IN THE SUPREME COURT OF MISSISSIPPI
No. 2007-IA-01586

WILLIAM O'BRIEN JENKINS, a/k/a
BUDDY JENKINS, APPELLANT

Versus

MARGARET B. OSWALD, a/k/a
ELAINE OSWALD, APPELLEE

On Petition for Interlocutory Appeal from the Chancery Court of Madison County, Mississippi
Petition Granted By Supreme Court By Order Of October 3, 2007

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. **Plaintiff in Chancery Court, Appellee in this Court:**
   Margaret B. Oswald, also known as Elaine Oswald

2. **Counsel for Ms. Oswald:**
   Vann F. Leonard
   Betty T. Slade DeRossette

3. **Defendant in Chancery Court, Appellant in this Court:**
   William O. Jenkins, Jr.

4. **Counsel for Mr. Jenkins in Chancery Court:**
   William O. Colbert, Jr.

5. **Counsel for Mr. Jenkins on Appeal:**
   James W. Craig, Phelps Dunbar LLP
   Dale Danks, Jr.

SO CERTIFIED BY ME, this the 5th day of March, 2008.

JAMES W. CRAIG

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This case involves a **time lapse of four and a half years** between the filing of Oswald's Complaint and the service of process on Jenkins. The Chancellor denied Jenkins' motion to dismiss based on MRCP 4(h). The issues presented in Jenkins' Petition for Interlocutory Appeal, which was granted by the Mississippi Supreme Court on October 3, 2007, are as follows:

Whether the Chancellor erred as a matter of law in denying Jenkins' Motion to Dismiss:

A. By defining Oswald's burden of good cause and diligence as a "light burden of reasonable diligence," and,

B. By abusing the Court's discretion in finding that no specific evidence of attempt to serve process in Florida, and continuing attempt to "Google" Jenkins for a current address for over four years constituted "good cause" and "diligence" in not complying with the one hundred twenty (120) day deadline imposed by Rule 4(h) of the Mississippi Rules of Civil Procedure; and

C. Because the Chancery Court's finding of "good cause" and "diligence" is not supported by substantial evidence.

STATEMENT OF THE CASE

A. Statement of Proceedings Relevant to this Interlocutory Appeal

Plaintiff Margaret B. Oswald ("Oswald") filed her Complaint for Preliminary Injunctive and Other Relief in the Chancery Court of Madison County on July 18, 2002. CP 1.[1] An alias summons was issued for Defendant William O. Jenkins, Jr. ("Jenkins") at a Florida address on August 3, 2002. CP 36. No return of service was ever filed as to this summons.

Between July 2002 and November 2006, no motion to extend the time for serving process was ever filed by Oswald.

On November 28, 2006, nearly four and a half years later, a second alias summons was issued for Jenkins. CP 38. This summons was served on Jenkins in Rankin County on January 9, 2007. CP 39.

On February 8, 2007, Jenkins moved under Rule 12(b) of the Mississippi Rules of Civil Procedure to dismiss the complaint. CP 39. The motion relied on Rule 4(h), which requires that process be served within one hundred and twenty (120) days of the filing of the Complaint.

The Chancery Court of Madison County, the Honorable Cynthia L. Brewer presiding, conducted a hearing on Jenkins' motion on June 11, 2007. At the

[1] References to the Clerk's Papers are cited herein as "CP ____." References to the transcript of the hearing in the Chancery Court on Jenkins' motion to dismiss are cited herein as "T ____."

conclusion of the hearing, the Chancellor issued her opinion from the bench denying Jenkins' motion to dismiss. T 66-68.

The Chancery Court entered its written order denying the motion to dismiss on June 15, 2007. CP 42. Jenkins filed his motion for reconsideration on June 25, 2007. CP 43. That motion was denied by Order entered August 23, 2007. CP 53.

Jenkins' Petition for Interlocutory Appeal was granted by order of the Mississippi Supreme Court on October 3, 2007. CP 54.

B. Statement of Facts Relevant to this Appeal

The witnesses at the motion hearing were Ms. Oswald and William and Georgia Jenkins. Oswald is no novice to legal proceedings, but is rather an experienced paralegal; her employer throughout the pendency of this case was Mr. Leonard, her attorney of record in this case. T 24.

Oswald testified that after her first attempt to serve process on Jenkins at his Madison County address was unsuccessful, she filed an official inquiry with the United States Postal service to obtain a new address. T 17-18. On August 8, 2002, she then caused an alias summons to be issued at the Florida address given to her by the USPS. T 19. Oswald claimed that she hired a process server in Florida to serve the alias summons; however, she could not recall the name of the process server or whether she had actually paid for the services. T 27. She produced no

invoice or other documentation showing any efforts made by any Florida process server.

Jenkins testified that in May 2002, he moved temporarily to Bradenton, Florida, to care for a sick friend. T 43. He confirmed that the address given to Oswald by the Postal Service was his correct address until he moved back to Mississippi in May 2003. T 44.

Although Rule 4(c)(5) allows process to be served by certified mail, the court file does not disclose any effort by Oswald to serve Jenkins by mail during the time (May 2002 to May 2003) he was in Florida.

Jenkins rented a home in Brandon for three years. T 45. He built a home in Brandon, where he has resided since 2006. T 46. Jenkins testified that he saw Oswald in May 2003 at a store, and told her he was living in Brandon. T 49. He saw Oswald again on the 4th of July in 2003 in Brandon at a local market, and told her that he was living "just down the street." T 49. Jenkins' wife Georgia, who was dating Jenkins in 2003, corroborated Jenkins' testimony about seeing Oswald on the 4th of July. T 62-63.

Oswald testified that from 2002 through 2006, there were "random spottings" of Jenkins by friends in the Jackson area. T 21. However, no alias summons were even issued for Jenkins between August 2002 and November 2006. T 31.

Oswald testified that she occasionally used the "Google" website to attempt to locate Jenkins. T 20. The second alias summons was issued, according to Oswald, because she saw a television program in November 2006 which featured Jenkins and a business with which he was associated. T 22. Based on this information, Oswald caused a new alias summons to be issued and served Jenkins on January 9, 2007. Id.

SUMMARY OF THE ARGUMENT

The Supreme Court and Court of Appeals have made clear that Rule 4(h) shall be strictly enforced. Thus, a civil action should be dismissed without prejudice as to any defendant not served within 120 days of the filing of the Complaint. *See Powe v. Byrd*, 892 So. 2d 223 (Miss. 2004); *Mitchell v. Brown*, 835 So. 2d 110 (Miss.Ct.App. 2003).

The only exception to this rule is where a diligent plaintiff can show good cause for failing to effect service of process in a timely manner. *See Bacou-Dalloz Safety, Inc. v. Hall*, 938 So. 2d 820 (Miss. 2006); *Rains v. Gardner*, 731 So. 2d 1192 (Miss. 1999).

In this case, over four years passed between the filing of the Complaint and service of process on Defendant Jenkins. Plaintiff Oswald claimed to have hired a process server, but had no specific facts about the efforts, if any, this process server made. No invoice or documentation of the process server's efforts were shown to

the Chancellor. *Compare Kingston v. Splash Pools of Mississippi, Inc.*, 956 So. 2d 1962 (Miss.Ct.App. 2007) (good cause could not be found where plaintiff did not establish in detail the efforts allegedly made by process server).

Moreover, although Oswald had Jenkins' correct Florida residential address in the summer of 2002, no effort was made to serve Jenkins by certified mail during that time. *Compare Rains*, 731 So. 2d at 1198 (failure to use certified mail option showed lack of diligence).

Jenkins did not evade process. Instead, the uncontested evidence is that he saw Oswald during the time process was pending, and made no effort to hide his location. This is therefore a clear case in which the plaintiff, a paralegal in a law firm, has not been diligent. There is no good cause for Oswald's failure to serve the defendant over a four year time span.

The Chancellor erred in considering the law governing Rule 4(h), as shown by the Court's characterization of the "good cause" standard as a "light burden" on the plaintiff. The facts in this case are no better than those where the Supreme Court or Court of Appeals have held that plaintiff had not been diligent, and thus could not show good cause for failure to timely effect service of process.

For these reasons, the Chancery Court's denial of Jenkins' motion to dismiss should be reversed and judgment rendered on appeal for Jenkins.

LAW AND ARGUMENT

Rule 4(h) of the Mississippi Rules of Civil Procedure is quite clear. It provides that:

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf service was required cannot establish good cause why such service was not made within that period, the action **shall be dismissed** as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. (emphasis added)

The Mississippi cases interpreting this rule make clear that, in the absence of good cause, "shall" means "shall." Thus, where a plaintiff who successfully served a defendant **three days** after the 120 day deadline could not show good cause for the delay, the Supreme Court held that the case should be dismissed. *Powe v. Byrd*, 892 So. 2d 223 (Miss. 2004). Similarly, where process was served thirteen days after the Rule 4(h) deadline, dismissal of the complaint was affirmed by the Court of Appeals. *Mitchell v. Brown*, 835 So. 2d 110 (Miss.Ct.App. 2003).

The denial of a motion to dismiss for failure to timely serve process presents a question of law, which is reviewed *de novo*. *Bacou-Dalloz Safety, Inc. v. Hall*, 938 So. 2d 820, 822 at ¶9 (Miss. 2006). Any findings of fact made by the trial court are reviewed for abuse of discretion, or for lack of substantial evidence to

support the finding. *Id.*; *see also Rains v. Gardner*, 731 So. 2d 1192, 1197-98 at ¶19 (Miss. 1999).

Although this standard of review is necessarily deferential, the deference given has limits. Thus, where a circuit court had found good cause for untimely service by virtue of a mere two attempts to serve process in a two year period, the Supreme Court reversed. *Bacou-Dalloz Safety, Inc.,* 938 So. 2d at 823, ¶¶14-15. The Court held that the two attempts showed "a lack of good cause far beyond excusable neglect." *Id.* at ¶14. Accordingly, the Supreme Court reversed the trial court's denial of Bacou-Dalloz' motion to dismiss and rendered a judgment of dismissal without prejudice. *Id.* at ¶15

Under Rules 4(h) and 12(b), plaintiff bears the burden to demonstrate the existence of good cause for the failure to timely serve process. *Whitten v. Whitten*, 956 So. 2d 1093, 1096-97 at ¶15 (Miss.Ct.App. 2007). Moreover, plaintiff must be diligent in serving process if she is to show good cause in failing to serve process within 120 days. *Id.* In this connection, the Supreme Court has taught that if it appears service cannot be made within the 120-day period, a diligent plaintiff should file a motion for additional time to serve process within the 120 day period. *Bacou-Dalloz Safety, Inc.,* 938 So. 2d at 823 ¶13, *citing Webster v. Webster*, 834 So. 2d 26, 29 (Miss. 2002).

Put another way, in order to establish good cause, plaintiff must demonstrate at least as much as would be required to show excusable neglect, as to which simple inadvertence or mistake of counsel or ignorance of the rules usually does not suffice. *Bacou-Dalloz Safety, Inc.*, 938 So. 2d at 823 ¶12, *citing Webster,* 834 So. 2d at 28. The plaintiff's proof must include "some level of detail" to constitute a demonstration of good cause for failure to timely serve the defendant. *Kingston v. Splash Pools of Mississippi, Inc.*, 956 So. 2d 1962, 1065 at ¶11 (Miss.Ct.App. 2007). Thus, in *Kingston,* the Court of Appeals noted:

> While Kingston or his attorney may have had personal knowledge of the server's attempts, the record is void of any detail to support such an assertion [of diligence]. For instance, no dates, times, or locations were given to prove that any efforts had been made to serve process on the defendants within the 120-day time period. Likewise, no affidavit from the process server exists to demonstrate if any attempts were made, and the record is void of any returns of the summons originally issued. The only indication in this record which would support a finding that Kingston may have attempted to serve process during that time period was a statement that 'some attempts" were made. No further details were given.

Id., 956 So. 2d at 1064-65, ¶10.

Bacou-Dalloz and *Kingston* control this case. Here, as in *Bacou-Dalloz*, only two alias summons were ever issued. Moreover, Oswald's two attempts to serve Jenkins occurred over a four and a half year time span -- twice as long as the delay condemned in *Bacou-Dalloz*.

And like *Kingston*, Oswald gave the Chancellor no details about the alleged attempts by her Florida process server to effect process on Jenkins. Rather, while Oswald claimed that she hired a process server in Florida to serve the alias summons issued in August 2002, she could not recall the name of the process server or whether she had actually paid for the services. T 27. She produced no invoice or other documentation showing any efforts made by any Florida process server. No return of service was filed showing that Jenkins was "not found," and no motion to extend the time period to effect service was filed.

The Mississippi Supreme Court's holding in *Rains v. Gardner, supra*, also compels reversal of the Chancellor's ruling in this case. As Jenkins testified, he was in residence at the Florida address given to Oswald by the USPS. Thus, process by certified mail under Rule 4(c)(5) would have been effective on Jenkins in the summer of 2002. In Rains, the Supreme Court found dispositive the fact that the plaintiff had the knowledge and the means to serve process by mail, but did not do so. *Rains*, 731 So. 2d at 1198, ¶20. As the *Rains* Court made clear, a plaintiff who has not availed herself of the certified mail option cannot be found diligent, and cannot establish good cause for failing to timely serve the defendant. That is exactly the case here.

Nor can Oswald's slight efforts to ascertain Jenkins' location be considered the acts of a diligent plaintiff who has good cause for failing to serve the

defendant. As the Court of Appeals, in *Page v. Crawford*, 883 So. 2d 609, 612-13 (Miss.Ct.App. 2004), has pointed out:

> There is no bright line rule as to how many efforts must be made by a plaintiff to locate a named defendant to satisfy the requirements of diligent inquiry. There is also the question of balancing the quality of those inquiries with their quantity. Standing on a street corner and asking passers-by if they know the defendant's location would clearly not constitute diligence, no matter how many persons were asked in that manner.

Id. Oswald's efforts to periodically ask friends if they knew where Jenkins lived are no better than this.

Finally, the delay of over four years in serving process in this case cannot be attributed to any evasion or misconduct of Jenkins. *See Holmes v. Coast Transit Authority*, 815 So. 2d 1183, 1186 at ¶12 (Miss. 2002), *citing* 4B C. Wright & A. Miller, Federal Practice and Procedure §1137 at 342 (3rd ed. 2000).

The Chancellor erred in considering the law governing Rule 4(h), as shown by the Court's characterization of the "good cause" standard as a "light burden" on the plaintiff. As the above discussion amply demonstrates, the facts in this Record are no better than those in cases where the Supreme Court or Court of Appeals held that plaintiff had not been diligent, thus could not show good cause for failure to timely effect service of process.

CONCLUSION

There is no need to belabor the point. The Record here shows no more than two alias summons being issued during a time span extending over four years, with no specific factual record of any attempt to serve Jenkins with process from 2002 until 2007. At the same time, plaintiff had sufficient information to effect service by certified mail. There is no diligence here; and there can be no finding of good cause on these facts. We respectfully submit that the Chancellor erred, abused the Court's discretion, or made factual findings without substantial evidence. This Court should vacate the Chancery Court's denial of Jenkins' motion to dismiss and render judgment of dismissal without prejudice.

Respectfully submitted,

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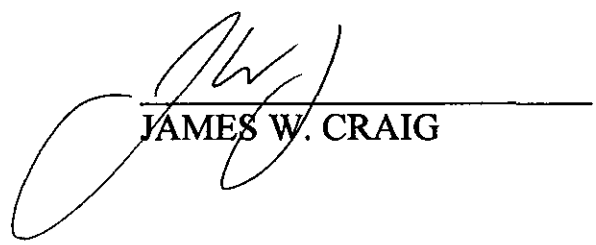
CERTIFICATE OF SERVICE

I, James W. Craig, hereby certify that I have this day caused to be served, via United States Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellant to the following persons:

The Hon. Cynthia L. Brewer
Chancery Judge of Madison County
Post Office Box 404
Canton, MS 39046

Vann F. Leonard, Esq.
P.O. Box 16026
Jackson, MS 39236

THIS the 5th day of March, 2008.



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