

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2023-012492

11/20/2023

HONORABLE FRANK W. MOSKOWITZ

CLERK OF THE COURT
J. Holguin
Deputy

SUN CITY GRAND COMMUNITY
ASSOCIATION INC

KATHERINE J MEROLO

v.

ANTHONY J ABATE, et al.

ANTHONY J ABATE
19726 N MOUNTAIN SAGE LN
SURPRISE AZ 85374

COLLEEN M ABATE
19726 N MOUNTAIN SAGE LN
SURPRISE AZ 85374
SECRETARY OF HOUSING AND
URBAN DEVELOPMENT
451 7TH ST SW
WASHINGTON DC 20410
JUDGE MOSKOWITZ

MINUTE ENTRY

Pending before the Court is Plaintiff's Motion to Extend Service Deadline, filed November 15, 2023 ("the Motion").

THE COURT FINDS AS FOLLOWS:

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“Rule 4(i) provides a mandatory extension based on good cause and a discretionary extension without a showing of good cause.” *Sholem v. Gass in & for Cnty. of Maricopa*, 248 Ariz. 281, 286 (2020).

The Court in *Sholem* went on to explain that:

Proving good cause under Rule 4(i) requires a plaintiff to show that, under the specific facts of the case, she exercised reasonable diligence in trying to serve the defendant. *See Grobe*, 105 Ariz. at 579, 468 P.2d at 938 (stating that former Rule 6(f) “places a legal duty upon a plaintiff to exercise due diligence in serving a defendant within” the prescribed time period); *Maher*, 211 Ariz. at 548 ¶ 14, 124 P.3d at 775 (“[T]o show good cause to extend time ... a plaintiff must demonstrate ... diligence in trying to serve the defendant.”).

To show reasonable diligence, a plaintiff must provide the court with a valid reason or explanation for failing to serve the defendant within the allotted time period. *See Snow*, 121 Ariz. at 83–84, 588 P.2d at 825–26 (stating that there was no good cause for an extension where plaintiff supplied no “satisfactory reason” for missing the service deadline); *Air Power, Inc.*, 142 Ariz. at 494, 496, 690 P.2d at 795, 797 (holding that there was no good cause shown where plaintiff failed to provide a valid reason or explanation “as to why service was not made within the one-year period”); *see also Boley v. Kaymark*, 123 F.3d 756, 758 (3rd Cir. 1997) (stating that under Federal Rule 4(m), “[i]n determining whether good cause exists, a court’s ‘primary focus is on the plaintiff’s reasons for not complying with the time limit in the first place’ ” (citation omitted)). Ignorance of the rule, mistake, and inadvertence do not constitute a valid reason for missing the service deadline. *See Mann v. Castiel*, 681 F.3d 368, 376 (D.C. Cir. 2012).

Specifically, a valid reason generally involves a circumstance such as “sudden illness, natural catastrophe, or [defendant’s] evasion of service of process,” all of which are outside a plaintiff’s control. *Gambino v. Vill. of Oakbrook*, 164 F.R.D. 271, 274 (M.D. Fla. 1995); *see also Lepone-Dempsey v. Carroll Cty. Comm’rs*, 476 F.3d 1277, 1281 (11th Cir. 2007) (“Good cause exists ‘only when some outside factor[,] such as reliance on faulty advice ... prevented service.’ ” (citation omitted)).

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However, abandoning service after a few unsuccessful attempts does not constitute diligence. *See Riley v. Superior Court*, 116 Ariz. 89, 91, 567 P.2d 1218, 1220 (App. 1977) (stating plaintiffs failed, in part, to exercise reasonable diligence because they made only one attempt to serve defendants, who had moved to China, while they were in the United States); *see also Barrett v. City of Allentown*, 152 F.R.D. 46, 48–49 (E.D. Pa. 1993) (stating there was no good cause for failure to make *290 **282 proper service under former Rule 4(j) where plaintiff made two attempts to serve the defendants with an original complaint and one attempt to serve the amended complaint). Additionally, diligence generally requires a plaintiff to engage in multiple attempts to serve the defendant *throughout* the allotted time period. *See D'Amario v. Russo*, 750 F. Supp. 560, 563–64 (D.R.I. 1990) (finding good cause shown where plaintiff attempted service on “numerous occasions throughout the month”); *cf. Saucedo v. Engelbrecht*, 149 Ariz. 18, 19, 716 P.2d 79, 80 (App. 1986) (finding diligence sufficient to satisfy due process and allow service by publication when the plaintiff made several attempts over eight months to locate and serve defendant).

Although Rule 4(i) provides a court discretion to grant an extension without good cause shown, this discretion is not “limitless.” *Efaw*, 473 F.3d at 1041; *see also Mann v. Castiel*, 729 F. Supp. 2d 191, 198 (D.D.C. 2010) (stating that under Federal Rule 4(m), “plaintiffs need not show good cause, but they must still show some cause as to why the Court should not dismiss their case.”) (internal quotation marks omitted). As an initial matter, a court's discretionary finding must be based on facts contained in the record. *See United Imps. and Exps., Inc. v. Superior Court*, 134 Ariz. 43, 46, 653 P.2d 691, 694 (1982), *abrogated on other grounds by Gonzalez v. Nguyen*, 243 Ariz. 531, 414 P.3d 1163 (2018) (“A discretionary finding of fact based on no evidence is arbitrary and an abuse of discretion.”).

In determining whether to grant a discretionary extension, courts have considered several factors, including whether: (1) the applicable statute of limitations bars the plaintiff from re-filing the action; (2) the defendant evaded service; and (3) the defendant would be prejudiced if the court grants the extension.

Id. at 289- 90.

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Here, Plaintiff states that it “provided payoff figures to Defendants. Plaintiff requests this extension so that updated payoff figures can be provided and then, if no payment is remitted, so that it can request and accomplish service by publication. This request is not may [sic] for any undue purpose or delay, but rather to conserve costs and resources.” While the Court appreciates the desire to conserve costs and resources, unfortunately that is not a relevant factor for an extension under *Sholem*.

IT IS THEREFORE ORDERED denying the Motion *without prejudice* to refiling provided a proper showing for an extension can be made under *Sholem*.