*
Shirley Harley Brown v. Mary M. Harley, et al.
C.A. No. 11043-MZ

Dear Ms. Brown and Ms. Smithers:

Three sisters have been embroiled in litigation over control of family property since 1999, in the context of guardianship proceedings and foreclosure proceedings. Now that their mother has passed away, the sisters' distrust manifests in a probate dispute. The allegations are wide-ranging, but I write today on the discrete issue of service. In short, the petitioner has failed to serve both defendants. I recommend the Court dismiss this action against one sister and give the petitioner one final opportunity to serve the other.

Shirley Harley Brown began this action on May 20, 2015, when she filed a Verified Petition for the Production of the Last Will and Testament of Mrs. Rachel D. Harley (“Petition”). The Petition was accompanied by a certificate of service indicating Shirley¹ delivered the Petition by first class mail to respondents Sandra Smithers and Mary Harley at each of their Delaware residences.² Shirley took no further action, so I requested a status update on April 24, 2017.

On May 11, 2017, Shirley filed a motion for summary judgment (“Motion”). Shirley supplemented the exhibits to her Motion on May 24, 2017. The certificates of service for Shirley’s Motion and supplement do not indicate any service to Sandra or Mary. Instead, they indicate service to “Vivian Houghton, Attorney for Sandra Smithers,” and “Brian T. Murray, P.A., Attorney of record for Mary Harley.”³ Neither Ms. Houghton nor Mr. Murray have entered their appearance in this matter.

Sandra, proceeding *pro se*, responded to Shirley’s Motion on June 23, 2017. Sandra asserts she never received a copy of the Petition, and that Shirley had sent documents to Sandra’s bankruptcy attorney, Ms. Houghton, who as a courtesy

¹ In this family dispute, I use first names in pursuit of clarity. I intend no familiarity or disrespect.

² Docket Item (“D.I.”) 6.

³ D.I. 9, 14.

forwarded them to Sandra. In reply, Shirley claims she served Sandra and Mary by delivering “notice of service for the action” to attorneys who had previously represented the defendants in different lawsuits.⁴

In May 2017, Mr. Murray wrote Shirley and the Court to indicate he did not represent any party to the action and could not accept the Motion on behalf of any party. The Court wrote Shirley on July 10, 2017, indicating Shirley had not effectively served Mary with the Petition or Motion, and requesting Shirley do so and file proof of service within thirty (30) days to move the matter forward. On July 20, 2017, Shirley filed a “Proof of Service” stating she had mailed her “Motion for the Production of the Complete Last Will and Testament of Mrs. Rachel D. Harley” and her “Motion for Summary Judgment” to Mary’s Delaware residence via certified mail on July 18, 2017.⁵ Shirley’s filing contained copies of unsigned certified mail receipts.

I interpret Sandra’s *pro se* assertion that she was not properly served as a motion to dismiss for insufficiency of service of process pursuant to Court of Chancery Rule 12(b)(5). “It is fundamental that the Court only may exercise personal jurisdiction over a defendant when service is properly effected, regardless

⁴ D.I. 21, Mot. for Sanctions, ¶ 1.

⁵ D.I. 24.

of whether or not actual notice is achieved.”⁶ “Personal jurisdiction must be effected through proper service of process, and actual notice by a defendant does not satisfy this constitutional requirement.”⁷ The plaintiff bears the burden of demonstrating that service of process was effective.⁸

For an individual Delaware resident with a known address, who has not demonstrated any attempt to avoid service, Court of Chancery Rule 4(d)(1) requires service of a summons and complaint by personal delivery or by leaving copies thereof with an appropriate person at the individual’s residence. Mary and Sandra are both individuals residing in Delaware; Shirley knows their addresses; and Shirley has not indicated either defendant has attempted to evade service. There is no evidence that Shirley has sought a summons or attempted personal service, and she states she mailed materials to attorneys who represented each defendant in different lawsuits.⁹ Shirley has failed to adequately serve Mary and Sandra. I recommend the Court grant Sandra’s motion to dismiss pursuant to Rule 12(b)(5).

⁶ *Thomas v. Nationstar Mortgage, LLC*, 2015 WL 5766775, at *2 (Del. Ch. Sept. 18, 2015).

⁷ *Id.* (quoting *Boulden v. Albiorix, Inc.*, 2013 WL 396254, at *9 (Del. Ch. Jan. 31, 2013) and *Shurr v. Mun. City of Newark, Del.*, 2004 WL 332508, at *1 (D. Del. Jan. 28, 2004)).

⁸ *Id.*

⁹ I take judicial notice of the fact, provided by the public tracking website of the United States Postal Service, that the July 18, 2017, certified mailings to Mary were not delivered by the date of this report. Del. R. Evid. 201(b)(2); see *Henderson v. Blalock*, 2017 WL 3304451, at *2 n.5 (Tex. Ct. App. Aug 3, 2017) (taking similar judicial notice and collecting cases).

Mary has not appeared in this action. Shirley's complaint has been pending for over two years. This is an untenable situation without an obvious denouement, given Shirley's failure to serve Mary when directed to do so by the Court. The rules of this Court prescribe no definite time limit for effecting service of process.¹⁰ Other courts have instituted a 120-day limit for service of process, and use a good cause standard to determine if the court should allow an extension of time.¹¹ Without the benefit of a fixed time period, this Court looks to the actions of both parties in order to determine if service of process has been made in a timely manner.¹² "In particular, the court will consider whether the failure to make service is the result of dilatory conduct on the part of the person obliged to make service, whether the party to be served received actual notice of the suit and whether the failure to make timely service has resulted in prejudice."¹³ "That person needs to use at the very least some showing of reasonable diligence."¹⁴

In this case, I conclude the deficient service is attributable entirely to Shirley's dilatory conduct. I do not view the Petition's certificate of service via

¹⁰ *Hovde Acquisition, LLC v. Thomas*, 2002 WL 1271681, at *6 (Del. Ch. June 5, 2002) (citing Ct. Ch. R. 4).

¹¹ *Id.* (citing Fed. R. Civ. P. 4 and Del. Super. Ct. R. 4(j)).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

first class mail as conclusory evidence that Mary received actual notice of the suit, given that Mary did not receive the subsequent certified mailings. There is no evidence Mary has evaded personal service in any way. In this estate matter, I presume prejudice from the two years this action has been pending, because Delaware courts are mindful of a special public policy in favor of prompt settlement of decedents' estates.¹⁵ The Court wrote to Shirley requesting that she serve Mary, and Shirley responded by sending insufficient certified mailings that Mary did not receive.

I conclude that Shirley's service of Mary is long overdue. The issue is what can be done about it. Court of Chancery Rule 41 permits dismissal for failure to prosecute only upon a defendant's motion (which Mary has not made), or after a one-year period of inactivity (which was restarted upon Shirley's May 2017 motion for summary judgment). Further, because Shirley is proceeding *pro se*, this Court is particularly keen on reaching the merits of the case.¹⁶ I therefore extend Shirley one final thirty-day extension within which to properly serve Mary and file proof of service pursuant to Court of Chancery Rule 4. If Shirley fails to serve Mary, I will enter an order dismissing the case.

¹⁵ See *Tunnell v. Stokley*, 2006 WL 452780, at *3 (Del. Ch. Feb. 15, 2006).

¹⁶ See Del. Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants, Rules 1.1, 1.3.

This is a final report pursuant to Court of Chancery Rule 144.

Respectfully,

/s/ Morgan T. Zurn

Master in Chancery

cc: Mary Harley