

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE

In re

MILLERS COVE ENERGY CO., INC.)

Debtor.)

THE OFFICIAL COMMITTEE OF)
UNSECURED CREDITORS OF MILLERS)
COVE ENERGY COMPANY, INC.)

Plaintiff,)

v.)

CHICAGO FUEL & IRON COMPANY,)
INC.; DAVID AUDUS; BANCO)
MERCANTILE MIAMI-BANCO)
PRINCIPAL DIVISAS, CARACAS,)
VENEZUELA; CARBONES NARICUAL)
C.A.; JOHN CLARK; DONAN)
ENGINEERING, INC.; ELMER BUCHTA)
TRUCKING; MICHAEL H. HAGEDORN)
TRUST ACCT., TELL CITY, INDIANA;)
MARCOAL, INC.; MARCOAL U.S.A,)
INC.; FREDERICK KEADY; FIRST)
NATIONAL BANK OF JOLIET,)
ILLINOIS; RALPH HIX; SEMCA)
EQUIPMENT, INC.; MIAMI,)
FLORIDA; STRACHAN SHIPPING CO.;)
TIME INSURANCE COMPANY)

Defendants.)

Case No. 90-34050

Adv. Proc. No. 93-3013

M E M O R A N D U M

This matter is before the court upon the motion filed March 16, 1994, by plaintiff requesting pursuant to FED. R. BANKR. P. 7004(a) that it be allowed to serve its complaint on certain defendants more than 120 days after the complaint was filed. On April 19, 1994, Chicago Fuel and Iron Co., Inc. ("CFI"), a defendant in this proceeding who has not yet been served, filed a response to the motion requesting that the motion be denied and that the court dismiss this adversary proceeding with respect to it

due to plaintiff's failure to effect service on CFI within 120 days of the filing of the complaint as required by FED. R. CIV. P. 4(j), made applicable to adversary proceedings by FED. R. BANKR. P. 7004(a). For the reasons set forth below, the court agrees that denial of the motion is proper and that this action shall be dismissed as to CFI. This is a core proceeding. See 28 U.S.C. § 157(b)(2)(H).

I.

This is an adversary proceeding to avoid and recover certain alleged fraudulent transfers from the debtor to seventeen named defendants. On April 29, 1992, the court entered an order in the debtor's bankruptcy case authorizing the plaintiff, the official unsecured creditors committee, to file certain actions, including the instant one, on behalf of the debtor. The complaint initiating this proceeding was filed on January 14, 1993. A review of the court file establishes that the following occurred thereafter:

(1) The summons was issued on January 20, 1993, but neither served or returned unserved within the 120 day period thereafter.

(2) On September 9, 1993, the clerk of the court sent a memo to the plaintiff's counsel, requesting that he advise the clerk of the status of this adversary proceeding.

(3) In response to the clerk's memo, an employee of plaintiff's counsel telephoned the clerk's office on September 13, 1993, and requested that an alias summons be issued.

(4) The alias summons was issued on September 16, 1993.

(5) In a letter to the clerk from plaintiff's counsel dated

September 23, 1993, counsel stated that the summons would be served within a week to ten days. This alias summons was neither served nor returned unserved.

(6) On October 25, 1993, an employee of plaintiff's counsel telephoned the clerk and requested the issuance of a second alias summons.

(7) The second alias summons was issued on October 26, 1993 and served on defendants Banco Mercantile, Marcoal Inc., Marcoal USA, Inc., Frederick Keady, First National Bank of Joliet and Semca Equipment, Inc. on November 1, 1993, 283 days after the complaint in this proceeding was filed. Defendants Donan Engineering and Hagedon Trust were served on November 2, 1993.

On March 16, 1994, the plaintiff filed the present motion¹ requesting that it be allowed to serve its complaint greater than 120 days from the date on which the complaint was filed. The motion came before the court for hearing on March 25, 1994. No evidence was submitted at the hearing, but subsequently, on April 8, 1994, the affidavits of Neal S. Melnick and C. Allen Ragle, attorneys for the plaintiff, along with the affidavit of Shanna Fuller Veach, a paralegal employed by Mr. Melnick and Mr. Ragle, were filed for the court's consideration.

¹Presumably, the motion is filed with respect to the defendants remaining unserved, Carbones Naricual C.A., John Clark, Elmer Buchta Trucking, Ralph Hix, Strachan Shipping Co., and CFI, although the motion is not specifically limited to these defendants. The court will, however, limit its analysis to these defendants.

II.

FED. R. BANKR. P. 7004(a) provides the time and manner for service in adversary proceedings, and incorporates the majority of FED. R. CIV. P. 4, including subsections (a) and (j). Rule 4(a) assigns to the plaintiff the responsibility of serving the summons and complaint. Rule 4(j) requires service of the summons and complaint within 120 days of the filing of the complaint.² Specifically, Rule 4(j) provides the following:

If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.

Subsection (j) was added to Rule 4 when Congress enacted sweeping amendments to the procedures for service of process in 1983. 4 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1137 (1983), citing P.L. 97-452, 96 Stat. 2527. Because these amendments shifted the burden of serving the summons and complaint from the U. S. marshalls to the plaintiff, Congress included the 120 day requirement to force parties to be diligent in prosecuting

²FED. R. CIV. P. 4 was amended effective December 1, 1993, with the result, *inter alia*, that the obligation of the plaintiff to serve the summons and complaint is now contained in subsection (c) and the 120 day requirement is set forth in subsection (m). However, the bankruptcy rules mandate application of the version of FED. R. CIV. P. 4 in effect on January 1, 1990, see FED. R. BANKR. P. 4(g), so the amendments are not applicable to this proceeding.

lawsuits. *In re DuFour*, 153 B.R. 853, 855 (Bankr. D. Minn. 1993).

Application of Rule 4(j) requires the court to determine whether "good cause" has been established for plaintiff's failure to serve the defendants within 120 days. Absent a showing of good cause, the language of Rule 4(j) mandates dismissal. *Habib v. General Motors Corporation*, 15 F.3d 72, 73 (6th Cir. 1994); *Friedman v. Estate of Presser*, 929 F.2d 1151, 1157 (6th Cir. 1991); *United States v. Gluklick*, 801 F.2d 834, 837 (6th Cir. 1986), cert. denied, 480 U.S. 919 (1987). Plaintiff bears the burden to establish good cause. *Id.* And as noted in the treatise, FEDERAL PRACTICE AND PROCEDURE, "the grant of a good cause extension is not automatic; it is incumbent on the plaintiff to make an adequate showing of need and justification to the court before an extension will be granted." 4 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1137 (1983).

In its motion, plaintiff alleges that it has not been able to serve defendants Carbones Naricual C.A., John Clark, Elmer Buchta Trucking, Ralph Hix and Strachan Shipping Co. because it has not been able to obtain their accurate addresses. With respect to CFI, the plaintiff alleges that it did not have an accurate address and that CFI's local counsel had informed plaintiff's counsel that he was not authorized to accept service of process. As a basis for not serving all defendants timely, plaintiff contends that service of process has been delayed by attempts on part of the plaintiff and Frederick Keady, one of the defendants "who had, and/or continues to have business ties to some of the other defendants" to

settle this adversary.

The legislative history of Rule 4(j) provides only one example of what constitutes "good cause" - when the defendant intentionally evades service of process. *Friedman*, 929 F.2d at 1157, citing 128 CONG. REC. H9849, 9852 n.25 (daily ed. Dec. 15, 1982), reprinted in 1982 U.S.C.C.A.N. 4434, 4446 n.25. Many courts have held that to show good cause the plaintiff must demonstrate that it has made "reasonable and diligent efforts to serve process." See *Habib*, 15 F.3d at 74, citing *Electrical Specialty Co. v. Road and Ranch Supply, Inc.*, 967 F.2d 309, 312 (9th Cir. 1992); *Quann v. Whitegate-Edgewater*, 112 F.R.D. 649, 659 (D. Md. 1986). "The legislative history to the FED. R. Civ. P. 4 amendments of 1983 also refers to 'diligence' and 'reasonable efforts to effect service.'" *Habib*, 15 F.3d at 74, citing *Boykin v. Commerce Union Bank of Union City, Tennessee*, 109 F.R.D. 344, 348 (W.D. Tenn. 1986). Accordingly, the court must determine whether the plaintiff was diligent and made reasonable efforts to effect service within 120 days.

From a review of the affidavits submitted by plaintiff, it appears that not only were reasonable efforts not made, but in fact no efforts were made within the 120 days to effect service. With respect to the assertion by plaintiff that it was not able to serve certain of the defendants because it did not have accurate addresses, neither of the affidavits of plaintiff's counsel set forth any efforts to obtain the correct addresses within the initial 120 days. The affidavit of Ms. Veach, a paralegal for

plaintiff's counsel, recites that after the adversary proceeding was filed, she "on at least one occasion" reviewed counsel's file and the March 12, 1992 deposition of Frederick Keady in an attempt to locate the addresses of defendants. Plaintiff's brief and the affidavits establish that except for this one half-hearted effort, no steps whatsoever have been taken by plaintiff to serve or even obtain the correct addresses of defendants Carbones Naricual C.A., Elmer Buchta Trucking, Strachan Shipping Co., and Time Insurance Company. With respect to defendant Ralph Hix, except for the review of the file and deposition by Ms. Veach discussed above, plaintiff made no efforts to obtain Mr. Hix's address until November, 1993, at least 283 days after the complaint was filed, when the complaint and summons (plaintiff's first attempt to serve Mr. Hix) was returned to plaintiff's counsel by the post office due to an incorrect address. Clearly, these facts fail to establish reasonable efforts and due diligence on the part of plaintiff to timely serve defendants.

With respect to the defendant Chicago Fuel and Iron Company, Inc., plaintiff contends that CFI's local counsel informed plaintiff's counsel that he was not authorized to accept service of process, that CFI has had actual knowledge of the existence of the adversary since February of 1993, and that CFI has submitted itself to the jurisdiction of the court through its active participation in the debtor's bankruptcy case and its appearance at the March 26, 1994 hearing on this motion. All of these arguments are without merit. As in the present case, the plaintiff in *In re Heinz*, 131

B.R. 38 (Bankr. D. Md. 1991), raised the argument that counsel for the defendant had refused to accept service. The court found the refusal irrelevant to the issue of good cause and stated that "[t]he fact that the defendants' counsel did not see fit to accept service on behalf of his clients has no impact upon the underlying duty to effect service." *Id.* at 41.

Similarly, actual knowledge of the proceeding is no substitute for proper service of process. *Friedman*, 929 F.2d at 1155. As quoted by the Sixth Circuit in *Friedman*,

"Before a court may exercise personal jurisdiction over a defendant, there must be more than notice to the defendant and a constitutionally sufficient relationship between the defendant and the forum." (cite omitted); "Due process requires proper service of process in order to obtain in personam jurisdiction." (cite omitted) In short, the requirement of proper service of process "is not some mindless technicality" (cite omitted).

Id. at 1156. CFI's counsel's appearance at the March 25, 1994 hearing does not mandate a different result because the appearance was for the limited purpose of responding to plaintiff's motion and challenging service. *Id.* at 1157, n.7 ("[a]s [defendant's] first pleading specifically contested the insufficiency of service of process, it cannot be plausibly contended that he waived Rule 4's requirements and thereby submitted to the district court's jurisdiction").

The plaintiff also argues that it intentionally did not effect service because it was attempting to resolve the adversary without the necessity of lengthy and expensive litigation which would begin

with service of process, that it was concerned about the effect the continued prosecution of the adversary would have on the debtor's ability to reorganize, and that on at least one occasion, defendant Frederick Keady requested that the complaint not be served.

Numerous courts have held that intentional nonservice, including specifically because of ongoing settlement negotiations, does not establish good cause for failure to effect timely service. *Mid Continent Wood Products, Inc. v. Harris*, 936 F.2d 297, 302 (7th Cir. 1991) ("[n]owhere in Rule 4 is there an exception for settlement discussions"); *Sullivan v. Mitchell*, 151 F.R.D. 331, 334 (N.D. Ill. 1993) ("[n]either defendant's alleged knowledge of the litigation nor the settlement discussions between counsel relieve plaintiff of his requirement to timely effect service under Rule 4(j)"); *Davis-Wilson v. Hilton Hotels Corp.*, 106 F.R.D. 505 (E.D. La. 1985) (good cause not satisfied notwithstanding that service was effected five days after expiration of 120 day time period and that service was not effected within requisite time period because plaintiff was trying to settle matter amicably without court action). Cf. *Assad v. Liberty Chevrolet, Inc.*, 124 F.R.D. 31 (D.R.I. 1989) (good faith settlement negotiations with defendant constituted good cause for failure to serve codefendant). See also *Moncrief v. Stone*, 961 F.2d 595, 597 (6th Cir. 1992) (plaintiff's argument that he did not timely effect service because the case was complicated and he was waiting to see if other causes of action should be joined did not constitute good cause); *Wei v. State of Hawaii*, 763 F.2d 370, 372 (9th Cir. 1985) (plaintiff's desire to

amend his complaint before effecting service did not qualify as good cause); *Redding v. Essex Crane Rental Corp. of Alabama*, 752 F.2d 1077, 1078 (5th Cir. 1985) (good cause not established by plaintiff's service delay because he thought he could get a better settlement in pending state compensation claim if defendant did not have discovery opportunity); *Vincent v. Reynolds Memorial Hospital, Inc.*, 141 F.R.D. 436, 437-438 (N.D. W. Va. 1992) (intentional nonservice in order that other pending cases between the parties could be developed toward resolution did not amount to good cause); *Gitz v. St. Tammany Parish Hospital*, 125 F.R.D. 138 (E.D. La. 1989) (plaintiff's intentional decision not to serve defendant so that additional information could be gathered prior to activating the lawsuit through service does not establish good cause); *Salow v. Circus-Circus Hotels, Inc.*, 108 F.R.D. 394, 395 (D. Nev. 1985) (plaintiff who did not timely serve defendant in district court action because he wanted state court action to be completed first did not constitute good cause).

At least one court has stated that "intentional delay of service is more inexcusable than inadvertence." *Fimbres v. United States of America*, 833 F.2d 138, 139 (9th Cir. 1987) (rejecting argument that service was not effected because service would have triggered pretrial and discovery deadlines which the plaintiff sought to delay due to its lack of financial resources). Accordingly, the court does not find that plaintiff's settlement negotiations establish good cause for plaintiff's failure to effect service within 120 days.

The assertion by plaintiff that it delayed service because it was concerned about the effect the continued prosecution of this adversary would have on the debtor's reorganization presents a more difficult question. However, the affidavits of plaintiff's counsel do not state that continued prosecution of this adversary would have derailed or even had a particularly adverse effect on debtor's reorganization efforts; instead the affidavits recite that the effect "has been an important issue" and that counsel did not want to "interfere with the debtor's reorganization." While the court does not intend to suggest that the only problem with plaintiff's argument is semantics, counsel's choice of words fails to convince the court that counsel was sufficiently concerned that continued prosecution of this adversary would have disrupted debtor's reorganization. Plaintiff did not inform the court of its concern until the filing of this motion, some 426 days after the filing of the complaint. While motions under Rule 4(j) need not be presented to the court prior to the expiration of the 120 day period, the lengthy delay in filing this motion and raising this issue does tend to cast doubt on plaintiff's assertion of concern. See *Fimbres*, 833 F.2d at 139.

With respect to plaintiff's contention that good cause exists because defendant Frederick Keady, who has or had business ties to some of the other defendants, requested that the complaint not be served, the court notes that Mr. Melnick's affidavit recites that this request was made in August or September, 1993 - a period of at least 198 days after the complaint was filed. While Mr. Keady's

request would be significant if it were made within the first 120 days after the complaint was filed and if this motion were being made by plaintiff so that it could serve Mr. Keady outside the required 120 day time period, the court does not find that a request made by a defendant at least 78 days after expiration of the 120 day period is sufficient to establish good cause for plaintiff's failure to serve Mr. Keady's codefendants within the 120 days.

Plaintiff also submits that the court should be guided by the "excusable neglect" standard as interpreted by the U. S. Supreme Court in *Pioneer Investment Services v. Brunswick Associates*, _____ U.S. _____, 113 S.Ct. 1489 (1993), because plaintiff's motion was filed after the expiration of the 120 days. FED. R. BANKR. P. 9006(b)(1) provides that if a party moves after the expiration of a specified time period to have the period enlarged, the court for cause may enlarge the period "where the failure to act was the result of excusable neglect." In *Pioneer*, the Supreme Court held that the concept "excusable neglect" could include attorney inadvertence or negligence under certain circumstances. The applicability of the excusable neglect standard as defined in *Pioneer* to Rule 4(j) has been rejected by the courts that have considered the issue subsequent to *Pioneer*. See *McGinnis v. Shalala*, 2 F.3d 548, 551 n.1 (5th Cir. 1993); *In re DuFour*, 153 B.R. 853 (Bankr. D. Minn. 1993). As stated by the *DuFour* court:

I find nothing in the *Pioneer* opinion suggesting that the flexible view of "excusable neglect" applied to Bankruptcy Rule 9006(b) should also apply to "good cause"

under Rule 4(j). The term good cause makes no reference to negligence or inadvertence. Furthermore, Rule 4(j) is concerned with compelling plaintiffs' lawyers to act diligently, not with the equitable policies that underlie the chapter 11 process and the Bankruptcy Rules. Finally, since the term excusable neglect is used in Rules 6(b), 13(f), 60(b)(i) and 60(b)(6), such term certainly would have been used in Rule 4(j) had the drafters intended the same standard to apply.

Id. at 857.

Similarly, in the only circuit court to consider the issue post-*Pioneer*, the Fifth Circuit Court of Appeals rejected *Pioneer's* "excusable neglect" analysis when construing Rule 4(j) because "the mode of analysis appropriate to Rule 9006(b)(1) is not necessarily appropriate to Rule 4(j) if only because the standard articulated in Rule 4(j) is good cause, not excusable neglect." *McGinnis*, 2 F.3d at 551 n.1. Even prior to *Pioneer*, the Ninth Circuit held that the appropriate standard is "good cause" rather than Rule 6(b)(2)'s excusable neglect. See *United States for Use and Benefit of DeLoss v. Kenner General Contractors, Inc.*, 764 F.2d 707, 711 (9th Cir. 1985). Cf. *Bandette v. Barnette*, 923 F.2d 754, 755-56 (9th Cir. 1991); *Winters v. Teledyne Movable Offshore, Inc.*, 776 F.2d 1304, 1306 (5th Cir. 1985); *In re Heinz*, 131 B.R. 38, 42 (Bankr. D. Md. 1991) (good cause requires "at least" as strict a showing as excusable neglect). This court agrees that the appropriate standard is good cause, not excusable neglect.

Finally, although it is not clear, the plaintiff appears to argue that there may be some danger of the statute of limitations running, thus in effect, resulting in a dismissal with prejudice as

opposed to without prejudice as Rule 4(j) directs. The Sixth Circuit along with the majority of other courts have found this result to be irrelevant when applying Rule 4(j). See *Friedman*, 929 F.2d at 1158; *Townsel v. County of Contra Costa County, California*, 820 F.2d 319, 320 (9th Cir. 1987); *Norlock v. City of Garland*, 768 F.2d 654, 657 (5th Cir. 1985); *In re Heinz*, 131 B.R. at 41; *In re Wilson*, 96 B.R. 301, 303 (Bankr. E.D. Cal. 1989); *In re Hatch*, 93 B.R. 263, 264 (Bankr. D. Utah 1988), rev. in part, 114 B.R. 747 (D. Utah 1989).

Lastly, the court considers plaintiff's argument that the 120 day time period is not applicable to defendant Carbones Naricual C.A. because it is a foreign corporation. The precise language in Rule 4(j) dealing with foreign corporations is that "[t]his subdivision shall not apply to service in a foreign country pursuant to subdivision (i)" (emphasis supplied). Rule 4(i) provides alternative methods of effecting service in a foreign country which may be used in addition to those procedures set forth in Rules 4(c)(2)(C)(ii) and 4(d)(3). A plain reading of Rule 4(j) suggests that the 120 day requirement is inapplicable only when service is pursuant to one of the methods set forth in Rule 4(i); if service is pursuant to other methods, the 120 day rule applies. In accordance with this construction, the Second Circuit Court of Appeals in *Montalbano v. Easco Hand Tools, Inc.*, 766 F.2d 737 (2nd Cir. 1985), concluded that the foreign country exception to the 120 day rule was inapplicable because plaintiff had never attempted to serve process on the defendant in a foreign country under

subdivision (i); instead, service had been attempted under Rule 4(c)(2)(C)(i) and (d)(3). See also *Chilian Nitrate Corp. v. M/V Hans Leonhardt*, 810 F. Supp. 732, 734 (E.D. La. 1992) (120 day rule applicable because service in a foreign country was not pursuant to Rule 4(i)); cf. *Foster v. Dentaurum*, 86 WL 20899, 1 (D. Kan. 1986) (Rule 4(j)'s 120 day rule applies only if the defendant may not be served under the alternative provisions listed in subdivision (i)).

In the present case, there is no evidence that plaintiff has attempted to serve defendant Carbones Naricual C.A. under any method. In plaintiff's brief wherein it recites its efforts to serve each defendant, the only statement made with respect to defendant Carbones Naricual C.A. is that "M&M, [Melnick & Moore, plaintiff's counsel] believes this defendant to be a foreign corporation. Upon review of its files concerning the Chapter 11 case, and Keady's deposition taken on March 12, 1992, M&M has not located an address for service of process of this defendant." This court concludes that because there have been no efforts to serve Carbones Naricual C.A. under subsection (i) of Rule 4, the foreign country exception to the 120 day requirement is inapplicable.

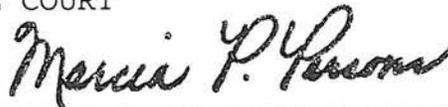
The court realizes that the plaintiff may now rectify the situation by serving defendant Carbones Naricual C.A. pursuant to Rule 4(i) and thus take itself out of the 120 day requirement. In fact it has been held that under the clear language of the statute, the Rule 4(i) exclusion in Rule 4(j) is applicable when service is made in a foreign country pursuant to Rule 4(i) even when the plaintiff does not attempt to serve the defendant within 120 days

of the filing of the complaint. See *Lucas v. Natoli*; 936 F.2d 432, 433 (9th Cir. 1991) (per curiam), cert. denied, ___ U.S. ___, 112 S.Ct. 971 (1992). However, other courts have held that even in the absence of a 120 day requirement, the court has the power to dismiss a case for failure to effect service of process within a reasonable time or for failure to proceed with due diligence, the standard which was in effect before Rule 4(j)'s 120 day time limit was adopted in 1983. See *Crysen/Montenay Energy Company v. E & C Trading, Ltd.*, ___ B.R. ___, 1994 WL 139932, p. 6 (S.D.N.Y. 1994); *In re Southold Development Corp.*, 148 B.R. 726, 730 (E.D.N.Y. 1992). In the present case, there is no evidence that plaintiff has acted with due diligence. To the contrary, plaintiff's half-hearted attempts to obtain the correct address of Carbones Naricual C.A. and its total failure to make any attempts to serve Carbones Naricual C.A. even though more than a year has passed since the complaint was filed, establish the opposite.

Accordingly, the court concludes that plaintiff's motion to serve the defendants more than 120 days from the date on which it filed its complaint should be DENIED and that CFI's motion to dismiss should be GRANTED. The court will enter an order in accordance with this memorandum.

ENTER: May 25, 1994

BY THE COURT



MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE