

1 **IN THE UNITED STATES DISTRICT COURT**
2 **FOR THE DISTRICT OF PUERTO RICO**

3 **GLADYS GOZA-GONZALEZ, et al.,**

4 **Plaintiffs,**

5 **v.**

6 **SOUTH AMERICAN RESTAURANTS**
7 **CORP., et al.,**

8 **Defendants.**

Civil No. 12-1794 (GAG)

9
10 **OPINION AND ORDER**

11 Norberto Colon-Lorenzana and Gladys Goza-Gonzalez (collectively “Plaintiffs”) bring this
12 trademark action against South American Restaurants Corporation and various unknown defendants
13 (collectively “Defendants”) claiming Norberto invented the “Pechu Sandwich.” (Docket No. 1.)
14 While still in its nascent stages, Defendants move to dismiss the complaint due to Plaintiffs’ failure
15 to serve process within 120 days of filing the complaint. (See Docket No. 9.) Plaintiffs oppose
16 claiming they were hamstrung due to the late issuance of the summons by the court. After reviewing
17 the documents, the court **DENIES** Defendants’ motion to dismiss.

18 **I. Procedural Background**

19 Key to determining the merits of Defendants’ motion is the timeline of the events. Plaintiffs
20 file the complaint on September 24, 2012. (Docket No. 1.) The clerk’s office notified Plaintiffs that
21 the summons attached to the complaint failed to conform to the format prescribed by the U.S.
22 District Court on September 25, 2012. (Docket No. 3.) On October 29, 2012, Plaintiffs re-filed the
23 summons with the court in the correct format (Docket No. 5) and the clerk’s office issued the
24 summons on November 29, 2012 (Docket No. 8). The present motion to dismiss was filed on March
25 26, 2013 (Docket No. 9), the court ordered Plaintiffs to show cause as to why the complaint should
26 not be dismissed (Docket No. 10), and Plaintiffs’ response was filed on April 9, 2013 (Docket No.
27 11).

28 **II. Discussion**

Civil No. 12-1794 (GAG)

Federal Rule of Civil Procedure 4(m) (the “Rule”) states:

If a defendant is not served within 120 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

FED. R. CIV. P. 4(m) (2013). Defendants claim the 120 day period expired on January 22, 2013, but that the court granted Plaintiffs until January 25, 2013 to execute service. (See Docket No. 9 at 2.) Plaintiffs conveniently disremember the initial defective filing of the summons and simply argue it is the court’s fault for the delay because the clerk’s office did not issue the summons until November 29, 2012 and it was not received by Plaintiffs until December 3, 2012. (See Docket No. 11 at 2.) Therefore, the 120 days began to run on December 4, 2012 allowing Plaintiffs to execute service on or before April 4, 2013.

As the Rule indicates, a district court has broad discretion in ruling whether to dismiss the complaint or allow an extension. See United States v. Lezdey, Civil Action No. 12-11486-RWZ, 2013 WL 704475, at * 2 (D. Mass. Feb. 26, 2013) (citing United States v. Tobins, 483 F. Supp. 2d 68, 77 (D. Mass. 2007)); Pomales-Soto v. Guzman, Civil No. 12-1091 (JAF), 2012 WL 6005763, at * 2 (D.P.R. Nov. 30, 2012). In this case, the court finds it best to use the December 4, 2012 date to commence the 120 period. Plaintiffs did not unreasonably delay in curing their defective filing with the court and Plaintiffs did execute service of process within 120 days from receiving the summons from the clerk’s office. Finally, the action was only delayed, at most, by three months and Defendants have not argued any prejudice stemming from a ruling denying their motion. Therefore, the court, in its discretion, **DENIES** the motion to dismiss.

SO ORDERED

In San Juan, Puerto Rico this 11th day of April, 2013.

S/Gustavo A. Gelpí
GUSTAVO A. GELPÍ
United States District Judge