

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

**FORUM ADMINISTRATIVE** )  
**SERVICES LIMITED LIABILITY** )  
**COMPANY, et al.,** )  
 )  
**Plaintiffs** )  
 )  
v. )  
 )  
**WESTWOOD VENTURES, LTD., et al.,** )  
 )  
**Defendants** )

*Docket No. 97-82-P-H*

**MEMORANDUM DECISION ON PLAINTIFFS' MOTION TO EXTEND TIME  
FOR SERVICE OF PROCESS**

The plaintiffs move for an extension of time in which to service the complaint and summonses upon the individual defendants, Gary Miller and Adam Zalta, whose names were added as defendants when the court on September 16, 1997 granted the plaintiffs leave to amend their complaint. Docket No. 11. The plaintiffs made no attempt to serve the amended complaint on these individual defendants, who are principals of the other defendant, Westwood Ventures, Ltd., within the 120-day period allowed by Fed. R. Civ. P. 4(m). This motion was filed on the twenty-second day after the expiration of that 120-day period. Miller was served twenty-one days after the deadline and Zalta was served on the twenty-second day after the deadline. I grant the motion.

Rule 4(m) provides:

**Time Limit for Service.** 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. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1).

Attorney neglect or inadvertence, standing alone, does not constitute good cause under Rule 4(m). *E.g., In re Kirkland*, 86 F.3d 172, 174 (10th Cir. 1996); *McGregor v. United States*, 933 F.2d 156, 160 (2d Cir. 1991) (decided under predecessor version of rule). The plaintiffs here have shown nothing beyond attorney neglect or inadvertence in their explanation for the failure to serve Miller and Zalta in a timely fashion.

The inquiry under Rule 4(m) does not end there, however. A finding of lack of good cause is not dispositive. Courts have the discretion to enlarge the 120-day period even in the absence of good cause. *Henderson v. United States*, 116 S.Ct. 1638, 1643 (1996). If the court determines that good cause has not been shown, it should consider whether a permissive extension of time is warranted. *Panaras v. Liquid Carbonic Indus. Corp.*, 94 F.3d 338, 340-41 (7th Cir. 1996).

In deciding whether to extend the time for service in the absence of good cause, the court may consider factors such as whether the defendant has evaded service, concealed a defect in attempted service, or been prejudiced by the failure to serve. Other important considerations include whether service was eventually accomplished, and if so, how long after the 120 day time period, and whether the statute of limitations has expired, thereby barring the plaintiff from refileing the complaint.

*Goodstein v. Bombardier Capital, Inc.*, 167 F.R.D. 662, 666 (D. Vt. 1996) (citations omitted).

In the instant case, the individual defendants did not evade service or attempt any concealment because no timely attempt at service was made. The service was eventually accomplished, twenty-one and twenty-two days after the 120-day time period. There is no indication in the record that any applicable statute of limitations is at issue. I find none of these factors

particularly supportive of either side of the dispute on this issue.

That leaves for consideration the individual defendants' assertion that they will be prejudiced by the granting of the motion. There is no doubt that they have been aware of the amended complaint naming them since its filing was allowed by the court. Nevertheless, the defendants assert that, if formally brought into this action, they will file counterclaims that will require additional discovery. Defendant Westwood Ventures' Opposition to Plaintiffs' Motion for Enlargement of Time (Docket No. 35) at 4. Counsel appearing on their behalf for purposes of opposing this motion has represented to the court that the additional discovery involved will be a deposition or depositions estimated not to exceed one hour in duration. Report of Conference of Counsel (Docket No. 42) at 2. In response, the plaintiffs assure the court that they will promptly make available the requested deponent or deponents. *Id.* All parties state that they will not seek leave to file any dispositive motions concerning the counterclaims. *Id.* The only other prejudice identified by the individual defendants in this regard is that approval of the motion would force them to litigate their claims against the plaintiffs in this jurisdiction as counterclaims rather than, as they prefer, in their "home" forum of New York. *Id.* This asserted "prejudice" is not cognizable in connection with a motion to extend the time for service.

Without minimizing the serious nature of the plaintiffs' failure to effect timely service, the granting of the plaintiffs' motion in this case will not have the effect of postponing trial and will serve the interests of judicial economy and limiting the cost of litigation, because all claims will be addressed in a single action. In the exercise of discretion, I **GRANT** the motion for enlargement of time.

*Dated this 9th day of March, 1998.*

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*David M. Cohen*  
*United States Magistrate Judge*