

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF PUERTO RICO

3 RAFAEL OCASIO-LOZADA, et al.,

4 Plaintiffs,

5 v.

6 UNITED STATES OF AMERICA, et al.,

7 Defendants.

Civil No. 09-1192 (JAF)

8 **ORDER**

9 On July 22, 2009, Defendants United States of America and
10 Luis S. Fraticelli moved to dismiss Plaintiffs' complaint under
11 Federal Rule of Civil Procedure 12(b)(5) for insufficient service of
12 process. (Docket No. 6.) Plaintiffs opposed the motion on August 7,
13 2009 (Docket No. 7); the government and Fraticelli replied on
14 August 18, 2009 (Docket No. 14); and Plaintiffs sur-replied on
15 August 25, 2009 (Docket No. 16). As Fraticelli now concedes that he
16 was properly served with process on May 28, 2009 (Docket No. 14), the
17 sole issue before us is the sufficiency of service on the government.

18 Federal Rule of Civil Procedure 4(m) requires service of process
19 "within 120 days after the complaint is filed." Unless the plaintiff
20 shows good cause for failing to meet the deadline, we may choose
21 between dismissal without prejudice and an allowance for service
22 within a specified time. Fed. R. Civ. P. 4(m). In a case against
23 the government, Rule 4(i)(1)(A) requires the plaintiff to serve the
24 summons and complaint to the United States attorney for the federal

1 district where the case is brought. The plaintiff may also deliver
2 service to "an assistant United States attorney or clerical employee
3 whom the United States attorney designates in a writing filed with
4 the court clerk." Fed. R. Civ. P. 4(i)(1)(A)(i).

5 The government argues that Plaintiffs have, without good cause,
6 failed to serve the United States attorney for this district.
7 (Docket Nos. 6, 14.) Plaintiffs contend that their server, Melissa
8 Vélez, attempted service on the United States attorney by delivering
9 it to the office for the Federal Bureau of Investigations ("FBI") in
10 Puerto Rico. (Docket Nos. 7; 10; 16.) Vélez states that she visited
11 the FBI office on May 22, 2009, and was informed that Fraticelli was
12 absent. (Docket No. 10-2.) Vélez then asked whether anyone was
13 present to receive the summons issued to the government, and Milton
14 Ramos, a paralegal, emerged. (Id.) Ramos read the documents,
15 confirmed that he was authorized to receive service, and signed an
16 acknowledgment. (Id.)

17 At the threshold, Ramos is neither an assistant United States
18 attorney nor a clerk expressly authorized to receive service of
19 process. See Fed. R. Civ. P. 4(i)(1)(A)(i). Even if established,
20 Ramos' apparent authority to receive process would be insufficient.
21 See Fed. R. Civ. P. 4(i)(1)(A); see also Blair v. City of Worcester,
22 522 F.3d 105, 113 (1st Cir. 2008) (citing cases requiring actual
23 authority to receive service of process). Furthermore, any reasonable
24 person should have been aware that the FBI office is distinct from

1 that of the United States attorney. Other than Vélez' affidavit,
2 Plaintiffs have submitted no proof of service on Ramos. We,
3 therefore, lack any basis to assess whether Ramos had implied actual
4 authority to receive summons for the United States attorney.
5 Accordingly, Plaintiffs have not shown good cause for their error.
6 See Fed. R. Civ. P. 4(m).

7 However, we find no reason to dismiss without prejudice because
8 Plaintiffs will likely re-file their complaint. Meanwhile, eight
9 months have passed since Plaintiffs commenced this case on
10 February 27, 2009 (Docket No. 1), and they have not attempted to cure
11 their error. As Plaintiffs have wasted judicial resources, we will
12 truncate the discovery process accordingly.

13 In view of the foregoing, we hereby **DENY** the government and
14 Fraticelli's motion to dismiss (Docket No. 6). We **ORDER** Plaintiffs
15 to properly serve process on the United States pursuant to Federal
16 Rule of Civil Procedure 4(i)(1) **on or before November 12, 2009.**

17 **IT IS SO ORDERED.**

18 San Juan, Puerto Rico, this 2nd day of November, 2009.

19 s/José Antonio Fusté
20 JOSE ANTONIO FUSTE
21 Chief U.S. District Judge