IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

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| JAMES HALL, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | C.A. No. 02C-03-264-JRJ |
| | ) | |
| BELL ATLANTIC-DELAWARE, INC., | ) | |
| | ) | |
| Defendant. | ) | |

Date Submitted: November 7, 2002
Date Decided: November 15, 2002

M E M O R A N D U M  O P I N I O N

*Application for Certification of Interlocutory Appeal* - ***DENIED***

Michael I. Silverman, Esquire, Silverman & McDonald, 1010 North Bancroft Parkway, Suite 22, Wilmington, Delaware 19805, for Plaintiff.

J.R. Julian, Esquire, J.R. Julian, P.A., 824 Market Street, P.O. Box 2171, Wilmington, Delaware 19899, for Defendant.

JURDEN, J.

Defendant, Bell Atlantic-Delaware Incorporated ("Bell Atlantic"), filed an Application for Certification of an Interlocutory Appeal, pursuant to Supreme Court Rule 42, following this Court's October 16, 2002 Order which denied the defendant's Motion to Dismiss, denied the Plaintiff's Motion for Default Judgment, and granted the plaintiff an additional sixty (60) days to effectuate service of process on the defendant.[1] The defendant argues that "the Court erred in not dismissing the [plaintiff's] Complaint for lack of jurisdiction due to insufficiency of service of process."[2] The defendant further argues that "[i]n doing so, the Court determined substantial issues and established legal rights" and that "review of the Interlocutory Order may terminate the litigation or otherwise serve considerations of justice."[3] For the reasons that follow, the defendant's application is **DENIED**.

## BACKGROUND

This case has a rather long and tortured procedural history.

On March 27, 2002, the plaintiff filed a "Huffman Suit"[4] against the defendant seeking overdue worker's compensation payments. The Praecipe directing service of process instructed the Sheriff of New Castle County to serve Gilbert H. Smith, Jr. ("Smith"), an individual who the defendant alleges at the time of service was no longer the registered agent of the defendant corporation. On April 5, 2002, pursuant to title 8, section 321 of the Delaware Code, the Sheriff served the Complaint on Bell Atlantic at 901 North Tatnall Street, Wilmington, Delaware by serving Ms. Fatima Moore ("Moore"), a security guard, who was located at the

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[1] *See Hall v. Bell Atlantic-Delaware, Inc.,* Del. Super., C.A. No. 02C-03-264, Jurden, J. (Oct. 16, 2002) (Order).

[2] Def.'s Application Certification Interlocutory Appeal ¶ 12, *Hall v. Bell Atlantic-Delaware, Inc.*, Del. Super., C.A. No. 02C-03-264 JRJ (No. 31).

[3] *Id.*

[4] *See Huffman v. C.C. Oliphant*, 653 A.2d 1207 (Del. 1981).

security post at the entrance to the defendant's office.[5]

The defendant filed no responsive pleading. On May 13, 2002, the plaintiff filed and served a Motion for Default Judgment. The Notice of Motion accompanying the motion stated that the plaintiff would present the motion on May 29, 2002.[6] On June 4, 2002, defendant filed a Motion to Dismiss for lack of jurisdiction due to insufficiency of service of process. In its motion, the defendant argued that, at the time of service, Gilbert Smith was no longer the defendant's registered agent and that Moore "is not a Bell employee and is not authorized to accept service on behalf of [defendant]. Rather, Ms. Moore is an employee of Pinkerton-Burns Security Services, an entirely separate corporate entity."[7] The plaintiff argued that Moore had apparent authority to accept service of the Complaint. On June 10, 2002, the plaintiff filed a motion seeking leave to depose Moore to establish her agency relationship with the defendant. On June 19, 2002, the Court granted the plaintiff's motion[8] and the plaintiff deposed Moore on June 21, 2002.

On June 26, 2002, the plaintiff filed a response to the defendant's Motion to Dismiss alleging that Moore's testimony established that the April 5, 2002 service on the defendant was effective under the doctrine of apparent authority. In her deposition, Moore testified that she was instructed by Phyllis Adams, a Bell Atlantic employee and secretary to Mr. Joshua Martin, an officer of Bell Atlantic, to "call up to Phyllis Adams and ask her if I'm allowed to take [papers

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[5] On June 10, 2002, the plaintiff issued an Alias Praecipe, directing the Sheriff to serve Gilbert H. Smith, Jr. *See*, Def.'s Application Certification Interlocutory Appeal ¶ 8.

[6] The Hearing on Plaintiff's Motion for Default Judgment was continued to August 7, 2002. The motion was renoticed.

[7] Bell Atlantic-Delaware Inc.'s Motion to Dismiss. The defendant alleged that "the first notice Bell received of the Complaint was the Motion for Entry of Default Judgment." *Id.* at 2.

[8] *Hall v. Bell Atlantic-Delaware, Inc.*, Del. Super., C.A. No. 02C-03-264 JRJ, Jurden, J. (June 19, 2002) (Order) (granting plaintiff leave to take Moore's deposition).

meant for Bell Atlantic], and she tells me to go ahead.' Ms. Adams will then pick up the deliveries."[9]

This Court heard oral argument on the Motion for Default Judgment and the Motion to Dismiss on August 7, 2002. On October 16, 2002 the Court denied the plaintiff's Motion for Default Judgment, denied the defendant's Motion to Dismiss, and granted the plaintiff an additional sixty (60) days to effectuate service on the defendant.[10] Counsel for Bell Atlantic

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[9] *Id.*

[10] The Court and plaintiff's counsel discussed at the August 7, 2002 hearing what the Court anticipated in the wake of this ruling:

> THE COURT: So you have 60 days to serve Corporation Trust.
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> * * *
>
> MR. SILVERMAN: Is not a better way to short-circuit this is to simply deny both motions, have the defendant corporation respond to the complaint absent service defenses, but not absent any other defenses which they may feel are applicable?
>
> I don't really understand, given where we are procedurally, the benefit to the defendant—I don't mean to stand in their shoes –
>
> THE COURT: Of making you go through formal service?
>
> MR. SILVERMAN: -- of having a third attempt at service. Because I can tell you—
>
> THE COURT: What I expect will happen is Mr. Julian will talk to his client, and his client will realize that's needless jumping through hoops, and he will get authorization to accept service. That's my hope. I mean—
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> * * *
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> THE COURT: I've given him the additional 60 days with the hope that perhaps his client would say, All right, we have insisted that they follow the rules; the Court has ruled in our favor insofar as they're making them re-serve, but now we can dispense with the formalities and get on with it.
>
> But I'm not going to tell your Client they have to do that. They're perfectly entitled to require you to effectuate service.

Tr. *Hall v. Bell Atlantic-Delaware, Inc.*, Del. Super., C.A. No. 02C-03-264 JRJ, Jurden, J. (Aug. 7, 2002) (Transcript). *See also, Hall,* Del. Super., C.A. No. 02C-03-264, Jurden, J. (Oct. 16, 2002) (Order).

refused to accept service of the Complaint. Consequently, on August 20, 2002, the plaintiff issued a First Pluries Summons directing the Sheriff to serve the Complaint on Corporation Trust Co., the current registered agent for the defendant. Service on Corporation Trust was effectuated on August 21, 2002, more than 120 days after the Complaint was filed.

**DISCUSSION**

Supreme Court Rule 42 governs certification of interlocutory appeals. It provides in pertinent part:

> No interlocutory appeal will be certified by the trial court or accepted by this Court unless the order of the trial court determines a substantial issue, establishes a legal right and meets 1 or more of the following criteria:
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> * * * *
>
> (v) Case dispositive issue. A review of the interlocutory order may terminate the litigation or may otherwise serve considerations of justice.[11]

"Interlocutory appeals will only be accepted where there are important and urgent reasons for an immediate determination by the Supreme Court."[12] "The denial of a motion to dismiss a complaint is an interlocutory order and, as such, is not appealable unless it has determined substantial legal rights."[13]

The Order sought to be certified for interlocutory appeal does not meet the criteria for certification under Supreme Court Rule 42. The legal issue involved in this dispute is whether the plaintiff is entitled to damages as a result of the defendant's alleged failure to comply with

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[11] DEL. SUPR. CT. R. 42(b)(v).

[12] DVI Financial Services, Inc. v. Imaging Management Associates, Inc., Del. Super., C.A. No. 95C-01-238, Del Pesco, J. (April 13, 1995) (Order) (citing *State Farm Mutual Automobile Ins. Co. v. Nalbone*, Del. Supr., No 494, 1988, Christie, C.J. (Jan. 10, 1989)).

[13] *Wilmington Medical Center, Inc. v. Coleman*, 298 A.2d 320, 322 (Del. 1972).

the Industrial Accident Board's May 1, 2000 Order granting plaintiff compensation, attorney's fees and other damages.[14] This Court has not yet considered this legal issue and therefore has made no determination in this regard. The only determination this Court has made is that the plaintiff presented good cause for his failure to serve the defendant within 120 days. Consequently, the Court refused to dismiss the Complaint. The "good cause" is plaintiff's reasonable belief, based on Moore's conduct and supported by her testimony, that Moore was authorized to accept service on behalf of Bell Atlantic.

This Court's decision to grant the plaintiff an additional sixty (60) days to effectuate service of process on the defendant was made pursuant to Superior Court Civil Rule 4(j),[15] after plaintiff's counsel established that the plaintiff had good cause to believe that Moore had the authority to accept service on behalf of the defendant. The Court's decision to give the plaintiff more time to serve the Complaint is not a determination of "substantial issue." The decision to allow the plaintiff additional time to effectuate service, under the circumstances presented, is a matter for the Court's discretion and does not constitute a determination of substantial legal

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[14]*Hall v. Bell Atlantic-Delaware, Inc.*, Indus. Accident Bd., No. 1089683 (May 1, 2000). *See also,* Pl.'s Super. Ct. Compl. ¶ ¶ 7-9.

[15] Delaware Superior Court Civil Rule 4(j) provides:

> 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.

rights.[16] Accordingly, Bell Atlantic's Application for Certification of an Interlocutory Appeal is **DENIED**.

**IT IS SO ORDERED.**

Jan R. Jurden, Judge

[16] *See e.g., Anticaglia v. Benge*, Del. Super., C.A. No. 99C-04-341-WTQ, Quillen, J. (Jan. 20, 2000):

> The public policy of this State favors permitting a litigant his or her day in Court. There are, however, limits. But, this Court has discretion to allow service beyond the 120-day limit for good cause, and the Rule seeks to balance the need for speedy, just and efficient litigation with a desire to provide litigants their right to a day in Court.