

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
(Northern Division)

JAMES REDDING

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Plaintiff,

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v.

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CIVIL ACTION NO. 1:11-cv-00674-CCB

JUSTIA, INC., et al.

\*

Defendants.

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**MOTION TO DISMISS DUE TO INSUFFICIENT SERVICE OF PROCESS**

Defendants, Cynthia McCoy and Justin Shelton, by and through their counsel, Robert M. Schwartzman, Esquire, John J. Yannone, Esquire and Resnick & Schwartzman, L.L.C., pursuant to Fed. R. Civ. P. 12(b)(5), move the Court to dismiss the Complaint filed against them in this matter by James Redding.

The grounds for this Motion are fully set forth in the accompanying Memorandum in Support, which is incorporated herein by reference.

**REQUEST FOR HEARING**

Pursuant to Local Rule 105.6, Defendants request that the Court hear argument on this Motion.



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**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**  
**DUE TO INSUFFICIENT SERVICE OF PROCESS**

Defendants, Cynthia McCoy and Justin Shelton (collectively referred to as “Defendants”), by and through their undersigned counsel, pursuant to Fed. R. Civ. P. 12(b)(5), submit this Memorandum in Support of their Motion to Dismiss Plaintiff’s Complaint Due to Insufficient Service of Process filed against them in this matter by Plaintiff James Redding (“Mr. Redding” or “Plaintiff”)

**INTRODUCTION**

On March 14, 2011 Mr. Redding filed a four count Complaint against six Defendants, namely Justia, Inc., Elizabeth A. McClanahan, Judge of the Court of Appeals of Virginia, James W. Haley, Jr., Judge of the Court of Appeals of Virginia, Jere M.H. Willis, Jr., Senior Judge of the Court of Appeals of Virginia, Cynthia L. McCoy, Clerk of the Court of Appeals of Virginia, and Justin Shelton, Deputy Clerk of the Court of Appeals of Virginia.

Mr. Redding’s Complaint arises from underlying workers’ compensation claims that were denied before the Virginia Workers’ Compensation Commission. Mr. Redding filed workers’ compensation claims on April 5, 1996 for allegedly being exposed to bodily fluids that

caused him to contract tuberculosis and Hepatitis B. The Deputy Commissioner denied Mr. Redding's claims on October 29, 2009. Mr. Redding requested a Review which was conducted on the record. After reviewing the record, the three Commissioner panel affirmed the Deputy Commissioner's ruling that Mr. Redding had failed to prove by a preponderance of the evidence a compensable injury by accident, a compensable occupational disease, or an ordinary disease of life arising out of or in the course of employment.

Mr. Redding appealed the Review decision to the Court of Appeals of Virginia. In an unpublished Memorandum Opinion – Per Curiam, Judges McClanahan, Haley and Willis affirmed the Review decision on February 15, 2011.

Mr. Redding then filed the instant action on March 14, 2011 alleging fraud, slander, intentional infliction of emotional distress, and racial discrimination seeking damages, injunctive and other relief.

### **STATEMENT OF THE CASE**

This Motion pertains solely to Cynthia L. McCoy, Clerk of the Court of Appeals of Virginia and Justin Shelton, Deputy Clerk of the Court of Appeals of Virginia. Subsequent to Mr. Redding filing his Complaint on March 14, 2011, The Honorable Catherine C. Blake issued an Order dated June 10, 2011, directing the Court's Clerk to:

prepare and issue summons to plaintiff, who must then serve a copy of the summons and the complaint on defendant. Plaintiff may effectuate service by presenting summons to the Clerk for signature and seal and then serving a copy of the summons and complaint on defendants. Pursuant to Fed. R. Civ. P. 4(c)(2), this service may be effected by any person who is not a party and who is at least 18 years of age. Plaintiff is reminded that under Fed. R. Civ. P. 4(1), the person effecting service must promptly notify the court, through an affidavit, that he or she has

served defendants.

By footnote, the Order further states, “If Plaintiff does not use a private process server, and instead use[s] certified mail, return receipt requested to make service, they must file with this Court the United States Post Office acknowledgement as proof of service. Service by mail must be made by ‘restricted delivery.’” See Exhibit A.

On June 20, 2011, Mr. Redding sent by certified mail a copy of the summons, without a copy of the Complaint, to Mr. Shelton. On June 28, 2011, Ms. McCoy and Mr. Shelton each received, via first-class mail, a summons addressed to them individually at the address of their employer, the Court of Appeals of Virginia. No copy of the complaint was served with either of the summonses. Service has not been effected by personal service or any other proper means. See Affidavits attached as Exhibit B incorporated herein by reference.

### **LEGAL STANDARD**

Fed. R. Civ. P. 12(b)(5) provides for the filing of a motion to dismiss based on insufficiency of service of process. Braithwaite v. Johns Hopkins Hospital, 160 F.R.D. 75 (D. Md. 1995).

Conclusory statements that defendant was properly served are insufficient to overcome defendants’ sworn affidavit that they were never served with process; when defendant makes a Fed. R. Civ. P. 12(b)(5) motion, it is plaintiff’s burden of proof to establish its service of process was adequate. Cooper v. Conn. Pub. Defender’s Office, 480 F. Supp. 2d 536, 537 n.1 (D. Conn. 2007).

## ARGUMENT

The mailing by first-class mail of a copy of the summons without a copy of the Complaint to Cynthia L. McCoy and Justin Shelton by Mr. Redding on June 28, 2011 is deficient for two reasons: (1) the first-class mailing is not in accordance with the Federal Rules in that service was not effected by certified mail, return receipt requested - restricted delivery, personal service or by any other proper means; and (2) the summons was not accompanied by a copy of the Complaint. Likewise, the June 20, 2011 certified mailing of the summons without the Complaint to Justin Shelton is deficient because the summons was not accompanied by the Complaint.

### **(1) Service Was Not Effected By Certified Mail, Return Receipt Requested - Restricted Delivery, Personal Service, Or By Any Other Proper Means.**

Fed. R. Civ. P. 4(c) provides that service is to be effected on an individual by “any person who is at least 18 years old and not a party” to the case. Additionally, in her Order dated June 10, 2011, Judge Blake made it plainly clear to Mr. Redding the steps he needed to take pursuant to the Federal Rules of Procedure to properly serve the Defendants in the action he filed. Judge Blake’s Order recited that proper service consisted of personal service by a person over the age of 18 who was not a party. It further stated that if a private process server was not used, but rather certified mail - return receipt requested, then service by mail must be by “restricted delivery.”

As attested to by Ms. McCoy and Mr. Shelton, Mr. Redding sent a copy of the summons without a copy of the Complaint to each on June 28, 2011 by first-class mail, not by certified mail - return receipt requested, and not by restricted delivery. Neither Ms. McCoy, nor Mr. Shelton was requested to waive service. Where there has been no service of suit or waiver thereof, the necessity of service is not dispensed with by the mere fact that a defendant may in

some way learn of the filing of suit. Therefore, where service is not properly made under such circumstances a motion to dismiss pursuant to Rule 12(b)(5) must be granted. Al & Dick, Inc. v. Cuisinarts, Inc., 528 F. Supp. 633 (D. Ga. 1981). As stated in Cooper, it is Plaintiff's burden to establish his service of process was adequate. 480 F. Supp. 2d at 537 n.1. This is impossible because under no circumstances is mailing by first-class mail a copy of the summons to the Defendants considered proper service. As such, no effective service has been rendered on either Ms. McCoy or Mr. Shelton as a result of Plaintiff's conduct on June 28, 2011 and Plaintiff's Complaint against Ms. McCoy and Mr. Shelton should be dismissed pursuant to Rule 12(b)(5).

**(2) The Summons Was Not Accompanied By A Copy Of The Complaint.**

(a) Fed. R. Civ. P. 4(c)(1) mandates that "a summons must be served with a copy of the complaint." Judge Blake's Order made clear that the summons and Complaint needed to be served by appropriate methods. The failure of Mr. Redding to serve a copy of the Complaint with the summons on Ms. McCoy and Mr. Shelton on June 28, 2011 is in violation of the Federal Rules of Civil Procedure. See Albra v Advan, Inc., 490 F3d 826 (11th Cir. 2007) (Plaintiff's service—mailing the summons to the Defendant without a copy of the complaint—was deemed a violation of the Federal Rules and the complaint was dismissed). Though courts lend liberal construction to the pleadings of pro se parties, the parties are still required to conform to procedural rules. Id. at 829. Mr. Redding on June 28, 2011 did not provide a copy of the Complaint with the summons that he sent via first-class mail to Ms. McCoy and Mr. Shelton. Mr. Redding's attempt at service is deficient pursuant to the Federal Rules and Plaintiff's Complaint against Ms. McCoy and Mr. Shelton should be dismissed pursuant to Rule 12(b)(5).

(b) Regarding the attempted service of Mr. Shelton by Mr. Redding on June 20, 2011, as attested to by Mr. Shelton, although it was sent via certified mail - return receipt requested, a

copy of the Complaint was not included. Again, the Federal Rules provide and Judge Blake's Order mandates that a copy of the summons and Complaint be served upon the Defendants. Mr. Redding failed to serve the Complaint with the summons on Mr. Shelton on June 20, 2011. Furthermore, Fed. R. Civ. P. 4(l) provides: "Proving Service. (1) *Affidavit Required*. Unless service is waived, proof of service must be made to the court. Except for service by a United States marshal or deputy marshal, proof must be by the server's affidavit." As provided by Judge Blake's Order, the United States Post Office acknowledgement must be provided as proof of service when utilizing certified mail. To date, Mr. Redding has not filed such an acknowledgement. Mr. Shelton not having been personally served, Plaintiff cannot file a server's affidavit. For these reasons, Mr. Redding's attempt at service upon Mr. Shelton on June 20, 2011 is deficient pursuant to the Federal Rules and pursuant to Rule 12(b)(5) Plaintiff's Complaint against Mr. Shelton should be dismissed.

### CONCLUSION

Plaintiff has failed to adhere to the Federal Rules of Procedure and a Court Order. Plaintiff mailed the Defendants a copy of the summons by first-class mail which they received on June 28, 2011. Thereby, Plaintiff failed to serve the Defendants either by personal service or certified mail – return receipt requested, restricted delivery, or any other proper means as required. In addition, Plaintiff failed to accompany the summons with a copy of the Complaint as required when sending via first class mail only the summons to Ms. McCoy and Mr. Shelton which was received by them on June 28, 2011. Likewise, Plaintiff failed to include a copy of the Complaint with the summons as required when sending via certified mail only the summons to Mr. Shelton which was received by him on June 20, 2011. Accordingly, Defendants, Cynthia

