IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

KAREN D. STOPPEL,)
)
Plaintiff,)
)
v.) C.A. No. N10C-03-078 PLA
)
STATE OF DELAWARE DEPARTMENT)
OF HEALTH AND SOCIAL SERVICES,)
)
Defendant.)

ON DEFENDANT STATE OF DELAWARE
DEPARTMENT OF HEALTH AND SOCIAL SERVICE'S
MOTION TO DISMISS
DENIED

Submitted: May 19, 2011
Decided: August 9, 2011

Jeffrey K. Martin, Esq., MARTIN & ASSOCIATES, P.A., Wilmington, DE, Attorney for Plaintiff

Joseph C. Schoell, Esq., DRINKER BIDDLE & REATH LLP, Wilmington, DE, Attorney for Defendant

ABLEMAN, JUDGE

I. Introduction

The State of Delaware Department of Health and Social Services (DHSS) moves for the dismissal of a Whistleblowers' Act[1] claim brought against it by a former employee, Plaintiff Karen Stoppel. Stoppel's initial Complaint in this action identified three specific DHSS employees as defendants, but not the agency itself. The individual defendants sought dismissal on the grounds that Stoppel had not timely perfected service of her original Complaint and that they did not qualify as "employers" subject to liability under the Whistleblowers' Act. Stoppel amended her Complaint to name DHSS as a defendant, and the Court granted the individual defendants' motion to dismiss.

DHSS now contends that Stoppel's Amended Complaint identifying it as a defendant should not relate back to the filing date of her original Complaint, such that her claim against it is time-barred by the Whistleblowers' Act's statute of limitations. In addition, DHSS argues that because Stoppel failed to complete proper service upon any of the dismissed defendants and the time period for service of the original Complaint has expired, her suit is subject to dismissal and cannot be "resurrected" by service of the Amended Complaint.

Based upon the content of Stoppel's original Complaint, which describes DHSS as a defendant despite her failure to identify it as such in the initial caption,

[1] 19 *Del .C.* § 1703.

summons, or praecipes, the Court finds that the Amended Complaint satisfies all requirements for relation-back under Superior Court Civil Rule 15(c). The Court further holds that Stoppel had good cause for failing to complete service of the original Complaint, as it named immune parties as the only defendants. Although Stoppel's addition of DHSS to the case may have been prompted by the individual defendants' earlier motion to dismiss, her amendment was directed to correcting a mistake, not reversing an earlier strategic decision to exclude DHSS as a defendant. The Court therefore concludes that a new period for service as to DHSS began with the filing of the Amended Complaint. Accordingly, the Court will **DENY** Defendant DHSS's Motion to Dismiss.

II. Factual and Procedural Background

While working as a charge nurse at the Delaware Psychiatric Center (DPC) in early November 2006, Stoppel reported an incident of alleged patient abuse in which she witnessed several male employees restrain a female patient with what Stoppel considered excessive force. After she spoke with her nursing director and filed a Patient Abuse, Mistreatment and Neglect Report regarding the incident, Stoppel claims that several of her superiors engaged in a campaign of cover-up and retaliation. Among other occurrences, Stoppel alleges that DPC personnel altered documentation, filed false professional complaints about her, attempted to have her

removed from her position, and violated the terms of a Department of Labor agreement that was intended to end the retaliatory conduct.

DPC is operated by DHSS under the aegis of the Division of Alcoholism, Drug Abuse, and Mental Health. At the time of the litigated events, Renata J. Henry served as the director of that division and as the chairperson of the DPC's governing body. During the relevant time period, Susan Watson Robinson was the hospital's director, and Philip Thompson was Stoppel's direct supervisor on the unit to which she was assigned. Stoppel alleges that Henry, Robinson, and Thompson all participated in retaliatory conduct against her.

Stoppel filed suit on March 5, 2010, for alleged violations of Delaware's Whistleblowers' Act. Her initial Complaint named Henry, Robinson, and Thompson ("the individual defendants") as defendants. Although the body of the initial Complaint referred to DHSS as "Defendant Delaware Department of Health and Social Services," the agency was not included in the caption or served as a defendant. Writs were issued for service upon the individual defendants on March 24, 2010. According to a return filed on June 21, 2010, the sheriff's office served Robinson personally at DPC. The sheriff's return also indicated that personal service had been accomplished upon Thompson, although this information later proved inaccurate. Service was never completed as to Henry, although a motion for appointment of a special process server was granted.

Prior to answering the Complaint, the individual defendants moved to dismiss on the grounds that they did not qualify as "employers" subject to liability under the Whistleblowers' Act and that Stoppel had not timely perfected service against any of them.[2] Even if Stoppel had served each of the individual defendants personally or had good cause for failing to do so, they maintained that her service attempts were defective for failing to comply with 10 *Del. C.* § 3103, which requires that a party asserting claims against state governmental officers related to the exercise of their official powers or duties must serve the Attorney General, State Solicitor, or Chief Deputy Attorney General to complete service of process. In response to the motion, Stoppel opposed dismissal of the individual defendants, but also sought to amend her Complaint to name DHSS as a defendant.

By opinion dated January 4, 2011, the Court dismissed the individual defendants on the basis of the arguments raised in their motion.[3] The Court further held that Stoppel had the right to amend her Complaint without leave of the Court under Superior Court Civil Rule 15(a), because no responsive pleading had been served.[4] Stoppel filed an Amended Complaint adding DHSS to the caption as a

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[2] The motion was filed by Thompson and Robinson, but presented arguments for dismissal of the Complaint against all of the then-named defendants, including Henry.

[3] *Stoppel v. Henry*, 2011 WL 55911 (Del. Super. Jan. 4, 2011).

[4] Super. Ct. Civ. R. 15(a) ("A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive

defendant and completed service of the Amended Complaint upon the agency's current Secretary and the State Solicitor on March 30, 2011.

In its previous opinion, the Court cautioned counsel about two issues that would *not* be resolved by its conclusion that Stoppel was entitled to an amendment as of right adding DHSS as a defendant:

> First, the Court cannot discern from the limited facts before it whether the late addition of DHSS as a defendant presents an issue with regard to the statute of limitations, and thus it does not address whether the amendment will relate back to the filing date of the initial Complaint pursuant to Rule 15(c). Second, the related question of whether the period to effect service will restart as to DHSS with the filing of the amended Complaint is not before the Court at this time, but has been the subject of decisions in other jurisdictions.[5]

The Court noted that both issues appeared "potentially significant" to the future of the case.[6]

III. Parties' Contentions

Unsurprisingly, the Court's observation turned into a self-fulfilling prophecy: in the instant motion to dismiss DHSS argues that Stoppel's claims are untimely under the Whistleblowers' Act's three-year limitations period[7] and that

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pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served.").

[5] 2011 WL 55911, at *4 (footnote omitted).

[6] *Id.*

[7] *See* 19 *Del. C.* § 1704(a) ("A person who alleges a violation of this chapter may bring a civil action for appropriate declaratory relief, or actual damages, or both within 3 years after the occurrence of the alleged violation of this chapter.").

Stoppel's failure to perfect service of the original Complaint on any party within the time period prescribed by Rule 4(j) is fatal to her case. DHSS suggests that relation-back of the Amended Complaint to the March 5, 2010 filing date of the original Complaint is inappropriate because Stoppel cannot show that her failure to name it as a defendant in the original Complaint resulted from a "mistake concerning the identity of the proper party," as required under Rule 15(c). Assuming relation-back does not apply, DHSS contends that Stoppel's claim against it is timely only if the the last alleged violation of the Whistleblowers' Act occurred on or after March 3, 2008, three years before the filing of the Amended Complaint. DHSS notes that the only specific allegations of time contained in Stoppel's Amended Complaint describe DPC personnel conducting an investigation of the November 2, 2006 patient incident she reported during the three weeks immediately thereafter. Finally, with regard to service of process, DHSS argues that "[b]ecause dismissal under Rule 4(j) is the proper remedy for Plaintiff's failure to properly serve any defendant, [she] cannot resurrect the action with a later filed Amended Complaint that 'relates back' to the original action" even if the requirements of Rule 15(c) are otherwise satisfied.[8]

[8] Def. DHSS's Mot. to Dismiss ¶ 7.

Stoppel's opposition describes this case as "*precisely* the type of situation" in which relation-back of an amended pleading is appropriate.[9] Stoppel explains that "the claims against DHSS are essentially identical to previous claims [against the individual defendants], and the omission of DHSS was a mistake" that can be remedied without prejudice to the agency, which has been on notice of the suit since Robinson was served at DPC within 120 days of the filing of the original Complaint.[10]

With respect to DHSS's argument that neither the original Complaint nor the Amended Complaint describe actionable conduct occurring later than November 2006, Stoppel has also submitted an affidavit detailing what she deems "an ongoing and continuous hostile environment" at DPC, spanning from her report of the alleged patient abuse in November 2006 through her departure from employment at the hospital in September 2007. Stoppel further claims that after she left DPC, the hospital reported to prospective employers that she had been disciplined for engaging in emotional abuse while disrupting a potential altercation between two patients. She portrays both the underlying disciplinary action and DHSS's post-employment disclosure of it to prospective employers as part of the agency's retaliatory tactics. Because she filed her original Complaint less than

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[9] Pl.'s Opp'n to Def. DHSS's Mot. to Dismiss ¶ 3.

[10] *Id.*

three years after September 2007, Stoppel argues that relation-back of the Amended Complaint would render her claim against DHSS timely.

Finally, Stoppel argues that the 120-day service period of Rule 4(j) should begin anew upon the filing of her Amended Complaint. She contends that good cause exists to renew the time for service upon a defendant added after the original Rule 4(j) period has expired where the additional time is necessary to prevent a statute of limitations violation.

IV. Analysis

Under Superior Court Civil Rule 15(c), a party seeking to amend a pleading must satisfy three criteria in order for the amendment to relate back to the date of the original pleading:

> (1) The claim asserted in the amended pleading must arise out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading;
> (2) Within the period provided by statute or the Superior Court Civil Rules for service of the summons and complaint, the party to be brought in by amendment received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits; and
> (3) The party to be brought in by amendment knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.[11]

Rule 15(c) applies to amendments to add or substitute previously uninvolved parties.[12]

[11] Super. Ct. Civ. R. 15(c).

Stoppel's original and amended complaints allege an ongoing pattern of retaliatory conduct, which she now contends lasted until her departure from DHSS employment in September 2007, if not longer.[13] For her claims against DHSS to be deemed timely under the three-year limitations period contained in the Whistleblowers' Act, her Amended Complaint must relate back to the March 5, 2010 filing date of the original Complaint. The parties do not dispute that the claims Stoppel asserts against DHSS arise from the same conduct, transaction, or occurrence set forth in the original Complaint. DHSS was placed on notice of the suit when DPC's director, Susan Watson Robinson, was personally served prior to the expiration of the time for service of the original Complaint. DHSS is represented by the same counsel as Thompson and Robinson. In light of the notice to DHSS and the fact that no discovery or pre-trial scheduling has yet occurred, there is no apparent prejudice if DHSS is required to maintain a defense on the merits. DHSS only challenges Stoppel's ability to satisfy the "mistake" requirement of Rule 15(c)(3), which requires that the party to be added "knew or

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[12] *Mullen v. Alarmguard of Delmarva, Inc.*, 625 A.2d 258, 265 (Del. 1993).

[13] Although DHSS's motion raises the absence of specific dates in Stoppel's complaints as a ground for dismissal, the allegations in both complaints, despite their vagueness as to the times involved, allege continuing wrongs that logically must have occurred after Stoppel filed the incident report in November 2006. Because the Amended Complaint does not on its face exclude the possibility that Stoppel's claims are timely under the Whistleblowers' Act, dismissal on statute of limitations grounds would not be appropriate. From the limited account of events currently provided to the Court, it appears that the determination of when the limitations period commenced could be a fact-intensive inquiry.

should have known that, but for a mistake concerning the identity of the proper party," it would have been made a party in the earlier pleading.

Upon review of Stoppel's original Complaint, the Court concludes that Stoppel's conduct demonstrates a "mistake concerning the identity of the proper party" under Rule 15(c)(3), albeit a somewhat unusual one. The Court perceives Stoppel's mistake as a failure to identify DHSS as one of the defendants in the caption of her initial Complaint (which error was further propagated into a failure to prepare a praecipe for service upon DHSS and to include it in the original summons). Notwithstanding that mistake, the body of the Complaint clearly indicated Stoppel's intent to name DHSS as a defendant. As the Court noted in its previous opinion, Paragraph 2 of Stoppel's original Complaint, in the section labeled "Parties," referred to DHSS as "Defendant Delaware Department of Health and Social Services." Moreover, the original Complaint included allegations of conduct undertaken by "DHSS," and not by the individual defendants,[14] and requested certain forms of relief, specifically reinstatement in her position at DPC and restoration of fringe benefits, that could be obtained only from the agency.

Relying upon *Johnson v. Paul's Plastering, Inc.*[15] and *Lavin v. Silver*,[16] DHSS argues that relation-back is inappropriate because Stoppel "elected" to sue

[14] Pl.'s Compl. ¶ 12.

[15] 1999 WL 744427 (Del. Super. July 30, 1999).

the three immune individuals, rather than DHSS. DHSS submits that this is "not a case where a plaintiff makes a reasonable mistake about a party's identity," but rather "one in which counsel—with knowledge of the party sought to be added—nevertheless names the wrong party."[17]

The plaintiffs in *Johnson* and *Lavin* sought to name new defendants whose identities and potential liability were known long before amendment was requested. In this respect, *Johnson* and *Lavin* bear a superficial resemblance to the case at bar. Nevertheless, the Court finds *Johnson* and *Lavin* distinguishable, as both cases addressed situations in which the party to be added by amendment would reasonably have believed that its earlier omission from the case was the result of the plaintiff's conscious *choice* not to sue.

In *Johnson*, a construction worker filed suit against two named defendants and three unknown parties for injuries he allegedly suffered in a work-related accident at the A.I. duPont Hospital for Children. After the statute of limitations expired, the plaintiff moved to amend his complaint to substitute the hospital for one of the unknown parties. The hospital did not oppose the amendment, but moved to dismiss on the basis that the plaintiff's claims against it would not relate

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[16] 2003 WL 21481006 (Del. Super. June 10, 2003).

[17] Def. DHSS's Mot. to Dismiss ¶ 6.

back to the time his original complaint was filed.[18] This Court determined that the plaintiff failed to satisfy the "mistake" requirement of Rule 15(c)(3), reasoning that "[l]ack of knowledge of a known party is not a mistake."[19] Because the plaintiff knew of his injuries, knew where his accident occurred, and knew that the hospital was necessarily involved in construction occurring on its premises, any notice of the action that the hospital received within the time period required by Rule 15(c) would have led it to conclude that the plaintiff "had *voluntarily* chosen not to name [it] as a party."[20]

Lavin, which presented even more extreme facts, was a personal injury action arising out of an automobile accident.[21] The plaintiff brought suit against another driver for rear-ending his vehicle. The defendant driver filed a third-party claim against his no-fault insurer, alleging that the accident had been caused by a phantom vehicle that came to a stop on the highway. The case proceeded to trial. After the close of the evidence, the plaintiff moved to amend his complaint to assert a direct claim against the third-party defendant.[22] This Court found that the requirements of Rule 15(c)(3) were not satisfied, even assuming the plaintiff's

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[18] 1999 WL 744427, at *1.

[19] *Id.* at *2.

[20] *Id.* (emphasis in original).

[21] 2003 WL 21481006, at *1.

[22] *Id.*

lengthy delay in seeking amendment was excusable. The Court observed that after the third-party defendant had been brought into the suit, the plaintiff was fully aware of its identity and potential liability, and yet, "for whatever reason, strategically [chose] not to bring a claim against the insurance company" prior to trial.[23] Because the plaintiff's conscious decision not to bring a direct claim against the insurer was "a matter of choice, not mistake," the Court deemed amendment inappropriate.[24]

In this case, by contrast, the Court does not view Stoppel's amendment as an attempt to undo a deliberate but misguided strategic choice not to sue a known proper party at the outset of her case. Rather, Stoppel's original Complaint suggests that she fully intended to bring suit against DHSS in addition to the individual defendants, despite counsel's apparently inadvertent omission of the agency from the caption. When the individual defendants' motion to dismiss brought this oversight to light, Stoppel promptly sought to amend the initial Complaint to add DHSS as a defendant.[25]

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[23] *Id.* at *3.

[24] *Id.* (quoting *Walley v. Harris*, 1997 WL 817867, at *2 (Del. Super. Nov. 24, 1997)).

[25] Plaintiff's counsel sought to file the Amended Complaint as an amendment as of right around the time he filed Stoppel's response to the individual defendants' motion to dismiss, in October 2010. Because of the pending motion and the existence of conflicting case law on whether a pre-answer motion to dismiss would be considered a "responsive pleading" for Rule 15 purposes, Plaintiff's counsel was instructed by Court personnel to file a motion seeking leave to amend, in case the Court determined that the amendment required its leave. Ultimately, the Court found that the motion to dismiss was not a responsive pleading, and that Stoppel was therefore entitled

As noted in *Johnson*, the Rule 15(c)(3) analysis is similar to an estoppel test, and is "designed to ensure that the new defendant knew its joinder was a distinct possibility."[26] Delaware courts strictly construe the "mistake" requirement, and will not permit relation-back where a plaintiff "merely chose the wrong party to sue," because "in the absence of a mistake by the plaintiff, of which the defendant sought to be added was aware, the defendant could assume that he or she was not originally joined for tactical reasons or lack of proof."[27] Unlike the potential late-added defendants in *Johnson* and *Lavin*, DHSS had reason to know that Stoppel's initial failure to name it as a defendant was a mistake, because the director of DPC was personally served with the original Complaint, which described DHSS as a defendant, contained allegations of conduct undertaken by DHSS, and sought relief requiring action by DHSS. These circumstances—particularly in light of the fact that DHSS was the only individual or entity described as a defendant in the "Parties" section of the initial Complaint that could be deemed Stoppel's employer

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to the amendment without leave of the Court or consent of the adverse party. *Stoppel v. Henry*, 2011 WL 55911, at *3. Thus, although the Amended Complaint was filed after the Court's January 2011 opinion dismissing the individual defendants, that sequence of events arose from the Court's instructions, as Stoppel had to await the Court's decision on the procedure and standard applicable to her amendment. She attempted to file an amendment as of right in advance of the Court's previous opinion.

[26] 1999 WL 744427, at *2 (quoting 3 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 15.19[3][d] (3d ed. 1999)).

[27] *Brown v. City of Wilm. Zoning Bd. of Adjustment*, 2007 WL 1828261, at *11 (Del. Super. June 25, 2007) (quoting 61B AM. JUR. 2D *Pleading* § 821).

for purposes of the Whistleblowers' Act—undermine any reasonable belief on DHSS's part that Stoppel's failure to name it as a defendant resulted from a conscious choice rather than a mistake. The "distinct possibility" of joinder should have been apparent to DHSS from the original Complaint.

Permitting relation-back in this case raises the question of whether Stoppel's service of the Amended Complaint upon DHSS was timely when the Rule 4(j) period for service of the original Complaint passed without proper service against any of the original defendants. Rule 4(j) provides as follows:

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

In applying Rule 4(j), the Court seeks to balance "the need for speedy just and efficient litigation" with the "desire to provide litigants their right to a day in court" and thereby resolve on their merits.[28]

To establish good cause for an extension of time to serve under Rule 4(j) the party seeking the enlargement must show "good faith . . . and some reasonable basis for noncompliance within the time specified in the rules."[29] To the extent the party's noncompliance resulted from its own neglect, good cause exists only if the

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[28] *Dolan v. Williams*, 797 A.2d 34, 36 (Del. 1998).

[29] *Id.* (quoting *Dominic v. Hess Oil V.I. Corp.*, 841 F.2d 513, 517 (3d Cir. 1988)).

neglect was excusable, or such as "might have been the act of a reasonably prudent person under the circumstances."[30]

DHSS argues that Stoppel's case essentially ended when she failed to perfect service of the original Complaint against any of the defendants named in it, and that she should not be able to revive her action by service of the Amended Complaint. DHSS draws support for its position from two Delaware cases, *DeSantis v. Chilkotowsky*[31] and *Ellis v. Davis*,[32] in which plaintiffs' motions to amend were denied after they failed to complete timely service of their original complaints. In *DeSantis*, the plaintiff in an automobile accident case received multiple notices of failed service before eventually serving her complaint several months past the Rule 4(j) service period, which she never sought to have enlarged.[33] After completing this untimely service, the plaintiff moved to amend her complaint to add an additional defendant. The defendants did not oppose the amendment, but reserved the right to challenge service. This Court dismissed the plaintiff's claims, and the Supreme Court affirmed. The Supreme Court found that the plaintiff had offered no good cause or explanation of excusable neglect for her

[30] *Id.* (quoting *Cohen v. Brandywine Raceway Ass'n*, 238 A.2d 320, 325 (Del. Super. 1968)).

[31] 877 A.2d 52, 2005 WL 1653640 (Del. June 27, 2005) (TABLE).

[32] 1997 WL 527941 (Del. Super. July 22, 1997).

[33] 2005 WL 1653640, at *1.

failure to obtain service of the original complaint within the statutory period and that delivery of her amended complaint should not be permitted to "correct defects in the service of the original complaint."[34]

Ellis likewise hinged upon a plaintiff's failure to show good cause and excusable neglect for not complying with the Rule 4(j) service period.[35] The plaintiffs in *Ellis* were injured in an automobile accident. Eight months prior to initiation of a suit in this Court, the plaintiffs' attorney learned from an insurance adjuster that the other driver involved in the collision had died. After filing their complaint against the deceased driver in his individual capacity, Plaintiffs received a service *non est inventus*, which again confirmed that the driver had died. More than two months after the return *non est*, the plaintiffs' counsel began to investigate whether the deceased driver's family intended to open an estate and informed defense counsel that he might seek appointment of an administrator if an estate were not opened. Defense counsel explained that he had been unable to contact the defendant's widow about the possibility of an estate.[36] After receiving the standard notice from the Prothonotary's Office that service must be accomplished within 120 days of the filing of the complaint, or else an explanation

[34] *Id.* at *2.

[35] 1997 WL 527941, at *3.

[36] *Id.* at *1.

of good cause provided to the Court, the plaintiffs' counsel wrote to the Court describing his communication with defense counsel and his efforts to determine if defense counsel would accept service. After the 120-day period had elapsed, the plaintiffs' counsel directed two additional letters to defense counsel, to which he received no response until defense counsel moved to dismiss the case based upon the plaintiffs' failure to perfect service.[37] Plaintiffs' counsel subsequently filed a motion to enlarge the time for service and a motion to amend the complaint to name an appointed administrator as the defendant.

The *Ellis* Court dismissed the plaintiffs' claims and denied their motions for enlargement and amendment. After thoroughly reconstructing the timeline of plaintiffs' counsel's conduct, the Court found that the delay in service of the original complaint could not be attributed to excusable neglect or good cause.[38] The Court emphasized that the plaintiffs and their counsel had been on repeated notice of the driver's death, but exercised no effort to account for that fact by preparing their lawsuit against the proper party in the first instance or by diligently determining the status of the prospective defendant's estate after their complaint was filed and diligently pursuing the appointment of an administrator.

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[37] *Id.* at *2.

[38] *Id.* at *3.

With respect to the plaintiffs' proposed amendment, the *Ellis* opinion noted directly applicable Supreme Court precedents establishing that "[t]he insurer is not the agent of the deceased for acceptance of service of process, nor does an administrator . . . appointed [after the service period] have the requisite notice and knowledge required by Superior Court Civil Rule 15(c)(3)."[39] The Court further suggested that "[i]t seems convoluted . . . to suggest relation back can be bottomed on an extension to service a deceased person who never should have been sued in the first place."[40]

The Court's determination that this case meets the Rule 15(c) criteria for relation-back distinguishes it from *DeSantis* and *Ellis*. The *Ellis* Court explicitly found that Rule 15(c)(3) was not satisfied. In the *DeSantis* case, nothing in the trial court or appellate decisions supports that Rule 15(c)(3) was satisfied as to the defendant to be added by amendment in that case, and the plaintiff was attempting to use the proposed amendment to accomplish service upon defendants named in the original complaint but not timely served.[41]

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[39] *Id.* at *4.

[40] *Id.*

[41] Although never explicitly stated in the opinions, it appears that the new defendant brought in by amendment in *DeSantis* was the wife of the driver named as a defendant in the initial complaint. If so, the new defendant's potential liability may have been derivative, which would make her addition to the suit an obvious gambit by the plaintiff to avoid the consequences of the failure to timely serve the original complaint upon the driver and his business.

The Court is persuaded by cases and authorities analyzing the Federal Rules of Civil Procedure that where Rule 15(c) relation-back is established, and the purposes of imposing service periods are not undermined, a plaintiff amending her complaint to substitute or add a new defendant should receive a new Rule 4(j) period for service upon the new defendant, or be considered to have demonstrated good cause for an extension of the original service period as to the new party.[42] Renewing or extending the service period for a new party added by amendment comports with the language of Superior Court Civil Rules 4(j) and 15(c), and prevents a potential conflict between those two provisions.

Rule 4(j) defines the time limit for "service of the summons and complaint . . . upon *a defendant*" and provides that if service is not timely accomplished and no good cause is provided for the failure to perfect service, the action "shall be dismissed *as to that defendant*."[43] Rule 4(j) "makes absolutely no limiting

[42] *See, e.g.*, *Donald v. Cook County Sheriff's Dep't*, 95 F.3d 548, 560 (7th Cir. 1996); *Motley v. Parks*, 198 F.R.D. 532, 532 (C.D. Cal. 2000) ("Where . . . leave to amend is properly granted [under Rule 15(a)], and the amendment relates back to the filing of the original complaint under Rule 15(c)(3), there is good cause for extending the time for service under Rule 4(m)."); *McClenney v. Campbellton-Graceville Hosp.*, 1999 WL 639815, at *4 (N.D. Fla. 1999) ("[T]he only logical reading of the requirements of 4(m) in the context of a Rule 15(c)(3) amendment is that the 120 day clock, as to a newly added defendant, begins at the filing of the amended pleading which first names the new defendant."); *City of Merced v. Fields*, 997 F. Supp. 1326, 1338 (E.D. Cal. 1998); *Johnson v. United States*, 152 F.R.D. 87, 88 (E.D. La. 1993); *see also* 4B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1137 (3d ed.) ("Although filing an amended complaint in itself does not toll the service period, thereby providing an additional 120 days for service, adding a new party through an amended complaint initiates a new 120-day timetable for service upon the added defendant.").

[43] Super. Ct. Civ. R. 4(j) (emphasis added).

reference to the original complaint," and no other provision in the Court's rules provides an alternative service period particular to parties added in subsequent amended complaints.[44] Allowing a new or extended service period that is *defendant-specific* would not prejudice earlier-named defendants entitled to dismissal based upon the plaintiff's failure to serve the original pleading upon them.

Under Rule 15(c), relation-back of an amended complaint changing or adding a party is possible only where the party to be brought in by amendment received sufficient "notice of the institution of the action . . . within the period provided by statute or these Rules for service of the summons and complaint."[45] Rule 15(c) impliedly but clearly contemplates that claims may relate back even against a party added *after* the Rule 4(j) service period applicable to the original complaint has passed. Construing Rule 4(j) to require a plaintiff to accomplish service against original defendants and those brought in by amendment within the same period would effectively limit the time during which the plaintiff could add or substitute defendants to the Rule 4(j) service period for the original complaint. Such a reading would render nonsensical Rule 15(c)'s requirement that the party to be added received "notice" of the action within the Rule 4(j) time period, because

[44] *Johnson*, 152 F.R.D. at 89.

[45] Super. Ct. Civ. R. 15(c)(3).

the new defendant would actually have to receive *service* of the original pleading for the amendment to be viable under both rules.[46]

The Court acknowledges that restarting or extending the service period as to new defendants brought in by an amendment could permit plaintiffs to abuse Rule 15(c) by seeking a "second bite at the apple" after failing to comply with the Rule 4 service requirements as to the originally-named defendants. A plaintiff who failed properly and timely to serve the original defendants to his suit within the statute of limitations could view the renewed or extended period available for serving newly-added parties as an opportunity to revisit strategic decisions made in the original complaint by bringing in a new defendant deliberately omitted from the original complaint for tactical reasons. Concern must be particularly heightened where, as in this case, all of the original defendants are to be replaced after the plaintiff failed to perfect proper service against any of them.

Nevertheless, the Court believes the primary safeguard against unfair prejudice to defendants added by amendment after the expiration of the statute of limitations lies in Rule 15(c)'s notice, knowledge, and mistake requirements. When a plaintiff seeks to add a new defendant after expiration of the applicable statute of limitations, the plaintiff's failure to serve previously-named defendants

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[46] *Donald*, 95 F.3d at 560 ("The granting of an amendment which relates back under Rule 15(c) certainly constitutes good cause for the extension of sufficient time to serve the defendants added by amendment. If this were not the case, Rule 15(c)'s purpose, embodied in its requirement of *actual notice only* within the Rule 4(j) period, would be nullified.").

will not, absent other circumstances, suffice to establish the propriety of relation-back. To the extent Rule 4(j) is considered to set a time period only for service of an original complaint, the addition of a defendant against whom claims would *not* relate back after the applicable statute of limitations has run could not be considered "good cause" for extending the time for service. Whether the amendment is considered futile, the service period is deemed expired, or both, a prospective defendant excluded from the suit by the plaintiff's voluntary choice is protected by Rule 15(c) from the unfair prejudice that would result if the plaintiff were allowed to reverse that earlier decision.[47]

On facts somewhat similar to this case, the District Court for the Eastern District of Louisiana held in *Johnson v. United States* that "the fact that [the] original complaint named the wrong parties constitutes good cause for failing to serve it within 120 days" and merited an extension of time to allow service of an amended complaint upon the proper defendant.[48] The plaintiff in *Johnson v. United States* brought suit for personal injuries after she was in an automotive accident involving a U.S. Postal Service vehicle. Initially, the plaintiff sued the

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[47] Furthermore, although the issue is not before the Court given Stoppel's attempt to amend her Complaint in advance of the Court's decision on the individual defendants' motion to dismiss, there may be grounds for denying an extension or renewal of time to serve under Rule 4(j) if the plaintiff is dilatory and does not initiate an amendment or motion to amend until *after* all originally-named defendants have been dismissed. Any attempt to add a party by amendment under those circumstances would also have to be preceded by a Rule 60 motion for relief to re-open the case.

[48] 152 F.R.D. at 89.

postal employee who had been driving the government vehicle, as well as the U.S. Postal Service. The plaintiff never attempted to serve either the driver or the Postal Service, but did send a copy of her initial complaint to the U.S. Attorney by certified mail.[49] Both of the original defendants sought dismissal on the basis that they were not proper parties under 28 U.S.C. § 2679, and that the United States should be substituted as the defendant as required by that statute.[50] One hundred and sixteen days after filing her complaint, the plaintiff moved to amend it to substitute the United States as the sole defendant. The District Court granted the amendment almost three weeks later.[51] After the amendment was approved, the United States moved to dismiss on the basis that the 120-day period for service ran from the filing of the original complaint and had expired without completion of proper service upon either the original or substitute defendants.

The District Court acknowledged concern that "allowing amended complaints to serve as a substitute for proper service could allow a dilatory plaintiff an unwarranted means of wriggling free of Rule 4(j)'s command that,

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[49] *Id.* at 88.

[50] 28 U.S.C. § 2679 provides that in personal injury actions brought against government employees, "[u]pon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States . . . and the United States shall be substituted as the party defendant."

[51] *Johnson*, 152 F.R.D. at 88.

absent good cause, failure to serve . . . within 120 days mandates dismissal."[52] The *Johnson* court nonetheless found that the "narrow facts" of the case before it would not "trigger that concern."[53] Service of the original complaint would have been possible, but "utterly pointless," because it named incorrect parties.[54] The *Johnson* court found that circumstance to constitute good cause for failure to serve the original complaint, which justified providing the plaintiff with "a fresh 120 days to serve," running from the filing date of the amended complaint.[55] The *Johnson* court noted that providing this service period for the amended complaint would not prejudice a newly-added defendant, because "the newly named defendant is protected by the applicable statute of limitations if [the] plaintiff failed to diligently investigate the proper parties to the suit."[56]

In this case, the same considerations examined by the Court in determining that relation-back of Stoppel's claims against DHSS was appropriate also support that Stoppel is not seeking amendment as an unfair end-run around the intent of Rule 4(j). Although the multiple missteps in the drafting and attempted service of

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[52] *Id.*

[53] *Id.*

[54] *Id.* at 89.

[55] *Id.*

[56] *Id.* at 88 n.1 (discussing *Gear, Inc. v. L.A. Gear Cal., Inc.*, 637 F. Supp. 1323, 1326 (S.D.N.Y. 1986)).

the original Complaint all speak to carelessness on the part of Plaintiff's counsel, Stoppel's mistakes in filing the Complaint against the individual defendants and in failing to perfect proper service against them are conceptually separate from, and unrelated to, her mistaken omission of DHSS from the caption. This is not a situation in which the plaintiff "failed to diligently investigate the proper parties to the suit," at least with respect to DHSS; Stoppel's original Complaint placed DHSS on notice that but for the apparent typographical error by which she failed to include it as a defendant in the caption, it would have been named as a defendant. The body of the initial Complaint suggests that Stoppel would have sought to bring DHSS in by amendment when its mistaken omission came to light even if the individual defendants were appropriate parties and had been properly served.

Under these facts, the Court declines to find that Stoppel's failure to perfect service against any of the defendants named in her initial Complaint should prohibit the renewal or extension of her time to serve DHSS. Nothing in Rule 4 or Rule 15 expressly prevents a plaintiff from bringing in a new defendant by amendment on the basis that none of the original defendants were properly served with the original complaint. Here, just as in *Johnson v. United States*, perfecting service against any or all of the original defendants would have been an empty gesture: each of them would have been entitled to dismissal regardless of the proper service, because they were not subject to liability under the Whistleblowers'

Act.[57] Therefore, the Court finds that Stoppel established good cause for failure to perfect service of her initial Complaint, and was entitled to a 120-day period from the filing of the Amended Complaint to accomplish service upon DHSS. Because Stoppel completed service against DHSS twenty-seven days after it was filed (and eighty-five days after the Court's granting her motion to amend on the basis that she was entitled to an amendment as of right), service of the Amended Complaint was timely.

V. Conclusion

For the foregoing reasons, the Court finds that the claims in Stoppel's Amended Complaint relate back to the filing of her initial Complaint, that good cause exists for her failure to perfect service of the initial Complaint against any of the individual defendants, and that she timely served the Amended Complaint upon DHSS. Therefore, Defendant DHSS's Motion to Dismiss is hereby **DENIED**.

IT IS SO ORDERED.

/s/

Peggy L. Ableman, Judge

[57] Although the plaintiff in *Johnson v. United States* moved to amend before the service period applicable to her original complaint elapsed, that distinction from the case *sub judice* does not alter the Court's conclusions. Under Rule 15(c), the Court must focus upon whether the party to be added received adequate *notice* of the action and the plaintiff's mistake within the Rule 4(j) service period. That notice need not necessarily take the form of a motion to amend.