COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

2021-P-1126

NELLIE SANINOCENCIO

Plaitiff-Appellant

vs.

LUBIN AND MEYER, PC

Defendant-Appellee

I. APPELLANT'S REQUEST FOR FURTHER APPELLATE REVIEW

II. Statement of Prior Proceedings

The Appellant's Complaint was dismissed for failing to show good cause why she failed to serve it on the Appellee within the 90 day service period prescribed by Mass.R.Civ.P. 4(j). The judgment was affirmed by the appeals court without a hearing pursuant to M.A.C. Rule 23.0.

III. Statement of facts not correctly stated in the lower courts' decisions.

The Appellant was in Florida in early October of 2020 and informed her counsel of the facts supporting the allegations in her Complaint. Her counsel filed this legal malpractice action on October 20, 2020 to avoid any potential statute of limitations problems regarding this cause of action. The Appellant's counsel is not a practicing attorney and is not familiar with legal malpractice law. The Appellant's counsel used the 90 day service

period prescribed by Mass.R.Civ.P. 4 to help her find adequate representation.

The Appellant's counsel had a deputy sheriff of Suffolk County attempt service on the Appellee after failing to obtain adequate representation. The deputy found the doors of the Appellee's offices closed during normal business hours. The deputy spoke with the Appellee's receptionist who claimed she was working remotely and could not make contact with anyone in the offices who could have accepted service.

The Appellee contacted the deputy two hours later and agreed to accept service the following day. The Appellee failed to honor their agreement and filed their first motion to dismiss directly with the court the following day in violation of Superior Court Rule 9A.

The Appellee's first motion claimed that they were open to the public during the 90 day service period and that the Appellant would not be able to show good cause for failing to serve them during that time. The Appellant filed an opposition arguing that service failed because the Appellee was not open to the public and that the burden should be on them to explain why their doors were locked on the day the deputy attempted service.

The Appellee argued for the first time in a reply to the opposition that the Appellant should have made an earlier attempt to serve but failed to explain why they were closed to the public

on the day service was attempted.

The court rejected the Appellee's motion for failing to comply with Rule 9A. Rather than re-file the pleadings in a 9A package, the Appellee took the opportunity to file a different motion adding additional grounds to dismiss. They again failed to explain why they were closed to the public on the day the deputy attempted service. The Appellant again argued in opposition that service failed because the Appellee was not opened to the public and that the Appellee should explain why.

The Appellee had three pleadings in the record before a hearing was held on June 10, 2021. None of them provided an explanation of why their offices were closed on the day service was attempted. The Appellant was prepared to argue that the Appellee locked their doors to evade service. The Appellant was also prepared to argue that the Appellee misrepresented to the deputy that they would accept late service so that their lawyers could file their first motion to dismiss the following day.

The Appellee pre-empted the Appellant's arguments by claiming, **FOR THE FIRST TIME**, that the were closed due to COVID. The Appellant countered that she could not have foreseen that the Appellee had voluntarily closed due to COVID. The Appellee defeated this argument by claiming, **FOR THE FIRST TIME**, that their closure was mandated by Governor Baker's orders regarding the pandemic. Not having any evidence or affidavit to support

this claim, the Appellee argued that the court could take judicial notice of the Governor's orders.

The Appellee doubled down on their fraud when they intentionally misrepresented in a post-dismissal pleading that; "Governor Baker ordered all non-essential businesses, **including law firms**, to close on March 23, 2020. See COVID-19 Order No. 13 (March 23, 2020)."(p.5 of Defendant Lubin and Meyer's Opposition to Plaintiff's Motion to Vacate Dismissal and reproduced on p.39 of Appendix Volume 1 of 2).

Governor Baker's Order No. 13 was presented for the first time by the Appellant on appeal. The order explicitly designated law firms as essential businesses and exempted them from mandatory closure. This evidence conclusively proved that the motion judge dismissed the Complaint by relying on an intentional misrepresentation made by the Appellee's counsel. The appeals court ignored this evidence and relied on the Appellee's unsupported claim that they voluntarily closed due to the pandemic.

IV. Argument for further appellate review.

1. The lower courts ignored facts, failed to follow case precedent and denied the Appellant the opportunity to present evidence of fraud and evasion of service.

The Appellee's first motion argued that the Appellant shouldn't have had any problem serving her Complaint because they

were open to the public during the entire service period. Four months later, the Appellant's Complaint was dismissed because the Appellee claimed they were closed during the 90 day service period. That the Appellant was denied due process by the lower courts is shockingly obvious from their disregard for these contradictory arguments.

Conclusive evidence of fraud was presented to the appeals court and ignored. The Appellee has two different motions to dismiss, two oppositions to the Appellant's motions, and a 42 page appellate brief in the record.[1] Not one of these pleadings contains any evidence or affidavit supporting the claim that they were closed due to COVID. An inference could be made that their COVID argument is a cover for evasion from their repeated failure to provide an affidavit to support this claim.

The Appellant showed good cause for waiting until the last day of the service period because she was attempting to retain adequate counsel. (Kennedy v. Beth Israel Deaconess Med. Ctr., Inc. 43 Mass.App.Ct. 459, 465 (2009)). The Kennedy appellant twice avoided dismissal by claiming he was looking for a medical expert to draft a more comprehensive complaint. Looking for adequate counsel to prosecute her case should have been good cause not to dismiss the Appellant's Complaint.

[1] The Appellant has re-filed the Complaint and serve it within the service period. The Appellee's third motion to dismiss also provides no evidence or affidavit to support the claim that they were closed due to COVID.

The trial court opinion doesn't even mention this argument and the appeals court intentionally misrepresented it. They claimed that her first opposition "...indicated the delay occurred because (the Appellant) was in Florida and her attorney was looking for alternate counsel because he was under investigation by bar counsel." (p.4, footnote 3, Memorandum and Order Pursuant to Rule 23.0).

For the record, the Appellant's counsel's sole source of income for the last seven years has been driving a truck. The Appellant had good cause to use the service period to avoid having a truck driver represent her in this action.

Service failed because the Appellee's offices were closed on the day the deputy attempted service. Any legitimate reason for the closure should have been good cause not to dismiss the Complaint. Service also failed because no one in the Appellee's offices responded to their receptionist's attempt to contact them. Lack of communication between the Appellee's agents should have been good cause not to dismiss the Complaint. The lower courts ignored these arguments.

The Appellee admitted that if the deputy had merely left the Complaint at their front door, service would have been effected (pp. 62-63, Appendix Volume 1 of 2). The motion judge agreed with this (p.105, Appendix Volume 1 of 2). The Appellee already had the Complaint in their possession when the deputy attempted to

serve it at their front door. Actual notice of a Complaint being served at the Appellee's front door should have been good cause not to dismiss the Complaint.

The motion judge dismissed the Complaint by relying on an intentional misrepresentation that Governor Baker's executive orders mandated the Appellee's closure. The appeals court ignored this fraud and dismissed the appeal by relying on their unsupported claim that they voluntarily closed due to COVID.

The appeals court stated that "(Appellant) could have moved to enlarge time even after the service period if she could show good cause. See Passatempo v. McMenimen, 461 Mass. 279, 301 n. 30 (2012)" (p.3, footnote 2, Memorandum and Order Pursuant to Rule 23.0). The Passatempo court also stated that "(w)here a plaintiff files a motion for enlargement before expiration of the original time period, the plaintiff need only show 'good faith and lack of prejudice to the adverse party.'" Id. at 300-301 (citing J.W. Smith & H.B. Zobel, Rules Practice § 6.3 (2d ed. 2006)).

If the Appellee had not misrepresented that they would accept late service, the Appellant would have filed a motion for more time before the expiration of the original time period. The Appellee had actual notice of the lawsuit and would not have been prejudiced by the extension.

The Appellee would not have been prejudiced if their motion

to dismiss had been denied. The Appellant's reliance on the Appellee's agreement to accept late service induced her not to file for more time and ultimately resulted in her Complaint being dismissed. The Appellant would have been prejudiced if she had made an earlier service before she was prepared to prosecute her case. The Appellant was not allowed to present evidence of the Appellee's agreement to accept late service at the motion hearing.

The filing of the Appellee's first motion to dismiss conclusively proved they had no intention of honoring their agreement to accept late service. One of the Appellee's lawyers admitted that the deception was to pre-empt any attempt to file a motion for more time (p.17, Appendix Volume 1 of 2). Both lower courts ignored the Appellee's duplicity to justify dismissing the Complaint.

The Appellant's Complaint was dismissed because the Appellee claimed they were closed due to the pandemic. Both lower courts ignored the fact that the Appellee's first motion claimed they were opened during the pandemic. The trial court dismissed the Complaint by relying on their misrepresentation that Governor Appellee's COVID orders mandated their closure.

When the misrepresentation was exposed on appeal the Appellee changed their argument to cover up the deception. They argued that "(Appellant's) counsel admitted to Judge Deakin that

the sheriff pointedly told him that L&M was likely closed because many businesses were working remotely due to the COVID pandemic." (pp.27-28 of Appellee's appellate brief). What the sheriff pointedly told the Appellant's counsel is not evidence that they were actually closed due to COVID.

Agreeing to accept late service should have been good cause not to dismiss the Complaint. Kennedy v. Beth Israel Deaconess Med. Ctr., Inc., 73 Mass. App. Ct. 459, note 10 (2009). The Kennedy court stated if there had been evidence of an agreement to accept late service, the plaintiff would not have been required to utilize a process server but could have simply mailed the complaint. Mailing the Complaint was not required here as the Appellee already had it in their possession before the Appellant attempted to serve it.

The appeals court showed a complete disregard for the Appellant's due process rights by falsely claiming that "(t)he hearing transcript also directly contradicts (Appellant's) assertion that the motion judge denied her the opportunity to present evidence of evasion. In fact, the motion judge asked (Appellant's) counsel to present this evidence at least twice" (p.5, footnote 4, Memorandum and Order Pursuant to Rule 23.0). This is an outright lie as the transcript shows the motion judge refused three attempts by the Appellant's counsel to present her evidence. Also, how could the Appellant know that the Appellee

was misrepresenting that they were closed pursuant to Governor Baker's executive orders when this claim was being made for the first time during the hearing.

2. The case law supporting the dismissal of the Appellant's Complaint is either legally flawed or has been misapplied in this action.

Both lower courts relied on Shuman v. Stanley Works, 30 Mass. App. Ct. 951 (1991) to support their decisions to dismiss the Appellant's Complaint. "A plaintiff claiming good cause must show that she made a 'diligent albeit unsuccessful effort to complete service within the period prescribed by the rule'" Kennedy 73 Mass. App. Ct. at 464-465. (p.3, Memorandum and Order Pursuant to Rule 23.0).

The Appellant contacted the Suffolk County Sheriff's Department and was assured that service could be made within the 90 day service period. Service failed because the Appellee was closed to the public and their agents failed to communicate with each other while a process server waited at their front door. These things were not in the Appellant's control and she should not have suffered the most extreme consequence for not foreseeing them.

The lower courts clearly abused their discretion in determining that the Appellant's effort to complete service was not diligent without giving her the opportunity to present evidence of evasion. The trial court stated that "(a) first

attempt to serve the defendant on the final day of the ninety-day period does not constitute diligent efforts. See Shuman 30 Mass.App.Ct. at 953 (affirming dismissal for failure of service where plaintiff's first attempt at service occurred eight days before expiration of ninety-day period)." (p.3, Memorandum of Decision and Order on Appellee's Motion to Dismiss and reproduced on p.164, Appendix Volume 2 of 2).

The appeals court argued that this action was directly on point with Shuman: "In Shuman, we concluded no good cause existed where the plaintiff waited more than sixty-five days before attempting to locate an agent to accept service and only procured a process server with eight days remaining." (p.3-4, Memorandum and Order Pursuant to Rule 23.0). The Shuman court stated that "(c)ounsel's first attempt at service, the engaging of a Connecticut constable, was not made until eight days before the expiration of the ninety-day time period." Shuman 30 Mass.App.Ct. at 953.

The constable referred to in Shuman could not guarantee service before the expiration of the service period. Service wasn't actually attempted by a Hartford deputy sheriff until 171 days after the filing of the complaint. Service was actually attempted in this action within the service period by a Suffolk County deputy sheriff. The lower courts should have compared apples to apples and not to oranges to support their decisions.

Either the Shuman case erroneously equated an attempt to serve a complaint with contacting a process server or the rationale supporting Shuman was erroneously applied to this case.

A good faith effort is an unsuccessful attempt to serve a complaint and not an attempt to locate an agent to accept service or procure a process server. If the engagement of a constable is synonymous with an attempt to serve a complaint, the Appellant should have been allowed to present evidence that she engaged the Suffolk County Sheriff's Department in sufficient time to be assured that her Complaint would be served before the expiration of the service period.

3. The lower courts' decisions usurp the authority of the Massachusetts legislature.

If this court chooses to ignore the Appellee's deceit and the injustice done to this specific appellant, it should grant further appellate review of this case for 'substantial reasons affecting the public interest'; the lower courts are abusing their discretion in interpreting the legislative intent of the Mass.R.Civ.P. 4(j). Future litigants should know that they cannot rely on the 90 day service period prescribed in Rule 4 because it is subject to a judge's discretion.

The legislature reduced the original 120 day service period to 90 days and added the 'good cause' provision to Rule 4 in 1988. (see Rule 4's reporter's notes of 1988). The legislature

obviously gave the courts discretion to determine what constitutes good cause. It did not give the courts discretion to determine when a plaintiff should have served her complaint. The opinions in this action prove the courts have usurped the authority of the legislature by subjecting the ninety day service period to their discretion.

If the deputy had attempted to serve the Complaint on the sixty-fourth day of the service period, the holding in Shuman could not have supported the decision to dismiss it. Or would the appeals court have argued that attempting to serve on the sixty-fourth day was not a diligent effort to serve the Complaint?

The Appellant relied on the plain language of the rule and reasonably assumed she had 90 days to serve her Complaint. She did not know that it would be in a judge's discretion to determine which of the 90 days she should have attempted service.

The legislature intended to give every plaintiff 90 days to **ATTEMPT** service. The good cause provision was added to give the courts discretion to determine if the plaintiff's attempt was diligent. If this were not the legislative intent, there wouldn't be any time limit to serve a defendant. The courts would have been given the discretion to determine when a plaintiff should have attempted service and whether any delay in service prejudiced the defendant.

For these reasons, the Appellant requests further appellate

review of this case

By Appellant’s counsel,

/s/ Gary Dolan
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CERTIFICATE OF SERVICE

I, Gary Dolan, do hereby certify that I served a copy of the foregoing document on the Appellee via email on November 3, 2022 to the Appellee’s counsel at the following addresses;

Joseph.Lipchitz@saul.com

Kelsey.Marron@saul.com

/s/ Gary Dolan

CERTIFICATE OF COMPLIANCE

I, Gary Dolan, do hereby certify that the Appellant's Application For Further Appellate Review complies with Mass.R.A.P. 16(k), 20(a). The Application was prepared with TextMaker 2019 using Courier New 12 point font with 1 inch margins.

/s/ Gary Dolan

Addendum

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-1126

NELLIE SANINOCENCIO

vs.

LUBIN & MEYER, P.C.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, Nellie Saninocencio, appeals from the judgment dismissing without prejudice her complaint against the defendant, Lubin & Meyer, P.C. (L&M). On appeal, Saninocencio claims the motion judge abused his discretion in dismissing her complaint because her first attempt to serve L&M was on the last day of the ninety-day service period prescribed by Mass. R. Civ. P. 4 (j), as appearing in 402 Mass. 1401 (1988), and L&M intentionally evaded service and engaged in fraud. We affirm.

Discussion. We review the allowance of a motion to dismiss de novo. See Ryan v. Mary Ann Morse Healthcare Corp., 483 Mass. 612, 614 (2019). Rule 4 (j) of the Massachusetts Rules of Civil Procedure states that the court must dismiss an action without prejudice if the plaintiff: (1) does not serve the summons and complaint upon a defendant within ninety days after filing, and

(2) cannot show good cause for not making service within that period. See Mass. R. Civ. P. 4 (j).

Saninocencio filed this lawsuit in Superior Court on October 20, 2020. She first attempted to serve L&M at 2:20 P.M. on the afternoon of January 20, 2021, the last day of the ninety-day service period. L&M's office was closed and its staff was working remotely due to the COVID-19 pandemic. The attempted service therefore failed. The next day, L&M moved to dismiss for lack of service. Following the denial of that motion for noncompliance with Rule 9A of the Rules of the Superior Court (2018), L&M filed a second motion to dismiss on February 25, 2021. Saninocencio did not move to enlarge the time for service, as permitted under Mass. R. Civ. P. 6 (b), 365 Mass. 747 (1974), until after the June 2021 hearing on that motion. The motion judge denied the motion to enlarge and granted L&M's motion to dismiss. The judge treated Saninocencio's subsequent "motion to vacate" the dismissal as a motion for reconsideration and denied it.[1]

Saninocencio claims the motion judge erroneously dismissed the case because she attempted service within ninety days and L&M turned the process server away. Rule 4 (j) requires a judge to dismiss an action if the plaintiff does not make service

[1] Saninocencio waived her appeal from the order denying her motion to vacate the dismissal.

within ninety days and cannot show good cause for failing to do so. Mass. R. Civ. P. Rule 4 (j). Because Saninocencio tried but failed to serve L&M within the ninety-day period, the rule required the motion judge to dismiss the complaint unless Saninocencio could show good cause.

As the motion judge correctly noted, good cause for failure to make service is "a stringent standard" (citation omitted). Kennedy v. Beth Israel Deaconess Med. Ctr., Inc., 73 Mass. App. Ct. 459, 464 (2009). A plaintiff claiming good cause must show that she made a "diligent albeit unsuccessful effort to complete service within the period prescribed by the rule" (citation omitted). Id. at 464-465. Here, Saninocencio made a single attempt at service, just hours before the close of business on the ninetieth day and with no prior request to enlarge that time. The motion judge was well within his right to conclude this effort lacked diligence and did not amount to good cause.[2]

Saninocencio unsuccessfully attempts to distinguish this case from Shuman v. Stanley Works, 30 Mass. App. Ct. 951 (1991), which is directly on point with this case. In Shuman, we concluded no good cause existed where the plaintiff waited more than sixty-five days before attempting to locate an agent to

[2] Saninocencio could have moved to enlarge time even after the service period if she could show good cause. See Passatempo v. McMenimen, 461 Mass. 279, 301 n. 30 (2012) (after service period, plaintiff must show good cause for delay).

accept service and only procured a process server with eight days remaining. See id. at 953. Saninocencio claims the motion judge should have considered that, in contrast to Shuman, she made timely arrangements for service with the Suffolk County sheriff's department. We disagree. Rule 4 (j) requires that service be made, not attempted, within ninety days. See Mass. R. Civ. P. Rule 4 (j). Moreover, in accordance with Shuman, a process server's failure to complete service does not by itself constitute good cause. See Shuman, supra. Here, the sheriff's deputy was unable to complete service because of L&M's office closure. But in the absence of other diligent efforts by Saninocencio and her attorney, the process server's incomplete service is immaterial.[3] See id.

Saninocencio further claims that L&M evaded service. We have previously held that three failed attempts at service by certified mail did not amount to evasion even though each mailing was returned marked "unclaimed." Commissioner of Revenue v. Carrigan, 45 Mass. App. Ct. 309, 313 (1998). In

[3] Saninocencio has provided little justification for the lack of diligence prior to the ninetieth day. In her brief, Saninocencio states that her attorney's attempt to familiarize himself with legal malpractice or to find alternate counsel caused the delay. However, her January 2021 opposition to L&M's motion to dismiss for lack of service indicated the delay occurred because Saninocencio was in Florida and her attorney was looking for alternate counsel because he was under investigation by bar counsel.

Shuman, we found no evasion where the defendant's corporate offices were out-of-state, and the company had no resident agent for service in Massachusetts. Shuman, 30 Mass. App. Ct. at 952-953. The defendants in those cases were less accessible than L&M, whose office was well known to Saninocencio and could have been approached at any time during the service period. The motion judge therefore properly found there was no evasion. See Carrigan, supra (no evasion where failure of service was due to "inadvertence of [plaintiff's] counsel and half-hearted efforts").[4] Because Saninocencio did not show good cause for failing to make service on L&M within the ninety-day service

[4] The hearing transcript also directly contradicts Saninocencio's assertion that the motion judge denied her the opportunity to present evidence of evasion. In fact, the motion judge asked Saninocencio's counsel to present this evidence at least twice. The judge also explained that the burden was on Saninocencio to show that L&M's doors were locked for evasive reasons rather than because its employees were working remotely due to the COVID-19 pandemic.

period, the motion judge did not abuse his discretion in dismissing the complaint.[5]

Judgment of dismissal without prejudice affirmed.

By the Court (Meade, Milkey & Massing, JJ.[6]),

Joseph F. Stanton

Clerk

Entered: October 14, 2022.

[5] The dismissal is affirmed without prejudice, as the motion judge originally ordered. We decline to affirm with prejudice, as L&M asks us to do. Saninocencio's request for sanctions and costs is denied.

[6] The panelists are listed in order of seniority.

NOTIFY

06/17

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2084CV02420

Notice Sent
06.18.21
J.D.
SEAL
J.D.L.
K.C.M.
(NS)

NELLIE SANINOCENCIO,

PLAINTIFF,

vs.

LUBIN & MEYER, P.C.,

DEFENDANT.

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO DISMISS

Plaintiff Nellie Saninocencio brought this action against Defendant Lubin & Meyer, P.C., alleging legal malpractice and fraud. The claims arise from Lubin & Meyer's representation of Saninocencio in a medical malpractice action. The defendant filed a Motion to Dismiss Pursuant to Mass. R. Civ. P. 12(b)(6), 9(b), and 4(j) ("Motion," Paper No. 7). The court held a hearing on the motion on June 10, 2021. For the following reasons, the defendant's Motion is **ALLOWED WITHOUT PREJUDICE**.

BACKGROUND

In January 2012, Saninocencio fell and suffered a back injury. Subsequent surgery to repair a disc in her back resulted in more serious and permanent injuries. Comp. ¶ 1.[1] On December 31, 2013, represented by Lubin & Meyer, Saninocencio filed a medical malpractice action against the surgeon and the physician's group who employed him. *Id.* at ¶ 2. The Complaint alleges that Lubin & Meyer "settled the medical malpractice case for $0" on October

[1] References to the Complaint are denoted by the abbreviation, "Comp.," followed by a paragraph citation.

23, 2017. *Id.* at ¶ 3.[2] The Complaint further alleges that Lubin & Meyer coerced Saninocencio into signing a document entitled Authorization and Instructions to Dismiss ("Authorization," see Exhibit A to the defendant's Motion to Dismiss), instructing the firm to dismiss her case. Saninocencio alleges that Lubin & Meyer pressured her to sign the Authorization to obtain a more favorable settlement for another client, who also had claims against the surgeon. Comp. at ¶ 10.

DISCUSSION

Pursuant to Mass. R. Civ. P. 4(j), "[i]f a service of summons and complaint is not made upon a defendant within 90 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice . . . ." "[G]ood cause is 'a stringent standard requiring diligent' albeit unsuccessful effort to complete service within the period prescribed by the rule." *Kennedy* v. *Beth Isr. Deaconess Med. Ctr., Inc.*, 73 Mass. App. Ct. 459, 464-465 (2009), quoting *Commissioner of Rev.* v. *Carrigan*, 45 Mass. App. Ct. 309, 311 (1998). "The focus of the court's inquiry [as to good cause] is the reasonableness and diligence of counsel's effort to effect service within the time required." *Shuman* v. *Stanley Works*, 30 Mass. App. Ct. 951, 952-953 (1991) (rescript) (alteration in original). The burden is on the plaintiff to show "good cause" why service was not made within the required ninety-day period. See *Carrigan*, 45 Mass. App. Ct. at 311.

Saninocencio contends that the defendant refused service, which constitutes good cause for her failure to make timely service. The Complaint was filed on October 20, 2020. Under the

[2]In fact, the docket reflects that the case was voluntarily dismissed. See *Saninocencio* v. *Abumeri, et al*, Essex Superior Court, No. 2013-2091.

tracking order, the ninety-day period for service expired on January 20, 2021. Saninocencio first attempted to make service on the defendant at 2:20 p.m. on January 20, 2021. That attempt was unsuccessful, as the defendant's office space was closed due to concerns around the COVID-19 pandemic. At the time of the hearing on the Motion on June 10, 2021, service still had not been made on the defendant. Until the day after the hearing on this Motion to Dismiss, Saninocencio did not seek an extension of the period to serve the defendant.[3]

A first attempt to serve the defendant on the final day of the ninety-day period does not constitute diligent efforts. See *Shuman*, 30 Mass. App. Ct. at 953 (affirming dismissal for failure of service where plaintiff's first attempt at service occurred eight days before expiration of ninety-day period) (rescript). Saninocencio offers no reason as to why an attempt at service did not occur earlier and has not provided "good cause" as to why service was never made. Therefore, the defendant's Motion must be allowed, albeit without prejudice.

ORDER

For the foregoing reasons, the defendant's Motion to Dismiss is **ALLOWED WITHOUT PREJUDICE**.

David A. Deakin
Associate Justice

Dated: June 17, 2021

[3] On June 11, 2021, Saninocencio filed an "Emergency Motion to Enlarge Time to Serve Defendant" (Paper No. 9). That motion is denied.