

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

CRAIG M. STRUTTON,)	
)	
Plaintiff)	
)	
v.)	Civil No. 97-0151-B
)	
PAUL D. COOPER and)	
FRONTIER AIR SERVICE, INC.,)	
)	
Defendants)	

MEMORANDUM AND ORDER

Before the Court for consideration is the Plaintiff's Motion for Relief From Order Dated March 16, 1998 or An Extension of Time to Serve Process on the defendant, Paul Cooper. The Defendant, Frontier Air Service, filed an objection to the motion and the plaintiff has filed his reply. For the reasons explained below, the Court GRANTS the plaintiff's motion.

The Court issued an Order to Show Cause on February 24, 1998, when the plaintiff failed to serve the defendant, Paul Cooper, within the three month period set by the Court after the Plaintiff's first request to extend time for service. *See*, Report of Telephone Conference and Order dated November 21, 1997. The plaintiff failed to issue any response to the Order. Accordingly, the Court dismissed Defendant Cooper from the case without prejudice on March 16, 1998. Fed. Rule Civ. Proc. 4(m). Plaintiff now seeks relief from the Order. The Court will consider the plaintiff's Motion for Relief as one seeking relief from a judgment or order from the Court. Fed. Rule Civ. Proc. 60(b); *See, Watson v. Continental Healthcare Systems*, CIV.A. 95-2532-GTV, 1997 WL 383061 at *1 (D. Kan. June 18, 1997).

Plaintiff argues that he is entitled to relief under Rule 60 (b)(1), which permits a court to

grant relief from a final judgment for reasons of mistake, inadvertence, surprise or excusable neglect.¹ The plaintiff primarily asks for relief based on excusable neglect. Plaintiff cites the following facts to support his motion:

7. That despite a diligent search, Mr. Cooper's whereabouts could not be tracked. In fact, further information suggested that he may have relocated to Saudi Arabia. As a consequence counsel provided no response to a subsequent Order to Show Cause dated February 24, 1998.

8. That during the evening hours of May 19, 1998, a legal investigator employed by Cloutier & Briggs, through unrelenting efforts, including an inquiry to Interpol, narrowed the search to a Mr. Paul Cooper residing in upstate New York. A confirming conversation ensued on May 20, 1998.

9. That as a consequence, Plaintiff wishes to serve Mr. Cooper with process for the purpose of securing the Court's in personam jurisdiction.

Plaintiff's Motion at 2.

Plaintiff maintains that his failure to serve Cooper was the result of excusable neglect. The Supreme Court addressed the meaning of "excusable neglect" in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380 (1993). The Court delineated a balancing test taking into account equitable considerations and other circumstances surrounding the party's failure to comply. *Id.* at 395. The factors include, "the danger of prejudice [to an adverse party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith."² *Id.*

A particularly important factor is whether the reason for the delay was within the

¹ Having granted relief from judgment under Rule 60 (b)(1) the Court will not address whether the plaintiff is entitled to relief under Rule 60 (b)(2).

² Although in *Pioneer* the Court was applying the "excusable neglect" standard in the bankruptcy context, the has extended the analysis to the Rules of Federal Civil Procedure. *Stutson v. United States*, 516 U.S. 193 (1996).

reasonable control of the plaintiff. The Court is satisfied that it was not. The plaintiff has been making a good faith attempt to locate Cooper for some time using all reasonable means including hiring an investigator. Plaintiff's inability to locate Cooper and effectuate service was a matter entirely out of the plaintiff's control. Additionally, any prejudice the defendant may suffer by the plaintiff being able to serve Cooper is outweighed by the prejudice the plaintiff would suffer from being unable to seek legal redress against an alleged wrongdoer.³ Taking into account all of the equitable considerations the Court is satisfied that the plaintiff has offered an adequate excuse to obtain relief from judgment.

For the plaintiff to serve Cooper, the plaintiff must further demonstrate "good cause" as to why he did not effectuate service of process within the three month period specified by the Court. When 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 (3rd Cir. 1997) (quoting *MCI Telecomm. Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1097 (3rd Cir. 1995))⁴ As stated earlier, the plaintiff's reason for not complying with the time limit is clear; the plaintiff could not find Cooper to effectuate sufficient process despite employing a private investigator for the past several months. The Court is satisfied that the plaintiff has demonstrated "good cause" for not complying with the previous time limits.

Accordingly, the Court's previous Order of Dismissal as to Defendant Cooper is

³ If the plaintiff is unable to serve Cooper in this suit he will be barred from seeking action against him in the future because the statute of limitations has run.

⁴ Courts differ on whether "good cause" requires a greater showing of "excusable neglect". See *In re Kirkland*, 86 F. 3d 172, 174 (10th Cir. 1996) (finding that "good cause" requires a greater showing than "excusable neglect".); *But see MCI*, 71 F.3d at 1097 (equating the concept of "good cause" with that of "excusable neglect".) The Court also agrees with the Third Circuit that the primary focus when determining "good cause" are the reasons the plaintiff did not timely serve the defendant in the first place. *MCI*, 71 F.3d at 1097.

VACATED. The Court ORDERS the plaintiff to effect service by July 29, 1998. A revised Scheduling Order will issue upon service of process on Defendant Cooper.

SO ORDERED.

Eugene W. Beaulieu
U.S. Magistrate Judge

Dated on June 30, 1998.