

SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
1 The Circle, Suite 2
GEORGETOWN, DE 19947

June 24, 2005

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**RE: Chipman, et al. v. Marina Motel Ventures, LLC,
C.A. No. 04C-08-023 ESB**

Dear Counsel:

This is my decision on defendant Marina Motel Ventures, LLC's ("Marina Motel") motion to dismiss the complaint for lack of timely service of process. Marina Motel owns a motel in Dewey Beach named the "Marina Motel." I will refer to it from now on as the "Motel." Plaintiffs Catherine and Zachery Chipman (the "Chipmans") were guests at the Motel. The Chipmans filed a complaint against Marina Motel on April 31, 2004. The Chipmans' complaint alleges, among other things, that Marina Motel wrongly evicted the Chipmans from the Motel. The Chipmans attempted to serve Marina Motel by directing the Sussex County Sheriff (the "Sheriff") to serve Linda Klahr ("Klahr"). Klahr is an accountant for Dewey Beach Enterprises, Inc. ("DBE"). Her job duties include receiving and processing tax bills for entities in which Highway I Limited Partnership ("Highway I") has an ownership interest in or a management agreement with.

I presume that Highway I has an ownership interest in or a management agreement with Marina Motel. Klahr is not, and has never been, an officer, employee, or registered agent of Marina Motel. Joseph Corrado (“Corrado”) has been the registered agent of Marina Motel since September 3, 2003. The Chipmans got Klahr’s name from the Sussex County property tax records for Marina Motel, which list her as the contact person for property tax billing purposes. The Sheriff returned the summons “non-est” on October 21, 2004. The Sheriff’s return indicated that the Sheriff attempted to serve Klahr on September 2, 2004, but was not able to do so. The Sheriff’s return also indicated that Klahr was an accountant for Marina Motel.

The Sussex County Prothonotary sent written notices to the Chipmans’ attorney on November 23, 2004, and January 13, 2005, advising him of the need to complete service of process. The Chipmans’ attorney did respond orally to each letter, stating that he was trying to complete service. The Chipmans filed an amended complaint on February 3, 2005. It was identical to the original complaint in all aspects except that it identified Corrado as the managing partner of Marina Motel. The Chipmans served Corrado on February 9, 2005, well over 120 days after filing their original complaint.

Marina Motel argues that the amended complaint should be dismissed because the Chipmans did not comply with Superior Court Civil Rule 4(j). This rule states in part:

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.

Good cause must consist of good faith and excusable neglect. Muzzi v. Lewis, 1997 WL 127010 at *4 (Del.Super. Jan. 23, 1997).

The Chipmans argue that they were misled by Klahr, who allegedly said that Marina Motel did not own the Motel at the time of the Chipmans' alleged eviction. Klahr denies ever saying this. Her affidavit states that she was not at home when the Deputy Sheriff tried to serve her and that she called the Deputy Sheriff and told him that she was not the appropriate person to receive service for Marina Motel. The Chipmans also argue that their attorney responded to the Prothonotary's letters and that this should be sufficient to defeat Marina Motel's motion to dismiss.

Even assuming that Klahr misled the Chipmans, which I doubt, it does not matter. The Chipmans never tried to file suit against anyone else. Instead, they filed an amended complaint against the same defendant. The Chipmans have not shown that they were unable to serve the Marina Motel because of excusable neglect. Corrado was, at all times, listed as the registered agent for service of process for Marina Motel. For reasons that I cannot understand the Chipmans used the Sussex County property tax records to identify Marina Motel's registered agent for service of process. This is not excusable neglect, particularly when the information that the Chipmans needed was readily available from the Secretary of State's Office. It is also not enough that the Chipmans' attorney contacted the Prothonotary's Office to say he was still trying to complete service of process. Under Rule 4(j) the Chipmans still had to offer a suitable excuse for their failure to complete services of process in a timely manner. They have not done so. Therefore, Marina Motel's motion to dismiss is granted.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

ESB:lsm

Cc: Prothonotary's Office