# IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

# IN AND FOR NEW CASTLE COUNTY

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| **DIANA L. MILLER** | ) | |
| | ) | CIVIL ACTION NUMBER |
| | ) | |
| Plaintiff | ) | 08C-07-231-JOH |
| | ) | |
| v. | ) | |
| | ) | |
| **STATE OF DELAWARE,** and | ) | |
| **DEPARTMENT OF PUBLIC SAFETY** | ) | |
| | ) | |
| Defendant | ) | |
| | ) | |

*Submitted: April 13, 2009*
*Decided: June 16, 2009*

***MEMORANDUM OPINION***

*Upon Motion of Plaintiff for Default Judgment -* ***DENIED***
*Upon Motion of the Defendant to Dismiss -* ***DENIED***

***Appearances:***

Jeffrey K. Martin, Esquire, of Martin Associates, P.A., Wilmington, Delaware, attorney for plaintiff

Jennifer D. Oliva, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, attorney for the defendants

HERLIHY, Judge

Plaintiff Diana L. Miller has sued the Delaware Department of Public Safety and Homeland Security. She claims: (1) gender discrimination; (2) sexual harassment; and (3) retaliation. Suit was brought here after she received a "right to sue" letter from the State Department of Labor.

The Department has not filed an answer to Miller's complaint. She moved for default judgment which prompted the Department to move to dismiss for insufficient service. That motion is premised on the failure to serve any of the top three officials in the Attorney General's Office, as required by statute, and the failure to personally serve the Department's Secretary as required by court rule.

The Court finds under the totality of circumstances, Miller had good cause to believe service was achieved upon the Secretary of Public Safety and Homeland Security. Further, there is excusable neglect for the incomplete service on any of the three aforementioned persons in the Attorney General's Office that results in the Department's motion being **DENIED**. Fairness dictates that the Department now be given an opportunity to answer Miller's complaint. Accordingly, her motion for default judgment is **DENIED**.

***Factual Background***

The complaint alleges a course of conduct involving unwanted sexual advances towards Miller from two Delaware police officers, Lieutenant Paul Taylor and Captain John Laird. In the praecipe filed with her complaint, Miller requested a summons issue

for the Kent County Sheriff to serve the Department by serving "David B. Mitchell Secretary of Public Safety [sic]."[1] However, the Kent County Sheriff did not serve Secretary Mitchell. Instead, Fran Pennington, a receptionist, was served the complaint on August 8, 2008.

The mistaken service was further compounded when the Kent County Sheriff's notice of service was returned to the New Castle County Prothonotary on August 14th. However, in order to appreciate this service issue, an explanation as to docket maintenance by the Prothonotary's Office is needed.

This lawsuit is an e-filed case. The Court maintains, at the moment, two separate dockets on such cases. Part of the reason for this is the hoped-for transition to a new, comprehensive system, COTS (Courts Organized to Serve). The first docket system is LexisNexis, which is growing in popularity and use. This docket allows attorneys to remotely access case information without having to physically enter the courthouse. The older docket system, slowly being phased out, is the "JIC" docket. It is not remotely accessible.

Although the two dockets record the same case information, the systems work independently of each other and are not compatible. As a result, the Court staff makes separate entries into each docket system.

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[1] JIC Docket, #1.

The LexisNexis docket for the return from the Kent County Sheriff states:

> "Writ returned, served State of Delaware Department of Public Safety on 8-8-08."[2]

That is the docket Miller's counsel viewed. The JIC docket, however, has a different entry:

> "Writ returned served State of Delaware by serving Fran Pennington, receptionist on 8/8/08."[3]

Miller's counsel checked only the LexisNexis docket. He did not, as the LexisNexis system allows, "click" the docket entry which would have shown him the scanned-in writ revealing service on Pennington and not Secretary Mitchell.

Near the end of August 2008, Miller's counsel was advised by the State, through State Solicitor Lawrence Lewis, Esquire ("Lewis"), that it wished to pursue settlement negotiations with the Miller. A meeting was held on September 12, 2008 in which Miller's counsel, counsel for the Department, Jennifer Oliva ("Oliva") and Lewis began to engage in communications with each other. Immediately following this meeting, Oliva sent Miller's counsel an e-mail memorializing the event:

> The purpose of this e-mail is to confirm that we agreed this morning as to the following: (1) I will accept service of the complaint on behalf of the DDOJ; (2) you will file the complaint with the paragraph referencing Major Hughes under seal; and (3) we stipulate that anything filed related to that paragraph must also be filed under seal going forward. Please let me know if my understanding is incomplete or otherwise incorrect.[4]

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[2] Lexis-Nexis Docket, #3.

[3] JIC Docket, #2.

[4] Pl.'s Reply Br. to Def.'s Motion to Dismiss, Ex. 1.

Millers's counsel replied and agreed to all three conditions, but there was no "additional" service or action taken by Miller's counsel.

Discussions between the two parties lasted from September 12, 2008 to January 7, 2009. No resolution was obtained. When it was clear negotiations would be unproductive, Oliva e-mailed Miller's counsel a letter stating the Department of Justice's belief it had yet to be properly served. She wrote:

> Consistent with the e-mail I sent to you on Friday, September 12, 2008 (forwarded below) and your response on the same day (also forwarded below), the State Solicitor and I met with you on the morning of September 12, 2008 and agreed to three points: we would accept service electronically or otherwise (i.e., waive the personal service requirement of 10 *Del. C.* §3103(c)) in exchange for (1) your agreement to re-file the Miller complaint with the paragraph referencing MAJ Hughes under seal and (2) your stipulation that anything filed related to the paragraph referencing MAJ Hughes be filed under seal going forward. To the best of our knowledge, neither of these prerequisites to our accepting less than perfected service has occurred. If I am incorrect, please let me know and we will promptly accept electronic service. If you have an alternate course of action you would like to propose going forward in Miller, please feel free to contact me via phone or e-mail at your convenience today.
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> Simply stated, the State's position is that Ms. Miller has not perfected service on the State and the State will not accept alternative unless and until the complaint has not been re-filed per our agreement on September 12, 2008 (again, please see the e-mail communications below). If we do not receive a response from you by noon Friday (January 20, 2009), the State will assume that you do not wish to proceed per our September 12, 2008 as summarized above and, if the client so wishes, we will file a motion to dismiss for want of service of process.[5]

[5] E-mail Correspondence from Ms. Oliva (Jan. 28, 2009).

Therefore, Miller once again "served" the original July 28, 2008 complaint on January 30, 2009 to Oliva by re-filing the complaint. The complaint, however, did not have paragraph 80 (the reference to Maj. Hughes) placed under seal. Nor had Miller's counsel initiated the process to seal the complaint following the September 12th meeting. On a January 30, 2009 e-mail, he wrote a letter to Oliva stating it was his understanding the party seeking the seal was responsible for motioning the Court for such action.[6] However, in that January 30th e-mail, Miller's counsel advised he would not oppose any motion brought from the State to seal references to Maj. Hughes.[7] Furthermore, Miller's counsel wrote it was his understanding that Oliva accepted service for the Attorney General's Office in her September 12, 2008 e-mail.[8]

Afterwards, Oliva composed another e-mail to Miller's counsel, dated February 18, 2009, stating:

> In my January 28 e-mail, I reiterated that the State was willing to accept service of the complaint you filed on July 28, 2008 in the above-captioned matter irrespective of the fact that service had not yet been perfected pursuant to 10 *Del. C.* §3103(c) if, and only if, you re-filed the complaint with paragraph 80 and any and all references to Major Hughes under seal. You responded to my e-mail on January 30 by (1) forwarding to my attention a letter and (2) re-filing the complaint. You did not, however, motion the Superior Court to file paragraph 80 and any and all references to Major Hughes in the complaint filed January 30 under seal.

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[6] Pl.'s Reply to Def.'s Motion to Dismiss, Ex. 3.

[7] *Id.*

[8] *Id.*

> I agree with the declaration in your letter dated January 30 that it is necessary to obtain a Court Order under the Superior Court Rules of Civil Procedure, Rule 5(g)(2), to seal the relevant portions of a complaint. That stated, the proper procedure here is to motion the Court for an Order to seal the complaints filed on January 30, 2009 and July 28, 2008 respectively, and to file a redacted complaint (redacting paragraph 80 and any and all references to Major Hughes). In order to facilitate this process, we have attached for your review the following documents: (1) a motion to seal the January 30, 2009 and July 28, 2008 complaints and to file a redacted complaint; (2) a certificate of service; (3) notice of the motion to file the complaints under seal; (4) a draft order to seal the complaints; (5) a redacted complaint. Once these five documents are filed with the Superior Court, the State will accept service as agreed and, as a result, will have twenty days from the date of your filing to file its responsive pleading.[9]

Oliva sent another letter to Miller's counsel on February 25, 2008 which reiterated the same contentious points regarding service and, again, offered to accept service so long as Miller's counsel filed certain documents which were supplied by the Department of Justice. The documents were the same as those forwarded in Oliva's February 18th e-mail.

Instead of filing the documents supplied by the Department of Justice, Miller filed a motion for default judgment on March 9, 2009. This spurred the Department of Public Safety and Homeland Security to file a motion to dismiss the complaint for want of service on March 16, 2009. The motion to dismiss was accompanied by a motion to consolidate the Miller's motion with the Department's motion for one hearing. That consolidated hearing took place on April 13, 2009.

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[9] E-mail Correspondence from Ms. Oliva (Feb. 18, 2009).

***Parties' Contentions***

Miller asks this Court for default judgment because the Department has not answered her complaint within the required 20 days. She points to the docket which shows the writ was returned on August 14th showing service on the Department on August 8, 2008. In the alternative, she contends service of the complaint was perfected on September 12, 2008, when Deputy Attorney State Solicitor Oliva accepted service on behalf of the Department of Justice. Therefore, Miller argues she has achieved service pursuant to 10 *Del. C.*§3103(c).

The Department denies it has been properly served. Accordingly, it argues Miller's failure to serve the Department precludes any possibility of her succeeding on her default judgment motion. The Department's assertion on insufficient service is that (1) Secretary Mitchell was not personally served and (2) none of the three required persons in the Department of Justice were served.

Furthermore, it contends the e-mail communication of September 12, 2008 failed to achieve service on the Department of Justice because Miller never pursued the necessary steps to seal the complaint. As a result, it contends Miller did not fulfill her end of the bargain. Because the Department concludes there is no good cause for Miller's delay, it argues this Court should dismiss the complaint.

## *Discussion*

### *A. Miller Failed to Personally Serve the Defendant*

The starting point for a discussion of both parties' motions begins with Superior Court Civil Rule 4(j), the timing mechanism for serving a complaint.

> (j) *Summons: Time Limit for Service*. 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.

Additional service requirements are needed in order for the plaintiff to perfect service when a state agency is a defendant. Those rules are Super. Ct. Civ. R. 4(f)(1)(IV) and 10 *Del. C.* §3103(c). Rule 4(f)(1)(IV) provides that service of process is perfected "upon a…governmental organization subject to suit by delivering a copy of the summons, complaint and affidavit, if any, to the chief executive officer thereof or by serving copies thereof in the manner prescribed by law for the service of summons upon such a defendant." Furthermore, 10 *Del. C.* §3103(c) also requires a plaintiff to serve "the person of the Attorney General or upon the person of the State Solicitor or upon the person of the Chief Deputy Attorney General." It is settled law that both Super. Civ. Ct. R. 4(f)(1)(IV) and 10 *Del. C.* §3103(c) require a plaintiff to serve both the chief executive officer of the agency and one of the following three persons: (1) the Attorney General; (2)

the State Solicitor; or (3) the Chief Deputy Attorney General.[10] The issue before the Court is whether Miller has achieved service as required by these rules and, if not, whether Miller can show her failure to serve can be excused for good cause.

Miller attempted to serve the Delaware Department of Safety and Homeland Security pursuant to Super. Civ. Ct. R. 4(f)(1)(IV) by issuing a summons which accompanied her July 28, 2008 complaint. However, it is clear that Secretary Mitchell, her intended recipient, was not personally served. Therefore, Miller has failed to meet the standards of Super. Civ. Ct. R. 4(f)(1)(IV).

Miller was also required to serve either one of the three head positions in the Department of Justice. The Court's records indicate no writ was returned to the Prothonotary documenting any personal service any of them.

***B. Miller's Counsel Has Shown Good Cause and Excusable Neglect for Failing to Achieve Service***

Because Miller failed to serve either Secretary Mitchell or State Solicitor Lewis, she must rely on good cause to avoid dismissal. A plaintiff may show good cause as to why proper service was not achieved within the required period of time under Super. Ct. Civ. R. 4(j). To make a showing of good cause, the plaintiff must demonstrate to the Court that

[10] *Drake v. State*, 1979 WL 195352 (Del. Super. Nov. 5, 1979).

her failure to serve the defendant was a result of "excusable neglect."[11] In Delaware, excusable neglect is "neglect which might have been the act of a reasonably prudent person under the circumstances."[12] However, "[a] mere showing of negligence or carelessness without a valid reason may be deemed insufficient."[13] "Diligent efforts to comply with the Rule demonstrates excusable neglect, whereas delays resulting from half-hearted efforts by counsel to perfect service do not."[14] However, public policy favors litigants proceeding with their case on the merits.[15]

There is case precedent from this Court highlighting various factual scenarios that commonly fall under the rubric of excusable neglect. For example, excusable neglect has been found in cases where a typographical error accounted for the failure to serve.[16] It has also been found in cases where the defendant willfully evades service.[17] Finally, excusable neglect is also present when the plaintiff fails to find the defendant after making diligent efforts to locate the defendant.[18]

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[11] *Dolan v. Williams*, 707 A.2d 34, 36 (Del. 1998).

[12] *Cohen v. Brandywine Raceway Assoc.*, 238 A.2d 320, 325 (Del. Super. 1968).

[13] *Id.*

[14] *Anticaglia v. Benge*, 2000 WL 145822, at *2 (Del. Super. Jan. 20, 2000).

[15] *Dolan*, 707 A.2d at 36.

[16] *Fluharty v. Richeson*, 1998 WL 283467 (Del. Super. Apr. 20, 1998).

[17] *Viars v. Surbaugh*, 335 A.2d 285 (Del. Super. 1975).

[18] *Franklin v. Millsboro Nursing & Rehabilitation Center, Inc.*, 1997 WL 363950 (Del. Super. June 10, 1997).

However, in other cases, plaintiffs have failed to demonstrate excusable neglect. For example, excusable neglect is not shown when the plaintiff fails to properly serve the defendant and, instead, relies only upon the defendant's notice of the complaint.[19] Additionally, the fact that a defendant would not be prejudiced by plaintiff's failure to serve is equally irrelevant in service of process issues or excusable neglect considerations.[20]

The Court holds it was excusable neglect on the part of Miller's attorney in failing to properly serve Secretary Mitchell. In this case, Miller correctly identified and directed the Kent County Sheriff to personally serve Secretary Mitchell pursuant to Super. Civ. Ct. R. 4(f)(1)(IV). Due to current docketing procedures, the caption on the LexisNexis docket stated the complaint had been properly served and accepted by the Secretary. Miller's counsel relied on this information. Although counsel might have been better advised to take the extra step and view the actual writ that was returned to the Prothonotary through LexisNexis, the Court must shoulder some, if not all, of the blame for the inaccurate information displayed on the LexisNexis docket. As such, it was excusable neglect to believe service had been achieved upon the Secretary because of the Kent County Sheriff's failure to follow directions on Miller's praecipe and because of the typographical error by this Court.[21]

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[19] *DeSantis v. Chilkotowsky*, 877 A.2d 52, 2005 WL 1653640, at *2 (Del. June 27, 2005) (TABLE).

[20] *Anticaglia*, 2000 WL 145822, at *2.

[21] The Court, however, must add a warning to all counsel in this case and to the Bar (continued...)

Although Miller has shown excusable neglect in relation to her failure to properly serve Secretary Mitchell, Miller is also required to serve the State agency pursuant to 10 *Del. C.* §3103(c) by personally serving either the Attorney General, the State Solicitor, or the Chief Deputy Attorney General. Again, Miller must rely on good cause to avoid dismissal. Therefore, she must demonstrate excusable neglect for failure to personally serve one of the three head positions of the Department of Justice.

The Court is unaware of any factual cases similar to the one before it. This is not a case involving a typographical error, an evasive defendant, or a plaintiff having difficulty finding a defendant. The issue here is whether service was accepted by the State Solicitor during the meeting that took place on September 12th. Both parties stand in bitter disagreement with each other on the issue. While the parties agree to the factual account of the meeting, they do not agree on the conclusions to be drawn from those facts. Miller's attorney has maintained service on a necessary Department of Justice official was accepted at the meeting, which was attended by Lewis. As a result, Miller's attorney believed service had been perfected at that moment since he also believed the Secretary had

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[21](...continued)
as a whole. Miller's counsel relied upon an incomplete docket entry in LexisNexis docket. Availability of this Court's docket to counsel through e-filing is relatively new and the transition from the "old" to the "new" is still ongoing. Attorneys are advised to check the LexisNexis docket for completeness by going behind the first-viewed docket entry to bring up the actual pleading or document that has been scanned into the system. Of course, the Court has a duty to insure the initial caption is correct in the first place, but because the underlying document is readily available prudence seems to dictate counsel actually view the document, especially on service issues.

been personally served. As to the service requirement on the Department of Justice, that agency stated it accepted service conditioned upon Miller filing a paragraph of the complaint under seal. Furthermore, the Department of Justice has argued it constantly pointed out to Miller's counsel that service had not been perfected on it after the parties continued to communicate following the September 12th meeting.

It is clear, through the e-mail correspondence before the Court, that the Department[22] brought up the service issue following the breakdown in negotiations. There is, however, no e-mail record showing the service issue arising while negotiations were taking place. Miller's counsel states nothing was mentioned during the negotiations regarding service. The Department's counsel has stated the service issue was constantly addressed, even during negotiations.

There is no record of what was said at the September 12th meeting. As a result, the e-mail from Oliva serves as the meeting's only testimonial. The e-mail, which was agreed to by Miller's counsel, outlines that the Department of Justice was to accept service and plaintiff's counsel would move to file paragraph 80 under seal. Although both parties believed to be in agreement after this meeting and e-mail correspondence, once negotiations failed it became apparent the two parties had not agreed about the e-mail

[22] There are two distinct "Departments" here. The Department of Public Safety and Homeland Security is the party and client here represented by the Department of Justice. The Court views the Department of Justice's position really as representing the position of the Department of Public Safety and Homeland Security. The word "Department", to repeat, is meant to be the Department of Public Safety and Homeland Security.

meant regarding each party's role as the case moved forward. Miller's counsel maintains service was accepted on September 12th and sealing would be done by the Department, without objection from Miller. The Department argued service was contingent on the issue of sealing the complaint.

However, the narrow issue becomes whether the e-mail would lead a reasonable attorney to believe that service had been accepted by the Department. Given the unique facts surrounding this case, the Court views Miller's counsel as negligent; however, his negligence falls under excusable neglect because the e-mail is unclear as to whether service was immediately accepted at the meeting or was conditioned on the sealing of the complaint.

The Department has consistently maintained a contractual agreement was formed when Miller's attorney agreed to the September 12th e-mail. While this is one interpretation of that e-mail, the Court views that Miller could have reasonably held a different interpretation. Specifically, Miller believed service was achieved immediately following the meeting and e-mail exchange. To explain the sealing issue, Miller's counsel cites to Super. Ct. Civ. R. 5,[23] arguing the rule required that the party seeking the seal was

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[23] Super. Ct. Civ. R. 5(g):
*Sealing of Court Records*.

(2) Court Records or portions thereof shall not be placed under seal unless and except to the extent that the person seeking the sealing thereof shall have first obtained, for good cause shown, an order of this Court specifying those Court Records…or portions thereof which shall be placed under seal;…

to be the moving party to file the motion. The Court views Miller's interpretation of the e-mail to be reasonable because of the sealing rule. While the Department's interpretation of the e-mail as a *quid pro quo* agreement is also reasonable, the construction of the e-mail allows for two reasonable interpretations to be drawn from it.[24]

Because the September 12th e-mail lists the conditions of the agreement in serial fashion without any conditional language, the e-mail lacks the precise language that would make the Department's acceptance of service as dependent upon the issue of sealing by the plaintiff. The lack of clarity on this point is underscored by the language injected into the e-mails before the Court that were written following the breakdown of negotiations. The post-breakdown e-mails written by the Department's counsel employ a bargaining language that was not present in the original September 12th e-mail.[25] Because that language was absent in the first e-mail sent by the Department's counsel, the Court holds Miller's counsel could have held a good faith belief service was perfected following the conclusion of the meeting.

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[24] *AT&T Corp. v. Faraday Capital, Ltd.*, 918 A.2d 1104, 1108 (Del. 2007).

[25] "[W]e would accept service...*in exchange for*..." (Jan. 28 e-mail) (emphasis added).

"[O]ur position has repeatedly and consistently been that we will waive service of process *if, and only if*, you re-file the complaint...under seal." (Feb. 25 e-mail) (emphasis added).

"[T]he State did agree on September 12 that it would waive service if, *and only if*, Plaintiff's counsel re-filed the July 28, 2008 Complaint under seal." Def.'s Motion to Dismiss, ¶ 4.

Furthermore, there are two additional points besides the ambiguity of the September 12 e-mail which tend to favor Miller's counsel as acting within the bounds of excusable neglect: (1) State Solicitor Lewis was the person who called Miller's counsel and attended the September 12th meeting and (2) the two parties engaged in settlement negotiations with back-and-forth contacts between the two sides. While the Court is mindful that the mere presence of Lewis at the meeting does not cure any jurisdictional requirements of service of process, his presence at the meeting is a mitigating factor in favor of Miller's attorney acting within the bounds of excusable neglect. The fact that Lewis was present helps to support Miller's contention in his belief that service was either accepted on September 12th or, in the alternative, gives credence that Miller's attorney was acting under a good faith belief that service had been achieved. Although the Court is aware that the Department has stated it had reminded Miller's attorney that service had not been achieved during the negotiation phase of this case, it has not been able to document the same. Beyond the presence of Lewis, the existence of settlement negotiations are relevant in explaining why the service issue did not manifest itself earlier in the proceedings of this particular case.[26] Given Miller's belief that service had already been achieved and settlement negotiations were underway also help to underscore why Miller did not move to enlarge the period of time to serve the Department through one of the three required individuals.

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[26] *Dolan*, 707 A.2d at 37 (holding that plaintiff's involvement in settlement negotiations is a relevant consideration when a Court undertakes an excusable neglect analysis).

The Court does take note the Department's diligence in this matter, particularly following the end of negotiations, when it provided Miller's counsel with the necessary paperwork to file under seal. It also offered Miller the same conditions of the September 12th e-mail in January and February 2009. This offer was rejected by Miller, apparently because of her disappointment with failed settlement. The Court, however, will not delve into those considerations. Finally, while there are legitimate public policy concerns that the State and its agencies be properly served, the Court must also acknowledge there are potentially greater public policy reasons for allowing Miller an opportunity to advance her lawsuit on the merits.[27]

***Conclusion***

Because Miller's attorney committed excusable neglect in his attempt to perfect service pursuant to both Super. Ct. Civ. R. 4(f)(1)(IV) and 10 *Del. C.* §3103(c), the Court will grant the plaintiff 20 days from the date of this opinion to properly serve the complaint. The Department will have 20 days thereafter in which to reply.

For the reasons stated herein, Miller's motion for default judgment is **DENIED**, and the Department's motion to dismiss for improper/insufficient service is **DENIED**.

**IT IS SO ORDERED**.

J.

[27] *Id.* at 36 ("In Delaware, public policy favors permitting a litigant a right to a day in court.").