

Jorge Echevarria, Plaintiff vs. Value City Store # 158; John Doe #1, Store Manager; J. Clymer, Security Representative; and John Doe #2, Security Representative, Defendants, Franklin County Branch, Civil Action - Law No. A.D. 1996-345

*Echevarria v. Value City et al*

*Defective service of original process under Pa.R.C.P. 400(a).*

1. Original process must be served by the sheriff in order for the court to have jurisdiction over an action.
2. Improper service is not a mere procedural defect which can be ignored despite the defendant eventually becoming aware of the action through alternate means.
3. The party who filed the action has the burden of showing that the defendant was properly served.
4. Invalid service of process cannot be rendered valid simply because the serving party acted in good faith.
5. Although the court should not dismiss a *pro se* plaintiff's complaint simply for defects in form, his *pro se* status or lack of legal training does not entitle him to any particular advantage in the litigation, particularly regarding service of original process.
6. Where the plaintiff did not direct the complaint to the sheriff for service but instead merely mailed it to the defendant, the service is defective.
7. The proper remedy for defective service of original process is not to dismiss the complaint, but to set aside the defective service; the action remains intact and may be pursued if the plaintiff can properly bring the defendant on the record.
8. The statute of limitations is an affirmative defense which should be pleaded as new matter and not by preliminary objection.

*Jorge Echevarria, pro se*  
*Gloriana Noreika, Esquire, Counsel for Defendants*

### OPINION and ORDER OF COURT

Herman, J., April 17, 1998:

#### INTRODUCTION

Before the Court are preliminary objections filed by the defendants to the plaintiff's complaint. The defendants argue the complaint filed August 22, 1996 must be dismissed because the plaintiff failed to effectuate proper service. The parties agreed to submit this matter to the Court on written argument alone. The Court has reviewed the briefs and this matter is ready for decision.

#### FACTUAL BACKGROUND

On November 22, 1993 the plaintiff and one Tanya Keppley went to the defendants' store in the Chambersburg mall. A videotape surveillance camera recorded Keppley placing items in a pouch on the back of the plaintiff's wheelchair. According to the complaint the plaintiff is paralyzed from the waist down and was unaware of Keppley's actions. The plaintiff and Keppley were detained and questioned by Value City security personnel. By the time the plaintiff was released at 5:00 p.m. he had missed his ride home. He called for another ride. The mall closed and he waited outside for several hours until his ride came shortly before 11:00 p.m. While waiting outside for his ride the plaintiff became frightened and disoriented and experienced physical pain due to the cold weather. Over the next few days he suffered chills and fever and pain in his paralyzed legs as a result of exposure to the cold.

The plaintiff was charged with retail theft. District Justice Larry K. Meminger later dismissed the charge for lack of prosecution. The plaintiff contends a detainer lodged and retained against him on that charge nevertheless adversely affected his incarceration status on an unrelated charge, specifically, that his bail application was denied.

The plaintiff filed a praecipe for a writ of summons on August 22, 1996 seeking damages from the defendants for negligence. The defendants named on the writ's caption were the Manager of Value City Store #158 and Value City Security Department representative J. Clyme. However, the plaintiff also named Value City itself and John Doe #2 (a security representative) as defendants in two separate summons filed on that same date. The plaintiff paid the \$45.50 filing fee to the prothonotary but lost the writ and never served it on the defendants.

On November 15, 1996 the plaintiff requested the reissuance/reinstatement of the writ of summons against all four defendants. He sought compensatory and punitive damages and a declaratory judgment. He also petitioned to proceed *in forma pauperis*. By Order of Court dated and filed December 16, 1996 the Honorable William H. Kaye denied the petition. On that same date the reissued/reinstated complaint was also filed. It was served on the defendants only by mail. The defendants filed preliminary objections

to the complaint on February 24, 1997 seeking its dismissal for lack of conformity to Rule of Court, specifically, Pa.R.C.P. 400(a).

## DISCUSSION

Rule 400(a) provides that "original process shall be served within the Commonwealth only by the sheriff." This rule must be strictly followed because the court's jurisdiction over the defendant depends upon the effecting of proper service. Although generally the rules of civil procedure are to be liberally construed to allow for prompt and fair proceedings and the court "may disregard any error or defect of procedure which does not affect the substantial rights of the parties" (Pa.R.C.P. 126), improper service is not a mere procedural defect which can be ignored despite the defendant eventually becoming aware of the action through alternate means. *Frycklund v. Way*, 599 A.2d 1332 (Pa.Super. 1991); *Martin v. Gerner*, 481 A.2d 903 (Pa.Super. 1984); *Sharp v. Valley Forge Medical Center and Heart Hospital, Inc.*, 221 A.2d 185 (Pa. 1966); *Sklaroff v. Weiner*, 203 A.2d 366 (Pa.Super. 1964). The party who filed the original process has the burden of showing that the defendant has been properly served. *Wible v. Apanowicz*, 452 A.2d 545 (Pa.Super. 1982).

Invalid service of process cannot be rendered valid simply because the serving party acted in good faith. *Frycklund*, supra. Although the court should not dismiss a *pro se* plaintiff's complaint simply for defects in form, his *pro se* status or lack of legal training does not entitle him to any particular advantage in the litigation, particularly regarding service of original process. *Triffen v. Janssen*, 626 A.2d 571 (Pa.Super. 1993); *Mooney v. Commonwealth*, 578 A.2d 1384 (Pa.Comm. 1990).

The plaintiff did not direct the complaint to the sheriff for service. However, we do agree with the plaintiff that the proper remedy for defective service of original process is not to dismiss the complaint but to set aside the defective service. The action remains intact and if the plaintiff can properly bring the defendant on the record the action may be pursued. *Frycklund*, supra; *Weaver v. Martin*, 655 A.2d 180 (Pa.Super. 1995); *Trzcinski v. Prudential*, 597 A.2d 687 (Pa.Super. 1991); *Fox v. Thompson*, 546 A.2d 1146 (Pa.Super. 1988); *Nicolosi v. Fittin*, 252 A.2d 700 (Pa. 1969). The plaintiff will be given the opportunity to properly serve the defendants in conformity with Rule 400(a).

## Statute of Limitations

The incident giving rise to this action occurred on November 22, 1993. The plaintiff's writ of summons was filed on August 22, 1996. The plaintiff correctly notes that the defendants did not raise statute of limitations in their preliminary objections as grounds for dismissing the complaint but mention that issue for the first time in their brief. More to the point, however, is the fact that statute of limitations is an affirmative defense which must be pleaded as New Matter and not by preliminary objection. Pa.R.C.P. 1030(a); *Kyle v. McNamara & Cristie*, 487 A.2d 814 (Pa. 1985). The defendants' statute of limitations argument is premature and will not be considered at this juncture.

## In Forma Pauperis Petition

The plaintiff renews his request, initially denied by Judge Kaye on December 16, 1996, to proceed *in forma pauperis*. Judge Kaye denied the petition for the following reason: "... it appearing to the Court that the defendant is incarcerated at SCI-Coal Township, and that he is provided with housing, food, and clothing, and has a monthly prison income of \$60.00, the petition is DENIED as it appears he has sufficient resources to pay filing fees." The plaintiff's circumstances have not substantially changed since that time and therefore his petition will be denied.

For the reasons stated herein an appropriate Order of Court will be entered as part of this Opinion.

## ORDER OF COURT

NOW this 17th day of April, 1998, the preliminary objection filed by the defendants to dismiss the action for defective service of the complaint is hereby DENIED. The plaintiff is granted the opportunity to correctly serve the defendants pursuant to the Pennsylvania Rules of Civil Procedure. The plaintiff's petition to proceed *in forma pauperis* is hereby DENIED.