SUPERIOR COURT
OF THE
STATE OF DELAWARE

M. JANE BRADY
JUDGE

NEW CASTLE COUNTY
COURTHOUSE
WILMINGTON, DE 19801-3733

Michael J. Hood, Esquire
Michael J. Hood, LLC
1701 Shallcross Avenue, Suite C-1
Wilmington, Delaware 19805

Kenneth M. Doss, Esquire
Chaneta Brooks Montoban, Esquire
Casarino, Christman & Shalk, P.A.
800 North King Street, Suite 200
Wilmington, Delaware 19899

RE: WINSTON ALLEN V. MELISSA REDDISH and NICOLE ALLEN
C.A. No.: 05C-02-121MJB

Date submitted: April 27, 2006
Date decided: June 20, 2006

Counsel:

This is my decision regarding whether service has been perfected on Defendant Melissa Reddish.

Facts and Procedural History

The instant action arose out of the alleged negligent, careless and reckless operation of a motor vehicle by Ms. Reddish on or about March 8, 2003 that allegedly caused damages to Plaintiff Winston Allen ("Mr. Allen"). The complaint was filed February 10, 2005 by Mr. Allen. A Motion to dismiss in lieu of an answer was filed by Defendant Melissa Reddish ("Ms. Reddish") on February 21, 2006. A hearing was held on

April 6, 2006 in which the Court denied the Motion to Dismiss. The motion was denied because Plaintiff has been diligent in attempting to effectuate service on Ms. Reddish.[1] For illustrative purposes, the Court outlines the steps taken by Plaintiff here.

On February 10, 2005 Plaintiff filed the instant action in which a summons was sent to the Sheriff for service on Melissa Reddish at 24545 East Trap Pond Road, Georgetown, DE 19947. The summons was returned *non est* on March 23, 2005. On May 10, 2005 an *alias* summons was sent to the Sheriff for service on Ms. Reddish at 6324 Lehigh Road, Apartment N 12, Newark, DE 19713. The writ was returned on May 30, 2005 after four unsuccessful attempts at service. On July 29, 2005 Plaintiff sent a first *pluries* summons to the Sheriff for service on Ms. Reddish again at 24545 East Trap Pond Road, Georgetown, DE 19947. On September 20, 2005 the writ was returned *non est*, indicating Ms. Reddish moved to Oregon. On September 27, 2005 Plaintiff filed a motion to extend time for service on Ms. Reddish, which was granted on October 13, 2005. Also on September 27, 2005, Plaintiff filed a second *pluries* summons, which was never issued. On December 6, 2005 Plaintiff filed a second motion for enlargement of

[1] *See e.g. Desantis v. Chilkotowsky*, 877 A.2d 52 (Del. 2005) (holding a party must show good faith and excusable neglect to avoid dismissal of an action for failure to effectuate service within 120 days pursuant to Superior Court Civil Rule 4 (j)); *Viars v. Surbaugh*, 335 A.2d 285, 287 (Del. Super. Ct. 1975) ("The filing of a praecipe tolls the statute of limitations provided that the plaintiff diligently seeks to bring the defendant into Court and subject him to its jurisdiction. There must be no unreasonable delay in the service of process").

time, which was granted on December 20, 2005. Also on December 6, 2005 Plaintiff filed a motion for a special process server to serve the Secretary of State pursuant to DEL. CODE ANN. tit. 10, § 3104, which was granted December 7, 2005. On January 6, 2006 Plaintiff filed a third *pluries* summons directing a special process server to make service upon the Secretary of State pursuant to DEL. CODE ANN. tit. 10, § 3104. On January 13, 2006 the summons was served upon Rebecca Messick (process agent) authorized to accept service for the Secretary of State. At that point the Plaintiff undertook the procedures of DEL. CODE ANN. tit. 10, § 3104 to effectuate service on Ms. Reddish in Oregon.

The issue arose at the Motion to Dismiss hearing regarding whether Plaintiff had perfected service on Ms. Reddish pursuant to DEL. CODE ANN. tit. 10, § 3104, the Delaware Long Arm Statute.[2] The Court allowed the parties five days to supplement the record with anything relevant to the decision. Submissions were received from both parties and have been considered. This is the Court's opinion on the matter.

[2] It is unclear why Plaintiff attempted service on Defendant pursuant to DEL. CODE ANN. tit. 10, § 3104, instead of DEL. CODE ANN. tit. 10, § 3112 "service of process on nonresident operators of motor vehicles" and § 3113 "service of process on resident owner and operator of motor vehicles who depart from the State after an accident" because the instant action arose from a motor vehicle collision in Delaware. Plaintiff references service under § 3112 in a letter to Defendant attached to the Amended Complaint as Exhibit 1. However, Plaintiff attempted service under § 3104. The statutory requirements of each are identical.

Applicable Law

The statutory mandates of DEL. STAT. ANN. tit. 10, § 3104 are jurisdictional and cannot be relaxed by the Court.[3] § 3104 (d) requires notice be sent by registered mail. Although the issue was not addressed by the parties, the Court is obligated, when aware of legal requirements relevant to a matter before it, to address them. Notice in this case was sent by certified mail. The Court may not rule service has been properly effectuated by certified mail when the statute explicitly requires registered mail be used. This holding is supported by Delaware case law.

In *Brandywine Balloons, Inc. v. Custom Computer Service, Inc. et al*[4] the Court quashed service solely because the mailing was done by certified mail instead of registered mail. The Court ruled the statutory requirements are jurisdictional in nature and could not be varied by the Court.[5]

Similarly, in *McDaniel v. Asbestos Corporation of America, et al*,[6] the Court held there had not been compliance with § 3104 (d) because the mailings were done by certified, not registered mail.[7]

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[3] *Greenly v. Davis*, 486 A.2d 669, 671 (Del. 1984).
[4] 1988 WL 90527 (Del. Super.).
[5] *Id*.
[6] 1989 WL 70973 (Del. Super.).
[7] *Id* at *5.

In *First Union National Bank v. Harman*,[8] the Court also recognized the distinction made in § 3104 (d) between certified and registered mail and suggested in a footnote that a change in the statute could eliminate the confusion in this area.[9]

It may be true that certified mail is a reliable method to ensure service of process has been made on out of state defendants, but the statutory requirement is clear that service be effectuated via registered mail. Any amendment of the statutory provision is exclusively within the province of the Legislature.

Although that deficiency resolves the question whether service has been effectuated, to alleviate further issues in this action regarding the service of process requirements of DEL. STAT. ANN. tit. 10, § 3104 and Superior Court Civil Rule 4, the Court will also consider whether the remainder of the methods undertaken by Plaintiff are adequate to meet other service of process requirements.

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[8] 1996 WL 769343 (Del. Super.).

[9] *Id* at *3, FN 4 states:

> It is the Court's understanding that registered mail and certified mail have a similar tracking/receipt procedure. Apparently, registered mail is used as an insurance service for valuable items such as stocks, cash, negotiable instruments and irreplaceable items such as jewelry. Certified mail is used for recording purposes, to show proof of mailing and receipt of documents. Regardless of what may be considered a hypertechnical ruling, this appears to be an area in which a change in the statute could eliminate many headaches.

An excellent explanation of the procedure for effectuating service under the long arm statute appears in *Purnell v. Dodman*:[10]

> There appear to be two ways to proceed under [3104(d)] depending upon the result of the mailing of notice. Both procedures begin the same fashion, Viz., service upon the Secretary of State and the mailing of notice to the nonresident defendant within seven days after the return of the Secretary of State's service. Plaintiffs' next action depends upon whether the notice by registered letter is received, refused, or not received. If the letter is received, or refused, the plaintiff must proceed to file his return receipt accompanied by the appropriate affidavit within the time period impose by Superior Court Rule 4(h)…[A] second course is mandated by statute in the event of non-receipt of the notice. In this situation it is assumed that the plaintiff has already complied with the first mailing required by [3104(d)], I.e. [sic] the mailing which follows the return of service on the Secretary of State. Once the plaintiff becomes aware that his initial notice has not been received he may elect to prove non-receipt by filing a [3104(g)] affidavit but subject himself to the alternate procedure set forth in [3104(d)] which requires the sending of a notice to the defendant '[n]ot later than seven days following the filing with the Court of the proof of the non-receipt of notice provided for in subsection [(g)] of this section…'[t]hus, in a non-receipt situation the plaintiff is actually required to make two mailings to the defendant in order to effectuate his jurisdictional notice.[11]

It appears from the record Ms. Reddish was a Delaware resident at some point prior to this time, but has since left the state. After making several attempts at service in Delaware, service of process was made on the Secretary of State pursuant to DEL. STAT. ANN. tit. 10, § 3104 on January

[10] 297 A.2d 391, 394 (Del. Super. Ct. 1972) (addressing a failure to comply with the proof of nonreceipt requirements of the nonresident motorist statute).
[11] *Id*; *see also Franklin v. Millsboro Nursing and Rehabilitation Center, Inc*., 1997 WL 363950 at *6 (Del. Super.) (outlining the same procedure).

13, 2006. The Sheriff's return was filed with the Prothonotary on January 17, 2006.[12] On January 17, 2006 certified mail was sent to Ms. Reddish's forwarding address in Oregon.[13] On February 15, 2006 it was returned unclaimed.[14] On February 16, 2006 an amended complaint was filed including an affidavit stating the above facts pursuant to DEL. STAT. ANN. tit. 10, § 3104 (g) and Rule 4(h). On February 17, 2006 a second certified mail notice was sent to Ms. Reddish pursuant to DEL. STAT. ANN. tit. 10, § 3104 (d).[15]

It appears Plaintiff has done all that is required by DEL. STAT. ANN. tit. 10, § 3104 to gain personal jurisdiction over Ms. Reddish, except send notice by registered mail.

Defendant argues service has not been perfected because there is no indication a second affidavit of non-receipt filed as an amendment to the complaint was filed with the Court as required under Superior Court Civil Rule 4(h). Plaintiff argues such filings are not required under the Rule, but if the Court finds they are required, Plaintiff should be allowed to supplement the record in that regard because he has been diligent in pursuing service of process on Defendant Reddish.

[12] Plaintiff's Amended Complaint (Exhibit 1).
[13] Exhibit A to the Affidavit attached to the Amended Complaint.
[14] Exhibit 2 of the Amended Complaint.
[15] Exhibit A to the Supplemental Briefing of Plaintiff.

Rule 4(h) states:

> *Actions in which service of process is secured pursuant to* 10 Del. C. § 3104, § 3112 or § 3113. In an action in which the plaintiff serves process pursuant to § 3104, § 3112 or § 3113, the defendant's return receipt and the affidavit of the plaintiff or the plaintiff's attorney of the defendant's nonresidence and the sending of a copy of the complaint with the notice required by the statute shall be filed as an amendment to the complaint with the notice required by the statute shall be filed as an amendment to the complaint within 10 days of the receiving by the plaintiff or the plaintiff's attorney of the defendant's return receipt; provided, however, that the amendment shall not be served upon the parties in accordance with the provisions of Rule 5(a).

The filing of the amended complaint pursuant to Rule 4(h) is not required to perfect service under § 3104. As the court in *Millsboro* stated: "it is the process and service thereof that confers jurisdiction. The return is no part of the service, but evidence only of such service."[16] Therefore, once the court acquires jurisdiction through compliance with § 3104 (the mailing of the second notice in this case), it has the power to consider an application to enlarge the time for filing the amended complaint pursuant to Rule 6(b) because the filing of the amended complaint is not a statutory requirement to perfect service.[17]

The filing of a second amendment to the complaint is not required to perfect service under § 3104 either. Like the first amendment to the

[16] *Franklin v. Millsboro Nursing and Rehabilitation Center, Inc*., 1997 WL 363950 (Del. Super.); citing *Lightburn v. Delaware Power & Light Co*., 158 A.2d 919, 923 (Del. 1960).
[17] *Id*.

complaint required under Rule 4(h), it does not affect the validity of service. However, it is required to be filed within 10 days of receiving the defendant's return receipt in order to comply with Rule 4(h). While the Court may consider a petition to enlarge the time for such a filing, the proper practice is to make such a filing within the time period required by the Rule. If the Plaintiff seeks some relief from the Court, proof of the second mailing is a necessity. However, neither DEL. STAT. ANN. tit. 10, § 3104 nor case law require such a procedure to perfect service. Proof of a second mailing was not filed in this case, but any application to enlarge the time for such a filing is rendered moot because service is ineffective due to the use of certified, rather than registered, mail.

Defendant also argues Plaintiff has not established the address which was used for service upon Ms. Reddish was actually her residence or usual place of abode for service of process purposes. The Court is satisfied the address used to serve Ms. Reddish was the forwarding address she left the post office and was her "usual place of abode" for service of process purposes.[18]

[18] *See e.g. Swift v. Leisure*, 285 A.2d 428, 430 (Del. Super. Ct. 1971) (construing identical language in DEL. CODE ANN. tit. 10, § 3112, the motor vehicle "long-arm" statute: "[T]he statute in its present form requires that notice be sent to the 'non-resident defendant' which can only mean to that address where the plaintiffs have good grounds to believe that notice will be effectively brought to the defendant's attention.").

Plaintiff has been diligent in pursuit of effectuating service of process on Ms. Reddish, but must attempt service by registered mail to proceed.[19] In light of the diligence with which counsel has acted to effect service, the Court will grant an enlargement of time for 120 days from this date for Plaintiff to attempt to perfect service in this matter.

Conclusion

For the reasons stated herein, this Court finds that service of process has not been perfected to date.

IT IS SO ORDERED.

/s/
M. Jane Brady
Superior Court Judge

[19] The Court is compelled to cite the well-established Delaware rule of law that a person involved in a motor vehicle accident, such as Ms. Reddish, has a duty to furnish the proper authorities a current address because the possibility of future litigation is apparent. Plaintiffs using the long arm statute are not required to search for defendants. *See e.g. Swift v. Leisure*, 285 A.2d 428 (Del. Super. Ct. 1971); *Cunningham v. City of Wilmington*, 1982 WL 592911 (Del. Super.); *Fagan v. Beaston*, 2005 WL 445849 (Del. Super.).