IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

JAMES PIGRUM and HENRY PIGRUM,	)	
Plaintiffs,	)	
VS.	)	No. 01-1361
PATRICK JORDAN, et al.,	)	
Defendants.	)	

ORDER

Plaintiffs filed their complaint on December 7, 2001. All defendants, except Defendant Randy Crews, Jr., have been served with process. Accordingly, in an order entered on June 12, 2002, Plaintiffs were ordered to provide to the court an explanation as to why Defendant Crews has not been served with process and to show cause why the action against Defendant Crews should not be dismissed for failure to prosecute.

Plaintiffs have responded to the order to show cause by stating that they have been unable to personally serve Defendant Crews and no one at his residence will accept service for him. Plaintiffs request the court to allow them to serve Defendant Crews by publication or by certified mail. Implicit in Plaintiffs' response is a request for additional time in which to effectuate service of process as to Defendant Crews.

Rule 4(m) of the Federal Rules of Civil Procedure requires service of the summons

and complaint to be made on a defendant within 120 days after the filing of the complaint unless good cause is shown by the plaintiff as to why this time period should be extended.[1] In relevant part, Rule 4(m) 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.

The first clause of Rule 4(m) indicates that a district court shall either (1) dismiss a complaint without prejudice or (2) direct that service be effected within a specified time, if a plaintiff fails to serve a summons and complaint within 120 days after filing the complaint. The second clause of Rule 4(m) states that a district court shall extend the time for service if a plaintiff demonstrates good cause for failing to comply with the 120 day time requirement. The Advisory Committee notes explain that:

> 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**.... Relief may be justified, for example, if the applicable statute limitations would bar the refiled action....

Advisory Committee Notes on Fed. R. Civ. P. 4(m) (1993) (emphasis added).

In Henderson v. United States, 517 U.S. 654 (1996), the Court acknowledged the Advisory Committee notes, stating: "Most recently, in 1993 amendments to the Rules, courts

[1] Plaintiffs' 120 day time period elapsed on April 8, 2002.

have been accorded discretion to enlarge the 120-day period 'even if there is no good cause shown.'" Id. at 662.[2] Accord Johnson v. Hayden, 2000 WL 1234354 (6th Cir.) ("Rule 4(m) provides significantly more discretion for the district court to grant an extension of time to serve process than did the former Rule 4(j), and no longer requires district courts to find good cause before granting such an extension." (citations omitted)).

Therefore, this court concludes that it may, in its discretion, extend the 120-day period for Plaintiffs to effect service on Defendant Crews, even absent a showing of good cause, and the court finds such exercise of its discretion appropriate in the present case.[3] See May v. Oklahoma Dept. of Corrections, 2000 WL 633244 (10th Cir.) (Pursuant to Rule 4(m), a district court should take a two-step approach to extensions of time for service. The court should first inquire whether the plaintiff has established good cause for failing to effect timely service, and, if so, the court must extend the time for service. If the plaintiff fails to show good cause, the district court must still consider whether a permissive extension of time may be warranted.)

---

[2] Rule 4(m), which became effective on December 1, 1993, replaced former Rule 4(j), with respect to the timing requirements for effecting proper service of process. See Byrd v. Stone, 94 F.3d 217, 219 n. 2 (6th Cir.1996). Former Rule 4(j) provided:

> 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.

Construing former Rule 4(j), the Sixth Circuit held that "[a]bsent a showing of good cause to justify a failure of timely service, Fed.R.Civ.P. 4(j) compels dismissal." United States v. Gluklick, 801 F .2d 834, 837 (6th Cir.1986).

[3] The court may grant an extension of time *sua sponte*. In re Richards, 1999 WL 26913 (4th Cir.) (citing 1 Moore's Federal Practice s 4.82[1] (3rd ed.1998)).

It appears that the statute of limitations would bar a re-filed action.[4] According to the complaint, Plaintiffs' cause of action accrued on December 10, 2000. Civil rights claims have a one-year statute of limitations. T.C.A. § 29-3-104(a)(3); Kessler v. Board of Regents, 738 F.2d 751, 754 (6th Cir. 1984). Therefore, if the action is dismissed as to Defendant Crews pursuant to the first clause of Rule 4(m), Plaintiffs' action against him may be barred.[5]

Another factor justifying an extension is that Plaintiffs did, in fact, attempt to serve Defendant. C.f. May v. Oklahoma Dept. of Corrections, 2000 WL 633244 (10th Cir.) (When service "was never accomplished, in contrast to having been merely defective in form, the court did not abuse its discretion in refusing to allow plaintiffs a second chance to effect service."). See also Horn v. Dept. of Defense, 1999 WL 33117271 (S.D. Ohio) ("Although Horn's counsel bears the ultimate responsibility for the actions of her legal assistant, the Court finds counsel's illness and the good-faith attempts made by her assistant to be relevant considerations.")

Additionally, the court has been made aware of the service of process problem in a timely fashion and, therefore, Defendant Crews will not be prejudiced by granting Plaintiffs

---

[4] Although a statute of limitations problem militates against dismissal under a discretionary standard, see Fed. R. Civ. P. 4(m) Advisory Committee's Note ("Relief may be justified ... if the applicable statute of limitations would bar the refiled action."), this factor does not support a finding of good cause. Brandon H. v. Kennewick School Dist. No. 17, 1998 WL 10552 (9th Cir.); Despain v. Salt Lake Area Metro Gang Unit, 13 F.3d 1436, 1439 (10th Cir. 1994).

[5] The Advisory Committee Notes to the 1993 amendments to Fed. R. Civ. P. 4 point out that "the device of requested waiver of service is not suitable if a limitations period which is about to expire is not tolled by the filing of the action. Unless there is ample time, the plaintiff should proceed directly to the formal methods for service identified in subdivisions (e), (f), or (h)."

additional time to effectuate service. C.f. Boley v. Kaymark, 123 F.3d 756 (3rd Cir. 1997) (The running of the statute of limitations is a factor favoring the plaintiff and not a basis for potential prejudice to the defendant.) See also Adams v. AlliedSignal General Aviation Avionics, 74 F.3d 882 (8th Cir. 1996) (Plaintiffs requested relief almost one year after service issues were first raised. During that period, the dispute frustrated discovery because no named defendant had been served and disrupted the court's efforts to set a trial date.)

For all these reasons, the court finds it appropriate, after considering all of the facts and circumstances, to exercise its discretion and extend Plaintiffs' time for effecting service of process. Plaintiffs will have an additional twenty days from the date of the entry of this order to properly serve Defendant Crews.

Next, the court must consider Plaintiffs' request to be allowed to serve Defendant Crews by publication or by certified mail. The Federal Rules of Civil Procedure do not provide for service through publication. However, Rule 4(e)(1) provides for service on an individual "under the circumstances and in the manner prescribed in" a statute or rule of the state in which the court is held. Service of process under this rule, thus, requires reference to Tennessee's Rules of Civil Procedure.

Tennessee state law dispenses with personal service in a court of chancery when, among other reasons, the defendant is a non-resident, he cannot be found, his residence is unknown, or, if the defendant is a domestic corporation, it has ceased to do business and has no officers or agents on whom service may be had. T.C.A. § 21-1-203(a). None of those

factors are present in this case. As explained in Continental Ins. Co. v. Masters, 1993 WL 4856 (Tenn. App.),

> Tenn. R. Civ. Proc. 4.05 deals with constructive service and the comments to the rule make it clear that, unless specifically changed by the rules, "no changes in the statutes governing constructive service are intended." Therefore, in accordance with the rules, the statute does not apply to the circuit court.
>
> Beyond that obvious difficulty, however, is the notion that Tenn. Code Ann. § 21-1-203 gives the court the power to render a purely personal judgment against a defendant where the only service is by publication ... In other cases involving the general law (and not Tenn. Code Ann. § 21-1-203 specifically) the courts have been equally definitive. "In actions purely personal [the defendant] is entitled to personal service on himself, or on someone standing before the law as his proper representative; and no valid personal recovery can be had against him without such service ..."
>
> [I]n effect, the statute provides a means of giving notice to interested parties when the court is acting *in rem*. [citation omitted]. We are satisfied that even if Tenn. Code Ann. § 21-1-203 could be applied in circuit court it would not give the court the power to enter a personal judgment against a defendant where the defendant was served by publication only.

Continental at *1, *2.

Furthermore, notice by publication is not sufficient to comply with due process when the person's name or address is known, as in the present case. Mullane v. Central Hanover Bank & Trust Company, 339 U.S. 306, 318 (1950); Baggett v. Baggett, 541 S.W.2d 407, 410-11 (Tenn.1976). Consequently, this court has no authority to authorize service of Defendant Crews by publication. As to service by certified mail, Plaintiffs are directed to refer to Tennessee Rule of Civil Procedure 4.04(10) which authorizes service of process by certified return receipt mail in certain circumstances.

In summary, Plaintiffs will be given an additional twenty (20) days in which to

effectuate service of process on Defendant Crews.

IT IS SO ORDERED.

_____
JAMES D. TODD
UNITED STATES DISTRICT JUDGE

_____
DATE