

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

TONY A. WHEELER,

Plaintiff,

v.

**FDL, INC. and NUMARK INDUSTRIES
CO., INC.,**

Defendants.

CIVIL ACTION

No. 02-2444-CM

MEMORANDUM AND ORDER

This matter comes before the court on defendant Numark Industries Co., Inc.'s Motion to Dismiss Claims of Plaintiff and Third Party Plaintiff (Doc. 67) and Motion to Dismiss (Doc. 82). Defendant Numark requests that the court dismiss all of the claims against it as a result of plaintiff's failure to properly serve process upon it.

I. Background

Plaintiff Tony Wheeler filed his original complaint against defendant FDL, Inc. (FDL), on September 17, 2002. Plaintiff filed a first amended complaint, adding Numark Industries, Co., Inc. (Numark) as a defendant, on December 6, 2002. The same day, plaintiff sent, by certified mail to Numark at an address in Avon, Indiana, a copy of the summons, the first amended complaint, and a request for waiver of service. Although someone signed for the certified mail delivery, Numark never returned the waiver of service. On April 23, 2003, the court issued to plaintiff a Notice and Order to Show Cause why plaintiff had not served the summons and complaint upon Numark within 120 days from its filing. On May 6, 2003, plaintiff

responded to the show cause order and requested additional time to obtain service upon Numark because plaintiff had failed to correctly name Numark in the first amended complaint. The court did not enter an order in response to plaintiff's request for additional time in which to obtain service of process. Plaintiff filed a second amended complaint on November 20, 2003, correcting Numark's identity.

On November 24, 2003, FDL filed a third party complaint against Numark and an amended answer to plaintiff's complaint, which includes a cross-claim against Numark. On December 11, 2003, FDL successfully served its third party complaint on Numark at the same Avon, Indiana address, through the Office of the Kansas Secretary of State.

Numark filed its first motion to dismiss plaintiff's claims on January 22, 2004. On March 19, 2004, plaintiff delivered to Numark's attorney, via facsimile, copies of its first and second amended complaints in a second attempt to obtain service of process. Numark filed its second motion to dismiss plaintiff's claims on April 8, 2004. When plaintiff failed to respond to either of Numark's motions to dismiss, the court issued a show cause order, dated June 9, 2003, directing plaintiff to show cause why his claims against Numark should not be dismissed. Plaintiff responded to the show cause order, claiming that he had served the first and second amended complaints upon counsel for Numark pursuant to Fed. R. Civ. P. 5(b)(1) and 5(b)(2)(d), after Numark entered its appearance in the case by filing the motions to dismiss.

II. Legal Standard for Motion to Dismiss

The court will dismiss a cause of action for failure to state a claim only when it appears beyond a doubt that the plaintiff can prove no set of facts in support of the theory of recovery that would entitle him or her to relief, *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1304 (10th Cir. 1998), or when an issue of law is dispositive. *Neitzke v. Williams*, 490 U.S. 319,

326 (1989). The court accepts as true all well-pleaded facts, as distinguished from conclusory allegations, *Maher*, 144 F.3d at 1304, and all reasonable inferences from those facts are viewed in favor of the plaintiff. *Swanson v. Bixler*, 750 F.2d 810, 813 (10th Cir. 1984). The issue in resolving a motion such as this is not whether the plaintiff will ultimately prevail, but whether he or she is entitled to offer evidence to support the claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds*, *Davis v. Scherer*, 468 U.S. 183 (1984).

III. Analysis

A. Plaintiff's Claims

Numark claims that plaintiff's claims against it should be dismissed due to lack of personal jurisdiction, insufficiency of service of process, and as outside the applicable statute of limitations set forth in Kan. Stat. Ann. § 60-513. Essentially, Numark argues that the court lacks personal jurisdiction over it because it has not been properly served with process pursuant to Fed. R. Civ. P. 4, and that the statute of limitations on plaintiff's claim has expired because plaintiff did not effect formal service of process on Numark. Numark also contends that it would be prejudicial to require it to enter the lawsuit and defend itself after significant discovery, including plaintiff's deposition, has already occurred. Plaintiff argues that it has completed service of process on Numark pursuant to Fed. R. Civ. P. 5.

In *Espinoza v. United States*, 52 F.3d 838 (10th Cir. 1995), the Tenth Circuit set out the inquiry a district court should make before dismissing a claim pursuant to Federal Rule of Civil Procedure 4(m) for failure to serve process:

The preliminary inquiry under Rule 4(m) is whether the plaintiff has shown good cause for the failure to timely effect service. In this regard, district courts should continue to follow the cases in this circuit that have guided that inquiry. If good cause is shown, the plaintiff is entitled to a mandatory extension of time. If the plaintiff fails to show good cause, the district

court must still consider whether a permissive extension of time may be warranted. At that point the district court may in its discretion either dismiss the case without prejudice or extend the time for service.

Espinoza, 52 F.3d at 841. In this case, plaintiff responded to the court's April 23, 2003 show cause order, set forth the efforts he had made to serve Numark, and requested additional time to properly serve Numark. The court recognizes that it did not provide plaintiff with guidance in response to his request for additional time in which to serve Numark, but finds that plaintiff was entitled to a mandatory extension of time.

That being said, the court does not approve of plaintiff's wait and see approach to serving Numark - especially once plaintiff was aware that FDL had successfully effected service of process on Numark in December 2003. The court also notes that plaintiff's faxed copy of the first and second amended complaints to Numark pursuant to Fed. R. Civ. P. 5 does not meet the requirements for service of the complaint as set forth in Fed. R. Civ. P. 4. However, the court prefers to decide cases on their merits rather than on technicalities. *Hardin v. Manitowoc-Forsythe Corp.*, 691 F.2d 449, 456 (10th Cir. 1982). Accordingly, the court finds that, in these circumstances, a permissive extension of time in which to serve Numark is appropriate. The court will permit plaintiff an additional 20 days from the date of this Order to properly serve Numark with the amended complaint. If plaintiff fails to effect proper service on Numark within 20 days from the date of this Order, the court will dismiss plaintiff's claims against Numark without prejudice. Therefore, at this time, the court denies Numark's motions to dismiss plaintiff's claims against it.

B. Defendant FDL, Inc.'s Claims

Numark has also moved to dismiss FDL's claims against it, claiming that FDL's third party complaint is barred by the statute of limitations and that FDL has improperly sought to implead Numark as a defendant pursuant to Fed. R. Civ. P. 14. As noted above, Numark's status as a party in the litigation

is unclear. As a result, the court finds it premature to rule on the merits of Numark's motion to dismiss FDL's claims against it.

IT IS THEREFORE ORDERED that Numark's Motion to Dismiss Claims of Plaintiff and Third Party Plaintiff (Doc. 67) and Motion to Dismiss (Doc. 82) are denied.

IT IS FURTHER ORDERED that plaintiff shall effect service of process of its amended complaint on Numark within **20 days from the date of this Order**. **If plaintiff fails to effect proper service on Numark within 20 days from the date of this Order, the court will dismiss plaintiff's claims against Numark without prejudice.**

Dated this 19th day of October 2004, at Kansas City, Kansas.

s/ Carlos Murguia _____
CARLOS MURGUIA
United States District Judge