

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

REV. XIU HUI “JOSEPH” JIANG,)	
)	
Plaintiff,)	Case No. 4:15 CV 1008 CEJ
)	
v.)	JURY TRIAL DEMANDED
)	
TONYA LEVETTE PORTER, ET AL.,)	
)	
Defendants.)	

**PLAINTIFF’S RESPONSE TO THE COURT’S SHOW CAUSE ORDER
REGARDING SERVICE OF PROCESS ON DEFENDANT A.M.**

In response to the Court’s October 27, 2015 Show Cause Order (Doc. 55), Plaintiff Rev. Xiu Hui “Joseph” Jiang respectfully requests that this Court find good cause for an extension of time of six months in which to effect service of process on defendant A.M., pursuant to Rule 4(m) of the Federal Rules of Civil Procedure. In the alternative, Plaintiff respectfully requests that this Court grant a discretionary extension of time to serve defendant A.M. under Rule 4(m).

As recounted in the attached Declaration of John J. Hefele (attached as Exhibit 1), Plaintiff has made numerous, diligent attempts to effect service of process on A.M. since the filing of the complaint and issuance of summons on June 25, 2015. *See* Ex. 1, at ¶¶ 2-9. These attempts included a series of attempts in June and July of 2015, and a renewed series of attempts in October 2015, before the expiration of the time for service on October 23, 2015. *See id.* ¶¶ 3, 7. These included numerous unsuccessful attempts to locate A.M. at the street address listed on the summons, as well as attempts to track him down at other locations where he or his vehicle might have been found. *See id.* ¶¶ 2-9. They also included attempts to locate A.M. by inquiring of neighbors and acquaintances. *Id.* ¶¶ 4-5.

The circumstances of these attempts to serve A.M. raise the reasonable inference that A.M. has actively sought to evade service of process. First, A.M.'s address listed on the summons and derived from official records has the neglected and dilapidated appearance of a domicile that is not in regular usage. *Id.* ¶ 3. Yet the domicile has remained listed as A.M.'s address and is used by A.M. to receive mail and packages, as evidenced by the discarded shipping labels addressed to A.M. in plain view at the address. *Id.* at ¶ 5. Moreover, A.M. has not abandoned the address completely, as his next-door neighbor advises that he returns to the address at infrequent intervals to collect mail and cut the grass. *Id.* ¶ 5. A person acquainted with A.M. indicated that other process servers have been making attempts to locate and serve him in other cases, *id.* ¶ 4, and a records search indicates that A.M. currently has 2 liens and 16 judgments filed against him, establishing a strong motive to seek to evade service of process. *Id.* ¶ 8. Numerous attempts to locate A.M. using vehicle information, as well as that street address, met with no success. *Id.* ¶ 9. These circumstances strongly suggest that A.M. has personally vacated the address listed on the summons, while maintaining it in official records as his address, for the express purpose of evading service of process, and is otherwise seeking to evade service.

Rule 4(m) of the Federal Rules of Civil Procedure provides: “If a defendant is not served within 120 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.” Fed. R. Civ. P. 4(m).

As the Eighth Circuit has stated, “under Rule 4(m), if the district court concludes that there is good cause for plaintiff’s failure to serve within 120 days, it *shall* extend the time for service. If plaintiff fails to show good cause, the court still *may* extend the time for service rather than

dismiss the case without prejudice.” *Kurka v. Iowa County, Iowa*, 628 F.3d 953, 957 (8th Cir. 2010) (emphasis in original) (quoting *Adams v. AlliedSignal Gen. Aviation Avionics*, 74 F.3d 882, 887 (8th Cir. 1996)). Plaintiff respectfully requests that this Court (1) find that there is “good cause” for Plaintiff’s failure to serve A.M.; or (2) in the alternative, hold that Plaintiff should be granted a discretionary extension of time to serve A.M.

Good cause. First, Plaintiff has shown good cause for failure to timely serve A.M. “Rule 4(m) does not define good cause, and courts have not given a conclusive meaning to the phrase.” *Kurka*, 628 F.3d at 957. “A showing of good cause requires at least ‘excusable neglect’—good faith and some reasonable basis for noncompliance with the rules.” *Id.* (quoting *Adams*, 74 F.3d at 887). “Good cause is likely (but not always) to be found when . . . the defendant has evaded service of process or engaged in misleading conduct . . . [or] the plaintiff has acted diligently in trying to effect service” *Id.* (quoting 4B Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 1137, at 342 (3d ed. 2002)).

Both these factors are present in this case. First, “plaintiff has acted diligently in trying to effect service.” *Id.* In particular, Plaintiff has made numerous attempts, both at the beginning of the case and during the weeks prior to the expiration of the 120-day period for service of process, to locate and serve A.M. *See* Ex. 1, ¶¶ 2-9. Second, the circumstances of Plaintiff’s attempts to serve A.M. support a reasonable inference that A.M. “has evaded service of process.” *Kurka*, 628 F.3d at 957. As the Ninth Circuit has stated, a defendant’s active evasion of service constitutes an “obvious” example of good cause under Rule 4(m)—indeed, it is the only example of good cause specifically cited in the legislative history of Rule 4. *Wei v. State of Hawaii*, 763 F.2d 370, 371 (9th Cir. 1985) (“Neither rule 4([m]) nor its scant legislative history define ‘good cause.’ The only

example of good cause provided by the legislative history is the obvious one of a defendant's evasion of service.") (citing 1982 U.S. CODE CONG. & AD. NEWS 4434, 4446 n. 25).

Discretionary Extension. In the alternative, Plaintiff respectfully requests a discretionary extension of time to serve A.M. under Rule 4. "To warrant a discretionary extension, the plaintiff must establish excusable neglect." *Kurka*, 628 F.3d at 957. As noted above, "excusable neglect" requires a showing of "good faith and some reasonable basis for noncompliance with the rules." *Id.* (quoting *Adams*, 74 F.3d at 887). Plaintiff has made this showing in this case. Plaintiff made numerous, diligent attempts to serve A.M. during the weeks immediately following the filing of the complaint, and he renewed these attempts—despite their likely futility—in the weeks prior to the expiration of the time for service. *See* Ex. 1, ¶¶ 2-9. These attempts establish Plaintiff's "good faith" in attempting to serve A.M. Further, the difficulty of locating A.M., as discussed above, provide Plaintiff's "reasonable basis for noncompliance with the rules." *Kurka*, 628 F.3d at 957.

Proposed Six-Month of Extension of Time. Rule 4(m) authorizes the Court to extend the period for service "for an appropriate period" in cases of good cause, or "within a specified time" in cases of excusable neglect. Fed. R. Civ. P. 4(m). Given the circumstances of A.M.'s evasion of service, Plaintiff respectfully requests an extension of time of six months, to and including May 9, 2016, in which to serve A.M. As indicated in the attached Declaration, Ex. 1, Plaintiff has exhausted currently active leads in locating A.M., but Plaintiff is hopeful that additional information about A.M.'s whereabouts may be revealed as discovery is conducted in this case. Because of the uncertain prospects of serving A.M. in the future, Plaintiff does not wish the absence of A.M. to delay proceedings involving the other parties. Plaintiff proposes that the case may proceed in the absence of A.M., but that Plaintiff be afforded the opportunity to serve A.M. if additional information about his whereabouts may be discovered.

CONCLUSION

For the reasons stated, pursuant to Rule 4(m), Plaintiff respectfully requests that this Court grant an extension of time of six months, to and including May 9, 2016, in which to locate and serve process on defendant A.M.

Dated: November 9, 2015

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served via the Court's electronic filing system on November 9, 2015, to be served by operation of the Court's electronic filing system on:

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