

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

BD. OF TRUSTEES OF THE IBEW
FUND LOCAL NO. 82 PENSION
FUND, *et al.*,

Plaintiff,

v.

BRIGHT STREET, LLC, *et al.*,

Defendant.

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Case No. 3:16-cv-481

JUDGE WALTER H. RICE

DECISION AND ENTRY OVERRULING MOTION TO DISMISS
AMENDED THIRD-PARTY COMPLAINT (DOC. #43); SUSTAINING
MOTION FOR LEAVE FOR ADDITIONAL TIME TO COMPLY WITH
COURT ORDER FILED SEPTEMBER 19, 2018 (DOC. # 45)

Third-Party Defendant International Brotherhood of Electrical Workers, Local Union 82 ("IBEW Local 82"), has entered a limited appearance and moved this Court for an Order dismissing the Amended Third-Party Complaint, Doc. #43, filed by Security Fence Group, Inc., ("Security Fence") pursuant to Fed. R. Civ. P. 4(m) and 41(b), claiming that said pleading was not served timely as required by this Court's earlier Decision and Entry, Doc. #40. The Court's Decision and Entry, filed September 19, 2018, sustained IBEW Local 82's motion to strike the proof of service and quash the returned Amended Third-Party Complaint, but gave Security Fence, pursuant to Fed. R. Civ. P. 4(m), 14 days, or until October 3, 2018, to serve its pleading.

Security Fence has opposed the motion to dismiss, Doc. #46, and also filed a motion for leave for additional time to comply with the Court's September 19, 2018, Decision and Entry, Doc. #45. IBEW Local 82 has opposed the request for additional time, Doc. #49, and Security Fence has filed a Reply, Doc. #50.

Security Fence states that it failed to meet comply with this Court's Order by the October 3, 2018, deadline due to oversight and a scheduled family vacation. Upon return from the family vacation, the oversight was discovered and Security Fence states that the Amended Third-Party Complaint was then served by mailing a "Request for Waiver of Summons" to IBEW Local 82 on October 18, 2018. Doc. #45, PAGEID#1041; Doc #50, PAGEID#1070. IBEW Local 82 objects to the 15-day delay stating "[I]t has now been 301 days since the *Third Party-Complaint* was filed, and Third-Party Defendant IBEW Local 82 *still* has not been served formally with a summons or pleading." (emphasis in original) Doc. #41, PAGEID#1061.

While Rule 4(m) of the Federal Rules of Civil Procedure governs the timing for service of the summons and complaint, it does give the Court discretion to extend the time for an "appropriate period." In its September 19, 2018, Decision and Entry, this Court gave Security Fence an additional 14 days. Although Security Fence argues that lack of prejudice to IBEW Local 82 is relevant, the Court notes that the Sixth Circuit has previously ruled, in the context of Rule (j),¹ that actual

¹ Rule 4(m), which became effective on December 1, 1993, replaced former Fed.R.Civ.P. 4(j) with respect to the timing requirements

notice and a lack of prejudice to the defendant are insufficient to satisfy the good cause required in Fed. R. Civ. P. 4 (m). *Moncrief v. Stone*, 961 F.2d 595, 596–597 (6th Cir.1992).

However, unlike the plaintiff in *Moncrief v. Stone*, Security Fence is not arguing the timing or procedure of service under Rule 4 (m) but, instead, is simply requesting additional time to comply with the Court’s September 19, 2018, Decision and Entry. IBEW Local 82 has not shown any prejudice to a further extension of this Court’s September 19, 2018, Decision and Entry and instead argues that dismissal is required pursuant to Rule 41(b) for failure to prosecute. However, it is clear from the pleadings filed by Security Fence that it intends to prosecute its claim. As such, all that would be accomplished in a dismissal without prejudice of Security Fence’s Amended Third-Party Complaint is a further increase in legal costs and delay since Security Fence will seek leave, refile and re-serve its third-party complaint. As a result, the parties will experience no real benefit if the motion to dismiss is sustained.

For these reasons, the motion for leave for additional time filed by Security Fence (Doc. #45) is sustained and the motion to dismiss filed by IBEW Local 82 (Doc. #43) is overruled. Security Fence will have 14 days from this filing to serve properly IBEW Local 82 with the Amended Third-Party Complaint. Failure to comply with this further and final extension of time will result in dismissal pursuant to Fed. R. Civ. P. 4 (m).

Date: December 31, 2018



WALTER H. RICE
UNITED STATES DISTRICT JUDGE