

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JASON B. NICHOLAS,
Plaintiff,

-v-

WILLIAM BRATTON, et al.,
Defendants.

15-CV-9592 (JPO)

OPINION AND ORDER

J. PAUL OETKEN, District Judge:

Defendant Eugene Whyte was added as a defendant while this case was already in progress. He moves to dismiss under Rule 12(b)(5), arguing that service was untimely. For the reasons that follow, the motion is denied.

I. Legal Standard

Rule 4(m) of the Federal Rules of Civil Procedure requires a defendant to be served with the summons and complaint within 90 days after the complaint is filed. However, courts must excuse untimely service if good cause is shown. *Id.* To determine whether a plaintiff has demonstrated good cause, courts generally consider three factors: (1) whether the delay resulted from inadvertence or whether a reasonable effort to effect service has occurred, (2) prejudice to the defendant, and (3) whether the plaintiff had moved for an extension of time to serve.

Echevarria v. Dep't of Corr. Servs., 48 F. Supp. 2d 388, 392 (S.D.N.Y. 1999).

II. Discussion

Nicholas has shown good cause to excuse the late service on Defendant Whyte. First, at the time Whyte was added, Nicholas was still proceeding *pro se*. While the Court had issued an order of service when this suit was initially filed (*see* Dkt. No. 7), it did not do so again when it approved the addition of Whyte as a defendant. Given that Nicholas may have reasonably

expected the Court to issue a second order of service, Nicholas's initial failure to act is excusable. *See Jones v. Westchester Cty.*, 182 F. Supp. 3d 134, 144 (S.D.N.Y. 2016).

Second, Nicholas encountered a technical issue that prevented him from obtaining a summons. Specifically, when granting the motion to file a Second Amended Complaint, the Court deemed the attached exhibit as the operative complaint. (*See* Dkt. No. 99 at 6.) However, the Court's electronic filing system requires a standalone complaint in order to issue a summons (i.e., the complaint must be filed under its own docket entry). The Court eventually remedied the defect by ordering that the Complaint be refiled (*see* Dkt. No. 125), but Nicholas's counsel made a good-faith effort to remedy the problem in the interim. *See Castro v. Manhattan E. Suite Hotel*, No. 01 Civ. 7912, 2002 WL 426221, at *2 (S.D.N.Y. Mar. 19, 2002). Accordingly, there is good cause to excuse the untimely service.

III. Conclusion

For the foregoing reasons, Whyte's motion to dismiss is DENIED. The Clerk of Court is directed to close the motion at Docket Number 134.

SO ORDERED.

Dated: February 23, 2018
New York, New York



J. PAUL OETKEN
United States District Judge