

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

CHARLOTTE M. COSTON,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 04C-03-333 MMJ
)	
RONALD E. BROWN,)	
)	
Defendant.)	

Submitted: August 2, 2004
Decided: September 10, 2004

ORDER

**UPON DEFENDANT’S MOTION TO QUASH PURPORTED SERVICE
AND
TO DISMISS DUE TO LACK OF PERSONAL JURISDICTION
AND
TO DISMISS DUE TO THE EXPIRATION OF THE STATUTE OF LIMITATIONS**

GRANTED

Upon review of Ronald E. Brown (“Defendant”)’s Motion to Quash Purported Service, to Dismiss Due to Lack of Personal Jurisdiction, and to Dismiss Due to the Expiration of the Statute of Limitations, and the record, it appears to the Court that:

1. This case involves a motor vehicle accident which occurred on November 28, 2000.

2. Charlotte M. Coston (“Plaintiff”) filed this action on November 18, 2002 in the Court of Common Pleas. It is undisputed that the filing of the lawsuit on November 18, 2002 was 10 days prior to the two-year anniversary of the accident. Therefore, the action was timely filed. A writ of summons was issued pursuant to 10 *Del. C.* § 3104 to the Sheriff of New Castle County to serve process upon Defendant at 1443 Christina Mill Road, Newark, Delaware 19711.

3. On or about December 10, 2002, service was returned by the Sheriff “non est” “no longer here.” No forwarding address was provided.

4. On March 20, 2003, Plaintiff filed an Alias Summons and service was attempted under the Delaware non-resident “long-arm” statute.¹ The Secretary of State was served on March 31, 2003 and the return of service was filed with the Clerk of the Court of Common Pleas on July 21, 2003. Plaintiff’s counsel, having no forwarding address for Defendant, did not forward a registered letter to Defendant, pursuant to 10 *Del. C.* § 3112(b). Within 7 days of the return of service, a registered

¹The Alias Summons states that service is pursuant to 10 *Del. C.* § 3104. The appropriate section is 3112, “Service of process on nonresident operators of motor vehicles.”

letter must be sent to the out-of-state defendant with certain statutory language and a copy of the suit papers.

5. On March 29, 2004 Defendant filed an Answer with Form 30 Answers to Interrogatories. A jury trial was demanded and the case was moved to the Superior Court on March 30, 2004.

6. In Defendant's Answers to Form 30 Interrogatories, Defendant responded to Interrogatory No 1:

Give the name and present or last known residential and employment address and telephone number of each eyewitness to the incident which is the subject of this litigation.

ANSWER: See names and addresses on Police Report.

The Police Report indicates the address of Defendant as 1443 Christina Mill Road, Newark, Delaware 19711.

7. Plaintiff contends that Defendant's carrier had actual notice of the accident and Plaintiff's claim, in that there had been ongoing negotiations between Plaintiff's counsel and representatives of Defendant's insurance carrier. Defendant's insurance carrier also was on notice of the action because Plaintiff was an employee of First Union Bank (now Wachovia) when the accident occurred and Allstate has been subject to a subrogation claim from the employer's workers' compensation carrier (Liberty Mutual Insurance Company).

8. It is well-settled Delaware law that strict compliance with the provisions of Section 3104 or Section 3112 is necessary to perfect service. The requirement of sending a registered letter to a non-resident defendant “not later than 7 days following the filing of the return of service of process” is jurisdictional.² The mailing is a precondition to this Court’s exercise of *in personam* jurisdiction.³ Absent compliance with the statutory requirement of registered-mail notice within 7 days, there is no effective service of process. There is no judicial cure for this defect.⁴

9. Plaintiff’s assertion that Defendant’s insurance carrier had actual notice cannot create personal jurisdiction. Actual notice is not sufficient. “Mere informal notice of the filing of the suit is not an accepted alternative to compliance with a statutory procedure for acquiring personal jurisdiction.”⁵ Because Plaintiff’s attempt at service of process was defective, this Court did not acquire *in personam* jurisdiction over the matter. Because service has not been perfected within the applicable limitations period, this action must be dismissed.⁶

²*Castelline v. Goldfine Truck Rental Service*, 112 A.2d 840, 843 (Del. 1955).

³*Griffin v. Granger*, 306 A.2d 725, 727 (Del. 1973).

⁴*Purnell v. Dodman*, 297 A.2d 391, 394 (Del. Super. 1972).

⁵*Padro v. Arzillo*, 1989 WL 158488 (Del. Super. 1989) at *1.

⁶*Fort v. Kosmerl*, C.A. No. 03C-07-087 PLA (Del. Super., Mar. 11, 2004).

10. The remaining issue is whether dismissal of Plaintiff's action would constitute abatement under 10 *Del. C.* § 8118, the "savings statute." Section 8118 is designed to mitigate against the harshness of the defense of statute of limitations raised against a plaintiff who, through no personal fault, finds the case technically barred by the lapse of time.⁷ If a suit has been filed within the statutory period and certain circumstances interfere with maintenance of the suit, a plaintiff is given an extra year within which to file a second suit.⁸ The statute has a remedial purpose and should be liberally construed to enable controversies to be decided upon the merits of a dispute rather than upon procedural technicalities.⁹

11. Plaintiff filed suit 10 days prior to the two year anniversary of the accident – well within the statutory period. Defendant's counsel and the insurance carrier were aware of Plaintiff's efforts to serve the insured, despite noncompliance with 10 *Del. C.* § 3112(b). In fact, in response to Form 30 Interrogatories, Defendant's counsel listed the Delaware address as Defendant's proper address. As a result of Defendant's own failure to supply a forwarding address to postal

⁷*Viars v. Surbaugh*, 335 A.2d 285, 289 (Del. Super. 1975).

⁸*O'Lear v. Strucker*, 209 A.2d 755, 758 (Del. Super. Ct. 1965).

⁹*Fort v. Kosmerl*, C.A. No. 03C-07-087 PLA (Del. Super. 2004) (citing *Howmet Corp. v. City of Wilmington*, 285 A.2d 423, 427 (Del. 1971); *Gosnell v. Whetsel*, 198 A.2d 924, 926 (Del. 1964)).

authorities, Plaintiff “was justified in assuming that further attempts to serve defendant at his Delaware address would be futile.”¹⁰

12. The Delaware Supreme Court held in *Giles v. Rodolico*¹¹ that where the technical requirement of service of process is deficient, not because of any fault attributable to the plaintiff, it would be a “miscarriage of justice” to hold that no cause of action may be brought by reason of expiration of time. The Court noted that such a result “[c]omplies with the purpose of Rule 1 of the Superior Court enjoining a construction of the rules ‘to secure the just, speedy and inexpensive determination of every proceeding.’”¹²

13. However, having determined to dismiss this action, the Court no longer has jurisdiction to consider the viability of any further action under Section 8118. “Only upon the filing of a second lawsuit, based on the same cause of action, will this Court have the jurisdiction to consider the practicability of application of the ameliorative effect of the savings statute to Plaintiff[’s] cause of action.”¹³

¹⁰*Viars*, 335 A.2d at 288.

¹¹140 A.2d 263 (Del. 1958).

¹²*Id.*

¹³*Fort v. Kosmerl*, C.A. No. 03C-07-087 PLA (Del. Super. 2004), *aff’d* 2004 WL 1737107 (Del. July 29, 2004).

CONCLUSION

Plaintiff has failed to effect service of process on Defendant because of lack of compliance with the specific requirements established by 10 *Del. C.* § 3112(b). This Court lacks *in personam* jurisdiction over this matter. Defendant's Motion to Quash Purported Service and to Dismiss Due to Lack of Personal Jurisdiction and to Dismiss Due to the Expiration of the Statute of Limitations is hereby **GRANTED**. This action is hereby **DISMISSED WITHOUT PREJUDICE**.

IT IS SO ORDERED.

The Honorable Mary M. Johnston

ORIGINAL: PROTHONOTARY'S OFFICE - CIVIL DIV.