

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

JOHN SOUTHWELL by HEADDIE HENRY, his)
mother and next of friend, and KENALIE ATTIDORE,)

Plaintiffs,)

v.)

THE GOVERNMENT OF THE VIRGIN ISLANDS,)
THE VIRGIN ISLANDS DEPARTMENT OF)
JUSTICE, GERRY SCHMIDT SR., ALLIANCE)
~~AVIATION FUELS, INC., JEROME KENDALL,~~)
TEXTRON, INC., and AVO CORPORATION,)
d/b/a LYCOMING ENGINES,)

Case No. ST-08-CV-183

Defendants.)

MEMORANDUM OPINION

Pending before the Court is Defendant Alliance Aviation Fuels, Inc.'s ("Alliance") motion to quash service of process.¹ For the following reasons, Alliance's motion will be granted but Plaintiff will be permitted to re-serve Alliance.

FACTUAL AND PROCEDURAL HISTORY

On October 15, 2009, Plaintiff filed a Second Amended Complaint naming Alliance as an additional defendant. On December 17, 2009, Plaintiff filed an affidavit of service indicating that Denise Charles accepted service on behalf of Vincent Frazer and that the place of service was the office of the Virgin Islands Department of Justice. Currently the Attorney General of the Virgin Islands, Vincent Frazer, Esq., was, at the

¹ Alliance filed its motion on March 5, 2010; Plaintiff filed an opposition on March 26, 2010; and Alliance filed a reply on April 7, 2010. In connection with its motion to quash, Alliance filed a motion to dismiss. Considering Alliance has not been properly served in this matter, a ruling on the motion to dismiss would be premature.

time of service, still shown on the records of the Office of the Lt. Governor, Division of Corporations and Trade Names, as the resident agent of Alliance, a post he first accepted while working as an attorney in private practice.

ANALYSIS

A “resident agent” is defined as “[a] person authorized to accept service of process for another person, esp. a corporation, in a particular jurisdiction.” Black's Law Dictionary 65 (7th ed.1999). When serving a corporation’s resident agent, service of process must be made upon the resident agent itself. See *Brunn v. Xtra Superfoods Centers, Inc.*, 2001 WL 180136, at *3 (D.V.I. 2001) (citing *Gottlieb v. Sandia American Corp.*, 452 F.2d 510, 514 (3d Cir. 1971)). Under Fed. R. Civ. P. 4, there is no provision for substitute service. See *Brunn, supra*, at *3. “Generally speaking, the process cannot be left with someone at the officer’s or agent’s office.” *Gottlieb, supra*, at 514.

Because Plaintiff served Denise Charles and not Vincent Frazer, Alliance has not been properly served. In addition, the one hundred and twenty day period for serving a defendant under Fed. R. Civ. P. 4(m) has expired.

Untimely service is evaluated pursuant to *Petrucci v. Bohringer and Ratzinger*, 46 F.3d 1298 (3d Cir. 1995). The time for service should be extended for an appropriate period if a plaintiff can show “good cause” for failing to effectuate timely service. See *Chiang v. U.S. Small Business Admin.*, 331 Fed. Appx. 113, 115 (3d. Cir. 2009) (citing *Petrucci, supra*, at 1312). In the absence of a showing of good cause, the court may consider the following:

[defendant’s] actual notice of the legal action; prejudice to the defendant; the statute of limitations on the underlying causes of action; the conduct of the defendant; and whether the plaintiff is represented by counsel, in addition to any


other factor that may be relevant when deciding whether to grant an extension or dismiss the complaint.


Chiang, supra, at 116; see also Fed. R. Civ. P. 4(m) Notes of Advisory Committee on 1993 amendments; *Boley v. Kaymark*, 123 F.3d 756, 759 (3d. Cir. 1997).

Here, Plaintiff has not shown good cause why he has not complied with Fed. R. Civ. P. 4(h). See *Chiang, supra*, at 115-116 (good cause for untimely service not shown where plaintiff offered no explanation for failing to comply with Fed. R. Civ. P. 4(i)). However, a dismissal without prejudice would effectively bar Plaintiff's action against Alliance as the statutory period of limitations for Plaintiff's claims has expired. While the expiration of the statute of limitations does not require a court to grant an extension of time to properly make service pursuant to Fed. R. Civ. P. 4, the Court will permit Plaintiff to re-serve Alliance.² An Order consistent with this Memorandum Opinion shall follow.

Dated: November 24, 2010

ATTEST: Venetia H. Velazquez, Esq.
Clerk of Court ___ / ___ / ___

by: 
Rosalie Griffith
Court Clerk Supervisor 11/29/10


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

CERTIFIED A TRUE COPY

Date: 11/30/10

Venetia H. Velazquez, Esq.
Clerk of the Court

By: 
Court Clerk

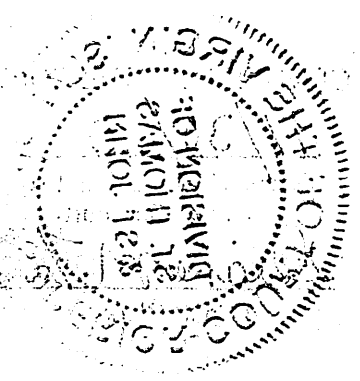
² Although Plaintiff's original service of process was not in compliance with Rule 4, the fact that Plaintiff served an individual who on frequent occasion has received service of process on behalf of Vincent Frazer weighs in favor of granting Plaintiff an extension. Plaintiff may also wish to consider service in some other authorized form in order to avoid another motion to dismiss on the grounds that the Attorney General is not authorized to accept service on behalf of a corporation under these circumstances.

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Defendants.)

Case No. ST-08-CV-183

ORDER

UPON CONSIDERATION of the premises, it is hereby

ORDERED that Alliance Aviation Fuels, Inc.'s motion to quash is GRANTED;

and it is

ORDERED that Plaintiff shall re-serve Alliance on or before

FEBRUARY 15, 2011; and it is

ORDERED that a copy of this Order shall be directed to counsel of record.

Dated: November 24 2010

ATTEST: Venetia H. Velazquez, Esq.
Clerk of Court ___/___/___

by: Rosalie Griffith
Rosalie Griffith
Court Clerk Supervisor 11/29/10

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

CERTIFIED A TRUE COPY

Date: 11/30/10

Venetia H. Velazquez, Esq.
Clerk of the Court

By: Diane M. Turnbull
Court Clerk

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