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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

ROBERT MORENO-PÉREZ,

Plaintiff

v.

PEDRO TOLEDO-DÁVILA, et al.,

Defendants

CIVIL 07-1863 (JA)

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OPINION AND ORDER

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This matter is before the court on motion for reconsideration filed by plaintiff, Robert Moreno-Pérez, on January, 20, 2010. (Docket No. 77.) The defendants, Pedro Toledo-Dávila, Diana Marrero-Trinidad, Carmen Bruno-Pabón, Luis R. Márquez-Martínez, and José Rivera-Alicea, filed a motion in opposition on January 5, 2010. (Docket No. 81.) For the reasons set forth below, plaintiff's motion is GRANTED.

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I. BACKGROUND

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On August 11, 2009, plaintiff filed a request for leave to file a third amended complaint to include Diego Santos-Pabón ("Santos") and Edric Medina-Laureano ("Medina") as defendants in this case. (Docket No. 43.) On September 4, 2009, plaintiff's motion was granted by the court. (Docket No. 45.) On September 11, 2009, plaintiff filed the third amended complaint. (Docket No. 46.) On September 15, 2009, plaintiff filed a request for issuance of summons addressed

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4 to Santos and Medina. (Docket No 47.) On that same day the court granted
5 plaintiff's motion. (Docket No. 48.) On September 17, 2009, the summons were
6 issued by the clerk. (Docket No. 49.) On December, 15, 2009, plaintiff filed a
7 motion for extension of time until March 5, 2010, to serve the summons. (Docket
8 No. 50.) Plaintiff's motion was denied by the court on December 16, 2009.
9 (Docket No. 51.)
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11 On January 15, 2010, the defendants filed a motion to dismiss pursuant to
12 Federal Rule of Civil Procedure 4(m). (Docket No. 60.) In their motion, the
13 defendants argued that the summons as to Santos and Medina were not served
14 by plaintiff within 120 days after the third amended complaint was filed. (Id. at
15 2, ¶ 3.) According to the defendants the summons were supposed to have been
16 served by January 9, 2010. (Id.) The defendants' motion was denied for lack of
17 standing. (Docket No. 61.) Despite of this the court, on its own motion,
18 dismissed without prejudice plaintiff's claims against Santos and Medina. (Docket
19 No. 62.)
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22 On January 19, 2010, plaintiff filed a motion requesting entry of default
23 against the defendants for failing to answer the third amended complaint.
24 (Docket No. 67.) Plaintiff also requested the court to reconsider the order
25 dismissing the claims against Santos and Medina. (Id.) On that same day, after
26 the defendants filed a motion in opposition, the court issued an order denying
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3 plaintiff's request for entry of default. (Docket Nos. 68 & 72.) However, the court
4 did not address plaintiff's request for reconsideration. (Id.)
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6 As a result, on January 20, 2010, plaintiff filed a motion requesting that the
7 court reconsider its order dismissing the claims against Medina and Santos.
8 (Docket No. 77.) In his motion plaintiff makes several arguments to support his
9 request. First, plaintiff states that if he had been given notice prior to the
10 dismissal he could have informed the court that the summons as to Medina and
11 Santos were served a couple of days after the deadline, on January 12 and 13,
12 2010. (Id. at 4.) Plaintiff claims that the reason why the summons were served
13 after the deadline was in part due to a delay in the Clerk's Office in issuing the
14 summons. (Id.) Second, he argues that contrary to what the court held in its
15 order an extension of time to serve the summons was requested. (Id.) Plaintiff
16 states that he also sought leave to serve the summons by publications but that
17 his request was not addressed by the court. (Id.) Third, plaintiff claims that he
18 made all diligent efforts to complete service within the 120 day period prescribed
19 by Rule 4(m). (Id. at 5.) Fourth, plaintiff sustains that the delay in service does
20 not prejudice the defendants in any way. (Id. at 6.) Finally, plaintiff claims that
21 justice would be best served if the court allowed a *nunc pro tunc* extension of time
22 until January 15, 2010, for service of process on Santos and Medina. (Id.)
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4 On February 5, 2010, the defendants filed a motion in opposition requesting
5 the court to deny plaintiff's request for reconsideration. (Docket No. 81.) The
6 defendants argue that justice would not be served by allowing an extension of
7 time. (Id. at 2, ¶ 5.) According to the defendants, plaintiff has been given
8 multiple opportunities to amend his complaint and correct the deficiencies
9 contained in it. (Id.) They also contend that if plaintiff knew that summons were
10 served after the 120 day period, he should have filed the proof of service
11 immediately after they were executed. (Id. at 3, ¶ 7.) Furthermore, the
12 defendants believe that vacating the court's order at this time would mean that
13 discovery in this case would have to be reopened in order for Santos and Medina
14 to properly defend against plaintiff's claims. (Id. ¶ 8.) However, the defendants
15 state that in the event that the order is vacated they will ask the court to allow
16 them to file a dispositive motion regarding the claims made by plaintiff against
17 Santos and Medina. (Id. ¶ 10.)
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21 II. STANDARD OF REVIEW

22 A motion for reconsideration may only be granted by a district court if the
23 moving party demonstrates that there is: (1) newly discovered evidence that
24 would change the result, (2) an intervening change in controlling law, or (3) the
25 need to correct a manifest error of law or fact. Silva Rivera v. State Ins. Fund
26 Corp., 488 F. Supp. 2d 72, 78 (D.P.R. 2007) (citing Dodge v. Susquehanna Univ.,
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3 796 F. Supp. 829, 830 (M.D. Pa. 1992)); see also Marks 3-Zet-Ernst Marks GmbH
4 & Co. KG v. Presstek, Inc., 455 F.3d 7, 15 (1st Cir. 2006). A motion for
5 reconsideration, however, may not be used “to repeat old arguments previously
6 considered and rejected, or to raise new legal theories that should have been
7 raised earlier.” Sánchez-Rodríguez v. Departamento de Corrección y
8 Rehabilitación, 537 F. Supp. 2d 295, 297 (D.P.R. 2008) (quoting Nat’l Metal
9 Finishing Com. v. Barcalys Am./Commercial, Inc., 899 F.2d 119, 123 (1st Cir.
10 1990)).

11 III. ANALYSIS

12 Summons

13 1. Notice

14 Plaintiff argues that the court dismissed, on its own motion, without notice,
15 all of the claims against Santos and Medina. (Docket No. 77, at 4.) He states that
16 if the court had given him notice he would have had time to file the proof of
17 service. (Id.) Rule 4(m) states, in pertinent part, as follows:
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19 If a defendant is not served within 120 days after the
20 complaint is filed, the court--on motion or on its own
21 after notice to the plaintiff--must dismiss the action
22 without prejudice against that defendant or order that
23 service be made within a specified time. But if the
24 plaintiff shows good cause for the failure, the court must
25 extend the time for service for an appropriate period.
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27 Fed. R. Civ. P. 4(m).
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4 In order to dismiss a complaint *sua sponte*, the rule requires that prior
5 notice of the impending dismissal be awarded by the district court. Panzardi-
6 Santiago v. Univ. of P.R., 200 F. Supp. 2d 1, 24-25 (D.P.R. 2002); see Ruiz-Varela
7 v. Sánchez-Vélez, 814 F.2d 821, 823 (1st Cir. 1987) (the First Circuit found that
8 the notice requirements were not violated because the district court's order of
9 dismissal itself gave plaintiff notice of the issue as well as the opportunity to argue
10 good cause for the failure of service); see also Brown v. District of Columbia, 514
11 F.3d 1279, 1286-87 (D.C. Cir. 2008) (where the district court erred in *sua sponte*
12 dismissing claims against individual defendants for a failure to effect service when
13 the plaintiff had neither actual nor constructive notice of the court's impending
14 action).

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17 However, "[w]hen the plaintiff has had an adequate opportunity to argue
18 good cause for the failure to serve, such as in a motion for reconsideration, some
19 circuits have held that a warning by the trial court prior to dismissal is not
20 required." Betancourt v. Toledo, 199 F.R.D. 447, 448 (D.P.R. 2001) (quoting
21 Smith-Bey v. Cripe, 852 F.2d 592, 593 (D.C. Cir. 1988) (citing Ruiz-Varela v.
22 Sánchez-Vélez, 814 F. 2d at 823)). In other words, an order of dismissal in itself
23 can serve as a proper means of notifying a plaintiff of the issue as long as he is
24 given the opportunity to argue good cause for the failure of service. Betancourt
25 v. Toledo, 199 F.R.D. at 448.
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3 Although it is correct that no warning was given prior to dismissal it does not
4 mean that plaintiff was prejudiced. It was plaintiff who had the obligation of
5 informing the court that the summons were served regardless of whether or not
6 notice was given before the impending dismissal. See Fed. R. Civ. P. 4(l)(1)
7 (“Unless service is waived, proof of service must be made to the court.”). There
8 is simply no excuse that can justify plaintiff’s lack of diligence. It was not until the
9 court dismissed plaintiff’s claims that he informed that the summons had been
10 served. As the defendants point out, if plaintiff knew that the summons were not
11 served within the time limit, he should have filed a proof of service immediately
12 after they were executed. (Docket No. 81, at 3, ¶ 7.)
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16 However, the fact that plaintiff did not file a proof of service before the
17 claims were dismissed does not mean that he has failed to provide any reason
18 that would justify the delay in serving the summons. Although plaintiff filed a
19 motion for entry of default and reconsideration, no ruling was made as to whether
20 there was good cause for justifying the delay in serving the summons. As such,
21 the court will now address the issue.
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23 2. Good Cause

24 “[A] plaintiff may escape dismissal in the face of insufficient service in two
25 circumstances: [(1)] where there is ‘good cause for the failure,’ or [(2)] even if
26 there is not good cause shown, where the court in its discretion decides to grant
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3 the plaintiff more time to effect service.” Bunn v. Gleason, 250 F.R.D. 86, 88 (D.
4 Mass. 2008) (citing Fed. R. Civ. P. 4(m); Advisory Committee's Notes on Fed. R.
5 Civ. P. 4 (“The [1993 amendment] explicitly provides that the court shall allow
6 additional time if there is good cause for the plaintiff's failure to effect service in
7 the prescribed 120 days, and authorizes the court to relieve a plaintiff of the
8 consequences of an application of this subdivision even if there is no good cause
9 shown.”); Riverdale Mills Corp. v. U.S. Dep't of Transp. Fed. Aviation Admin., 225
10 F.R.D. 393, 395 (D. Mass. 2005)).

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13 “Good cause is likely (but not always) to be found when the plaintiff’s failure
14 to complete service in timely fashion is a result of a third person, typically the
15 process server, the defendant has evaded service of the process or engaged in
16 misleading conduct, the plaintiff has acted diligently in trying to effect service or
17 there are understandable mitigating circumstance[s], or the plaintiff is proceeding
18 *pro se* or in *forma pauperis*.” Bunn v. Gleason, 250 F.R.D. at 89 (quoting McIsaac
19 v. Ford, 193 F. Supp. 2d 382, 383 (D. Mass. 2002) (quoting 4B Charles Alan
20 Wright & Arthur R. Miller, Federal Practice and Procedure § 1137, at 342 (3d ed.
21 2002)).

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24 However, “[i]f good cause is lacking, the determination of whether to extend
25 the time for service of process is based on a number of factors, including whether:
26 (a) the party to be served received actual notice of the lawsuit; (b) the defendant
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3 would suffer . . . prejudice; and (c) plaintiff would be severely prejudiced if his
4 complaint were dismissed.” United States v. Tobins, 483 F. Supp. 2d 68, 79-80
5 (D. Mass. 2007) (quoting Riverdale Mills Corp v. U.S. Dep’t of Transp. Fed.
6 Aviation Admin., 225 F.R.D. at 395 (quoting In re Sheehan, 253 F.3d 507, 512
7 (9th Cir. 2001)).
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10 The court finds that plaintiff has shown good cause for his delay in serving
11 the summons as to Medina and Santos. Plaintiff made reasonable efforts to serve
12 the summons within the time limit noted in Rule 4(m) after the third amended
13 complaint was filed. The record shows that plaintiff requested the help of both
14 the Department of Justice (“DOJ”) and the Puerto Rico Police Department
15 (“PRPD”) because he had no knowledge of the last known addresses of Santos and
16 Medina. (Docket No. 50.) However, since neither the DOJ nor the PRPD were
17 able to help, plaintiff requested an extension of time to serve the summons. (Id.)
18 Then, after his request was denied by the court, plaintiff hired a private detective
19 in order to find and serve Medina and Santos. (Docket Nos. 67-2, 67-3 & 77, at
20 5-6.) Needless to say, the detective was able to find them and serve process.
21 (Id.) Thus, it is clear that plaintiff exercised due diligence in effecting service of
22 process within the 120 day period.
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26 Furthermore, there are two mitigating circumstances that justify plaintiff’s
27 delay in serving the summons. First, plaintiff’s motion requesting an extension
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3 of time to serve the summons was denied because trial was scheduled for
4 February 1, 2010. (Docket No. 51.) However, the trial date was vacated and has
5 not been rescheduled. (Docket No. 63.) Second, as plaintiff points out there was
6 a delay in the issuance of the summons. (Docket No. 77, at 4-5.) The reason for
7 the delay plaintiff explains was due to a problem with the summons. (Id.)
8 According to plaintiff, after filing the third amended complaint along with the
9 summons on September 11, 2009, he was notified by the clerk's office that the
10 form that was used was outdated. (Id.) After being informed of the problem,
11 plaintiff on September 15, 2009, filed a motion for issuance of summons.
12 (Docket No. 47.) On that same day, the court entered an order granting plaintiff's
13 motion for issuance of summons. (Docket No. 48.) The new summons were
14 issued on September 17, 2009. (Docket No. 49.) All in all six days transpired
15 from the moment the plaintiff filed the third amended complaint until the
16 summons of Santos and Medina were issued. Plaintiff had until January 8, 2010,
17 to serve the summons.
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22 The record shows that the summons were served five days after the
23 deadline. (Docket Nos. 67-2 and 67-3.) Medina was served on January 12, 2010,
24 while Santos was served on January 13, 2010. (Id.) Therefore, this means that
25 if not for the problems encountered by plaintiff in obtaining the summons they
26 would have been served within the 120 days. Hence, plaintiff's claims against
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3 Medina and Santos probably would not have been dismissed by the court. Thus,
4 in light of all of these circumstances the court's order dismissing plaintiff's claims
5 must be vacated. Even though there was a short delay in serving the summons
6 of Medina and Santos, the court finds that all of the defendants were properly
7 served.
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10 The court would have arrived to the same conclusion, by exercising its
11 discretion, even if plaintiff had failed to show good cause for his failure to serve
12 the summons within the time period permitted by Rule 4(m). The fact that
13 defendants were served expediently gives the court reason to believe that both
14 Medina and Santos were aware of the claims asserted against them. In other
15 words, Medina and Santos' ability to defend themselves will not be affected or
16 diminished.
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18 Moreover, the defendants have not shown that by vacating the order
19 dismissing plaintiff's claims against Medina and Santos they will be prejudiced.
20 The defendants only argue that vacating the order will entail reopening the
21 discovery in this case. The defendants' argument, however, is unavailing. The
22 fact that plaintiff's claims were dismissed without prejudice does not mean that
23 the ideal course of action is to hold a separate trial against Medina and Santos,
24 much less when there was only a short delay in the service process. To hold
25 otherwise would only result in the waste of judicial resources.
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4 IV. CONCLUSION

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6 For the reasons set forth above, plaintiff's motion is hereby granted.

7 Accordingly, the court's order dismissing plaintiff's claims against Medina and

8 Santos is vacated.

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10 At San Juan, Puerto Rico, this 11th day of March, 2010.

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12 S/ JUSTO ARENAS
13 Chief United States Magistrate Judge

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