

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

* * * * *	C.A. NO. 04-312
ALBERT GRAY, et al	
VS.	SEPTEMBER 19, 2007
	2:07 P.M.
JEFFREY DERDERIAN, et al	
* * * * *	PROVIDENCE, RI

BEFORE THE HONORABLE RONALD R. LAGUEUX
 SENIOR JUDGE

(Motion to Dismiss; Motion to Enlarge Time)

FOR THE PLAINTIFFS:

BRIAN R. CUNHA, ESQ.
 904 Broadway
 East Providence, RI 02914

FOR THE DEFENDANTS:

THOMAS W. LYONS, III, ESQ.
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Court Reporter: Debra D. Lajoie, RPR, FCRR, CRI

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1 19 SEPTEMBER 2007

2 THE COURT: Good afternoon, everyone.

3 The matter before the Court is in the Station fire
4 cases. It's a motion by Defendants, Leggett & Platt,
5 Incorporated, and L & P Financial Services, to dismiss in
6 the Guindon, Sweet and Rodrigues cases for insufficiency of
7 service of process and lack of jurisdiction.

8 Will the attorneys interested in this particular
9 motion identify themselves for the record?

10 MR. LYONS: Thomas Lyons for the Defendants,
11 Leggett & Platt and L & P Financial.

12 MR. CUNHA: And Brian Cunha for the Plaintiff. I
13 think there's a second motion, too, Judge, that the Clerk
14 advised me would probably be heard at the same time, which
15 is my motion.

16 THE COURT: There's Plaintiffs' motion in those
17 three cases to enlarge the time to serve Defendants.

18 MR. CUNHA: That's correct, Your Honor.

19 THE COURT: That'll also be heard. It's all part
20 of the same issue.

21 MR. CUNHA: Thank you, Your Honor.

22 THE COURT: All right. Mr. Lyons, you filed the
23 original motion to dismiss.

24 MR. LYONS: Yes, Your Honor. As you said, this is
25 the Defendants' Leggett & Platt and L & P Financial's motion

1 to dismiss. I will refer to them collectively as the
2 Leggett Defendants, or Leggett, Your Honor. I want to
3 review the, for lack of a better term, the travel of the
4 situation that brings us here.

5 In December of 2004, and then again in early 2005,
6 these Plaintiffs in these three cases filed adoptions of the
7 Gray Plaintiffs' first amended master complaints. However,
8 they never effected service of that on the Leggett
9 Defendants.

10 In April, on April 27th, Plaintiffs' counsel called
11 me and asked whether I would accept service of process on
12 behalf of my clients. I said I would not accept service of
13 process. However, my clients would waive service of process
14 if we received the appropriate forms. We did not receive
15 the appropriate forms. I confirmed that phone conversation
16 by a letter dated April 29th, 2005.

17 On May 16th, 2005, I sent a follow-up letter
18 referring back to the prior phone conversation, and I also
19 stated that, unless we received the waiver of service forms,
20 we will not be filing answers to the complaint in those
21 three cases.

22 We never received the forms, and we never filed
23 answers. The Statute of Limitations ran on February 20th,
24 2006. On February 28th, 2006, these Plaintiffs adopted the
25 third amended master complaint filed by the Gray Plaintiffs.

1 They did not effect service of process of the third
2 amended master complaint on the Leggett Defendants within
3 120 days, as required by Rule 4M, nor did we receive waiver
4 of service forms, nor did Plaintiffs request an extension of
5 time to effect service at that point. Consistent with our
6 prior position, the Leggett Defendants did not file answers
7 in those cases.

8 On June 4th, 2006, these Plaintiffs moved for an
9 enlargement of time until August 1st, 2006, in which to
10 effect service on Defendants. The motion did not say which
11 Defendants, but it did say Defendants. And it's also not
12 clear whether the Court ruled on that motion, but in any
13 event, we were not served.

14 I note that a somewhat similar situation occurred
15 in the Gonzalves case, which is related to the Station or
16 arises from the Station fire litigation. And, in that case,
17 in December of 2006, the Plaintiff moved for a second time
18 to enlarge its time in which to effect service on numerous
19 Defendants, including specifically these Leggett Defendants.

20 Magistrate Judge Martin held a hearing on
21 January 17th as to whether the enlargement should be granted
22 and issued an order-- excuse me-- on January 26th, finding
23 that the factors in that case, at that time, just barely,
24 quote, unquote, weighed in favor of exercising the Court's
25 discretion to allow the extension.

1 On April 9th, 2007, the Leggett Defendants filed
2 their motions for summary judgment. On the front page of
3 that motion, there was a footnote identifying in which cases
4 we were filing the motion because it was filed in the
5 consolidated Gray and Henault cases, and the footnote said,
6 the last two sentences of it said, "L & P has not been
7 served in Guindon, Sweet and Rodrigues. Without waiving any
8 issues related to service, L & P notes this motion applies
9 with equal force to Plaintiffs' claims in those matters."
10 We were still not served.

11 Plaintiff subsequently filed an adoption of the
12 Gray Plaintiffs' initial response to the summary judgment
13 motion, which was the Gray Plaintiffs' request for discovery
14 in that case. At that point in time, we felt we couldn't
15 wait any longer, and we filed our motion to dismiss.

16 At this point, Your Honor, we are almost three
17 years past the time when Plaintiffs first adopted the Gray
18 Plaintiffs' first amended master complaint. We're almost
19 two and a half years since I wrote to Plaintiffs' counsel
20 stating that the Leggett Defendants would waive service of
21 process if counsel sent us the appropriate forms.

22 It's been about a year and a half since the Statute
23 of Limitations ran and Plaintiffs adopted the third amended
24 master complaint. It's been over a year since those
25 Plaintiffs requested a 45-day enlargement to effect service

1 on Defendants. And it's been eight months since Magistrate
2 Judge Martin rendered his decision on service.

3 Rule 4M requires that service take place within
4 120 days after filing the complaint. And I would note that,
5 with respect to the first amended master complaint, that
6 would have occurred back in 2005, and we were not served at
7 that point. But, even assuming the adoption of the third
8 amended master complaint constituted filing, the time in
9 which to effect service ran out in June, 2006, over a year
10 ago.

11 Rule 4M says the Court shall extend the time for
12 service for an appropriate period, provided the Plaintiff
13 shows good cause for the failure. In this case, the
14 Plaintiff made one request for an extension back in June of
15 2006 and did not effect service within the period of time
16 they had requested.

17 Here, however, the Plaintiff has now filed yet
18 another motion for an extension of time and essentially says
19 that the basis for allowing it is that somehow it is our
20 fault for not having continually alerted them of their
21 failure to serve us, Your Honor.

22 And they have also made the argument that we have
23 somehow waived service of process by virtue of the fact that
24 they have been served with motions and pleadings with
25 respect to other of the Station fire cases, Your Honor.

1 I would note that the argument is somewhat of a red
2 herring for a variety of reasons. One is, is that they have
3 entered their appearance in the consolidated Gray and
4 Henault cases. Accordingly, we have to file-- we have to
5 serve them, Your Honor.

6 The other point is, is that the cases on which they
7 rely all are, I guess you could say, technologically
8 obsolete in a way because they all involve the service of
9 hard copies of pleadings in the old days before the creation
10 of the Court's electronic case filing system, Your Honor.

11 In this case, now, things are noticed and served
12 via the electronic case filing system. It's not as if you
13 can sort of opt-- selectively opt out, at least to my
14 understanding, which counsel receive and which counsel
15 don't.

16 The other waiver argument is that we were-- that we
17 should have filed our motion to dismiss sooner. But,
18 frankly, Your Honor, there was no reason for us to file the
19 motion to dismiss sooner. These Plaintiffs didn't do
20 anything until they served their notice of the adoption of
21 the Gray Plaintiffs' request, Your Honor, and at that point,
22 we thought we had to act.

23 In any event, certainly the Plaintiffs were aware a
24 year ago, in June of 2006, that they had not effected
25 service on all Defendants, Your Honor, so that any of these

1 other issues don't pertain.

2 With respect to the claim of excusable neglect, the
3 Leggett Defendants will agree that Plaintiffs have cited the
4 appropriate standard. However, Plaintiffs have not and
5 cannot cite to any case holding that there was an excusable
6 neglect in circumstances similar to this.

7 The Leggett Defendants have cited numerous cases in
8 our memorandum holding such circumstances are not excusable
9 neglect and will simply rely on those cases, Your Honor.
10 And, accordingly, we request that the motion to dismiss be
11 granted and the Plaintiffs' subsequent motion for
12 enlargement be denied.

13 Thank you.

14 THE COURT: All right. Mr. Cunha?

15 MR. CUNHA: Thank you, Judge.

16 What happened in this case, Judge, was that, quite
17 frankly, when we filed the initial complaint, we called all
18 of the Defendants, as per the Rule, and asked that they
19 waive service and, if they couldn't, we would serve them,
20 which was done with all the Defendants.

21 Apparently, Leggett & Platt slipped through the
22 cracks back in April and May, 2005. I never saw-- he faxed
23 over two, two-line letters in April and May, 2005. I talked
24 to the paralegal that was in charge of it this morning
25 before I came, I asked her, "What happened?"

1 She said, "I saw those faxes, at least my memory is
2 I went in the file, and I saw the waiver of service in the
3 file and assumed that they had been served."

4 We heard nothing, Judge, from this Defendant. I
5 didn't get a phone call from Mr. Lyons. If he had called me
6 personally and said, Brian, gee, we didn't get the waiver of
7 service, send it to me, fine. He didn't do that. In fact,
8 what he did is he did nothing. He just waited, he
9 continually waited, waited, waited.

10 We then adopted the third amended complaint in
11 February of '06. They then answered that third amended
12 complaint that we had adopted, no mention, Judge, when they
13 answered that third amended complaint, that in fact they
14 hadn't been served, nothing. That was in-- the date of
15 that, Judge, was March 17th, '06.

16 From March 17th, '06, they filed over 35 documents,
17 Judge, in this case, each of which we were noticed on. We
18 had absolutely no notice that we had not been-- that we had
19 not sent back the waiver form. We were participating in the
20 case, they fully know we were participating in the case.
21 They noticed us on everything, we noticed them on
22 everything.

23 Then, Judge, in-- knowing full well that we
24 probably obviously didn't know we hadn't sent the waiver
25 form back, in the bottom of a footnote, a two-inch footnote,

1 and Your Honor has seen this in all the cases where you say,
2 this summary judgment motion applies to these Plaintiffs,
3 the very last line, they say, "This does not apply to Swift,
4 Guindon and Rodrigues." That's the notice that they say
5 gave-- that we gave.

6 We missed that, Judge, there's no question. They
7 know we missed that. Otherwise, we would have filed
8 service. Why would we not file service on them for two
9 years, participate in the case and not know it? He knew we
10 missed it. What did they do, Judge? Instead of giving me a
11 phone call and saying, gee, Brian, file the waiver, they
12 continually waited, and they waited and waited, and they
13 waited two and a half years, Judge, till finally they filed
14 their motion to dismiss.

15 Well, the cases are very clear, Judge. You have to
16 file your Rule 12 motion within a timely period. You don't
17 wait two and a half years, file answers to complaints, file
18 motions, put us on the certificate of service on every
19 single case, on every single motion that they are
20 participating in, and not file their 12(b)(6) motion.

21 And the reason for that is clear. The spirit of
22 the rule is, if you really have a defense, if you've really
23 got a defense, insufficiency of service of process,
24 insufficient jurisdiction, you got to bring it to the
25 Court's attention.

1 Well, they really didn't because, technically,
2 Judge, yes. But, as a practical matter, no. They waived
3 that, Judge, and they waived it, and why did they waive it?
4 They waived it because they should have brought it to the
5 Court's attention two years ago.

6 If they had done that at that time, Judge, in light
7 of the 90 or so Defendants that we note that are in this
8 case, the Court would have-- I would have easily recognized
9 what the situation was, we could have remedied it two and a
10 half, almost three years ago.

11 So what did they do? They waited two and a half
12 years, obviously, to gain some leverage with the Court.
13 There's no question why they waited and brought this motion
14 up in July of '07, rather than back in '06, when they
15 answered the complaint, or in '05, when they recognized that
16 we didn't send the waiver.

17 This isn't a case-- this isn't a garden-variety
18 case, Judge, where we just missed it, we didn't send any--
19 we didn't make any attempt to serve them. We called them.
20 They knew we were involved in the case. We asked if they'd
21 accept service. They said, "No. We'll waive service."

22 And now, two and a half years later, almost three
23 years later, they're saying, Let us out of the case, Judge,
24 because he didn't send the waiver form back to us. Well,
25 that just isn't fair, Judge.

1 Finally, this Court does have discretion, under
2 Rule 4M-- and I noticed, in the brief that was filed by the
3 associate throughout the brief, that they cited 6(b)2,
4 Judge, rather than 4M-- this Court has this discretion, and
5 the discretion is, is balanced upon or weighed against not
6 exercising discretion, and I know Your Honor knows what
7 the-- knows what the Rule says. And did they have notice?
8 Yes. Is the Statute of Limitations run? Yes.

9 Again, are they prejudiced? Zero. They are not
10 prejudiced in the least. They've been participating in this
11 case, and they answered this case, and they answered against
12 us. And now they're saying, Well, we didn't get served way
13 back when. Well, why didn't they bring that up in their
14 answer in '06, Judge?

15 THE COURT: They've never answered the complaint in
16 these three cases.

17 MR. CUNHA: Okay.

18 THE COURT: They've never answered in these three
19 cases.

20 MR. CUNHA: Okay.

21 THE COURT: They made a distinction. They were
22 answering in the other cases. And they gave you notice at
23 that time that they hadn't been served. You've had notice
24 continuously that they hadn't been served.

25 MR. CUNHA: Yes. I don't think that they did, in

1 the '06 answer, Judge, distinguish us. I honestly don't
2 think they did, Judge. I looked at the answer this morning,
3 and when they answered in '06, they did not say that they
4 weren't answering our case. They didn't.

5 THE COURT: Well, what's the good cause? You're
6 the one that has the burden of showing good cause.

7 MR. CUNHA: Judge, I'm not saying that there is
8 good cause. I'm saying, technically, there probably isn't.
9 It's a matter of discretion on Your Honor's part. So
10 that's-- I think that that's where we're at, Judge.

11 And in terms of weighing the factors, is there
12 discretion on your part, based upon this case, Judge, as to
13 whether they knew we were involved or whether they didn't?
14 Obviously, Tom knew we were involved. Why? Because we
15 called him. We called him. You're right, we didn't-- they
16 missed it, Judge, they didn't send the waiver back to him,
17 no question about that.

18 THE COURT: Well, it's somebody in your office who
19 missed it and missed it badly.

20 MR. CUNHA: No question, Judge.

21 THE COURT: And you have not given me the detail of
22 why that happened.

23 MR. CUNHA: I will tell you precisely what
24 happened, Judge.

25 When we-- initially, when we were filing the-- when

1 we were serving everyone, the way it was set up was that we
2 set up a folder for every single Defendant, and the girl,
3 this paralegal, was instructed to call every Defendant's
4 lawyer and ask them if they would agree to waive service,
5 which she did.

6 Most said yes. And I said-- and she said, "What do
7 I do?"

8 I said, "You've got to send the waiver form." The
9 instructions were given in a little meeting we had with the
10 associate, and the appropriate waiver forms were sent to all
11 the counsels, they signed them, they filed them. And that
12 was done in every single case but, apparently, Leggett &
13 Platt.

14 Tom then sent over a fax, which I didn't see-- I
15 talked to the paralegal this morning-- in April, and a
16 second one in May, and said, "Gee, why we still didn't get
17 that in."

18 I asked her, I said, "What happened with regard to
19 that?"

20 She said, "When I got"-- she says, "My custom
21 was"-- she says, "I don't remember specifically with Leggett
22 & Platt. My custom was"-- because this happened in a number
23 of cases. She said, "I would go to the file and look and
24 see if, in fact, the waiver form, or a copy of it, was in
25 the file." She said, "It was."

1 I said, "Did you see if the original was still
2 there?"

3 She said, "No. I just looked at it," she said, "so
4 I assumed it was okay." That's what she said, "I assumed it
5 was okay."

6 The next notice-- that's what she said to me,
7 Judge, I mean, and I can understand that.

8 The next time that there was any notice, Judge--
9 that was in May-- was in 2007, in January, 2007, almost a
10 year and a half later when, at the bottom of the footnote,
11 they said that this does not apply to us. So it was a year
12 and a half, Judge, between that time and the next time that
13 we had any notice.

14 So it was almost a year and a half-- more than a
15 year and a half later, Judge, when they filed that document,
16 I think it's Document No. 1241-- I'm sorry, Judge. It was
17 April, '07, it was two years later, Judge, when, at the
18 bottom of that footnote, they put that down.

19 So is that the sort of thing, Judge, that the Court
20 would weigh in terms of granting discretion? I would
21 suggest it probably is. I mean, if in fact, Judge, we
22 hadn't called originally to say, gee, would you accept
23 service and we just completely left them out of the mix, and
24 if he hadn't agreed and they didn't know about us, I would
25 say that that's a strong point.

1 But this is not one of those cases, and you're
2 right, Judge, we-- the girl missed it. I talked to her this
3 morning. I talked to her when we first got the motion. I
4 talked to Tom about it. I asked Tom, I said, "Why did you
5 wait, you know, two and a half years to file the motion?"

6 He says, "Well, you know, this is when the summary
7 judgment motion came, so that's when we decided to file."

8 But I'm saying, Judge, in the exercise of your
9 discretion and looking at all the factors in terms of where
10 this thing should follow, I'd suggest that we should be
11 allowed to send our waiver of service form to them and
12 continue on with the case. I don't see any interruption in
13 this case. I'm not saying that my office didn't foul up
14 because we did.

15 But that's where we're at, Judge. And I apologize
16 to the Court. And I understand that the Court has a great
17 interest in making sure that people diligently do what
18 they're supposed to do in terms of-- regarding the rules,
19 regarding waivers of service, and I certainly understand
20 that, Judge.

21 Thank you.

22 THE COURT: All right.

23 The burden's on Plaintiffs here to demonstrate to
24 me that there's good cause for allowing them to make tardy
25 service at this time. Good cause requires a demonstration

1 of good faith on the part of the party seeking an
2 enlargement and some reasonable basis for noncompliance with
3 the time specified in the Rule.

4 And it's been held that an attorney's inadvertence,
5 neglect or mistake is not good cause. And here, whether
6 it's a paralegal, or someone else in a Plaintiff's office
7 has not satisfactorily explained what happened.

8 Obviously, there was an oversight, as Plaintiff
9 says, without giving any details in the papers that were
10 filed, no affidavit, and a last-minute discussion with a
11 paralegal and the representation made to the Court that the
12 paralegal somehow didn't catch it.

13 But there's more to it than that. The Defendant
14 continually gave notice in various pleadings that they had
15 not been served and that they were not answering these three
16 complaints and the adoption of the master complaints in the
17 Gray case.

18 It's unfortunate that this happened, but trying to
19 shift the blame to the Defendants doesn't carry the day in
20 this case. I'm satisfied that the Plaintiffs have not shown
21 good cause for this long delay in either making service or
22 presenting the waiver of service to the Defendants.

23 The motion of these two Defendants is granted to
24 dismiss the complaint in Guindon, Sweet and Rodrigues
25 against them.

1 And the Plaintiffs' motion to enlarge time to serve
2 these Defendants is denied.

3 Present an order, Mr. Lyons.

4 MR. LYONS: Thank you, Your Honor.

5 (The proceeding was concluded at 2:32 p.m.)
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8

9 C E R T I F I C A T I O N
10
11

12 I, Debra D. Lajoie, RPR-FCRR-CRI, do hereby
13 certify that the foregoing pages are a true and accurate
14 transcript of my stenographic notes in the above-entitled
15 case.
16

17
18 *Debra D. Lajoie*
19 _____
20 Debra D. Lajoie, RPR-FCRR-CRI

21
22 *9/24/07*
23 _____
24 Date
25