

**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 APPELLEE**

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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.

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Betty T. Slade DeRossette

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**STATEMENT OF THE ISSUES OF APPEAL**

Appeal to this court was taken by Appellant Buddy Jenkins from the opinion rendered by the Chancery Court of Madison County, Mississippi by Chancellor Cynthia Brewer on Appellant's Motion to Reconsider on August 23, 2007, which upheld the previous finding by the Chancery Court of Madison County on Appellant's Motion to Quash Process and Dismiss on June 14, 2007. The Appellee will demonstrate that the Appellant is mistaken in the fact the Chancellor erred as a matter of law in denying his Motion to Quash Process and Dismiss. The Appellant categories the issues into three sub-parts. Each issue will addressed separately.

- A. THE CHANCELLOR DID NOT ERR IN FINDING THAT OSWALD HAD MET HER BURDEN OF SHOWING GOOD CAUSE AND DILIGENCE.
- B. THE CHANCELLOR DID NOT ABUSE HER DISCRETION IN FINDING THAT OSWALD'S ACTIONS CONSTITUTED "GOOD CAUSE" AND "DILIGENCE" UNDER RULE 4(H).
- C. THE CHANCERY COURT'S FINDING OF GOOD CAUSE AND DILIGENCE IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

**STATEMENT OF THE CASE**

**A. STATEMENT OF THE CORE PROCEEDINGS**

Appellee Margaret B. Oswald, a/k/a Elaine Oswald ("Oswald") filed her Complaint for Preliminary Injunction and Other Relief against Appellant William O'Brien Jenkins, a/ka Buddy Jenkins ("Jenkins") COMPLAINT and three Mississippi Corporations on July 18, 2002. The three

Mississippi Corporations that Oswald filed injunctive relief and damages against were SLK Marketing, SLK Corporation, and Lock-a-Link. All three corporate Defendants were served on July, 19, 2002.

An alias summon was issued for Jenkins at his Florida address on August 8, 2002, but Oswald was never able to obtain service. A second alias summons was issued for Defendant Jenkins on November 28, 2006 and served on Jenkins on January 9, 2007. On February 8, 2007, Jenkins filed his MRCP 12(b) Motion to Quash Process and Dismiss the Complaint against him under the provisions of MRCP 4(h). On June 14, 2007, the Chancery Court of Madison County entered its written order denying Jenkins' Motion. Jenkins filed his Motion to Reconsider on June 25, 2007. The Chancery Court of Madison County entered its written order denying Jenkins' Motion to Reconsider on August 23, 2007. Jenkins filed a Petition for Interlocutory Appeal which was granted by order of the Mississippi Supreme Court of October 3, 2007.

## **B. STATEMENT OF THE FACTS**

Jenkins is mistaken in his fact whereby he stated that Ms. Oswald is an "experienced paralegal." Ms. Oswald is a part time secretary for Mr. Leonard. Thus, she has neither trained nor taken classes to be trained or certified as a paralegal. Prior to working for Mr. Leonard, Oswald was employed by University Medical School in a management position for eight years.

As stated above, Oswald testified there were numerous attempts to serve Jenkins at his home address at the Breakers, which is a gated community in Madison County, Mississippi. On July 19, 2002, July 22, 2002, and July 23, 2002, Oswald hired Cecilia S. Thompson to serve process on Jenkins. Because Oswald was not able to get Jenkins served, Bryan Oswald attempted service of process on Jenkins at his home address on July 26, 2002, and August 2, 2002.

Based on information that Jenkins had moved from the state of Mississippi, Oswald's

attorney filed a 352-44a form with the United States Postal Service. As a result, Oswald learned that Jenkins had filed a change of address listing 2315 Sunset Drive, Bay Shores Condo. H1, Bradenton, Florida 34207. Thus, Oswald hired a process server in Florida to serve Jenkins at his Florida address; however, the process server was not able to obtain service on Jenkins.

On November 11, 2006, Jenkins appeared on WLBT television. On November 28, 2006 Oswald discovered on the Secretary of State's website that a corporation had been formed in Mississippi. The name of the company was Safeway Homes of Hattiesburg, and Jenkins was listed as the registered agent at an address listed in Pearl, Mississippi. Oswald hired a detective agency to locate and serve Jenkins.

On February 8, 2007, Jenkins filed a Motion to Dismiss Complaint and Quash Process. At the hearing Oswald testified that despite the fact she made numerous attempts to serve process upon Jenkins at his Madison County address, she was never able to get him served. And, because her attempts were unsuccessful, she filed the 352-44a form with the United States Postal Service in which she learned Jenkins had moved to Florida..Oswald caused an alias summons to be issued at the Florida address on August 8, 2002. Oswald testified to hiring a process server in Florida, but the process server was never able to locate and serve process upon Jenkins.

In addition to the numerous attempts to serve Jenkins at his Madison County address, Oswald testified that in 2003 she used White Pages, Google, and other internet search engines in order to locate Jenkins' address in addition to filing the 352-44a form with the United State Postal Service. However, the Florida process server was unable to locate and serve Jenkins. Oswald testified that in 2005 she continued to search internet search engines for Jenkins' address but was still unable to locate a valid address.

In July 2006, Oswald ran into Jenkins at Little Willie's Meat Market in Brandon, Mississippi.

Oswald testified that Jenkins wrote his cell phone number on a torn piece of paper. In return, Oswald also testified that she gave him both her cell phone and house phone number. When Oswald attempted to reach Jenkins on the number that he provided, the number was disconnected. Jenkins never attempted to contact Oswald.

On November 11, 2006, Jenkins appeared on WLBT television. Thus, Oswald hired S.R.A. Investigations in order to locate Jenkins. In January, 2007, Jenkins was served with process.

At that same hearing, Jenkins testified that he moved back to Mississippi in May or June of 2003. He testified that he moved to Brandon and leased a house for three years. Jenkins further testified that in the three years that he was renting said house that he never had a telephone number in his name. Jenkins stated he only had a cell phone. On further examination, the Court asked Jenkins several questions. Jenkins stated that he did not know when he got his Mississippi driver's license reinstated from his Florida's driver's license. More specifically Jenkins testified that he "can't remember when I got it. I went up there about five times, and every time there were about 300 people in line. I kept going back, going back, going back." Jenkins did testify that he maintained his Florida license for more than thirty consecutive days after returning to Mississippi. At the hearing, Jenkins could not even state as to when he actually obtained his Mississippi license. Jenkins wife, Georgia Ann Jenkins, also testified that when the couple moved to another house in Brandon, the telephone was listed in her name only and not in Jenkins name.

The Madison County Chancery Judge issued her opinion denying Jenkins' Motion to Dismiss under MRCP4(h). Jenkins filed his Motion to Reconsider on June 25, 2007. On August 23, 2007 the Madison County Chancery Judge denied Jenkins Motion to reconsider.

### **ARGUMENT**

Under Mississippi Rules of Civil procedure, Rule 4(h) states:



If a service of the summons and complaint is not made upon the defendant within one hundred twenty (120) days after 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 upon the court's own initiative with notice to such party or upon motion. Failure to file a motion for additional time is not a fatal flaw. Under Mississippi law, Rule

4(h) does not require that a motion for additional time for service of process. Webster v. Webster, 834 So.2d 26, 28 (2002). There are states that specifically require a motion for additional time. *Id.* More specifically, both Arkansas and New York's rules mandate that a motion for additional time be filed within the 120 day period. *Id.*, citing Weymouth v Chism, 75 Ark.App. 164, 55 S.W.3d (307) 2001. Thereafter, if the drafters of the Mississippi Rules of Civil procedure intended to require that motion for additional time be filed, they could and would have done so.

"Good cause" is the exception to this rule that the Appellee in this case must demonstrate in order to avoid dismissal in the instant matter. Bacou-Dalloz Safety, Inc. v. Hall, 938 So.2d 820 (Miss. 2006).

"Good cause" has been defined that there was need for the delay or other justification of the delay which would convince the courts to grant an extension in the service of process. Moore v Boyd, 799 So.2d 133, 136-37 (Miss. 2001)

Good cause would appear to require 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 normally does not suffice, and some showing of good faith on the party seeking an enlargement and some reasonable basis for noncompliance within the time specified is normally required. *Id.* citing, Black, 791 F. Supp. at 1127, citing Winters v. Teledyne Movable Offshore, Inc., 776 F.2d 1304, 1306 (5<sup>th</sup> Cir. 1985).

The Appellee mistakenly compares the facts to the case at bar to the facts set forth in the case of Bacou-Dalloz Safety, Inc. In his brief, the Appellant stated that "The Court held that the two attempts showed 'a lack of good cause far beyond excusable neglect.'" *Id.* at 14. The Appellant

conveniently failed to closely examine the facts set forth in Bacou-Dalloz, Inc. In Bacou-Dalloz, Inc., the Plaintiff originally served the incorrect agent for service of process in September 2002. *Id.* at 21. In December 2002, CT Corporation System return the documents and informed plaintiff's counsel that it was not the registered agent. *Id.* In December 2002, the plaintiffs filed their First Amended Complaint on December 31, 2002, which again incorrectly listed Corporate Service Company. *Id.*

In March 2004, plaintiffs filed a Motion for Leave to File Plaintiffs' Second Amended Complaint. The Plaintiffs' Second Amended Complaint once again listed an incorrect address for agent for process, although the agent's name was corrected. *Id.* Ultimately, Bacou-Dalloz's proper agent for service of process was served on May 24, 2004.

The Plaintiffs' in Bacou-Dalloz, Inc., knew for one year and five months of the failed service. In that case, the Plaintiffs were informed of their mistake but never reissued process for Bacou-Dalloz's agent for process. In that instance, the Defendant was a corporation, and the Plaintiff had knowledge of where to serve the Defendant entity.

Further, the Appellant also mistakenly relies on the court in Kingston v. Splash Pools of Mississippi, Inc. to support his position that Oswald failed to show good cause for failing to meet the deadline for service of process. In that case, the court held the Plaintiff had failed to show diligent effort to serve the corporation. The court specifically stated, "The lower court further noted that no evidence was presented to the court to establish good cause beyond broad assertions of diligence at the hearing on the motion to dismiss." 2007 WL 1334473.

It is without a doubt that the Plaintiffs in both Bacou-Dalloz Safety, Inc. and Kingston are vastly different that the Appellant in the case at bar. First, the Plaintiff in Bacou-Dalloz Safety, Inc. attempted service numerous times on the Defendant's agent for process. In that matter, the Plaintiff had knowledge that agent that was being served on behalf of Bacou-Dalloz was the incorrect agent.

The Plaintiff was notified that he was serving the wrong entity. Even having this knowledge, for reasons unknown, the Plaintiff chose not to serve the Defendant for an extended amount of time. In that matter, the Plaintiff knew the location and the name of the correct entity to serve process; yet again for reasons unknown chose to wait an inexcusable amount of time to do so.

Unlike the Plaintiffs in both Kingston and Bacou-Dalloz Safety, Inc., here Oswald testified to specific times and dates that service for process attempts were made on Jenkins's home address in Mississippi. Further, once Oswald realized Jenkins possibly had moved, she filed a 352-44a form with the United States Postal Service and found Jenkins had filed a change of address in Florida. On August 8, 2002 Plaintiff Oswald filed and alias summons to the address in Florida where Jenkins had listed his address. In response to this new information, Oswald hired a process server in Florida to obtain service on Jenkins. However, the process server was not able to obtain to obtain service on Jenkins. Oswald continued to utilize multiple internet search engines in order to locate a valid address for Jenkins. Further, once Oswald noticed Jenkins advertising for his new venture, she immediately hired S.R.A Investigations to locate and serve Jenkins.

Under MRCP Rule 4(h), asking the court for an extension of time for service of process is not required. The court in Kingston noted that the Plaintiff only showed that "some attempts" were made. Here, Oswald provided specific dates and locations regarding the numerous attempts for service of process upon Jenkins in addition to providing the names of the process servers.

A determination of good cause is a discretionary ruling by the trial court. Webster v. Webster, 834 So.2d 26, 28 (2002), citing Bang, 749 So.2d at 52, citing Raines v. Gardner, 731 So.2d 1192, 1197 (Miss. 1999).

A leading treatise states that:

Good cause is likely (but not always) to be found when the plaintiff's failure

to complete service in timely fashion is a result of the conduct of a third person, typically the process server, the defendant has evaded service of the process or engaged in misleading conduct, the plaintiff has acted diligently in trying to effect service of there are understandable mitigating circumstances, or the plaintiff is proceeding pro se or in forma pauperis. Holmes v. Coast Transit Authority, 815 So.2d 1183, 1186 (2002)., citing 4B Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1137 at 342 (3d ed.2000).

In the case at bar, it is evident based on the testimony at trial that Jenkins evaded process. First, Jenkins testified that when he moved back to Mississippi he rented a house for over three years, and the lease was not recorded with the court. He further testified that he did not have a land line telephone; he only had a cell phone. In an effort to further avoid any service of process, Jenkins moved again to different house with his now wife and purposefully had the telephone put in her name only.

Upon further examination by the court, the Chancellor asked Jenkins one question, "When did you get your Mississippi driver's license reinstated from the Florida driver's license you had." T. at 57. Jenkins replied by stating that he did not know when he reinstated his Mississippi drivers license in addition to admitting he resided in Mississippi for at least thirty days before obtaining a Mississippi drivers license. T. 57-58. Based on the above facts, it is without a doubt Jenkins did evade process. Oswald did not intentionally delay service but used different methods within her means in order to try to locate Jenkins at a valid address.

Ultimately, in the Chancellor's ruling stated that based on the testimony, Jenkins did not have an address that would be easily ascertained through searching on the internet nor through the telephone directory in the State of Mississippi and the tri-county area of Madison, Rankin, and/or Hinds. T at 67. The Chancellor further noted that Oswald's testimony was not only credible but that she was making diligent efforts in attempting to locating Jenkins. T.at 68.

## CONCLUSION


The Appellant insists that he was not trying to evade process. However, the actions of Jenkins are undisputable. For a person who presumably is not trying to avoid process, he certainly did not avail himself to the public. Not only did he rent a house when he moved back to Mississippi for three years, but the lease was not recorded with the court. Further, he only had a cell phone. Once he did obtain a telephone with a land line, he had telephone placed in his wife's name only. And lastly, upon examination by the Court, he was not able to answer the question as to when did he actually obtain a valid Mississippi driver's license. The one time Oswald ran into Jenkins, apparently when he had moved back to Mississippi, he furnished her with a bogus cell phone number. Although Oswald provided him with her correct cell and home telephone number, Jenkins never attempted to get in touch with her.

In the case at bar, Oswald has met the burden of good cause and proved why service of process was not made within the statute of limitations. Without a doubt, Oswald acted in a more than diligent matter in trying to effect service of process upon Jenkins. However, due to the misleading tactics of Jenkins, Oswald was unable to serve him within the 120-day limit. The facts are undisputable.

Clearly, Oswald's actions constitute sufficient evidence to support a finding of good cause in attempting to serve process upon Jenkins. Therefore, Oswald respectfully requests that this Court affirm the decision of the Chancery Court. To do otherwise would encourage and accept others engaging in the same type of avoidance methods.

DATED this the 7 day of May, 2008.

Respectfully submitted,

  
Betty T. Slade DeRossette  
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**CERTIFICATE OF SERVICE**

I certify that I have this date caused to be mailed by prepaid First Class United States Mail  
a true and correct copy of the above and foregoing Response to the Brief of Appellant to the  
following:

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SO CERTIFIED this the 7 day of May, 2008.

  
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