

NOTICE: All slip opinions and orders are subject to formal revision and are superseded by the advance sheets and bound volumes of the Official Reports. If you find a typographical error or other formal error, please notify the Reporter of Decisions, Supreme Judicial Court, John Adams Courthouse, 1 Pemberton Square, Suite 2500, Boston, MA, 02108-1750; (617) 557-1030; SJCRreporter@sjc.state.ma.us

25-P-1298

Appeals Court

GERTHA PIERRE vs. MARIE A. THEODAT & another.¹

No. 25-P-1298.

Suffolk. July 14, 2026. - October 23, 2026.

Present: Blake, C.J., Meade, & Hillman, JJ.

Practice, Civil, Service, Amendment of complaint, Dismissal.
Rules of Civil Procedure. Time.

Civil action commenced in the Superior Court Department on January 3, 2020.

A motion to dismiss was heard by Rosemary Connolly, J., and the case was tried before Julie E. Green, J.

Hui Chen (John F. Tocci also present) for Marie A. Theodat.
Michael D. Keohane for the plaintiff.

HILLMAN, J. In January 2020, the plaintiff, Gertha Pierre, filed a complaint in the Superior Court, alleging that the defendant, Marie A. Theodat, defaulted on a loan. Nearly two years and nine months later, Pierre made service on Theodat.

¹ Ernst Guerrier.

Approximately four months after serving the original complaint on Theodat, Pierre was permitted to file an amended complaint, which she served on Theodat within the time permitted under Mass. R. Civ. P. 4 (j), as appearing in 402 Mass. 1401 (1988) (rule 4 [j]). After a judge (motion judge) denied Theodat's motion to dismiss for failure to make timely service of the original complaint, the case was tried before a jury, which found that Theodat had defaulted on the loan and awarded damages to Pierre. On appeal, Theodat argues that the motion judge erred in denying her motion to dismiss and that the judge who presided over the trial erred in denying her request for a continuance and awarding attorney's fees to Pierre.

We conclude that timely service of the amended complaint did not excuse or cure Pierre's failure to make service of the original complaint on Theodat within ninety days as required by rule 4 (j). We further conclude that Pierre did not show good cause for her failure timely to make service of the original complaint on Theodat. Consequently, we reverse so much of the judgment as entered in favor of Pierre and against Theodat, and we order entry of a judgment of dismissal without prejudice as to Theodat.² In all other respects, the judgment is

² Neither party has argued that dismissal without prejudice would be an inappropriate remedy in this case notwithstanding that a trial on the merits has taken place. Cf. Deerskin Trading Post, Inc. v. Spencer Press, Inc., 398 Mass. 118, 126

affirmed.³

Background. As alleged in the complaint, on February 16, 2016, Pierre loaned Theodat \$75,000, secured by a mortgage on Theodat's property. Pierre's attorney, defendant Ernst Guerrier, drafted a promissory note and a mortgage memorializing the terms of the loan, which both Pierre and Theodat executed. In March 2016, Theodat defaulted on the loan.

On January 3, 2020, Pierre filed a complaint in the Superior Court in which she named Theodat and Guerrier as defendants.⁴ Pierre served the summons and complaint on Guerrier on January 21, 2020; she did not serve Theodat until October 5, 2022. At no point between the filing of the complaint and service on Theodat did Pierre file a motion to enlarge the time

(1986) ("denial of motions for summary judgment and partial summary judgment will not be reviewed on appeal after a trial on the merits"). The parties have also not addressed on appeal whether a judgment of dismissal at this stage would make a subsequently filed complaint subject to applicable statutes of limitation. If necessary, the parties may litigate that issue in the Superior Court. See G. L. c. 260, § 32. We express no view on the merits of such arguments.

³ Pierre timely served the original complaint on defendant Ernst Guerrier, who answered and asserted cross claims against Theodat. All claims by and against Guerrier were dismissed by the judgment after the jury found that Guerrier did not confer a benefit on Theodat. Guerrier filed an appearance but has not otherwise participated in this appeal.

⁴ Against Theodat, Pierre asserted counts of action on a promissory note and suit for money had and received and unjust enrichment. Against Guerrier, Pierre asserted counts of legal malpractice, misrepresentation, and breach of contract.

to serve Theodat pursuant to Mass. R. Civ. P. 6 (b), 365 Mass. 747 (1974) (rule 6 [b])).

In December 2022, a judge allowed Pierre to amend the complaint to reflect a different address for Theodat. Pierre filed the amended complaint on February 15, 2023, and served it on Theodat on February 23, 2023.

In March 2023, Theodat filed a motion to dismiss on the grounds that she had not been served with the original complaint within ninety days as required by rule 4 (j), and for failure to prosecute diligently as required by Mass. R. Civ. P. 41 (b) (2), 365 Mass. 803 (1974) (rule 41 [b] [2])). Pierre opposed, arguing, in part, that dismissal was unwarranted because service of the amended complaint had been timely; Theodat did not suffer prejudice in the delay; and there was good cause, namely, that Theodat's address was unknown to Pierre until the fall of 2022, justifying the delay in service. After a hearing, the motion judge denied the motion to dismiss, ruling:

"Upon review and after hearing, this motion is [d]enied. It appears that [Theodat] was served within 90 day[s] of the [a]mended [c]omplaint The [t]rial ha[s] be[en] continued and [n]o [n]ew date has been scheduled. The preference is to [c]onstrue the [c]ivil [r]ules of [p]rocedure to efficiently^[5] pursue justice and resolve [c]ases on their merits."⁶

⁵ On the docket, the word "efficiently" in the motion judge's handwritten order is transcribed as "effectively."

⁶ After Theodat's motion to dismiss was denied, she filed an answer and a counterclaim against Pierre, seeking a judgment

Discussion. We review a judge's ruling on a motion to dismiss under rule 4 (j) for abuse of discretion. See Shuman v. The Stanley Works, 30 Mass. App. Ct. 951, 952-953 (1991). "[A] judge's discretionary decision constitutes an abuse of discretion where [an appellate court] conclude[s] the judge made 'a clear error judgment in weighing' the factors relevant to the decision, such that the decision falls outside the range of reasonable alternatives" (citation omitted). L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

We begin with the motion judge's ruling that dismissal as to Theodat was unwarranted because Pierre timely served the amended complaint on her. Whether a plaintiff's timely service of an amended complaint excuses untimely service of the original pleading is a question that appears not to have yet been addressed by a Massachusetts appellate court.

Our analysis starts with the language of the rule. See Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 163 (1988). Rule 4 (j) provides:

"Summons: Time Limit for Service. If a service of the 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

declaring that the note was void and unenforceable or a judgment voiding the note pursuant to G. L. c. 271, § 49. After the jury returned their verdict, the trial judge entered judgment for Pierre on Theodat's counterclaims.

action shall be dismissed as to that defendant without prejudice . . . upon motion."

This provision does not address the effect on this ninety-day period of filing an amended complaint. Rule 15 of the Massachusetts Rules of Civil Procedure, 365 Mass. 761 (1974) (rule 15), which governs amended and supplemental pleadings, is likewise silent on the issue.⁷ Although rule 15 (c) provides in certain circumstances that amendment of claims, defenses, or parties "relate[] back" to the date of the original pleading, this provision relates to statutes of limitations, not service requirements. See Herrick v. Essex Regional Retirement Bd., 68 Mass. App. Ct. 187, 191-192 (2007), S.C., 77 Mass. App. Ct. 645 (2010) and 465 Mass. 801 (2013). See also 1973 Reporter's Notes to Rule 15 (c), Massachusetts Rules of Court, Rules of Civil

⁷ Rule 15 (a) provides:

"Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served and prior to entry of an order of dismissal or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders."

Procedure, at 28 (Thomson Reuters 2026) (rule 15 [c] "ties directly to the statute of limitations").

Because these rules do not specifically address the issue, we turn for guidance to Federal cases interpreting the cognate rule, Fed. R. Civ. P. 4(m).⁸ See Anyaosah v. Copart of Conn., Inc., 106 Mass. App. Ct. 213, 216 (2025) ("In construing our rules of civil procedure, we are guided by judicial interpretations of the cognate Federal rule absent compelling reasons to the contrary or significant differences in content" [citation omitted]).

The United States Courts of Appeals to have considered the issue have held that the filing of an amended complaint does not toll or restart the period in which a party named in the original complaint must be served with that complaint. See Bolden v. Topeka, 441 F.3d 1129, 1148 (10th Cir. 2006). Rather, those courts have construed the ninety-day service requirement of Fed. R. Civ. P. 4(m) to refer to the filing of "the first version of the complaint naming the particular defendant to be

⁸ Rule 4(m) of the Federal Rules of Civil Procedure provides in relevant part:

"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."

served." Id. at 1149.⁹ See Moore v. Walton, 96 F.4th 616, 626 (3d Cir. 2024), quoting 4B C.A. Wright, A.R. Miller, & A.M. Steinman, Federal Practice and Procedure § 1137, at 371 (2015) ("It is blackletter law that '[f]iling an amended complaint does not toll the Rule 4[m] service period' for an original complaint"); UWM Student Ass'n v. Lovell, 888 F.3d 854, 859 (7th Cir. 2018) ("filing an amended complaint does not restart the clock for serving defendants who are added to an amended complaint after having been dismissed from a prior one" due to lack of service); Lee v. Airgas -- Mid S., Inc., 793 F.3d 894, 898 (8th Cir. 2015), quoting 4B C.A. Wright, A.R. Miller, & A.M. Steinman, Federal Practice and Procedure § 1137, at 371 (2015) ("'[F]iling an amended complaint in itself does not toll the service period' or reset the 120-day clock; at best, 'adding a new party through an amended complaint initiates a new 120-day timetable for service upon the added defendant'").

We reach the same conclusion. The "underlying policy of [rule 4 (j)] is 'to encourage prompt movement of civil actions in [the] courts'" (citation omitted), Shuman, 30 Mass. App. Ct. at 954 n.3, and to "reflect[] a litigant's right to make

⁹ Rule 4(m) of the Federal Rules of Civil Procedure was amended in 2015 to require that service be made within ninety days. See Fed. R. Civ. P. 4(m) (2015). Prior to that, the rule required that service be made within 120 days. See Fed. R. Civ. P. 4(m) (2007).

decisions based on proper notice," Wang v. Niakaros, 67 Mass. App. Ct. 166, 170 (2006). To that end, plaintiffs have long been cautioned to treat the ninety-day service requirement of rule 4 (j) "with the respect reserved for a time bomb" (citation omitted). Commissioner of Revenue v. Carrigan, 45 Mass. App. Ct. 309, 315 (1998). Indeed, rule 4 (j) directs that, in the absence of "good cause," an action "shall" be dismissed as to that defendant if the complaint is not served within ninety days of filing. Mass. R. Civ. P. 4 (j). That is not to say that a plaintiff who has been unable to effect service within ninety days is without recourse. "Although [rule 4 (j)] was meant to be strictly construed, its execution is not unduly harsh due to the liberal extension of time allowances permitted under [rule 6 (b)]" (citations omitted). Carrigan, supra at 312.

To hold that timely service of an amended complaint excuses untimely service of an original pleading would thwart this procedural scheme, as it would enable "a plaintiff who had never bothered to serve any defendant [to] avoid altogether the original [ninety-day] deadline simply by filing an amended complaint when it felt like effecting service." Bolden, 441 F.3d at 1148-1149. We conclude that rule 4 (j) does not envision such a work-around. See Ashe v. Shawmut Woodworking & Supply, Inc., 489 Mass. 529, 532 (2022) (our task is to "interpret our rules of civil procedure in a manner which will

accomplish their obvious purpose and objective" [quotation and citation omitted]). Consequently, the motion judge erred in relying on Pierre's timely service of the amended complaint on Theodat as a basis for denying Theodat's motion to dismiss under rule 4 (j).

We next turn to whether Pierre otherwise established good cause for her untimely service of the original complaint on Theodat. "Good cause has been defined as a stringent standard requiring diligen[t] albeit unsuccessful effort to complete service within the period prescribed by the rule" (quotation and citation omitted). Shuman, 30 Mass. App. Ct. at 953. "The focus of the court's inquiry is the reasonableness and diligence of counsel's effort to effect service within the time required." Id. The burden is on the plaintiff to establish good cause. Id.

Here, Pierre did not effect service of the original complaint on Theodat until nearly two years and nine months after it had been filed.¹⁰ At no point during that time did

¹⁰ Because of the outbreak of the COVID-19 pandemic, the ninety-day service requirement of rule 4 (j) was tolled from March 17, 2020, through June 30, 2020, pursuant to the Supreme Judicial Court's Third Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (Coronavirus) Pandemic, No. OE-144 (June 24, 2020), <https://perma.cc/5K7R-27AT>. By March 17, 2020, seventeen days remained for Pierre to serve Theodat under rule 4 (j). Thus, when the tolling period expired on June 30, 2020, Pierre was

Pierre seek an extension of time to serve the complaint under rule 6 (b), which "is some evidence of lack of diligence." Shuman, 30 Mass. App. Ct. at 953. More to the point, in the face of a motion to dismiss for lack of timely service of the complaint, Pierre produced no evidence (e.g., communications with, or returns of service, invoices, or affidavits from, a process server; or affidavit of counsel detailing attempts at service) that she had made any attempt at serving the original complaint on Theodat. See and compare Kennedy v. Beth Israel Deaconess Med. Ctr., Inc., 73 Mass. App. Ct. 459, 465 (2009) (in context of untimely motion to vacate dismissal for lack of service, "plaintiff's counsel never provided any explanation of his efforts to serve the complaint and summons with the exception of [one] attempt"), and Hull v. Attleboro Sav. Bank, 33 Mass. App. Ct. 18, 26 (1992) (dismissal required where "there [was] not even a claim that the plaintiff attempted to make service at any time from the filing of the action" until date of late service), with Sullivan v. Smith, 90 Mass. App. Ct. 743, 751-752 (2016) (good cause existed where return of service showed several unsuccessful attempts to make service).

Pierre nevertheless argues on appeal, as she did in the Superior Court, that Theodat's evasion of service constituted

required to serve the complaint on Theodat on or before July 20, 2020.

good cause for the failure to serve. In denying the motion to dismiss, however, the motion judge did not base her decision on a conclusion that Theodat had evaded service. Nor could she have, where Pierre, as discussed supra, provided no evidence of any attempts to serve Theodat. Pierre's claim on this ground is unsupported by the record. See Carrigan, 45 Mass. App. Ct. at 312-313 (three unsuccessful mailings by certified mail, returned as unclaimed, did not establish evasion of service where no indication that defendant refused mailings or was home but unresponsive).

Pierre's argument that the motion judge properly denied the motion to dismiss because Theodat was not prejudiced by the delay in service is similarly without merit. In the good cause analysis, "[w]hether or not [Theodat] was prejudiced by [Pierre's] tardiness is not a relevant consideration, and thus does not enter into [the] analysis." Carrigan, 45 Mass. App. Ct. at 315-316. See Shuman, 30 Mass. App. Ct. at 954 n.3 ("The underlying policy of [rule 4 (j)] is 'to encourage prompt movement of civil actions in [the] courts' and 'prejudice to [Theodat] would not appear to be a relevant consideration'" [citation omitted]). That no trial date had been set for the case did not establish "good cause" for Pierre's delay in serving the original complaint on Theodat and was thus not a permissible consideration for denial of the motion.

Finally, as a ground for denying the motion to dismiss, the motion judge also stated that "[t]he preference is to [c]onstrue the [c]ivil [r]ules of [p]rocedure to efficiently pursue justice and resolve cases on their merits." The judge's reliance on that principle was not without basis. Theodat's motion to dismiss rested on both rule 4 (j) and rule 41 (b) (2).¹¹ In the context of a rule 41 motion to dismiss, our cases have recognized that "[t]he law strongly favors a trial on the merits of a claim" and that involuntary dismissal pursuant to rule 41 (b) (2) should be reserved for situations where a severe sanction is necessary. Monahan v. Washburn, 400 Mass. 126, 128-129 (1987).

Nevertheless, although the preference for resolution of a case on its merits is a factor within a judge's consideration when addressing a motion to dismiss under rule 41, the same cannot be said for a motion to dismiss under rule 4 (j). Dismissal for failure to serve under rule 4 (j) is mandatory absent a showing of good cause.¹² See Kennedy, 73 Mass. App. Ct.

¹¹ As relevant here, rule 41 (b) (2) provides, "On motion of the defendant, with notice, the court may, in its discretion, dismiss any action for failure of the plaintiff to prosecute or to comply with these rules or any order of court."

¹² Unlike rule 4 (j), which requires dismissal in the absence of good cause, Fed. R. Civ. P. 4(m) grants a judge, in the absence of a showing of good cause, discretion to dismiss a complaint if it is not served within ninety days, or to "giv[e]

at 464. See also Carrigan, 45 Mass. App. Ct. at 312, quoting United States v. Gluklick, 801 F.2d 834, 837 (6th Cir. 1986), cert. denied, 480 U.S. 919 (1987) ("Federal 'Rule 4[j] renders dismissal after 120 days mandatory rather than discretionary in the absence of good cause or a request for extension of time'"). Here, where Theodat moved to dismiss under rule 4 (j), and where Pierre did not establish good cause for the failure to timely effect service of the original complaint on Theodat, dismissal as to Theodat, without prejudice, was required.¹³

Conclusion. So much of the judgment as entered in favor of Pierre and against Theodat is reversed, and a judgment shall enter dismissing the action without prejudice as to Theodat. In all other respects, the judgment is affirmed.

So ordered.

the plaintiff more time" to make service. United States v. McLaughlin, 470 F.3d 698, 700 (7th Cir. 2006).

¹³ Concluding as we do, we need not address Theodat's remaining claims raised in this appeal. Pierre's request for an award of appellate attorney's fees is denied.