

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 North King Street, Suite 10400
Wilmington, Delaware 19801-3733
(302) 255-0664

Frederick W. Smith, Jr.
SBI #
James T. Vaughn Correctional Center
1181 Paddock Road
Smyrna, Delaware 19977

Eric Scott Thompson, Esquire
Marshall, Dennehey, Warner, Coleman & Goggin
1220 N. Market Street, 5th Floor
P.O. Box 8888
Wilmington, DE 19899
Attorney for Defendant

**Re: Frederick W. Smith, Jr. v. Correctional Medical
Services, Inc.
C.A. No. 07C-03-152 RRC**

Submitted: September 2, 2008
Decided: October 21, 2008

On Plaintiff's Motion for Default Judgment.
DENIED AS MOOT.

On Plaintiff's Motion for Arbitration.
DENIED AS MOOT.

On Defendant's Motion to Dismiss.
GRANTED.

Dear Counsel:

In this action, Plaintiff seeks compensation for prescribed footwear that Defendant allegedly failed to provide, and pain and suffering, totaling \$500.00. Defendant has filed a motion to dismiss the action, arguing that Plaintiff failed to effect service upon Defendant. For the reasons discussed below, Defendant's Motion to Dismiss is granted. Consequently, Plaintiff's Motion for Default Judgment and Motion for Arbitration are denied as moot.

I. Factual and Procedural Background¹

1. On September 28, 2006, Plaintiff, an inmate incarcerated at the Delaware Correctional Center, filed a Complaint naming Correctional Medical Service, Inc. ("CMS") as the Defendant in Justice of the Peace Court 9 seeking \$60.00 for footwear and \$440.00 for pain and suffering. On February 6, 2007, the Justice of the Peace, following the filing of a Motion to Dismiss by Defendant, dismissed the case for lack of jurisdiction over claims for personal injury and for Plaintiff's failure to serve CMS.
2. On March 14, 2007, Plaintiff filed this action in the Superior Court requesting an arbitration hearing to address Plaintiff's pain and suffering. Plaintiff sets forth that CMS sent him to a foot specialist and provided him with customized New Balance sneakers. Plaintiff seeks recovery for pain and suffering but does not set forth the cause of the alleged pain and suffering.
3. On April 23, 2007, Plaintiff issued summons to the Sheriff of New Castle County to serve CMS by serving the Attorney General's Office and Eric Scott Thompson, Esquire, Attorney for Defendant.
4. Service upon Mr. Thompson was refused because he is not an agent authorized by appointment or by law to receive service of process, officer, managing agent, or general agent. The summons, therefore, was returned *non est*. Service was erroneously accepted by the Attorney General's office, but upon realizing the error, it was promptly rejected, because it, too, is not an agent authorized by appointment or law to receive service of process, officer, managing agent, or general agent of CMS.

¹ The uncontested facts and procedural background are set forth in Response of Defendant to Plaintiff's Motion for Default Judgment and Motion for Arbitration and Motion of Defendant to Dismiss. Docket Item ("D.I.") 21 at 1-2.

5. On January 4, 2008, Plaintiff filed a Motion for Default Judgment seeking default against Defendant. This Court denied Plaintiff's Motion finding Plaintiff had failed to effectively serve Defendant.
6. Plaintiff has 120 days from the institution of suit to serve Defendant. This period expired on June 21, 2007. Plaintiff has made no attempt to enlarge the period of time for service.
7. Since this Court's denial of Plaintiff's Motion for Default Judgment, Plaintiff has made no further attempts to serve Defendant.

II. CONTENTIONS OF THE PARTIES

In connection with Plaintiff's Motion for Default Judgment, Plaintiff contends that CMS has failed to answer Plaintiff's complaint within 20 days.

In connection with Plaintiff's Motion for Arbitration, Plaintiff maintains that he should be afforded the opportunity for arbitration because Plaintiff has "diligently [been] prosecuting [his] claim."

In response, Defendant contends that Plaintiff has failed to effectuate service upon CMS within 120 days of instituting suit, and therefore, Plaintiff's suit should be dismissed.

III. STANDARD OF REVIEW

When deciding a motion to dismiss, "all factual allegations of the complaint are accepted as true."² A complaint will not be dismissed under Superior Court Civil Rule 12(b)(6) "unless it appears to a certainty that under no set of facts which could be proved to support the claim asserted would the plaintiff be entitled to relief."³ Therefore, the Court must determine "whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint."⁴

² *Plant v. Catalytic Constr. Co.*, 287 A.2d 682, 686 (Del. Super. 1972), *aff'd* 297 A.2d 37 (Del. 1972).

³ *Id.*

⁴ *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

IV. DISCUSSION

The central issue is whether Plaintiff properly effectuated service upon CMS, where Plaintiff served CMS's attorney and service was refused, and served the Attorney General's office and service was refused.

On September 28, 2006, Plaintiff filed a complaint in Justice of Peace Court naming CMS as Defendant and seeking \$60.00 for footwear and \$440.00 for pain and suffering. Pursuant to the filing of a Motion to Dismiss by Defendant, the Justice of the Peace Court dismissed the action for lack of jurisdiction over claims for personal injury and Plaintiff's failure to serve CMS.

On March 14, 2007, Plaintiff re-filed his Complaint in this Court. Plaintiff attempted to effectuate service on CMS by issuing a summons to the Sheriff of New Castle County to serve the Attorney General's Office and Eric Scott Thompson, Attorney for Defendant. Mr. Thompson properly refused service because he is not an agent authorized by appointment or law to receive service of process, officer or managing or general agent.⁵ Service was erroneously accepted by the Attorney General's office, but it was promptly rejected upon realizing the error.

Pursuant to Superior Court Civil Rule 4(j), Plaintiff has 120 days from the institution of suit to serve Defendant. The relevant period expired on June 21, 2007 and Plaintiff has made no attempt to enlarge the period of time for service, nor has he made any further attempt to serve CMS. Thus, because Plaintiff has failed to timely serve Defendant, Defendant's Motion to Dismiss is granted and Plaintiff's Motion for Default Judgment and Motion for Arbitration are denied as moot.

V. CONCLUSION

Accordingly, Plaintiff's Motion for Default Judgment is **DENIED AS MOOT**, Plaintiff's Motion for Arbitration **DENIED AS MOOT**, and Defendant's Motion to Dismiss is **GRANTED**.

⁵ See Super. Ct. Civ. R. 4(f).

IT IS SO ORDERED.

cc: Prothonotary