IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	Bankr. Nos. 99-2959
SUBMICRON SYSTEMS CORPORATION, et al.,	)	through 99-2962
	)	
Debtors.	)	
	)	
	)	
	)	
HOWARD COHEN, as Plan Administrator for the Estates of Submicron Systems Corporation, Submicron Systems, Inc., Submicron Wet Process Stations, Inc. and Submicron Systems Holding I, Inc.	)	Adv. Proc. No. 01-4044
	)	
Plaintiff,	)	
	)	Civ. No. 03-230-SLR
v.	)	
	)	
STOKES ELECTRICAL SUPPLY,	)	
	)	
Defendant.	)	

MEMORANDUM ORDER

At Wilmington this 5th day of April, 2004, having reviewed defendant's motion to dismiss and plaintiff's motion for an order extending time to serve the complaint and summons and the papers submitted in connection therewith;

IT IS ORDERED that defendant's motion (D.I. 15) is denied and plaintiff's motion (D.I. 16) is granted for the reasons that follow:

1. On May 25, 2001, plaintiff initiated an adversary proceeding against defendant in Bankruptcy Court by filing a summons and complaint for avoidance of preferences under 11

U.S.C. § 547 to recover money or property to benefit the debtors' bankruptcy estate.[1] (D.I. 2) On June 26, 2001, plaintiff attempted to serve the summons and complaint on defendant by postage-paid, first-class mail at 17th and Washington Streets, Easton, Pennsylvania (the "Former Address") to the attention of Vincent J. Presto, Chief Executive Officer. Defendant had registered the Former Address with the Commonwealth of Pennsylvania Department of State, Corporation Bureau (the "Bureau") under "Basic Entity Information," and plaintiff obtained the address from this source.[2] (See D.I. 16, ex. A)

2. On October 3, 2001, plaintiff sought entry of default judgment pursuant to Fed. R. Civ. P. 55 and Fed. R. Bankr. P. 7055, since defendant failed to enter any appearance, answer, plead, or otherwise present a defense. On October 22, 2001, the Bankruptcy Court ordered default judgment against

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[1]On September 1, 1999, debtors filed a voluntary petition for relief with the Bankruptcy Court under chapter 11 of the Bankruptcy Code. (D.I. 16 at 1) The Bankruptcy Court confirmed the First Amended Plan of Liquidation on May 8, 2000. (Id. at 2) Plaintiff was appointed as plan administrator on behalf of debtors pursuant to the Plan and the Order Approving the Plan Administrator Agreement entered May 24, 2000. (Id. at 3) On June 15, 2000, debtors served their Notice of Plan Effective Date, Cancellation of Shares, Appointment of Plan Administrator and Designation of Plan Administrator Counsel.

[2]Defendant discontinued operations at the Former Address in 1981. Defendant relocated to 3401 Northwood Avenue, Eaton, Pennsylvania at that time (the "Current Address"). (D.I. 15) Under the information for "Corporate Officers," defendant registered its Current Address. (See D.I. 16, ex. B)

defendant in the amount of $120,139.25 plus post-judgment interest. (D.I. 16 at 4)

3. On July 9, 2002, plaintiff sent defendant a demand letter via certified mail, return receipt requested, to the Former Address, informing defendant that the court entered default judgment. (Id.) Plaintiff also demanded payment on the judgment. The U.S. Postal Service forwarded the letter to defendant at a post office box maintained by defendant in Easton, Pennsylvania. (Id.)

4. On July 31, 2002, defendant filed a motion to vacate default judgment for failure of service pursuant to Fed. R. Civ. P. 55(c) and 60(b) or, alternatively, to reopen the proceeding. This court granted the motion to vacate on December 10, 2003. Contrary to defendant's contention that the court implicitly determined that service of the summons and complaint was ineffective, the court did not specifically address the issue of insufficiency of service. (D.I. 4) Instead, the court stated that "good and sufficient cause" exists for the relief requested.

5. Defendant moves the court to dismiss the litigation at bar pursuant to Fed. R. Civ. P. 12(b)(5) as a result of insufficient service. Defendant argues that more than two years and eight months have passed since the complaint was filed and plaintiff has still not perfected service. In response, plaintiff moves the court to order an extension of time

to serve the summons and complaint pursuant to Fed. R. Civ. P. 4(m). Plaintiff contends that he investigated defendant's corporate existence and registration status within the Commonwealth of Pennsylvania prior to filing the summons and complaint. (See D.I. 16, Cohen Declaration) Using information acquired from the Bureau, plaintiff asserts that he served the summons and complaint and that neither were returned to him as undeliverable. (Id.)

6. Service of process is essential to any procedural imposition on a defendant in a court of law. See Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, (1999); J.O. Alvarez, Inc. v. Rainbow Textiles, Inc., 168 F.R.D. 201, 203 (S.D. Tex. 1996)("A district court cannot exercise jurisdiction over a defendant which has not been served properly."). Fed. R. Bankr. P. 7400 authorizes nationwide service of process by mail on a corporate officer. This rule states in pertinent part:

> Upon a domestic or foreign corporation . . . by mailing a copy of the summons and complaint to the attention of an officer, a managing agent or general partner, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

Fed. R. Bankr. P. 7004(b)(3).

7. Fed. R. Bankr. P. 7004(a) incorporates by reference Fed. R. Civ. P. 4(m). Rule 4(m) provides for a time

limitation for service and recites in pertinent part:

> 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 Third Circuit has read Rule 4(m) "to require a court to extend time if good cause is shown and to allow a court discretion to dismiss or extend time absent a showing of good cause." Petrucelli v. Bohringer & Ratzinger, 46 F.3d 1298, 1305 (3d Cir. 1995). The Third Circuit also has enumerated the process that a court should follow when deciding whether to extend time.

> First, the district court should determine whether good cause exists for an extension of time. If good cause is present, the district court must extend time for service and the inquiry is ended. If, however, good cause does not exist, the court may in its discretion decide whether to dismiss the case without prejudice or extend time for service.

Id.

8. The presence or absence of good cause for an enlargement of time to effect service is a matter of discretion for a district court. See United States v. Nuttall, 122 F.R.D. 163, 166 (D. Del. 1988)(citing Dominic v. Hess Oil V.I. Corp., 841 F.2d 513, 514, 516-17 (3d Cir. 1988); Braxton v. United States, 817 F.2d 238, 242 (3d Cir. 1987)). The Federal Rules of

Civil Procedure do not define "good cause." As a result, courts have considered select factors in determining the existence of good cause: (1) the reasonableness of a plaintiff's efforts to serve; (2) prejudice to the defendant by lack of timely service; and (3) whether plaintiff moved for an enlargement of time to serve. Id. at 167. The Third Circuit has defined "good cause" as being tantamount to "excusable neglect" under Fed. R. Civ. P. 6(b). Petrucelli, 46 F.3d at 1307, n.11; Braxton, 817 F.2d at 241. Thus, in weighing these factors, the court's primary focus should be on the plaintiff's reasons for not complying with the time limit in the first place and whether the plaintiff acted in good faith in attempting service. Boley v. Kaymark, 123 F.3d 756, 758 (3d Cir. 1997)(quoting MCI Telecomms. Corp. v. Teleconcepts, 71 F.3d 1086, 1098 (3d Cir. 1995)). To this end, the Third Circuit has cautioned that inadvertence and "half-hearted efforts at service which fail to meet the standard" do not constitute "good cause." Braxton, 817 F.2d at 241.

9. The Federal Rules of Civil Procedure do not specifically explain what factors a court should consider when deciding to exercise its discretion to extend time for service in the absence of a finding of good cause. In Petrucelli, 46 F.3d at 1305-06, the Third Circuit identified the Advisory Committee note to Rule 4(m) as instructive. The Third Circuit stated:

> Although the list is not exhaustive, the Committee

> explained that, "relief may be justified, for example, if the applicable statute of limitations would bar the refiled action, or if the defendant is evading service or conceals a defect in attempted service.

Id. (quoting Fed. R. Civ. P. 4(m), Advisory Committee Note, 1993 Amendments). Besides guidance from the Advisory Committee, this court has set forth other considerations. "When deciding whether to exercise its discretion, a court may consider the following factors: (i) frivolousness [of the plaintiff's complaint]; (ii) [the plaintiff's] motivation in pursuing its claims; (iii) objective unreasonableness (both in the factual and legal components of the case); and (iv) the need in particular circumstances to advance considerations of compensation and deterrence.'" Ritter v. Cooper, 2003 WL 23112306, *3 (D. Del. 2003)(citing E.I. du Pont de Nemours & Co. v. New Press, Inc., 1998 WL 355522, *4 (E.D. Pa. June 29, 1998)).

10. In case at bar, plaintiff's service attempt comported with Fed. R. Bankr. P. 7004. Contrary to defendant's argument that plaintiff should have mailed the summons and complaint to its Current Address as registered with the Bureau under "Corporate Officers," Rule 7004(b)(3) only requires the service mailing to be directed "to the attention of an officer, a managing or general agent, or any other agent authorized by appointment or by law." Plaintiff followed this requirement because he directed his service mailing to the attention of

"Vincent J. Presto, Chief Executive Officer." Plaintiff had no reason to question the accuracy of the "Basic Entity Information" on file with the Bureau or to presume that Presto would not receive mail at the Former Address. Indeed, Presto stated in his affidavit that "I personally review, sort and distribute all mail addressed to [defendant], whether such mail is addressed to [defendant's] P.O. Box or [defendant's] Correct Address." (D.I. 17)

Additionally, the court is unpersuaded by defendant's argument that plaintiff should have been aware of the Current Address based on the fact that debtors served documents on defendant in the chapter 11 bankruptcy proceeding at the Current Address, engaged in business with defendant at the Current Address, and mailed invoices to debtors at the Current Address. Plaintiff is the plan administrator; he is not employed by debtors and, consequently, is not privy to their internal operations. The court concludes that plaintiff's efforts were in good faith and reasonable. Accordingly, the court finds that good cause exists for an extension of time.

11. Even in the absence of good cause, the court finds in its discretion that the relevant factors weigh in favor of excusing plaintiff's failure to effect service on defendant within 120 days. If the court were to dismiss the instant suit, plaintiff would not be able to re-file his complaint because the

action would be barred by the applicable statute of limitations.[3] See e.g., Hodges v. Greiff, 2002 WL 34368774, *2 (E.D. Pa. 2001)("[T]he fact that most of plaintiff's claims against defendant would now be time-barred is a factor supporting an exercise of the Court's discretion."). Defendant also had actual notice of the suit at the time he filed his motion to vacate judgment for failure of service on July 31, 2002. The court concludes that he will not be prejudiced if the court excuses plaintiff's untimely service. "[A]ctual notice to a defendant that an action was filed militates against a finding of prejudice." Boley, 123 F.3d at 759. Furthermore, plaintiff's claim against defendant is not frivolous by all accounts. As the plan administrator, plaintiff was appointed to liquidate the debtors' assets for the benefit of its creditors. If the instant suit is dismissed, the potential distribution to these creditors likely will be reduced. This is especially true given that the applicable statute of limitations has expired. Finally, the court finds that plaintiff's failure to effect service on defendant was not motivated by bad faith. That is, there is no evidence to suggest that plaintiff purposefully mailed the complaint to the defendant's Former Address, knowing that

[3]The parties do not contest the expiration of the statute of limitations. The court, therefore, accepts this expiration as a fact, although the parties have not provided sufficient information in the record for verification.

defendant no longer maintain operations at that location. Indeed, more than one year after filing the complaint, plaintiff mailed the demand letter to defendant at its Former Address. Surely, if plaintiff had been aware of the Current Address, he would have directed the demand letter there. In light of the absence of any prejudice to defendant and the substantial risk of prejudice to plaintiff, the court finds that it would be unjust to deprive plaintiff of the opportunity to prove his claim by dismissing his complaint for failure to effectuate service. Accordingly, the court grants plaintiff's motion for a thirty day extension within which to properly serve defendant. (D.I. 16) If plaintiff fails to perfect service within this period, then the court shall grant any renewed application to dismiss pursuant to Rule 4(m). In light of the forgoing, the court denies defendant's motion to dismiss for insufficiency of service (D.I. 15) without prejudice to renew.

Sue L. Robinson
United States District Judge