

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

JAMES N. SIDBERRY and)
TEREENA SIDBERRY,)

Plaintiffs,)

v.)

C.A. No. N18C-11-200 JRJ

GEICO ADVANTAGE INSURANCE)
COMPANY, CITY OF WILMINGTON,)
WILMINGTON POLICE)
DEPARTMENT, LAWRENCE A.)
JOSEFYK, ROBERT O. WRIGHT, and)
DEIANTAY DAVIS,)

Defendants.)

MEMORANDUM OPINION

Date Submitted: September 13, 2019

Date Decided: November 20, 2019

*Upon Defendants City of Wilmington, Lawrence A. Josefyk, Robert O. Wright, and
GEICO Advantage Insurance Company's Motion to Dismiss and Vacate Order:*

GRANTED.

Michael B. Galbraith, Esquire, Cooch & Taylor P.A., 1007 N. Orange Street, Suite 1120, Wilmington, Delaware 19899, Attorney for Plaintiffs.

Kelley M. Huff, Esquire, Murphy & Landon, 1011 Centre Road, Suite 210, Wilmington, Delaware 19805, Attorney for Defendants City of Wilmington, Wilmington Police Department, Lawrence A. Josefyk, and Robert O. Wright.

Erin K. Radulski, Esquire, Law Office of Dawn L. Becker, Citizens Bank Center, 919 Market Street, Suite 550, Wilmington, Delaware 19801, Attorney for Defendant GEICO Advantage Insurance Company.

Jurden, P.J.

I. INTRODUCTION

Plaintiffs James N. Sidberry and Tereena Sidberry filed suit in this Court against Defendants GEICO Advantage Insurance Company, City of Wilmington, Wilmington Police Department, Lawrence A. Josefyk, Robert O. Wright, (collectively “Moving Defendants”) and Deiantay Davis¹ alleging personal injuries arising from a motor vehicle collision. Moving Defendants filed a motion to dismiss Plaintiffs’ Complaint because they were not served within 120 days as required by Superior Court Civil Rule 4(j) and to vacate a Court order enlarging the time for service.² For the reasons explained below, Moving Defendants’ Motion is **GRANTED.**

II. BACKGROUND

Plaintiffs filed their Complaint on November 24, 2018.³ More than five months later, on May 3, 2019, the Prothonotary wrote to Plaintiffs’ counsel requesting a status update on the case due to inactivity on the docket.⁴ It was not

¹ The Court granted a motion for default judgment against Defendant Deiantay Davis on November 6, 2019 (Trans. ID. 64392391).

² Defendants’ City of Wilmington, Lawrence A. Josefyk, and Robert O. Wright Motion to Dismiss the Complaint and to Vacate Order (“Mot. Dismiss”), (Trans. ID. 63537540); Defendant GEICO’s Motion to Dismiss the Complaint, Vacate Order and Joinder (“GEICO Mot. Dismiss”), (Trans. ID. 63544605).

³ Mot. Dismiss ¶ 1.

⁴ Case Status Letter (Trans. ID. 63226184) (“[I]t appears this matter cannot proceed because either service of process or answer is lacking, a default judgment needs to be entered, or an arbitration hearing has not been completed. Please check your file and report back to the court on the status of this case by May 20, 2019. Failure to comply may result in the Court dismissing this action.”).

until this point that Plaintiffs' counsel realized that the required paper service copies had not been delivered to the Prothonotary⁵ and the Moving Defendants had not been served pursuant to Rule 4(j).⁶ On May 8, 2019 (166 days after the Complaint was filed), Plaintiffs filed a Motion to Enlarge Time for Service of Process. In that Motion, Plaintiffs told the Court:

On November 24, 2018, writs were issued to the Sheriffs of Kent and New Castle Counties to serve the Defendants. To date, no response has been filed regarding whether Defendants were served by the Sheriffs of Kent and New Castle Counties.⁷

On May 9, 2019, the Court granted Plaintiffs' motion on the papers and extended the time for service upon Defendants by an additional 120 days from the date of the Order.⁸ On June 10, 2019, the Prothonotary issued writs to the Sheriffs of Kent and New Castle Counties for service,⁹ and on June 28, 2019, Plaintiffs completed service on the Moving Defendants.¹⁰

⁵ See Super. Ct. Civ. R. 3 (“[A]n action is commenced by filing with the Prothonotary a complaint . . . and a praecipe directing the Prothonotary to issue the writ specified therein. Sufficient copies of the complaint shall be filed so that one copy can be served on each defendant as hereafter provided.”); see also Admin. Directive No. 2007-6 (Del. Super. Ct. Dec. 13, 2007) (“[A] paper copy of any praecipe, CIS (case information statement), complaint and summons shall be filed [with the Prothonotary] to facilitate service of process, with additional copies for service as required by the Rules.”).

⁶ September 13, 2019 Hearing Transcript (“Hr’g Tr.”) at 12 (“I believe it was . . . [when] the civil case manager . . . reached out that I realize[d] I had not actually gotten [the service copies] out yet . . .”).

⁷ Mot. Dismiss, Ex. B Motion to Enlarge Time ¶ 2.

⁸ Order (Trans. ID. 63248238); see Hr’g Tr. at 4–5.

⁹ Mot. Dismiss ¶ 2.

¹⁰ Sheriff’s Returns (Trans. ID. 63482723, 63482724, 63483592, 63497254, 63497255).

On July 11, 2019, Defendants City of Wilmington, Wilmington Police Department, Lawrence A. Josefyk, and Robert O. Wright filed the instant Motion seeking to dismiss Plaintiffs' Complaint and vacate the May 9, 2019 Order. Shortly thereafter, Defendant GEICO Advantage Insurance Company joined the Motion.¹¹ The Moving Defendants argue that because Plaintiffs failed to perfect service within 120 days of the filing of the Complaint and failed to show good cause for their failure to timely serve, the May 9, 2019 Order extending Plaintiffs' time for service must be vacated and the Complaint dismissed.¹²

In their written response to this Motion, Plaintiffs do not identify any efforts they undertook to accomplish service within the original 120-day time period, nor do they articulate specific facts establishing good cause.¹³ At the September 13, 2019 hearing on this Motion, the Court noted that Plaintiffs' Motion to Enlarge Time for Service did not contain an explanation as to why service was not perfected as of May 8, 2019, and asked Plaintiffs' counsel to provide an explanation.¹⁴ Plaintiffs' counsel responded:

[I]t was difficulty just getting [the service copies of the Complaint and initial filings] in. This was not a run of the mill type of case or pleadings, 12 separate copies of - - service copies of the [C]omplaint and initial filings to go out were serviced through, I think, three separate

¹¹ GEICO Mot. Dismiss.

¹² *Id.* ¶ 3; Mot Dismiss ¶ 3.

¹³ *See* Plaintiffs' Response to Defendants' Motion to Dismiss the Complaint and Vacate Order ("Pls. Resp."), (Trans. ID. 64182169).

¹⁴ Hr'g Tr. at 11.

avenues, the City of Wilmington defendants, the GEICO defendant and the individual defendant Mr. Davis in this case.

And being, at that point, a new law firm without much support staff, it literally took me - - I know there was two different attempts just trying to get this out of the office with the appropriate checks for it I wish I had a great excuse about, you know, typically in these types of scenarios, it is an issue about a defendant who had moved or couldn't be located, service came back *non est*, some of those things happened later on.

It was pure back office issues for me and navigating a new firm, new space, mostly on my own, and, well, that's pretty much it.¹⁵

In short, Plaintiffs' counsel contends that his failure to serve the Moving Defendants within the initial 120-day period was attributable to the difficulty of providing paper service copies for the numerous defendants, and because he had recently changed law firms and did not have much support staff.¹⁶ The Moving Defendants argue this explanation does not establish good cause, and therefore, the May 9, 2019 Order must be vacated and the claims against them dismissed pursuant to Rule 4(j).¹⁷

III. STANDARD OF REVIEW

Superior Court Civil Rule 4(j) allows service to be perfected after the 120-day required period only if the requesting party shows 'good cause' why service was not

¹⁵ Hr'g Tr. at 11-13.

¹⁶ *Id.*

¹⁷ *Id.* at 14.

made within 120 days.¹⁸ Although Rule 4(j) does not define “good cause,” Delaware courts interpret good cause to require a showing of excusable neglect, meaning a showing of ‘good faith’ and a ‘reasonable basis for noncompliance.’¹⁹ Excusable neglect is neglect which might have been the act of a reasonably prudent person under the circumstances,²⁰ such that a plaintiff’s failure to obtain service within 120 days of filing arose in spite of the plaintiff making *all possible efforts* to comply with Rule 4.²¹ However, “delays resulting from half-hearted efforts by counsel to perfect service do not.”²² Mere negligence without a valid reason is not sufficient to constitute excusable neglect.²³ “A plaintiff cannot rely on the prejudice they will suffer if their claims are dismissed as a substitute for good cause, nor can a plaintiff rely on lack of prejudice to a defendant.”²⁴

Delaware public policy favors permitting a litigant their day in court, and Rule 4(j) seeks to balance the need for speedy justice, efficient litigation, and resolving

¹⁸ *Ballard v. Takeda Pharm. Am., Inc.*, 2017 WL 3396488, at *3 (Del. Super. Ct. Aug. 7, 2017) (quotations omitted).

¹⁹ *Id.* (quotations omitted) (quoting *Dominic v. Hess Oil VI. Corp.*, 841 F.2d 513, 517 (3d Cir. 1988)).

²⁰ *Cohen v. Brandywine Raceway Assoc.*, 238 A.2d 320, 325 (Del. Super. Ct. 1968) (quotations omitted).

²¹ *Doe v. Catholic Diocese of Wilmington, Inc.*, 2010 WL 2106181, at *2 (Del. Super. Ct. May 26, 2010) (quotations omitted) (emphasis added).

²² *Ballard*, 2017 WL 3396488, at *4 (internal quotations omitted) (quoting *Anticaglia v. Benge*, 2000 WL 145822, at *2 (Del. Super. Ct. Jan. 20, 2000)).

²³ *Dishmon v. Fucci*, 32 A.3d 338, 346 (Del. 2011); *see also Anticaglia*, 2000 WL 145822, at *2.

²⁴ *Ballard*, 2017 WL 3396488, at *4 (first citing *Catholic Diocese*, 2010 WL 2106181, at *5; and then *DeSantis v. Chilkotowsky*, 877 A.2d 52, 2005 WL 1653640, at *2 (Del. 2005) (TABLE)).

claims on the merits.²⁵ However, Rule 4(j) mandates dismissal where a plaintiff cannot show good cause.²⁶ Whether a plaintiff's failure to comply under Rule 4(j) constitutes excusable neglect (and therefore good cause) is a matter of judicial discretion.²⁷

IV. DISCUSSION

The question before the Court is not whether the record demonstrates neglect, but whether the neglect is excusable.

A. Plaintiffs Fail to Demonstrate Excusable Neglect for Their Failure to Serve Defendants Within 120 Days.

Moving Defendants argue dismissal is required based on the following cases. In *Doe v. Catholic Diocese of Wilmington, Inc.*, the plaintiff failed to offer any explanation as to why she did nothing to complete service upon the defendant in the four-month period following the filing of the complaint.²⁸ The Court dismissed the complaint, finding that the plaintiff's lack of diligence and non-existent explanation for her failure to perfect service did not constitute good cause under Rule 4(j).²⁹ The

²⁵ *Ballard*, 2017 WL 3396488 at *3 (citing *Dolan v. Williams*, 707 A.2d 34, 36 (Del. 1998)); see also *Anticaglia*, 2000 WL 145822, at *2.

²⁶ See Super. Ct. Civ. R. 4(j) (“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 . . .”).

²⁷ *Catholic Diocese*, 2010 WL 2106181, at *2.

²⁸ *Id.* at *3.

²⁹ *Id.* (“Not only were [plaintiff’s] action not reasonable—as is required for a finding of ‘good cause’—but they were non-existence. This is certainly neglect, but it is hardly of the excusable kind.”).

Court held that the plaintiff did not make “all possible efforts” to effect timely service of process where plaintiff took no action, even though she knew where the defendant resided at the time the complaint was filed, and never sought an extension of time to perfect service.³⁰

In *Huelsenbeck v. Fermin-Jimenez*, the plaintiffs filed suit on July 18, 2012 and the writs of summons were returned *non est* on September 5, 2012.³¹ For two months the docket was dormant.³² On November 12, 2012, the plaintiffs filed a motion for an extension of time to serve the defendants, which was granted.³³ Then, on February 11, 2013—two months after the Court granted the extension, the plaintiffs filed a praecipe on the last day to complete service under the Court’s extension.³⁴ The plaintiffs failed to serve the defendants within the extended time period and moved for a second extension citing no explanation for plaintiffs’ counsel’s inactivity or lack of diligence.³⁵ The Court in *Huelsenbeck* found that the plaintiffs failed to show good cause for their untimely motion, and consequently, plaintiffs could not avoid dismissal under Rule 4(j).³⁶

³⁰ *Catholic Diocese*, 2010 WL 2106181, at *2.

³¹ 2013 WL 2481533, at *1 (Del. Super. Ct. June 7, 2013).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at *1–2.

In *Ballard v. Takeda Pharmaceuticals America, Inc.*, the plaintiff filed the complaint on October 21, 2016, and five months later, learned of their failure to serve the defendants.³⁷ On April 21, 2017—183 days after filing the complaint—the plaintiff filed a motion to enlarge time for service of process.³⁸ When the Court questioned plaintiff’s counsel as to how something like this could have happened, counsel replied that it was “an honest, good faith mistake” and he “tried to make service.”³⁹ The Court in *Ballard* found plaintiff’s counsel’s explanation “troubling” and unsatisfactory, and denied the motion for failure to show good cause.⁴⁰ The Court explained that plaintiff’s counsel should have been aware service was not perfected when, for six months, the only entry on the docket was the complaint—the Prothonotary did not issue any writs, the Sheriff did not file any Sheriff’s Returns, and the defendants did not file an answer or a motion to dismiss.⁴¹

As noted, to demonstrate excusable neglect, the movant must show good faith and a reasonable basis for noncompliance with Rule 4(j).⁴² Here, more than five months elapsed before Plaintiffs’ counsel even realized that none of the Defendants had been served. As in *Catholic Diocese of Wilmington, Inc.*, here, Plaintiffs’

³⁷ *Ballard*, 2017 WL 3396488, at *2.

³⁸ *Id.*

³⁹ *Id.* at *3.

⁴⁰ *Id.* at *6, 7 (“[W]hat is troubling in this case is not that a mistake occurred, but that there were multiple opportunities where counsel should have figured out that something had gone awry.”).

⁴¹ *Id.* at *3, 5.

⁴² *Dominic*, 841 F.2d at 517.

counsel took no steps to effect service upon the Moving Defendants for several months, and did not promptly comply with Superior Court Civil Rules 3 and 4 and Administrative Directive Number 2007-6. In addition, similar to *Huelsenbeck*, Plaintiffs' counsel cites no reasonable explanation for his lack of diligence in perfecting service. As in *Ballard*, the docket in this case was dormant for several months, and the only entry was Plaintiffs' Complaint. The Prothonotary had not issued any writs, the Sheriffs had not filed any Sheriff's Returns, and none of the Defendants had filed an answer or a motion to dismiss. And, as Moving Defendants correctly note and Plaintiffs' counsel concedes, this is not a case where the Moving Defendants were evading service or Plaintiffs could not locate their residences or registered agents.⁴³

The facts in this case are analogous to those in *Catholic Diocese of Wilmington, Inc.*, *Huelsenbeck*, and *Ballard*. Plaintiffs' counsel's argument that his failure to perfect service within the initial 120-day period was because of "pure back office issues" and the number of paper service copies required to serve Defendants is not persuasive. The record is undisputed that Plaintiffs took no action for 166 days after filing the Complaint to follow up on the status of service upon the Defendants. Plaintiffs' counsel admits it was not until the Prothonotary filed a case

⁴³ See Hr'g Tr. 6, 13.

status letter that he realized service was not perfected upon any of the Defendants.⁴⁴ That is to say, counsel's attention was drawn to the failure to provide paper service copies and lack of service only because the Prothonotary noticed the lack of activity in the docket and alerted him. The record demonstrates that Plaintiffs' counsel did not make any effort (much less "all possible efforts") to effect timely service of process within the initial 120-day period and did not seek an extension before the expiration of the initial 120-day period. The Court cannot find under these circumstances that Plaintiffs have shown the requisite good cause to establish excusable neglect.

B. The May 9, 2019 Order Must be Vacated.

Moving Defendants seek to vacate the May 9, 2019 Order pursuant to Superior Court Civil Rule 60(b) on the basis that Plaintiffs' Motion to Enlarge Time for Service failed to show good cause and the writs had in fact not been issued to the Sheriffs on November 24, 2018 as Plaintiffs' motion mistakenly stated.⁴⁵ Plaintiffs' Motion to Enlarge Time for Service of Process was filed on May 8, 2019. As noted above, Plaintiffs represented to the Court in that motion:

On November 24, 2018, writs were issued to the Sheriffs of Kent and New Castle Counties to serve the Defendants. To date, no response has been filed regarding whether Defendants were served by the Sheriffs of Kent and New Castle Counties.⁴⁶

⁴⁴ *Id.* at 12.

⁴⁵ Mot. Dismiss ¶ 8.

⁴⁶ *Id.*, Ex. B Motion to Enlarge Time ¶ 2.

Based on these statements, the Court granted Plaintiffs' motion, and allowed Plaintiffs an additional 120 days to serve the Defendants. A review of the record, however, indicates that the Prothonotary had *not* issued writs to the Sheriffs as of May 8, 2019. It was not until June 10, 2019—well after the 120-day period had lapsed and after Plaintiffs' counsel filed the Motion to Enlarge Time for Service—that the writs were issued.⁴⁷ To be clear, as of May 8, 2019, the day Plaintiffs' counsel filed the Motion to Enlarge Time for Service, writs had not been issued to the Sheriffs, and apparently Plaintiffs' counsel had not yet delivered paper service copies to the Prothonotary pursuant to Rule 3.⁴⁸ The Court entered the May 9, 2019 Order under the mistaken impression that Plaintiffs had taken the necessary steps to effect service. The Court was wholly unaware Plaintiffs had taken no action to comply with Rule 4(j)⁴⁹ and thus, there was no good cause for the 120-day extension.⁵⁰

Rule 60(b)(1) allows the Court to “relieve a party . . . from a final judgment, order, or proceeding” for reasons that include “mistake, inadvertence, surprise, or

⁴⁷ Writs (12) Issued on June 10, 2019, (Trans. ID. 63349324).

⁴⁸ *Id.*; Hr'g Tr. at 12; *see* Super. Ct. Civ. R. 3 (“[A]n action is commenced by filing with the Prothonotary a complaint . . . and a praecipe directing the Prothonotary to issue the writ specified therein. Sufficient copies of the complaint shall be filed so that one copy can be served on each defendant as hereafter provided.”).

⁴⁹ *See Catholic Diocese*, 2010 WL 2106181, at *5 (“If total inaction were to constitute a good faith effort, Rule 4 would be rendered meaningless.”).

⁵⁰ Super. Ct. Civ. R. 6 (Permitting the Court to order an enlargement of time where the moving party demonstrates excusable neglect).

excusable neglect”⁵¹ The record shows, contrary to Plaintiffs’ representation, that the Prothonotary did *not* issue writs on November 24, 2018. Consequently, the May 9, 2019 Order is vacated on the basis of mistake.

D. Plaintiffs Cannot Rely on Public Policy or Lack of Prejudice to Defendants as a Substitute for Good Cause.

Like the plaintiffs in *Huelsenbeck*, Plaintiffs here argue the Court must consider the *Drejka*⁵² factors before imposing a discretionary sanction which may ultimately result in dismissal of a case because Delaware public policy favors resolving cases on its merits. As the Court noted in *Huelsenbeck*,

Drejka and the cases that follow teach that this policy requires 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 in court.

A common thread among those cases is that the trial court was making a *discretionary* decision. . . . Rule 4(j) leaves no room for the imposition of a lesser sanction; rather the rule commands that the ‘action shall be dismissed.’⁵³

⁵¹ Super. Ct. Civ. R. 60(b)(1).

⁵² *Drejka v. Hitchens Tire Service, Inc.*, 15 A.3d 1221, 1224 (Del. 2010) (The Court must consider six factors before dismissing a case for a procedural default: (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the [opponent's] failure to meet [court] orders; (3) a history of dilatoriness; (4) whether the lapse was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, including alternative sanctions; and (6) the claim's merit).

⁵³ *Huelsenbeck*, 2013 WL 2481533, at *2; *see also Ellis v. Davis* 1997 WL 527941, at *5 (Del. Super. Ct. July 22, 1997) (“The Court should and does seek to decide cases on their merits. But a policy in favor of deciding cases on their merits does not permit either the parties or the Court to disregard the law of civil procedure and professional responsibility without colorable excuse. Plaintiffs bear the burden of showing that their failure to comply with the procedural requirements is excusable”).

Here, having found that Plaintiffs' counsel has not shown good cause for the failure to timely serve the Moving Defendants, the Court has no option but to dismiss the case against Moving Defendants pursuant to Rule 4(j).

Plaintiffs argue that Moving Defendants fail to allege any prejudice from the delay in service. Even, assuming *arguendo*, this is correct, the Delaware Supreme Court and the Superior Court have consistently rejected this argument in circumstances similar to those here.⁵⁴ The Delaware Supreme Court held in *DeSantis v. Chilkotowsky*, “there is nothing in the rule that excuses noncompliance when it is alleged that a defendant is not prejudiced by the failure of service.”⁵⁵ And, as the Court noted in *Catholic Diocese of Wilmington, Inc.*,

[I]f all that need be shown by a plaintiff to avoid dismissal were prejudice, then there would be no use for any rule: all plaintiffs in all circumstances would have an unlimited amount of time to perfect service of process. . . .

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 non-compliance with the jurisdictional requirements on that basis alone, as to do so would effectively emasculate the Rule.⁵⁶

⁵⁴ See *Anticaglia*, 2000 WL 145822, at *3; *Catholic Diocese*, 2010 WL 2106181, at *5; *Huelsenbeck*, 2013 WL 2481533, at *2 (“[A]llowing a Plaintiff to circumvent the required showing of good cause simply by filing an untimely motion for an extension would effectively render that requirement in Rule 4 a nullity.”).

⁵⁵ 2005 WL 1653640, at *2 (Del. 2005) (TABLE).

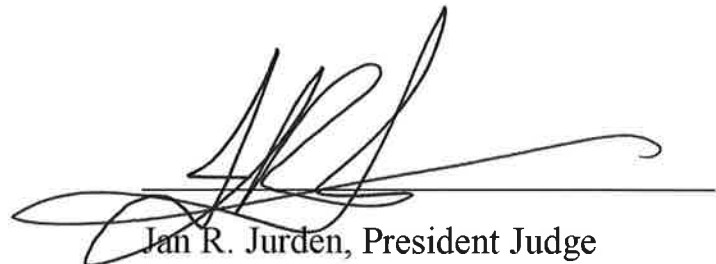
⁵⁶ *Catholic Diocese*, 2010 WL 2106181, at *5.

Here, the Court does not find that Plaintiffs' public policy or prejudice arguments change the outcome under Rule 4(j). As the Court in *Ballard* stated, "[p]ublic policy should not tip the balance unless there were sufficient diligent efforts on the part of Plaintiff's counsel to comply with [Rule 4(j)]."⁵⁷ Plaintiffs cannot circumvent the consequences of Rule 4(j) where they have failed to demonstrate diligent efforts to comply with the Rule, and therefore, have failed to show good cause.

V. CONCLUSION

The record before the Court demonstrates that Plaintiffs failed to timely serve Moving Defendants within 120 days and failed to show good cause for their untimely service pursuant to Rule 4(j). For the reasons stated above, the May 9, 2019 Order is vacated and the claims against Moving Defendants must be dismissed without prejudice pursuant to Rule 4(j). Moving Defendants' Motion to Dismiss the Complaint and to Vacate Order is **GRANTED**.

IT IS SO ORDERED.



Jan R. Jurden, President Judge

cc: Prothonotary

⁵⁷ *Ballard*, 2017 WL 3396488, at *7.