IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

NORTHERN MARIANAS HOUSING CORPORATION, Plaintiff, v. ASTERIO RUBEN and ANGELINA CHIPWELONG Defendants.	Small Claims Case No. 96-485 **ORDER GRANTING DEFENDANT CHIPWELONG'S MOTION TO DISMISS**

I. PROCEDURAL BACKGROUND

This matter came before the Court on August 20, 1998, in Courtroom A on Defendant Angelina Chipwelong's motion to dismiss. Michael A. White, Esq. appeared on behalf of Plaintiff. Douglas W. Rhodes, Esq. appeared on behalf of Defendant Angelina Chipwelong. The Court, having reviewed the memoranda, declarations, and exhibits, having heard and considered the arguments of counsel, and being fully informed of the premises, now renders its written decision.

FOR PUBLICATION

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II. FACTS

In 1987, Plaintiff Northern Marianas Housing Corporation (hereinafter referred to as "NMHC") entered into a lease agreement with Defendants Asterio Ruben and Angelina Chipwelong whereby NMHC leased to Defendants a house located in the Garapan Annex I Subdivision. The lease was subsequently

terminated in October 1991.

As of the date the lease was terminated, Defendants were indebted to NMHC for unpaid rent totaling $1,036.00. In addition, Defendants were obligated to pay NMHC the cost of repair to the premises, which totaled $646.28.

On March 12, 1996, NMHC filed a small claims action against Defendants seeking damages in the amount of $1,682.28 plus interest. The next day, Defendant Ruben was served with the summons and complaint. A default judgment was taken against Defendant Ruben on April 12, 1996. The process server was unable to locate and serve Defendant Chipwelong. On six occasions, the small claims summons was reissued and provided to various process servers in an attempt to have Defendant Chipwelong served. Finally, in January 1998, Defendant Chipwelong was located at her sister's residence in Dan Dan and was served with the summons and complaint.

This matter was set for trial on May 21, 1998, but was continued by the court until June 4, 1998, to allow Defendant Chipwelong to obtain counsel. On July 21, 1998, Defendant filed a motion to dismiss the complaint on two grounds: (1) that the statute of limitations had run pursuant to 7 CMC § 2505, and (2) that service was not completed within 120 days as required by Rule 4(m) of the Commonwealth Rules of Civil Procedure.

III. ISSUES

1. Whether NMHC's complaint is barred by the statute of limitations?

2. Whether NMHC's complaint should be dismissed pursuant to Rule 4(m) of the Commonwealth Rules of Civil Procedure?

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IV. ANALYSIS

B. 7 CMC § 2507

Defendant Chipwelong contends that NMHC's action is barred as the complaint was not filed within the applicable statute of limitations. As such, the action must be dismissed.

7 CMC § 2505 provides, in pertinent part, that:

> All actions other than those covered in 7 CMC §§ 2502, 2503, and 2504 shall be commenced within six years after the cause of action accrues . . .

7 CMC § 2505.

The cause of action at issue is governed by 7 CMC § 2507, which provides that:

> In an action brought to recover the balance due upon a mutual and open account, or upon a cause of action upon which partial payments have been made, the cause of action shall be considered to have accrued *at the time of the last item proved in the account.*

7 CMC § 2507 (emphasis added).

Therefore, based on the statutes above, the complaint must have been filed within six years of "the last item proved in the account". According to the statement provided to Defendant Ruben in April 1996, the last rental payment was made on April 3, 1991. As such, the statute of limitations would have run on April 2, 1997. However, the complaint was filed on March 12, 1996 - nearly thirteen months before April 2, 1997. As such, the complaint was timely filed.

A. Com.R.Civ.P., Rule 4(m)

In support of her motion, Defendant Chipwelong contends that service was not effectuated on her within the time prescribed by Rule 4(m) of the Commonwealth Rules of Civil Procedure. As such, the complaint must be dismissed. In opposition, Plaintiff contends that it has shown good cause for its failure to effectuate service and therefore, the complaint should not be dismissed.

Commonwealth Rules of Civil Procedure, Rule 4(m), provides in pertinent part as follows:

> 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 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 . . .

Com.R.Civ.P. Rule 4(m).

[p. 4] In order to avoid dismissal for failure to serve the complaint and summons within 120 days after filing, a plaintiff must show "good cause". Fimbres v. United States, 833 F.2d 138, 139 (9th Cir.1987); see also Habib v. General Motors Corp., 15 F.3d 72 (6th Cir.1994)(the plaintiff bears the burden of establishing "good cause" to justify failure of timely service).

Defendant Chipwelong contends that the holding in Guerrero v. L & T International, 3 CR 650 (N.M.I. Trial Ct. 1989) mandates dismissal of the instant action. In Guerrero, the Commonwealth Trial Court dismissed a personal injury complaint under Com.R.Civ.P., Rule 4(j) after finding that the plaintiff failed to show good cause why service was not made within 120 days of the filing of the complaint. In its

decision, the Guerrero court held that if a plaintiff cannot show good cause, the court *must* dismiss the action. Id. However, as noted above, the Guerrero decision was based on the Commonwealth's former Rule 4(j). The language of the Commonwealth's Rule 4(j) was amended and the rule redesignated Rule 4(m) after its federal counterpart, FRCP Rule 4(j), was amended and redesignated FRCP Rule 4(m) in 1993. Like the Commonwealth's former Rule 4(j), the language of Com.R.Civ.P. Rule 4(m) tracks the language of FRCP 4(m) verbatim.

In light of the distinct similarities between the Commonwealth rule and the federal rule, the Court deems it appropriate to look to federal court decisions interpreting FRCP Rule 4(m). See Govendo v. Micronesian Garment Manufacturing, Inc., 2 N.M.I. 270, 283 (1991). As such, courts that have interpreted Rule 4(m) under the amended language have held that the new rule requires a court to extend time if good cause is shown and to allow a court discretion to dismiss or extend time absent a showing of good cause. See Henderson v. United States, 517 U.S. 654, ___, 116 S.Ct. 1638, 1643 (1996); Petrucelli v. Bohringer and Ratzinger, 46 F.3d 1298, 1304-1305 (3rd Cir.1995); FRCP 4(m) Advisory Committee Note, (1993).

"Good cause" exists in situations where a plaintiff has made reasonable, diligent efforts to effect service on the defendant. T & S Rentals v. United States, 164 F.R.D. 422, 425 (N.D.W.Va. 1996); see also Bachenski v. Malnati, 11 F.3d 1371, 1377 (7th Cir.1993)(a plaintiff's attempts at service need be at the very least accompanied by some showing of reasonable diligence before good **[p. 5]** cause can be found). The ultimate determination of good cause is left to the sound discretion of the court. Friedman v. Estate of Presser, 929 F.2d 1151, 1157 (6th Cir.1991).

In the case at bar, the Court finds that NMHC has not shown good cause for its failure to effect service on Defendant Chipwelong. NMHC contends that it diligently attempted to effect service on Defendant Chipwelong but that its numerous attempts at service were unsuccessful. However, the record is bereft of any evidence of good cause for NMHC's failure to serve Ms. Chipwelong within 120 days of the filing in the complaint. For example, NMHC's process server, John Pialur, asserts that when he served Defendant Ruben in March 1996, he was advised by Mr. Ruben at that time that Defendant Chipwelong

was off-island.[1] On five subsequent occasions between April 19, 1996 and July 9, 1997, Mr. Pialur was provided reissued summonses to serve Defendant Chipwelong and "made various inquiries as to Ms. Chipwelong's whereabouts, but was unable to obtain any information".[2] Nowhere in his declaration does Mr. Pialur indicate what reasonable efforts or actions he took to obtain information on Defendant Chipwelong's whereabouts. For example, although Mr. Pialur relied on Defendant Ruben's initial representation that Defendant Chipwelong was off-island, there is nothing to show that Mr. Pialur made any subsequent inquiries to Mr. Ruben.[3] Likewise, the proffered declaration of Ana C. Magofna is of no help to NMHC either. Ms. Magofna declares that in addition to Mr. Pialur, she provided copies of the reissued summonses to other process servers as well.[4] However, Ms Magofna states that "each of these other process servers orally advised me that they were unable to locate Defendant Chipwelong".[5] Not only does the declaration of Ms. **[p. 6]** Magofna fail to indicate who in fact the "other process servers" were, but the declaration is void of any evidence of what the "other process servers" did to locate Ms. Chipwelong.

As noted by the Henderson and Petrucelli cases cited above, a court has discretion under Rule 4(m) to enlarge the time for service even absent a showing of good cause. However, this Court will not exercise such discretion in this case. The small claims action at issue was filed in March 1996 - nearly three years ago. Moreover, NMHC has not submitted any tangible proof to the Court to show that in the twenty-two months between filing and service that Mr. Pialur or the "other process servers" took any reasonable steps to locate and serve Defendant Chipwelong. Simply causing a summons to be reissued without some proof of reasonable or diligent attempts to locate Defendant Chipwelong does not justify a discretionary enlargement of time for service in this case.

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[1] *See* Declaration of John M. Pialur, dated August 20, 1998, at page 2, ¶ 4.

[2] Id. at ¶ 5.

[3] Subsequent inquiries to Mr. Ruben would have provided at least some showing of diligence and may have been fruitful considering the fact that Ruben and Chipwelong have six children together. *See* Reply to Memorandum to Motion to Dismiss, at page 6, ¶ 2.

[4] *See* Declaration of Ana C. Magofna, dated August 20, 1998, at page 2, ¶ 4.

[5] Id.

Based on the foregoing, NMHC has not shown good cause for its failure to serve Defendant Chipwelong within the time constraints of Com.R.Civ.P., Rule 4(m). Moreover, based on the facts presented before it, the Court will not exercise its discretion and enlarge the time for service. As such, the motion to dismiss is granted and NMHC's complaint shall be dismissed without prejudice pursuant to Com.R.Civ.P., Rule 4(m).[6]

V. CONCLUSION

For all the reasons stated above, Defendant Chipwelong's motion to dismiss is **GRANTED**. Plaintiff NMHC's complaint shall be dismissed without prejudice.

So ORDERED this 10 day of February, 1999.

/s/ Timothy H. Bellas

TIMOTHY H. BELLAS, Associate Judge

[6]In dismissing NMHC's complaint without prejudice, the Court notes that any attempt at refiling will be met with a successful statute of limitations challenge.