

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DANIEL OKOE,
*On behalf of himself and others similarly
situated,*

Plaintiff,

v.

PARFUMS DE COEUR LTD.,

Defendant.

Case No. 3:18-cv-01979-VLB

April 18, 2019

MOTION TO DISMISS

Defendant, PARFUMS DE COEUR LTD., hereby moves to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(5).

The Plaintiff failed to effectuate service on the Defendant within the ninety (90) day period prescribed by Federal Rule of Civil Procedure 4(m). Accordingly, the matter should be dismissed for insufficient service of process. A Memorandum of Law in support of this motion is filed herewith.

DEFENDANT,
PARFUMS DE COEUR LTD.

By: /s/ Jonathan P. Whitcomb
DISERIO MARTIN O'CONNOR &
CASTIGLIONI, LLP
Jonathan P. Whitcomb (ct15014)
jwhitcomb@dmoc.com
Jonathan J. Kelson (ct26755)
jkelson@dmoc.com
One Atlantic Street
Stamford, CT 06901
Telephone: (203) 358-0800
Facsimile: (203) 348-2321

Certificate of Service

I hereby certify that on this April 18, 2019, a copy of the foregoing was filed electronically and served by mail upon anyone unable to accept electronic filing. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

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MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Defendant, PARFUMS DE COEUR LTD. (“PDC” or “Defendant”), hereby submits this Memorandum of Law in support of its Motion to Dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(5).

I. BACKGROUND

Plaintiff brings this purported class action lawsuit claiming that he was misled by the label on DR TEAL’S® Epsom Salt products. (D.E. 1, Complaint, ¶ 1.)

Prior to the filing of this action, Plaintiff, through his counsel, sent PDC a demand letter, dated June 12, 2018 (“Pre-Suit Demand”). Plaintiff claimed that PDC falsely and misleadingly labeled, advertised and marketed that a particular product in the DR TEAL’S® Epsom Salt line, “Detoxify and Energize” is effective in treating and preventing health problems and diseases, namely that he would experience a medical detoxification as a result of using this bath soak product. The Pre-Suit Demand also claimed that PDC falsely cited scientific authority to lend credibility to its claims.

By letter dated June 20, 2018, PDC's outside counsel advised Plaintiff's counsel that they represented PDC, that they were undertaking to investigate the claims in the letter, will revert in due course, and that all future communications should be directed to PDC's outside counsel.

The Plaintiff did not respond to PDC's letter of representation. Instead, nearly six months later, Plaintiff filed a Complaint in this Court on December 5, 2018. (D.E. 1.) Significantly, the deadline for service of process on PDC was ninety (90) days later, or March 5, 2019. Fed. R. Civ. P. 4(m).

On December 6, 2018, via letter, PDC, by and through its outside counsel, responded to the Pre-Suit Demand, refuting Plaintiff's claims ("December 6 Letter"). In particular, PDC advised Plaintiff's counsel that the photograph of the product included in the Pre-Suit Demand, and supposedly purchased by Plaintiff, was not the current packaging of the DR TEAL'S® product in question.

The image submitted by Plaintiff was taken from outdated listings on the internet, and did not reflect the product that Plaintiff would have encountered in the marketplace in May 2018. Moreover, the December 6 Letter confirmed that Plaintiff's product packaging claims were neither false nor misleading, and did not cite any scientific authority. The December 6 Letter advised Plaintiff's counsel that his representations were simply wrong - the packaging did not and never has referenced disease treatment or cited any scientific authority whatsoever. The Pre-Suit Demand contained material allegations that were wholly inaccurate, and seemed to have been lifted from a form letter that did not apply to PDC's product.

In reality, PDC's product does not make any actual or implied claims that a user would experience a medical detoxification or equivalent. Nothing in the product packaging communicates any medical claim, nor did the product falsely cite scientific authority.

Plaintiff did not respond to the December 6 Letter. Plaintiff did not refute PDC's assertion that its advertising did not cite scientific authority. In fact, Plaintiff did not deny that he merely "cut and pasted" allegations and claims from another form letter claiming false advertising.

Undersigned counsel emailed Plaintiff's counsel to follow up on the December 6 Letter, but Plaintiff's counsel did not respond. Undersigned counsel called Plaintiff's counsel and left a message with a request for a telephone call to follow up on the December 6 Letter, but Plaintiff's counsel again did not respond. Months elapsed without any response to the letter, email and phone call.

The service deadline of March 5, 2019, passed without any personal service on PDC, nor any court filing from Plaintiff. Significantly, prior to the service deadline, Plaintiff did not contact PDC seeking an extension, and did not file a motion for extension of time to serve the complaint, under Federal Rule of Civil Procedure 4(m). Indeed, the docket contains no evidence that the Plaintiff served PDC.

Given the foregoing, PDC rightfully believed the matter to be resolved on the basis of its December 6 Letter.

Plaintiff then apparently attempted service of the Summons and Complaint on PDC on or about March 29, 2019, well beyond the 90 day limitation under Rule 4(m).

Despite Plaintiff's frivolous claims, the false allegations in Plaintiff's Complaint and the defective attempt at belated service, PDC's undersigned counsel attempted to engage in a settlement dialogue with Plaintiff's counsel in early April 2019.

In response, Plaintiff requested a waiver of defective service. However, at no time has Plaintiff ever disclosed a reason for his defective service, and certainly has not indicated any

good cause for same, nor did Plaintiff ever previously request an extension of time to serve the complaint, from Defendant, defense counsel, or the Court.

Plaintiff did not engage in any meaningful discussion concerning potential settlement, and stated that he would be willing to discuss removal of false allegations after PDC waived defective service, and that he would be willing to extend PDC's time to respond to the Complaint.

PDC rejected Plaintiff's request for a waiver on these terms, as, again, it created unnecessary legal costs for PDC, since the case and main allegations were based upon false information incontrovertibly unrelated to PDC's products.¹ Short of a voluntary removal of the offending allegations, PDC indicated that it would stipulate to a voluntary dismissal of the lawsuit without prejudice, which Plaintiff rejected. Below is an email exchange among counsel for the parties, reflecting the foregoing:

From: Jon Whitcomb
Sent: Thursday, April 4, 2019 4:43 PM
To: CK Lee
Cc: Julie V. Pinette; Chelsea Akwei; Rony Guldmann; William Brown
Subject: Re: June 2018 Letter regarding Dr. Teal's Epsom Salt

No. We will stipulate to dismissal without prejudice.

Sent from my iPhone

On Apr 4, 2019, at 4:41 PM, CK Lee <cklee@leelitigation.com> wrote:

I'm confused. Are you still waiving service ?

CK Lee
Sent from my iPhone

On Apr 4, 2019, at 2:57 PM, Jon Whitcomb <JWhitcomb@dmoc.com> wrote:

¹ Counsel for the parties discussed on numerous occasions that PDC's advertising did not cite scientific authority.

INADMISSIBLE SETTLEMENT DISCUSSION

CK, PDC will not release sales data.

The collective view is that this is a frivolous matter, e.g. there are [no] scientific or medical claims in our advertising, and your staff is confusing this product with another.

The advertising is not misleading...period.

In addition, my client will not waive the jurisdictional defense.

However, solely for cost-containment purposes, we are willing to entertain a reasonable settlement.

Please get back to me as soon as you can so we can forgo the expense of a motion to dismiss. Thanks. Jon

Jonathan P. Whitcomb

[<image003.png>](#)

Diserio Martin O'Connor & Castiglioni LLP

One Atlantic Street, Stamford, CT 06901

Main: (203) 358-0800 x 3332

Cell: (203) 559-7146

Fax: (203) 348-2321

Email: jwhitcomb@dmoc.com

[Email](#) [Bio](#) [Map](#) [dmoc.com](#)

From: Jon Whitcomb

Sent: Thursday, December 06, 2018 4:04 PM

To: cklee@leelitigation.com

Subject: RE: June 2018 Letter regarding Dr. Teal's Epsom Salt

CK, please let me know when you have some time to discuss.
Thanks. Best, Jon

Jonathan P. Whitcomb

[<image004.png>](#)

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One Atlantic Street, Stamford, CT 06901

Main: (203) 358-0800 x 3332

Cell: (203) 559-7146

Fax: (203) 348-2321

Email: jwhitcomb@dmoc.com

[Email](#) [Bio](#) [Map](#) [dmoc.com](#)

From: Shirley Maldonado
Sent: Thursday, December 06, 2018 12:16 PM
To: cklee@leelitigation.com
Cc: Jon Whitcomb; Jane Christie
Subject: June 2018 Letter regarding Dr. Teal's Epsom Salt

Attorney Lee,

Please see the attached correspondence from Jonathan Whitcomb.

Shirley

Shirley Maldonado | Legal Assistant

[<image005.png>](#)

Diserio Martin O'Connor & Castiglioni LLP

One Atlantic Street, Stamford, CT 06901

Main: (203) 358-0800 ext. 3323

Email: smaldonado@dmoc.com

[Email](#) [Map](#) [dmoc.com](#)

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* * *

Thereafter, and par for the course, Plaintiff's counsel sent your undersigned PDC's counsel an email and dishonestly claimed PDC agreed to waive defective service. Similar to Plaintiff's allegations concerning the product at issue, PDC once again had to call Plaintiff out for blatant untruthfulness. Below is an email exchange among counsel for the parties, reflecting the foregoing:

From: Jon Whitcomb
Sent: Wednesday, April 10, 2019 3:09 PM
To: Richmund Sta. Lucia
Cc: CK Lee; William Brown; Rony Guldmann
Subject: Re: Okoe v. Parfums De Coeur - Stipulation

Richmund, we had no such conversation.

In fact, I spoke with CK Lee, not you, and told him I'd be willing to stipulate to a dismissal without prejudice and nothing more. That offer still stands. Jon

Sent from my iPhone

On Apr 10, 2019, at 2:58 PM, Richmund Sta. Lucia
<richmund@leelitigation.com> wrote:

Dear Jonathan,

Pursuant to our telephone conference on April 4, 2019, please see the attached draft stipulation containing the proposed extension of time and waiver of service. Kindly review and confirm if you find the draft to be in order before we forward it to our co-counsel.

Thank you.

Best regards,
Richmund

Richmund Sta. Lucia
Lee Litigation Group, PLLC
30 East 39th Street, Second Floor
New York, NY 10016
richmund@leelitigation.com
Main: (212) 465-1180
Direct: (646) 598-8286
Fax: (212) 465-1181

* * *

As a result of the above, Defendant has been forced to file this Motion – and forced to incur obviously unnecessary legal expense.

II. LEGAL STANDARD

“Under Rule (12)(b)(5), a party may file a motion to dismiss due to insufficiency of service or process.” *Rzayeva v. United States*, 492 F.Supp.2d 60, 74 (D. Conn. 2007). “A motion to dismiss pursuant to Rule 12(b)(5) must be granted if the plaintiff fails to serve a copy of the

summons and complaint on the defendants pursuant to Rule 4 of the Federal Rules [of Civil Procedure], which sets forth the federal requirements for service.” *Id.*, citing *Cole v. Aetna Life & Cas.*, 70 F.Supp.2d 106, 110 (D. Conn. 1999).

Federal Rule of Civil Procedure 4(m) provides as follows:

If a defendant is not served within 90 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.

“Once validity of service has been challenged, it becomes the plaintiff’s burden to prove that service of process was adequate.” (Internal quotation marks omitted.) *Rzayeva*, supra, 492 F.Supp.2d at 74.

III. ARGUMENT

A. The Complaint should be dismissed due to Plaintiff’s failure to comply with Rule 4(m) of the Federal Rules of Civil Procedure.

The Federal Rules of Civil Procedure require a plaintiff to make service of their summons and complaint within 90 days of the filing the complaint. Fed. R. Civ. P. 4(m). When a plaintiff fails to comply with Rule 4(m), a court is typically required to dismiss the action. See *Eiden v. McCarthy*, 531 F. Supp. 2d 333 (D. Conn. 2008) (recognizing “[a] motion to dismiss pursuant to Rule 12(b)(5) must be granted if the plaintiff fails to serve a copy of the summons and complaint on the defendants pursuant to Rule 4 of the Federal Rules, which sets forth the federal requirements for service”). Complaints have been dismissed under such circumstances in this Circuit. See *Bogle-Assegai v. Connecticut*, 470 F.3d 498, 508-509 (2d. Cir. 2006) (affirming dismissal where plaintiff “made no effort to show good cause for her failure and never requested extension of time”); *Gerena v. Korb*, 617 F.3d 197, 202 (2d. Cir. 2010) (affirming dismissal

where complaint was served one month beyond Rule 4(m)'s deadline, and plaintiffs did not seek or obtain an extension of time to properly effect service).

Although Rule 4(m) has been interpreted to give latitude to courts in deciding when to grant extensions of time to serve, the Plaintiff has not requested, nor obtained, an extension. See *Zapata v. City of New York*, 502 F.3d 192 (2d. Cir. 2007). Furthermore, absent good cause, Courts have limited the circumstances under which a plaintiff's delayed service will not result in dismissal. See *Id.*, at 196, discussing *Bogle–Assegai*, supra, 470 F.3d at 508 (“Bogle–Assegai, who was neither a pro se litigant nor incarcerated, made no showing whatever as to any effort on her part to effect personal service.... [S]he also made no effort to show good cause for her failure and never requested an extension of time ... [and she] failed to advance any cognizable excuse for neglect—even one falling short of good cause”).

Here, the Plaintiff did not previously request an extension, and PDC is unaware of any reason for delayed service. Plaintiff failed to communicate any grounds, excuse or good cause for same to PDC prior to the attempted, belated and ineffective service on or about March 29, 2019, which date is 115 days after the Plaintiff's Complaint was filed, and well beyond the time allotted under Rule 4(m). There is no good cause to extend the time for service, particularly in light of the frivolous nature of the allegations made in this lawsuit, as previously conveyed to Plaintiff.

Plaintiff and his counsel were obviously aware of the service requirements, and had ample time and opportunity to effectuate proper service within the time allotted under Rule 4(m), or to file a motion for extension within such timeframe, or to contact PDC seeking an extension of time. Instead, Plaintiff ignored the Court's service requirements, like it ignored PDC and its counsel for months.

Furthermore, Plaintiff has missed the deadline in the Court's Order on Pretrial Deadlines to move for class certification in this case, and have no grounds to have in the past moved for, or to now seek, an extension of that deadline. See Order on Pretrial Deadlines (Rev. 8/7/13) (“[a]ll motions relating to ... class certification ... shall be filed within sixty (60) days after filing of the complaint ...”).² A schedule “may be modified only for good cause and with the judge’s consent.” Fed. R. Civ. P. 16(b)(4). Under Rule 16, “‘good cause’ requires a showing by the moving party of an objectively sufficient reason for extending a deadline such that the deadlines cannot reasonably be met despite the diligence of the party needing the extension. The inquiry focuses on the moving party’s reason for requesting the extension.” (Internal quotation marks omitted.) *Faghri v. Univ. of Connecticut*, 3:06-CV-01957 VLB, 2010 WL 2232690, at *3 (D. Conn. 2010). “The Second Circuit has emphasized that ‘the primary consideration’ in determining whether good cause has been shown ‘is whether the moving party can demonstrate diligence.’” *Id.*, quoting *Kassner v. 2nd Avenue Delicatessen Inc.*, 496 F.3d 229, 244 (2d Cir.2007).

Further, this Court’s Chambers Practices provide that motions for extension of time will be granted as follows:

The parties will be expected to adhere to their plan absent showing of good cause. Motions to modify the scheduling order must be made in writing and must state good cause. Good cause is an unforeseeable and insurmountable obstacle which in the exercise of due diligence prevented the party from adhering to the deadline within the total time allotted. A reasonable extension will be granted for good cause shown. (D.E. 5.)

Here, Plaintiff cannot demonstrate good cause to modify or extend any deadline in this case, including the deadline to serve the Summons and Complaint on PDC. Plaintiff’s conduct (recited above) was the exact opposite of diligence. Accordingly, the suit should be dismissed for

² See <http://www.ctd.uscourts.gov/sites/default/files/forms/VLB%20OPTD%20as%20of%208-7-13.pdf>.

insufficient service of process under Rule 4(m), and fees awarded to the PDC for causing PDC to incur obviously unnecessary legal expense to make this Motion.

B. No waiver of defenses or alternative grounds for dismissal under Rule 12.

In an abundance of caution, PDC is not waiving and expressly reserves all other defenses in this action. In the event the Complaint in this action is not dismissed under Rule 4(m), PDC has additional grounds for dismissal of the claims under Rule 12 and reserves the right to seek dismissal of the claims in this case under Rule 12.

IV. CONCLUSION

For the foregoing reasons, as well as for those which might be put forth upon the hearing of this matter, the Defendant requests the Court to grant its Motion to Dismiss and award Defendant its reasonable attorney's fees incurred in connection with this Motion.

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PARFUMS DE COEUR LTD.

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