

UNPUBLISHED

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION**

THOMAS TRACY, ET AL.,)	
)	
Plaintiffs,)	Case No. 2:02CV00057
)	
v.)	OPINION AND ORDER
)	
RON ANGELONE, ET AL.,)	By: James P. Jones
)	United States District Judge
Defendants.)	

James L. Sullivan, Maher & Williams, Fairfield, Connecticut, for Plaintiffs.

The question presented is whether this case, which was dismissed for failure to serve process within the 120-day time period allowed under Fed. R. Civ. P. 4(m) should be reinstated and the time for service extended. Because the statute of limitations might bar the plaintiffs' action if reinstatement and an extension were not granted, I will grant the plaintiffs' motions.

I

David Tracy, an inmate at the Wallens Ridge State Prison in Big Stone Gap, Virginia, committed suicide on April 6, 2000. Tracy's parents, Thomas and Alice Tracy, appearing pro se and acting on behalf of David Tracy's estate, filed this action

on April 5, 2002, under 42 U.S.C.A. § 1983 (West Supp. 2002). The complaint alleges that the defendants—Virginia Department of Corrections officials and employees—are liable for the death of David Tracy. Upon filing of the complaint, in accordance with Fed. R. Civ. P. 4(m), the plaintiffs were required to obtain service of the summons and complaint upon the defendants within 120 days.

On July 18, 2002, the clerk of this court notified the plaintiffs that no service had been executed and that failure to provide proof of such service by August 3, 2002, would result in a dismissal. No response was made to this notice and proof of service was not provided to the clerk's office within the required period. On August 7, 2002, pursuant to Rule 4(m), the court dismissed the complaint without prejudice for lack of service. The plaintiffs filed the present motion on August 13, 2002, requesting an enlargement of time of forty-five days to provide proof of service pursuant to Fed. R. Civ. P. 4(m) and 6(b). In their motion the plaintiffs claim that service had been made on August 1, 2002, and that only the proof of such service was missing. The plaintiffs also simultaneously filed a motion to reinstate the action on the ground that "the Plaintiff [sic] effectuated service upon the Defendants by express mail on August 1, 2002 and is awaiting evidence of service." (Mot. for Reinstatement at 1.)

Pursuant to Fed. R. Civ. P. 4(e), absent a waiver, service of process must be made either “by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual’s dwelling house or usual place of abode,” or it must be made upon an individual in accord with the laws of the state in which the district court is located. *Id.* Virginia law requires that service of process be made by delivery of process personally, by delivery of process to a family member over the age of sixteen at the person’s abode, or by posting the process on the door of the person’s abode and then certifying to the court that a copy of such process was also mailed to the person’s abode. *See* Va. Code Ann. § 8.01-296 (Michie 2001). Simply mailing a copy of the summons and complaint to a party does not satisfy Rule 4(e) nor does it satisfy the requirements of Virginia law. Therefore, based on the record it is unlikely that service of process has yet been properly effected in this case.

II

Fed. R. Civ. P. 4(m) provides that a plaintiff must provide service of the summons and the complaint within 120 days of the filing of a cause of action. However, the district court may grant an extension of time for service of process

provided that good cause is shown for the failure to do so within the 120-day time period.

Good cause is shown when the plaintiff “demonstrate[s] that he made ‘reasonable, diligent’ efforts to effect service on the defendant.” *Hammad v. Tate Access Floors, Inc.*, 31 F. Supp. 2d. 524, 528 (D. Md. 1999) (quoting *T&S Rentals v. United States*, 164 F.R.D. 422, 425 (N.D. W. Va. 1996)). “Inadvertence, neglect, misunderstanding, ignorance of the rule or its burden, or half-hearted attempts at service have generally been waived as insufficient to show good cause.” *Vincent v. Reynolds Mem’l Hosp., Inc.*, 141 F.R.D. 436, 437 (N.D. W. Va. 1992). Based on the evidence in the record, it does not appear that a reasonable, diligent effort to perfect valid service of process was made and that therefore there has been no showing of good cause.

The Supreme Court has in dicta interpreted Rule 4(m) to grant a district court the discretionary power to grant an extension of time in order to allow for service of process even if no good cause is shown. “Most recently, in 1993 amendments to the Rules, courts have been accorded discretion to enlarge the 120-day period ‘even if there is no good cause shown.’” *Henderson v. United States*, 517 U.S. 654, 662 (1996) (quoting Fed. R. Civ. P. 4 advisory committee’s note). While prior Fourth Circuit authority was to the contrary, the better view is now that Rule 4(m) does not

require good cause. *See Hammad v. Tate Access Floors, Inc.*, 31 F. Supp. 2d at 527-28.

The advisory committee notes elaborate that “[r]elief may be justified, for example, if the applicable statute of limitations would bar the refiled action.” Fed. R. Civ. P. 4 advisory committee’s note. *See Panaras v. Liquid Carbonic Indus. Corp.*, 94 F.3d 338, 341 (7th Cir. 1996).

The action filed by the plaintiffs under § 1983 does not have its own statute of limitations and normally borrows from an analogous cause of action for personal injury under Virginia law. *See Lewis v. Richmond City Police Dep’t*, 947 F.2d 733, 735 (4th Cir. 1991). Based on the applicable Virginia personal injury cause of action and the statute of limitations set out in Va. Code Ann. § 8.01-243(A) (Michie 2002), the appropriate statute of limitations for the plaintiffs’ § 1983 claim is two years. *See Lewis*, 947 F.2d at 735.

The action filed by the plaintiffs on April 5, 2002, successfully tolled the statute of limitations just shy of the two-year period that would have barred their claim. Accordingly, if the case is not reinstated and additional time allowed for

service, their cause of action is likely precluded since the statute of limitations has now run.¹

Federal Rule of Civil Procedure 60(b)(6) permits relief from a final order if “such action is appropriate to accomplish justice.” *Klapprott v. United States*, 335 U.S. 601, 615 (1949). Here the plaintiffs proceeded pro se until the current motions under consideration were filed by their counsel. Since a reinstatement and extension of time to effect service is necessary to prevent a possible time-bar of their claim, I find that justice would be served by vacating the prior order of dismissal.

III

For the reasons stated, it is **ORDERED** as follows:

1. The plaintiffs’ motions (Doc. Nos. 4 and 5) are granted;

¹ The prior dismissal was without prejudice, as required by Rule 4(m). *See Mendez v. Elliot*, 45 F.3d 75, 78 (4th Cir. 1995). However, the “without prejudice” provision does not give a party “a right to refile without the consequences of time defenses, such as the statute of limitations.” *Id.* The tolling of the statute of limitations under § 1983 is also governed by state law. *See Board of Regents v. Tomanio*, 446 U.S. 478, 485-486 (1980); *Wade v. Danek Med. Inc.*, 182 F.3d 281, 289 (4th Cir. 1999). The applicable state statute, Va. Code Ann. § 8.01-229(E)(1) (Michie 2000 & Supp. 2001), states that if an action is filed within the appropriate period but is later dismissed for a reason other than a determination on the merits, “the time such action is pending shall not be computed as part of the period within which such action may be brought and another action may be brought within the remaining period.” *Id.* Therefore, because the plaintiffs’ action was filed one day before the statute of limitations would have run, they would have had one day following dismissal to re-file their action with this court to prevent a time-barring of their action.

2. The previous order of this court entered August 7, 2002, dismissing the case without prejudice is vacated and this action is reinstated on the docket; and
3. The plaintiffs are granted forty-five days from the date of entry of this order to file proof of service of the summons and complaint on the defendants in the manner provided by law.

ENTER: September 5, 2002

United States District Judge