IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

SUSAN HUELSENBECK and ALLEN HUELSENBECK, husband and wife, and LORI E. HUELSENBECK-DILL and BENSON DILL, husband and wife, and LORI E. HUELSENBECK-DILL, as Guardian of ALEXANDER PARSONS, a minor,	)	C.A. No. N12C-07-216 JAP
Plaintiffs,	)	
v.	)	
CLEMENTE FERMIN-JIMENEZ and KATY HICHEZ-SABINO,	)	
Defendants.	)	

Memorandum Opinion

This case arises from a February 2011 motor vehicle accident on Delaware Route 4 (commonly known as Chestnut Hill Road) near Newark. Plaintiff Lori Huelsenbeck-Dill was driving westbound when her car was rear-ended by a vehicle operated by Clemente Fermin-Jimenez. Mr. Fermin-Jimenez was driving a car owned by defendant Katy Hichez-Sabino. According to the complaint Ms. Huelsenbeck-Dill as well as passengers Susan Huelsenbeck and Alexander Parsons (a minor) were injured. At oral argument Plaintiffs' counsel reported that their injuries were of the soft tissue variety, with the exception that a chiropractor

treating one of the plaintiffs is contemplating recommending his patient to a physician for possible surgery.

The issue before this court is whether the court should excuse Plaintiffs' failure to serve the defendants. The following chronology lists Plaintiffs' efforts to effect service:

- July 18, 2012 — Suit filed
- August 27, 2012 — Counsel enters appearance for defendants; no answer filed.
- September 5, 2012 — Summons returned *non est* as to both defendants
- November 12, 2012 — Plaintiffs move for extension of time
- December 11, 2012 — Defendants' counsel provides last known addresses of defendants.
- December 12, 2012 — Court grants 60 day extension
- February 11, 2013 — Plaintiffs file praecipe
- March 6, 2013 — Defendants move to dismiss
- March 19, 2013 — Plaintiffs move for extension of time

Rule 4(j) provides that "[i]f a service of the summons and complaint is not made upon a defendant within 120 days after 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."[1] Plaintiffs, who have yet to serve Defendants, concede that

[1] Emphasis added.

they have not met the 120 day deadline as extended by the court. The sole issue under Rule 4 is whether Plaintiffs can show good cause why service has not been made.

Rule 4 does not define "good cause", but the term has been interpreted as something akin to excusable neglect. In *Dolan v. Williams*[2] the Delaware Supreme Court had this to say about the issue:

> While "good cause" is not defined within the rule, it has been interpreted by Federal Courts to require a showing of excusable neglect, by a demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance within the time specified in the rules. That is, by showing neglect which might have been the act of a reasonably prudent person under the circumstances.[3]

The record here shows an almost complete lack of diligence by Plaintiffs. They learned that the writs of summons had both been returned *non est* in early September, yet they did nothing for more than two months, until mid-November, when they asked the court for an extension, which the court granted when the motion was presented. On December 11 Defendants' counsel tried to assist Plaintiffs' counsel by sending him the last known addresses of the Defendants. For another two months Plaintiffs did nothing until they filed a praecipe (using the addresses given to them by Defendants' counsel) on February 11, the last day to complete (not initiate) service under the court's December

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[2] 707 A.2d 34 (Del. 1998).

[3] *Id.* at 36 (footnotes and internal quotation marks omitted)

extension. Now, one month shy of a year after the case was filed, neither of the defendants has been properly served.

It is difficult to find any justification for Plaintiffs' counsel's inactivity. At oral argument Plaintiffs' counsel candidly admitted there is none. He did tell the court that Plaintiffs had retained a private investigator, but he did not know the investigator's name or when the investigator was retained. In addition to the lack of diligence on counsel's part, the court is concerned about a representation made by Plaintiff's counsel. In a May 31 letter to the court (the last business day before the 9 a.m. oral argument on these motions) counsel told the court "Attached to this letter response is an Affidavit of Service which proves that the Defendant, Katy Hichez-Sabino has been served by Plaintiffs." The affidavit is titled "Affidavit of Service Pursuant to 10 Del. C. section 3104 (d)(3)." The affidavit recites that defendant Hichez-Sabino received a certified letter at her Delaware address near Newark. The court pointed out to Plaintiffs' counsel that section 3104 relates only to service upon defendants residing outside the state, and counsel conceded that, in fact, no service had taken place.

Important here is the strong public policy favoring resolving cases on their merits. That policy has been referenced in countless judicial opinions, most recently in *Drejka v. Hitchens Tire Service, Inc.*[4] and its progeny. *Drejka* and the cases that follow teach that this policy requires

[4] 15 A.3d 1221 (Del. 2010)

that before imposing a discretionary sanction which may ultimately be case dispositive (e.g. excluding an expert for late identification) a trial court must first consider whether lesser sanctions will protect the innocent party while preserving the miscreant party's right to it day in court.

A common thread among those cases is that the trial court was making a *discretionary* decision. But having found in the instant case that Plaintiff has not shown due diligence in attempting to serve defendants and therefore has not shown "good cause" for his failure to do so, the court has no option but to dismiss the case. Rule 4(j) leaves no room for the imposition of a lesser sanction; rather the rule commands that the "action shall be dismissed."

Plaintiff also presented a motion for an extension of time in which to serve defendants. If timely filed, such a motion would be addressed to the court's discretion. The court will not consider a motion for an extension of time to serve defendants after the time for such service has expired. If it were to do so, the requirements of Rule 4(j) would be rendered meaningless. In *Doe v. Catholic Diocese of Wilmington, Inc.*[5]this court was confronted with the argument that the absence of prejudice to the defendant is sufficient to excuse the failure to make timely service. The court disagreed, reasoning that such a ruling would eviscerate Rule 4 by ignoring its plain language:

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[5] 2010 WL 2106181 (Del. Super.)

> Stated another way, a plaintiff who did nothing at all to accomplish service could avoid the effects of the Rule merely by alleging prejudice, which would *always* arise from the dismissal of a defendant. Not only does the law in Delaware not allow prejudice to be the single guiding factor, but our decisional law does not excuse any non-compliance with the jurisdictional requirements on that basis alone, as to do so would effectively emasculate Rule.[6]

By the same token, allowing a Plaintiff to circumvent the required showing good cause simply by filing an untimely motion for an extension would effectively render that requirement in Rule 4 a nullity.

At oral argument Plaintiff raised the possibility that the savings statute found in 10 *Del. Code* section 8118 might allow Plaintiff to re-file this matter. The court mentioned, without benefit of written argument, that section 8118 might not apply. In retrospect (and with the benefit of its own later research) the court concludes that its analysis during its colloquy with Plaintiff's counsel was woefully incomplete. The court therefore repeats what it told counsel at the time—its musings on the applicability of section 8118 were not intended as a ruling. Likewise, nothing in this opinion is intended as an opinion on that matter.

Defendants' motion to dismiss is **Granted** and Plaintiffs' motion for an extension of time is **DENIED.** Plaintiffs' motion to appoint a special process server is **DENIED** as **MOOT.**

Dated: June 7, 2013

John A. Parkins, Jr.

[6] *Id.* at *5