IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

IN RE: KELVIN MANBODH ASBESTOS LITIGATION SERIES	ASBESTOS DOCKET MASTER DOCKET NO.: 324/1997
KELVIN MANBODH, ET AL., Plaintiffs, vs. HESS OIL VIRGIN ISLANDS CORPORATION, ET.AL., Defendants.	CIVIL NO. 324/1997 ACTION FOR DAMAGES JURY TRIAL DEMANDED MASTER FILE NO. 3231
HESS OIL VIRGIN ISLANDS CORPORATION, Third Party Plaintiff, vs. LOCKHEED MARTIN CORPORATION, ET AL., Third Party Defendants.	**MEMORANDUM OPINION DENYING HESS OIL VIRGIN ISLANDS CORPORATION'S MOTION TO FOR ENLARGEMENT OF TIME IN WHICH TO SERVE VIACOM INC. AND GRANTING VIACOM INC.'S MOTION TO DISMISS**
LITWIN CORPORATION and LITWIN PAN-AMERICAN CORPORATION, Third Party Plaintiffs, vs. UNIVERSAL OIL PRODUCTS COMPANY, ET AL., Third Party Defendants.	**NOT FOR PUBLICATION**

COUNSEL:

BRITAIN H. BRYANT, ESQ.
BRYANT, BARNES, MOSS, & BECKSTEDT LLP
Attorney for Third-Party Plaintiff Hess Oil Virgin Islands Corp.
P.O. Box 4589
1134 King Street, 2nd Floor
St. Croix, VI 00820

FRANCIS L. SPINELLI, ESQ.
EVERT & WEATHERSBY
Attorney for Viacom f/k/a CBS f/k/a Westinghouse Electric Company
3405 Piedmont Road, N.E., Suite 225
Atlanta, Georgia 30305

CABRET, MARIA M., Senior Sitting Judge[1]

[1] Assumed senior status on July 1, 2006.

MEMORANDUM OPINION
(Filed August 31, 2006)

THIS MATTER is before the Court on Third-Party Plaintiff Hess Oil Virgin Islands Corporation's [hereinafter "HOVIC"] Motion for Enlargement of Time in Which to Serve its Third Amended Third-Party Complaint. Third-Party Defendant Viacom, Inc., successor by merger to CBS Corporation f/k/a Westinghouse Electric Corporation [hereinafter "Viacom"] entered a special appearance to file an opposition to HOVIC's Motion, and to file a motion to dismiss for failure to timely serve a complaint. HOVIC replied to the opposition and opposed the instant motion to dismiss. Viacom filed a reply to HOVIC's opposition. For the following reasons, HOVIC's Motion is denied and Viacom's Motion is granted.

I. BACKGROUND

To resolve pre-trial matters, this Court, in May 1997, consolidated in a single docket, *In re Kelvin Manbodh Asbestos Litigation Series*, lawsuits filed on behalf of Plaintiff Kelvin Manbodh and 210 additional parties against HOVIC, Westinghouse Electric Corporation [hereinafter "Westinghouse"] and some twenty-six other defendants. HOVIC filed motions seeking leave to file third-party and cross-claim complaints in November 2001. These initial motions, granted shortly thereafter, sought to implead parties, including Westinghouse, only with respect to the four cases set for trial. On June 28, 2002, HOVIC stipulated to the dismissal of its cross-claim against Westinghouse, because Westinghouse had previously settled with the four plaintiffs in the cases set for trial. In early January 2003, Westinghouse reached a settlement with the 148 remaining Plaintiffs, prompting the stipulation for dismissal entered on January 15, 2003.

After claims between HOVIC and First-Party Plaintiffs were settled in early 2003, subsequent motions to amend by HOVIC, impleading previously named and additional

defendants in all remaining first-party cases, were granted in October 2004, with HOVIC's Complaint now naming Viacom, Inc., successor by merger to CBS Corporation f/k/a Westinghouse Electric Corporation, as a third-party defendant. HOVIC's Third Amended Third-Party Complaint was filed November 3, 2004. On that same day, HOVIC attempted service of the Complaint by certified mail on Westinghouse's previous counsel, Evert Weathersby LLP.

II. DISCUSSION

In HOVIC's Motion, filed on June 14, 2005, it seeks an enlargement of time so that it may serve Viacom with a Third Amended Third-Party Complaint outside the 120-day period contained in Rule 4(m) of the Federal Rules of Civil Procedure. HOVIC contends that it was unaware until recently[2] that its November 3, 2004 service by certified mail of the Complaint on Westinghouse's previous counsel, Evert Weathersby LLP, was not permissible. HOVIC believed, consistent with its contemporaneous service of prior counsel of other third-party defendants, that service of Evert Weathersby LLP's was authorized because of its prior involvement on behalf of Westinghouse. Thus, HOVIC argues that the delay in serving its Complaint was due to no fault of its own and was attributable to good cause. In the alternative, HOVIC directs this Court to the absence of prejudice to Viacom, in support of an extension, given that counsel continued to receive correspondence during the interim.[3]

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[2] In June of 2005, when HOVIC elicited discovery responses, Evert Weathersby LLP notified HOVIC of its continued objection to service by a June 6, 2005 letter. (Special Appearance of Viacom to Make the Following Submissions: (1) Mot. to Dismiss HOVIC's Third Am. Third-Party Compl. as against Westinghouse and (2) Mem. in Opp'n to HOVIC's Mot. for Enlargement of Time in Which to Serve its Third Am. Third-Party Compl. Ex. D) [hereinafter "Special Appearance"]. HOVIC, in its reply, contends that the statement in its motion should have claimed that they learned that service was defective in March 2005, "when serving a new complaint against Viacom." (Opp'n of HOVIC to Special Appearance at 3.) In either case, the claim that HOVIC only recently learned of the defect in service is dubious because of Viacom's December 8, 2004 letter communicating that defect. (Special Appearance, Ex. A.)

[3] Absence of prejudice to a defendant alone can never suffice for a showing of good cause under Rule 4(m). *See MCI Telecomm. Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1097 (3d Cir. 1995). It may be considered,

Viacom counters, arguing that on several occasions, beginning with a December 8, 2004 letter, Evert Weathersby LLP communicated to HOVIC that counsel was not authorized to receive service in this matter for Viacom. Thus, because of HOVIC's prior notice, Viacom claims that the delay could not have been attributable to good cause. Moreover, Viacom asserts that HOVIC's June 20, 2005 attempt to cure the defect in service before the Court granted leave constituted a violation of the applicable law and rules. Viacom contends that both the failure to establish good cause and the service of the Complaint without permission warrant dismissal. This Court will grant Viacom's Motion, but not for the reasons contained in Viacom's memoranda.

Superior Court Rule 27(b) states in relevant part that the "summons and process shall be served in the same manner as required to be served by Rule 4 of the Federal Rules of Civil Procedure." Accordingly, Rule 4 governs this dispute. *See Charles v. Woodley*, Civ. No. 178-2003, 2005 WL 3487864 at *2-5 (Super. Ct. Nov. 21, 2005) (providing that Rule 4(m) of the Federal Rules of Civil Procedure, not Rule 10 of the Superior Court Rules, governs motions for enlargement of time and motions to dismiss for failure to serve). Viacom argues that dismissal is proper pursuant to Rule 4(m) of the Federal Rules of Civil Procedure, which requires that a summons and complaint be served on a defendant within 120 days after the filing of a complaint. Rule 4(m) provides:

> TIME LIMIT FOR SERVICE. If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, *shall dismiss* the action without prejudice as to that defendant *or direct* that service be

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however, within the court's discretion under Rule 4(m). Evert Weathersby LLP concedes that it received correspondence and even access to HOVIC's discovery website during the interim, but explains that such allowances were attributable to its representation of Cross-Claim Defendant Foster Wheeler Corporation, not Viacom.

> effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court *shall extend the time for service* for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1).

FED. R. CIV. P. 4(m) (emphasis added). In particular, Viacom asserts that a dismissal is warranted under Rule 4(m) because of HOVIC's lengthy delay in service and inability to show good cause for that delay. HOVIC counters, claiming that it is entitled to an extension under Rule 4(m).

Since the Third Amended Complaint was filed in November 2004, both the filing of the June 14, 2005 Motion for Enlargement of Time and the subsequent attempt to cure the defect in service occurred after the expiration of the permissible Rule 4(m) time period. On the factual record there exists no good cause for HOVIC's delay. *See MCI Telecomm. Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1097 (3d Cir. 1995) (citing with approval *United States v. Nuttall*, 122 F.R.D. 163, 166-67 (D.Del. 1988) for the proposition that "courts have considered three factors in determining the existence of good cause: (1) reasonableness of plaintiff's efforts to serve (2) prejudice to the defendant by lack of timely service and (3) whether plaintiff moved for an enlargement of time to serve [prior to the expiration of the period prescribed by the rule]"). *MCI Telecomm. Corp.* cautions, however, that the primary inquiry shall focus on the reasonableness of a plaintiff's efforts. 71 F.3d at 1097. Here, a December 8, 2004 letter from Evert Weathersby LLP supplied notice to HOVIC that service on Viacom's counsel was not authorized. (Special Appearance, Ex. A.) Counsel again communicated this defect in March 2005 on two separate occasions, via phone and email, to representatives from the law firm of Wilson Elser Moskowitz Edelman & Dicker, HOVIC's stateside co-counsel. (Special Appearance, Ex. B.) Yet, even with such information, HOVIC did not seek permission

to serve Viacom outside the 120-day period until more than two months later. HOVIC's efforts hardly appear reasonable.

The Court need not find that the presented facts demonstrate that HOVIC had good cause for delay, however, because even if good cause is not shown, this Court still has the ability to grant HOVIC additional time to serve Viacom under Federal Rule of Civil Procedure 4(m). Good cause is not the exclusive means for justifying an extension. *See* FED. R. CIV. P. 4(m) advisory committee's note to 1993 Amendments; *Petrucelli v. Bohringer*, 46 F.3d 1298, 1304-08 (3d. Cir. 1995) (remanding district court decision for failure to consider other factors supporting an extension, including statute of limitations issues, after determining that good cause did not exist). Rule 4(m) provides that if service is not accomplished within 120 days of filing, the Court shall either dismiss the case or direct that service be effected within a specified time. FED. R. CIV. P. 4(m). The existence of good cause removes a trial court's discretion to dismiss, as the rule instructs that upon the requisite showing, "the court shall extend the time for service for an appropriate period." FED. R. CIV. P. 4(m). Due to the absence of good cause or any other compelling reason, *inter alia*, the expiration of the period prescribed by the statute of limitations, the Court will dismiss HOVIC's action against Viacom.

The Court will dismiss this matter pursuant to Rule 4(m) and Rule 12(b)(5) because there is little danger that the dismissal contemplated by the rule – a dismissal *without* prejudice – will operate as a dismissal with prejudice of HOVIC's timely claims due to the expiration of the period prescribed by the statute of limitations. Actions that were timely filed when HOVIC amended its pleading to name Viacom in its Third Amended Third-Party Complaint will continue to be timely, if promptly re-filed and served by HOVIC.

All the claims in HOVIC's Complaint which name Viacom are subject to the same six-year statute of limitations contained in section 31 of title 5 of the Virgin Islands Code. *See* V.I. CODE ANN. tit. 5, § 31 (1997).[4] Common law contribution and indemnification are considered implied contract causes of action, that accrued at the time HOVIC paid the settlement in early 2003.[5] *See generally* Maurice T. Brunner, Annotation, *What Statute of Limitations Covers Action for Indemnity*, 57 A.L.R.3d 833, 838 (1974) (providing that the majority of jurisdictions treat common law indemnity causes of action as implied contracts); Maurice T. Brunner, Annotation, *What Statute of Limitations Applies to Action for Contribution Against Joint Tortfeasor*, 57 A.L.R.3d 927, 929 (1974) (providing that where there is not a specific statute for such actions, the majority of jurisdictions treat common law contribution causes of action as implied contracts); *but see Dublin v. V.I. Tel. Corp.*, 15 V.I. 214, 229-30 (Terr. Ct. 1978) (concluding that common law indemnification and contribution brought against the Government of the Virgin Islands under the Tort Claims Act are tortious in nature and are subject to the two-year statute of limitations contained in section 31(5)(A)).[6] The breach of

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[4] "Civil actions shall only be commenced within the periods prescribed below after a cause of action shall have accrued...:

(3) Six years -

(A) An action upon a contract or liability, express or *implied*, excepting those mentioned in paragraph (1)(C) of this section.

5 V.I.C. § 31(5)(A) (emphasis added).

[5] *See* Maurice T. Brunner, Annotation *When Statute of Limitations Commences to Run Against Claim for Contribution or Indemnity Based on Tort*, 57 A.L.R.3d 867, 873-884 (1974) (providing that common law contribution and indemnity causes of action accrue from the time of payment of the underlying claim, judgment or settlement, though because of the peculiarities of third-party practice, actions could be filed while they are still inchoate).

[6] In *Dublin*, the court explained that the Virgin Islands statute of limitations was borrowed from Alaska, which in turn had its origins in the Oregon statute of limitations. *Dublin*, 15 V.I. at 229 n.13. *Dublin* acknowledged that, at the time, Oregon followed the majority position, interpreting contribution and indemnification actions as implied contract actions. *See e.g., Owings v. Rose*, 497 P.2d 1183, 1189-90 (Or. 1972) (interpreting the same statute). Nevertheless, the *Dublin* court concluded instead that such actions should be considered as torts, primarily due to the fact that the Government was a third-party defendant and potential indemnitor. The Court relied heavily on the policy supporting the Virgin Islands Tort Claims Act, found in section 3409 of title 33 of the Virgin Islands Code, which provides causes of action against in the government only in limited circumstances.

contract causes of action leveled against Viacom in Counts III (indemnification) and IV (failure to name as insured) of HOVIC's Third Amended Third-Party Complaint are similarly not impacted by a dismissal.[7] *See* 5 V.I.C. § 31(3)(A).

III. CONCLUSION

In sum, because HOVIC failed to establish good cause and Court chooses not to exercise its discretion, Viacom's Motion to Dismiss will be granted. HOVIC will not be placed in a different procedural position than it would have been otherwise, if it promptly re-files and serves its Complaint. As detailed in the accompanying order, HOVIC's belated Motion will be denied.

ATTEST:
Denise Abramsen
Clerk of the Court

By: _____
Deputy Clerk

Dated: Aug. 31, 2006

MARIA M. CABRET
Senior Sitting Judge of the Superior Court
of the Virgin Islands

CERTIFIED TO BE A TRUE COPY
THIS 5th day of Sept 2006
Denise D. Abramsen
CLERK OF THE COURT
By _____ Court Clerk

Although Alaska and Oregon have since adopted specific statutes of limitations for contribution and indemnification actions, now providing for shorter periods, without a similar directive, the Court finds that the six-year provision applies to these actions. *See e.g.*, OR. REV. STAT. § 31.810 (causes of action for contribution now have a two-year statute of limitations); AMERICAN LAW OF PRODUCTS LIABILITY TREATISE § 52:137 (3d ed. 2005) (most states have adopted specific statutes of limitations for contribution).

[7] Under Rule 15 of the Federal Rules of Civil Procedure, the Third Amended Third-Party Complaint naming Viacom as a Third-Party Defendant does not relate back to the initial filing of that action in November 2001. *See* FED. R. CIV. P. 15(c). In January 2003, Viacom's predecessor, Westinghouse, was dismissed from HOVIC's Cross-Claim Complaint. The naming of Viacom in the November 2004 Third Amended Third-Party Complaint does not qualify for any of the grounds in Rule 15(c) concerning the relation back of amendments. First, the statute of limitations does not expressly permit the relation back for such causes of action. *See* 5 V.I.C. § 31; FED. R. CIV. P. 15(c)(1). Second, HOVIC seeks to name a new party, Viacom, not merely to add a claim against an existing party to the lawsuit. *See* FED. R. CIV. P. 15(c)(2). Finally, HOVIC did not mistakenly name a party and now seek to correct that error. FED. R. CIV. P. 15(c)(3). Accordingly, the only timely actions would have accrued within six years of the filing date for the Third Amended Third-Party Complaint, November 3, 2004. To the extent that any of HOVIC's claims accrued prior to November 3, 1998, they would be untimely even if HOVIC was not forced to refile.