

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: DIET DRUGS : MDL DOCKET NO. 1203
(PHENTERMINE, FENFLURAMINE, :
DEXFENFLURAMINE) PRODUCTS :
LIABILITY LITIGATION :

RONNIE CADAM :
 :
v. :
 :
QUALITEST PHARMACEUTICALS, :
INC., et al. :

 : CIVIL ACTION NO. 98-20529

FILED APR 13 1999

PRETRIAL ORDER NO. 571

AND NOW, TO WIT, this 13th day of April, 1999, upon consideration of Qualitest Pharmaceuticals, Inc.'s ("Qualitest") Motion to Dismiss Pursuant to FRCP 4(m) (Document #200661) and Ronnie Cadam's ("Plaintiff") response thereto, IT IS ORDERED that said motion is DENIED.

Plaintiff filed her Complaint on March 4, 1998 in the Superior Court of the State of California. Plaintiff attempted to serve Qualitest on March 26, 1998 by personally serving the Complaint on Prentice Hall Corporation System, Inc. ("Prentice Hall"), Agent for Service. (Pl.'s Mem. at 2.) On March 30, 1998, defendants other than Qualitest filed a timely Notice of Removal to the Northern District of California. On July 1, 1998, this action was transferred to this court as part of MDL No. 1203. Qualitest filed this motion to dismiss on February 24, 1999, stating that Prentice Hall was not its correct service agent and that Qualitest was never properly served. Plaintiff states that a Complaint was properly served on Qualitest March 1,

1999, subsequent to the filing of this motion. (Pl.'s Mem. at 4; Tindal Dec. Ex. H.)

Qualitest moves to dismiss for Plaintiff's failure to timely serve the Complaint under Federal Rule of Civil Procedure 4(m), which provides:

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.

Fed. R. Civ. P. 4(m). The Third Circuit has set forth a two step process for district courts to employ. Petrucci v. Bohringer and Ratzinger, 46 F.3d 1298, 1305 (3d Cir. 1995). If "good cause exists for an extension of time," then "the district court must extend time for service and the inquiry is ended." Id. However, if good cause is lacking, "the court may in its discretion decide whether to dismiss the case without prejudice or extend time for service." Id.

The court finds that there exists no good cause to excuse the lateness of service. In determining whether good cause exists, "a court's 'primary focus is on the plaintiff's reasons for not complying with the time limit in the first place.'" Boley v. Kaymark, 123 F.3d 756, 758 (3d Cir. 1997) (citation omitted), cert. denied, 118 S. Ct. 1038 (1998).

Plaintiff argues that she personally served Prentice Hall with


the good faith belief that she was properly serving Qualitest. (Pl.'s Mem. at 2.) However, Plaintiff does not explain why her counsel mistakenly believed Prentice Hall was a proper service agent for Qualitest. Furthermore, Plaintiff does not explain why her counsel never inquired into the reasons Qualitest did not file an answer or otherwise appear for eleven months after the Complaint was served. The court finds that such inaction demonstrates an absence of good cause to excuse the lateness of filing.

Although good cause is lacking, the court will exercise its discretion to excuse the lateness of service. In so doing, the court looks to the prejudice imposed upon the parties in excusing or refusing to excuse Plaintiff's late service. See Boley, 123 F.3d at 759 (discussing prejudice of parties). Plaintiff points out that the applicable California statute of limitations on her claim against Qualitest has run and so a refusal to excuse late service would extinguish her claims. (Pl.'s Mem. at 1-2.) The Third Circuit has stated that "[i]f the district court determines that good cause does not exist . . . it [may] consider whether the running of the statute of limitations would warrant granting an extension of time." Petrucci, 46 F.3d at 1306. The running of the statute of limitations in this case weighs in favor of excusing the late service. See Boley, 123 F.3d at 759 (stating "[d]istrict courts have consistently interpreted Rule 4(m) in the same way, treating the running of the statute of limitations as a factor favoring the plaintiff and

not as a basis for potential prejudice to the defendant"); see also Fed. R. Civ. P. 4(m) Adv. Comm. Notes (1993) (stating "[r]elief may be justified, for example, if the applicable statute of limitations would bar the refiled action").

The court also looks to potential prejudice to the defendant caused by the delay of service. Boley, 123 F.3d at 759 (stating "[d]elay may damage a defendant's ability to defend on the merits"). Here, Qualitest argues that it is "irreparably harmed and seriously prejudiced as a result of the Plaintiff's intentional, long term delay in serving [the Complaint]." (Qualitest Mem. at 4.) However, the only example it provides to demonstrate prejudice is that Qualitest was absent at Plaintiff's deposition and has not been served with a copy of Plaintiff's Fact Sheet. Id. at 5. In light of the fact that Qualitest may obtain such discovery through the procedures established in this MDL No. 1203 litigation, the court finds that Qualitest's absence at the Plaintiff's deposition and its failure to receive a fact sheet is not, in and of itself, prejudicial. Moreover, Qualitest does not claim that it was unaware this case was pending against it. The court also notes that Qualitest is currently a named defendant in other MDL No. 1203 civil actions facing substantially similar claims as Plaintiff asserts here. The court finds that Plaintiff would be prejudiced by granting the motion to dismiss and finds no prejudice to Qualitest in excusing Plaintiff's tardy service.

For the foregoing reasons, the court excuses Plaintiff's late service and has denied Qualitest's motion to dismiss.



LOUIS C. BECHTLE, J.

ENTERED: 4-14-99
CLERK OF COURT