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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

ANNE WEISE,)	
)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 07-cv-0423 A (F)
)	
FORD MOTOR COMPANY,)	
And UNITED AUTOMOBILE)	
WORKERS LOCAL UNION 897,)	
)	
Defendants.)	

**PLAINTIFF’S MEMORANDUM IN OPPOSITION TO
DEFENDANT UAW LOCAL 897’S AND DEFENDANT FORD MOTOR COMPANY’S
MOTIONS TO DISMISS**

I. PRELIMINARY STATEMENT

Plaintiff Anne Weise commenced this action on June 28, 2006. Service of the Summons and Complaint in this action was not immediately rendered due to ongoing negotiations with the Defendants. Counsel for Plaintiff made attempts to serve the Summons and Complaint prior to October 26, 2007, however, service was not completed until October 29, 2007. As authorized by Fed. R. Civ. P. 4(m), Plaintiff herein requests this court to “order that service be made within a specified time” specifically that service be rendered by October 29, 2007, and to thereby deny the Defendants’ Motions to Dismiss for insufficient service. Furthermore, upon the showing of the following, Plaintiff hereby requests that this court deny Defendant UAW Local 897’s Motion to Dismiss for failure to state of cause of action in compliance with Fed. R. Civ. P. 12(b)(6).

II. FACTS

Plaintiff filed her Complaint with this Court on June 28, 2007. During the summer of 2007, Plaintiff's counsel discussed the possibility of settlement of the matter with corporate counsel for Defendant Ford Motor Company. With the risk of overstating the obvious, the talks did not result in settlement of the matter. On or about September 2, 2007, Plaintiff's counsel sent a request for service of process to James Hoelscher, a local process server. On October 26, 2007, having not heard from the process server regarding process, Plaintiff's counsel contact the process server to again request service of process. The process service did not have the proper documents to serve. Upon discovering this mistake, the proper papers were immediately sent out for service and served on October 29, 2007. *See generally* Affidavit of Scott W. Kroll, Esq., dated January 22, 2008.

As stated in the Complaint, Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("E.E.O.C.") on July 25, 2006. On March 30, 2007, the E.E.O.C. issued a determination finding that it was "unable to conclude that the information obtained establishes violations of the statutes." The determination also stated that a lawsuit must be filed within 90 days of receipt of the notice. The notice was received on April 2, 2007. The present complaint was filed within the requisite 90-day period.

III. ARGUMENT

A. Plaintiff's claims against Defendants should not be dismissed for failure to serve the Summons and Complaint

Both Defendants make motions to dismiss the complaint for noncompliance with Fed. R. Civ. P. 4 (m), which states:

Time Limit for Service. 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. [Emphasis added.]

Contrary to defendants' assertion, the court is not limited to dismissal of an action for failure to serve within 120 days. The Court may, in the alternative, order that service be made within a specified time. The Notes of Advisory Committee on the 1993 Amendment provide further insight as to the court's discretionary authority in this arena:

The new subdivision explicitly provides that the court shall allow additional time if there is good cause for the plaintiff's failure to effect service in the prescribed 120 days, and authorizes the court to relieve a plaintiff of the consequences of an application of this subdivision ***even if*** there is no good cause shown. [Emphasis added.]

Thus, even absent "good cause," dismissal is not mandatory. *See Beauvoir v. United States Secret Serv.*, 234 F.R.D. 55 (E.D.N.Y. 2006). However, in the instant motion, good cause exists for Plaintiff's failure to effect service within the allotted 120 days. "In determining whether a plaintiff has shown good cause under Rule 4(m), courts in [the Second] Circuit generally consider whether (1) the plaintiff made reasonable efforts to serve the defendant, and (2) the defendant was prejudiced by the delay in service." Rivera v. Warden of M.C.C., et al., 2000 U.S. Dist. LEXIS 8212 (S.D.N.Y. 2000) *citing* Equal Empl. Opp. Comm. v. Die Fliedermaus, L.L.C., 77 F. Supp. 2d 460, 474 (S.D.N.Y. 1999) (internal quotations omitted). *See also* Lloyd v. Alpha Phi Alpha Fraternity, Inc., et al., 1998 U.S. Dist. LEXIS 6514 (N.D.N.Y. 1998); Husowitz v. American Postal Workers Union and its Officers, et al., 190 F.R.D. 53; 1999 U.S. Dist. LEXIS 13104 (E.D.N.Y. 1999); and Coleman, et al. v. Cranberry Baye Rental Agency, et al., 202 F.R.D. 106; 2001 U.S. Dist. LEXIS 11551 (N.D.N.Y. 2001).

First, as shown in the Affidavit of Attorney Kroll, the plaintiff made reasonable efforts to serve Defendants within the 120 days. Because of ongoing negotiations, service was not attempted until the final month of the allotted time frame. As stated by Attorney Kroll, attempts were made in good faith to serve the defendants by placing such documents into the hands of a trusted process server. When Plaintiff's counsel discovered that there was a mistake in the documents provided, it was immediately rectified and the defendants were expeditiously served. Such efforts were reasonable on the part of the Plaintiff and should be accepted by the court as good cause for the minor delay in service.

Second, Defendants cannot claim that such a short delay in service will prejudice them in any way. Defendants, because of the ongoing negotiations in this matter and because of conversations with Plaintiff and Plaintiff's counsel regarding these claims, knew of the claims against them and were served only one business day after they were expecting service of same. Furthermore, and most significantly, Defendants have claimed no prejudice from the delay in service.

The standard set forth in Rule 4(m) "allows the court, in its discretion, to extend the time for service, even if the plaintiff fails to show good cause. If the plaintiff has shown good cause, the extension is mandatory." Husowitz, 190 F.R.D. 53 *citing* Blessinger v. United States, 174 F.R.D. 29, 30 (E.D.N.Y. 1997) (*citing* Espinoza v. United States, 52 F.3d 838, 840-41 [10th Cir. 1995]). *See also* Coleman, 202 F.R.D. 106 ("If plaintiff fails to demonstrate good cause, the court may, nevertheless, extend the time for service in the exercise of its discretion."). Therefore, if the above reasons are found to be "good cause" by this court for the delay in service, the court must extend the time to serve. However, if the court finds that the above circumstances do not

warrant a finding of good cause, it is respectfully requested that this court exercise its discretion and allow for the extension of the time for service.

In considering whether to exercise its discretion in this capacity, the court should consider the following: “whether the applicable statute of limitations would bar a re-filed action; whether defendant had actual notice of the claims asserted in the complaint; whether defendant had attempted to conceal a defect in service; and whether defendant would be prejudiced by an extension.” Coleman, 202 F.R.D. 106 citing Blandford, 193 F.R.D. at 68. The strongest factors in this matter at hand that should be considered by the court are: first, the 90-day deadline set for the by the E.E.O.C. has expired and re-filing the claim would be time-barred; second, the short delay of one business day will not cause Defendants to be prejudiced by an extension; and third, Defendants were on notice of the nature of the claims against them. It is, therefore, respectfully requested that the above factors prompt the court to extend the time for service in the exercise of its discretion.

Furthermore, it must be noted that Defendant Ford’s reliance on the case law cited in its Memorandum is misplaced. Defendant Ford would have this court believe only the first half of Rule 4(m) is followed by the courts and that the courts discretion to “order service to be made within a specified time” as allowed in the second half of this Rule is largely unused. However, the cases which are referenced by Ford show that the court only refuses to exercise its discretion when there is a gross delay in service. In Gonzalez v. L’Oreal USA, Inc., 489 f. Supp. 2d 181 (N.D.N.Y. 2007), the service was 231 days late and after a tolling to the time for service was still 78 days late. In Mused v. United States Dep’t of Agric. Food & Nutrition Serv., 169 F.R.D. 28 (W.D.N.Y. 1996), the matter had lain dormant for a period of 10 months prior to the court prompting the plaintiff to act. Only after such prompting failed to rouse the plaintiff to act

timely, was the case was dismissed. In Zapata v. City of New York, 502 f.3d 192 (2d Cir. 2007) service was effectuated 84 days past expiration of statute of limitations, yet only 4 days after the expiration of the 120 day period for service of the complaint. A closer look at the facts of the case in Zapata show that the plaintiff had been served with two notices for failure of service and that he failed to act in a timely matter to rectify the situation.

In the present case, the Defendant had actual knowledge of the suit as the result of settlement discussions. Plaintiff's counsel attempted to have service effected upon defendants, but was unable to do so before the expiration of the 120 day period. Upon realization that service had not been effected, Plaintiff's counsel immediately attempted to serve Defendants in a timely fashion. Unfortunately, Plaintiff's counsel efforts resulted in service upon the Defendant's on October 29, 2007, the next business day following the expiration of the 120 day period for service. Good cause exists for the late service. Further, in the interests of justice, because Defendant had notice of the suit, Plaintiff should be granted an extension of time to serve the Summons and Complaint by October 29, 2007, and thereby deny the Defendants' Motions to Dismiss for insufficient service.

B. Plaintiff's claim is not barred by the statute of limitations.

As to the claim by Defendant UAW Local 897 that the Complaint should be dismissed for failure to file within the applicable statute of limitations, Plaintiff denies such failure. The applicable time limitation for this suit was set forth in the E.E.O.C. letter of April 2, 2007, addressed to the plaintiff, which states: "Your lawsuit **must be filed WITHIN 90 DAYS of your receipt of this Notice**; or your right to sue based on this charge will be lost." The claims against both Defendant Ford and against Defendant UAW are based upon the charges filed with the

E.E.O.C. and the basis as such is clearly set forth in the Complaint. Defendant UAW's reliance upon the six month statute of limitations is erroneous.

IV. CONCLUSION

For the foregoing reasons, the court should grant Plaintiff an extension of time to serve the Summons and Complaint and should thereby deny Defendants' Motions to Dismiss for failure of timely service. Furthermore, the court should deny Defendant UAW's Motion to Dismiss based on 12(b)(6) as Plaintiff filed complaint within the time frame set forth by the E.E.O.C.

Dated: Buffalo, New York
January 22, 2008

s/ David W. Kloss
David W. Kloss, Esq.
Kloss, Stenger, Kroll & LoTempio
Attorneys for the Plaintiff
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Buffalo, New York 14202
716-853-1111
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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

ANNE WEISE,)
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 Plaintiff,)
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 v.) **Civil Action No. 07-cv-0423 A (F)**
)
 FORD MOTOR COMPANY,)
 And UNITED AUTOMOBILE)
 WORKERS LOCAL UNION 897,)
)
 Defendants.)

AFFIDAVIT OF SCOTT W. KROLL

Scott W. Kroll, after being duly sworn, deposes and states as follows:

1. I am a member of the firm Kloss Stenger Kroll LoTempio, counsel for the Plaintiff.
2. I make this affidavit based on my personal knowledge and familiarity with this matter.
3. On June 28, 2007, Plaintiff filed a Complaint in this Court.
4. During the summer of 2007, I had two conversations with counsel for Defendant Ford Motor Company regarding the possibility of settlement of this matter.
5. On or about September 2, 2007, I requested that the filed Summons and Complaint be served on the Defendants.
6. On October 26, 2007, noting that I had not seen affidavits of service, I again requested that the Summons and Complaint be served.

7. I was informed that the process server could not serve the documents, because they were not the proper copies.

8. Our office immediately commenced a thorough search for the proper documents.

9. On Monday, October 29, 2007, the file containing the proper documents was found and the documents were sent to the process server.

11. The Summons and Complaint were immediately served on both Defendant Ford Motor Company and Defendant UAW Local 897.

/s/ Scott W. Kroll
Scott W. Kroll, Esq.

Sworn to me this 22nd day of January, 2008.

s/ Gwendolyn R. Higley
Notary Public

Gwendolyn R. Higley
Notary Public, State of New York
Qualified in Erie County
My Commission Expires August 27, 2011

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

ANNE WEISE,)
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 Plaintiff,)
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 FORD MOTOR COMPANY,)
 And UNITED AUTOMOBILE)
 WORKERS LOCAL UNION 897,)
)
 Defendants.)

CERTIFICATE OF SERVICE

I, David W. Kloss, hereby certify that on the January 22, 2008, I electronically filed the Plaintiff's Memorandum in Opposition to Defendant UAW Local 897's and Defendant Ford Motor Company's Motions to Dismiss and supporting Affidavit of Scott W. Kroll, Esq. in the matter of Weise v. Ford Motor Co., et al, Civil No. 07-0423 with the Clerk of the District Court using its CM/ECF System, which would then electronically notify the following CM/ECF participants:

- 1. M. Rogan Morton, Esq.**
Attorney for Defendant Ford Motor Company
- 2. Jonathan G. Johnsen, Esq.**
Attorney for Defendant UAW Local 897

s/ David W. Kloss
David W. Kloss, Esq.
Kloss, Stenger, Kroll & LoTempio
Attorneys for the Plaintiff
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