IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

NORMAN FAGAN and DIANE GOLDBERG	)	
Plaintiffs,	)	
v.	)	C.A. No. 04C-03-155-FSS
CARLA BEASTON, and GLASGOW AUTO BODY, INC. And JEFFREY M. RASER,	)	
Defendants.	)	

Submitted: November 11, 2004
Decided: February 25, 2005

MEMORANDUM OPINION AND ORDER

Upon Defendant's Motion to Dismiss – ***DENIED***

F. Phillip Renzulli, Esquire, 500 N. King Street, Wilmington, Delaware, 19801. Attorney for Plaintiffs.

Robert M. Greenberg, Esquire, Tybout Redfearn & Pell, P.O. Box 2092, Wilmington, Delaware, 19899. Attorney for Defendants, Beaston and Glasgow Auto Body, Inc.

SILVERMAN, J.

The question in this personal injury case is whether Plaintiffs made service under Delaware's "long arm" statute.[1] Defendant, Carla Beaston, has moved to dismiss, raising two arguable defects in service. First, Plaintiffs did not give Beaston notice. Instead, they relied on a cryptic, return-receipt notice from the postal service. Second, Plaintiffs filed their affidavits of service a few days late.

To decide this case, therefore, the court must consider whether, taking everything into account, Plaintiffs' attempts to notify Defendant were satisfactory. If they were, the court must further consider whether Plaintiffs' filing their affidavits late makes a difference.

I.

According to their complaint, Plaintiffs were seriously injured in a car crash on May 24, 2002, near Glasgow, Delaware. Based on the complaint and the police report attached to it, Beaston allegedly caused the collision when she failed to yield while attempting an illegal left turn, into Plaintiffs' path. The police report estimated the damage to Fagan's Corvette as $2,000. The estimated damage to the Saturn driven by Beaston was $1,500. In other words, the impact probably was not great. But the drivers moved their cars to the side of the road and waited until the police arrived. Eventually, the police cited Beaston. The record does not show what

[1] Delaware's Non-resident Motor Vehicle Statute. 10 *Del. C.* § 3112.

Beaston did about the traffic ticket.

On March 12, 2004, approximately two months before the statute of limitations expired, Plaintiffs filed suit. Plaintiffs not only sued Beaston as the other driver, they sued her employer, Glasgow Auto Body, Inc., and the owner of the car Beaston was driving, Jeffrey M. Raser. Plaintiffs easily made personal service on Glasgow Auto Body and Raser. (Raser has since been dismissed.)

Plaintiffs, however, had trouble serving Beaston. She had presented the police with a Maryland driver's license showing an address in Elkton. Accordingly, Plaintiffs attempted service under Delaware's "Non-resident Motor Vehicle Statute." Plaintiffs sent the required paperwork by registered mail, return-receipt requested, to Beaston at the address shown on the driver's license she presented to the police at the scene of the collision. According to the Domestic Return Receipt, now of record, someone at the postal service checked the boxes for "Unclaimed" and "Refused."

Plaintiffs' attempt to serve Beaston by registered mail happened in mid-April 2004. For reasons unknown, Plaintiffs waited until June 18, 2004 to file the statutorily required affidavit of service. Under Superior Court Civil Rule 4(h), the affidavit is filed as an amendment to the complaint. It is due within ten days after plaintiff receives the return receipt.[2]

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[2] Super. Ct. Civ. R. 4(h).

In any event, Plaintiffs attempted to serve Beaston a second time by registered mail on June 17, 2004. Eventually, they received notice from the postal service that their second notice was "NOT DELIVERABLE AS ADDRESSED UNABLE TO FORWARD." It is unclear precisely when Plaintiffs received the second return receipt from the postal service, but it probably was shortly after July 9, 2004. Eventually, on July 26, 2004, Plaintiffs filed a second affidavit, which they properly denominated as a "Second Amendment To Complaint."

Beaston has now appeared through counsel to challenge service. Otherwise, however, she has not cooperated with Plaintiffs' attempt to make a record about what actually happened to Plaintiffs' first registered letter and how she found out about this case. Her counsel takes the position that in August 2004, Beaston had moved from the address on the driver's license she showed the police in May 2004. Beaston's counsel proffers that Beaston "first received notice of the law suit from her brother," who lived on the same street as Beaston. Beaston's counsel does not say when Beaston's brother notified her about the law suit. Beaston's counsel has also submitted a print-out from the Maryland Motor Vehicle Administration purporting to show that Maryland issued a license to Beaston at another address in Elkton, on May 5, 2003. In other words, Beaston's counsel disputes the first, return receipt's accuracy. And Beaston's counsel also contends that Plaintiffs' counsel could have

easily learned about Beaston's change of address by simply contacting Maryland's Motor Vehicle Administration.

In summary, taking Plaintiffs' undisputed factual allegations and Beaston's proffers into account, it appears that Beaston knew almost immediately in 2002 that she had been in a collision, for which she had been blamed by the police. It is unclear whether Beaston knew anyone was injured in the collision, but she obviously knew property damage was involved. It further appears that Plaintiffs waited almost two years to file suit. But once they did, both the man who owned the car Beaston was driving when she collided with Plaintiffs and her employer received service, and they were aware of this case.

Moreover, it is reasonable to infer from Beaston's proffer that around the time that Plaintiffs attempted to notify Beaston about this case in 2004, Beaston's brother learned of it and he mentioned it to Beaston. Meanwhile, the postal service says that Plaintiffs' original notice was unclaimed and refused. Finally, in summary as to the facts, Maryland's records suggest that Beaston moved a few months after the collision in 2002.

II.

The law concerning how to apply Delaware's "long-arm" statute was laid

out in a series of cases over twenty years ago. The first case, *Swift v. Leisure*,[3] is nearly on point. *Swift* started with an automobile accident on September 26, 1968. Like the Plaintiffs here, the Swifts waited almost until the statute of limitations on their personal injury claims had run. Finally, in September 1970, the Swifts filed suit and invoked the "long-arm" statute. The Swift's notices to Leisure were sent to the address provided by Leisure at the accident scene. The notices were returned by the Post Office noted "'unclaimed, moved, left no address' and 'unclaimed, no order, returned to sender.'" In *Swift*, Defendant asserted "that under the statute the plaintiffs are required to [ensure] that notice actually gets to the defendant and not just that notice be sent to some address."[4] The issue, according to *Swift*, was "whether it was reasonable for plaintiffs to rely upon an address furnished by the defendant nearly two years prior to the attempt to send notice to him."[5]

Swift holds that having been involved in a relatively serious accident, aware of possible future litigation and having submitted an address where legal process could be served on Leisure, "he was under a continuing duty to keep this

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[3] *Swift v. Leisure*, 285 A.2d 428 (Del. Super. Ct. 1971).

[4] *Id.* at 429.

[5] *Id.* at 430.

address current for a reasonable period of time."[6] *Swift* further holds that the "burden of furnishing the Post Office with a forwarding address was negligible compared with the difficulties imposed upon the plaintiffs to establish defendant's whereabouts by means of an independent and, perhaps, expensive search."[7] *Swift* concludes that under the circumstances the court "will not impose upon plaintiffs the obligation to ferret out the actual location of defendant."[8]

That the accident here may have been less serious than the one in *Swift* is inconsequential. The fact remains that Beaston knew she had been in a collision that, at the least, had caused property damage and she had been ticketed. Just like Leisure, in *Swift,* Beaston should have known that the incident was not likely to end at the crash scene. The other potentially distinguishing fact between *Swift* and this case is that the Swifts' notices were returned unclaimed, no forwarding address. The first notice sent in this case, as discussed, was returned unclaimed and refused. Thus, Plaintiffs here had less reason to ferret out Beaston's new address. They had reason to believe she had refused service. Under the "long arm" statute, "the notation of refusal shall constitute presumptive evidence that the refusal was by the defendant or

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[6] *Id.*

[7] *Id.*

[8] *Id.*

the defendant's agent."[9]

Swift v. Leisure, was followed quickly by *Sommers v. Gaston*.[10] *Sommers'* facts are distinguishable. Compared to this case, Gaston obviously was gone and Sommers tried harder to find him. Nevertheless, citing *Swift v. Leisure*, *Sommers* holds: "An obligation remained with Gaston to advise the authorities of his correct address."[11] The court followed *Swift v. Leisure* and *Sommers v. Gaston* consistently in *Viars v. Surbaugh*[12] and *Cunningham v. City of Wilmington.*[13]

In its letter memorandum, the court in *Cunningham* embellishes plaintiffs' obligation under 10 *Del. C. §* 3112 (e). *Cunningham* adds "if a plaintiff learns that the address he has used is incorrect, he must make a reasonable effort to find an address for the defendant where it is probable that delivery will be made to him." In *Cunningham*, plaintiffs contacted defendant's insurance company to find Defendant's address, without success. *Cunningham* asked, "Was enough done?" *Cunningham* observes that "plaintiffs could have checked the Maryland Post Office

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[9] 10 *Del. C.* § 3112(d).

[10] *Sommers v. Gaston*, 295 A.2d 578 (Del. Super. Ct. 1972).

[11] *Id.* at 581.

[12] *Viars v. Surbaugh*, 335 A.2d 285, 288 (Del. Super. Ct. 1975).

[13] *Cunningham v. City of Wilmington*, Del. Super., C.A. No. 80C-MR-124, Stiftel, J. (Feb. 11, 1982) (Mem. Op.).

to find out the meaning of the words 'Moved, Not Forwardable,' and to see if it had any information concerning defendant's new address." *Cunningham* also observes, "Possibly, plaintiffs could have tried the Maryland Department of Motor Vehicles for a new address and maybe the Delaware Division of Motor Vehicles should have been checked to see if [defendant] moved to Delaware . . . ." *Cunningham* answers its rhetorical question:

> Even though plaintiffs could have done more, defendant should have acted responsibly. He was involved in a serious automobile accident. He was aware of the possibility of litigation. He should have given the Post Office, his father, his insurance company and other authorities a forwarding address at which he could be located and served.

Accordingly, *Cunningham* holds that plaintiffs were not obliged to check on the driver's address with Maryland's motor vehicle department, and their failure to actually notify defendant was excused.

So far, the court has refused to require plaintiffs using the "long-arm" statute to search for defendants. If a defendant has had an automobile collision in Delaware and if the plaintiff attempts to meet the "long-arm" statute by sending notices to the address defendant gave to the police, defendant cannot avoid service by moving without leaving a forwarding address.[14]

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[14] *C.f. Plummer v. Sherman*, Del. Super., C.A. No. 99C-08-010, Cooch,
(continued...)

In this case, Defendant reasonably relied on the return receipt showing that Plaintiffs' first notice had been refused. As mentioned, that notice was evidence that Beaston had refused service. The court is not satisfied that Beaston's counsel's unsworn proffers, including the record from Maryland, overcome the presumption. Moreover, Beaston's having moved without leaving a forwarding address was legally irresponsible and her act did not leave Plaintiffs with the burden of tracking her down. When Beaston drove in Delaware, she agreed to service under the "long arm" statute. When she either refused the notice from Plaintiffs or moved without leaving a forwarding address, she, in effect, waived further notice.

III.

As to the second issue, whether it makes a difference that Plaintiffs' file their affidavits of service late, the court is troubled by Plaintiffs' lackadaisical approach to their own case. First, they waited until almost the last minute to file suit. After they finally invoked the "long-arm" statute, they ignored its deadline for filing their affidavits.

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[14](...continued)
J. (Dec. 9, 2003)(Letter Op.), *rev'd on other grounds*, *Plummer v. Sherman*, 861 A.2d 1238 (Del. 2004)(case dismissed where Plaintiff served Secretary of State but failed to attempt service by registered mail).

Nevertheless, *Lightburn v. Delaware Power & Light Co.*[15] addresses failure to file an affidavit of service on time. *Lightburn* still stands for the proposition that the failure to file the required affidavit does not amount to a failure of service. "Proof of service is no part of the service itself."[16] Because the court sees no harm caused by Plaintiffs' delayed filing of their affidavits, other than to the court's management of its civil docket, there is no reason to allow Defendant to stand on that technicality.

IV.

For the foregoing reasons, Beaston's Motion to Dismiss based on incomplete service of process is ***DENIED***. The court cautions Plaintiffs that it expects them to take the court's tone seriously. If, through their inaction, Plaintiffs give the court reason to dismiss this case for failure to prosecute, the court will act. In other words, the court expects Plaintiffs to get cracking.

IT IS SO ORDERED.

Judge

oc: Prothonotary (Civil Division)

[15] *Lightburn v. Delaware Power & Light Co.*, 158 A.2d 919 (Del. 1960).

[16] *Id.* at 923.