

2012 WL 3598815

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NOT FOR PUBLICATION
United States District Court,
D. New Jersey.

ADVANCED SURGERY CENTER, Plaintiff,

v.

CONNECTICUT GENERAL LIFE,
INSURANCE COMPANY, et al., Defendants.

Civil Action No. 12–2715 (JLL). | July 31, 2012.

Attorneys and Law Firms

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REPORT AND RECOMMENDATION

[MICHAEL A. HAMMER](#), United States Magistrate Judge.

*1 I. INTRODUCTION

This matter comes before the Court on the plaintiffs' motion for remand to the Superior Court of New Jersey, Law Division, Civil Part, Passaic County. The Honorable Jose L. Linares referred the matter to the Undersigned for Report and Recommendation. Pursuant to [Fed.R.Civ.P. 78](#), the Court did not hold oral argument. For the reasons set forth below, the Undersigned respectfully recommends that the plaintiff's motion be denied.

II. BACKGROUND

A. Factual Background

Plaintiff Advanced Surgery Center provides ambulatory surgical services and is located in Clifton, New Jersey. (Compl. (attached to Notice of Removal) ¶¶ 2, 9, Jan. 12, 2012, ECF No. 1–2). Defendant Connecticut General Life Insurance Company is a national health insurance carrier doing business in New Jersey and located in Bloomfield, Connecticut. (*Id.* ¶ 3.) Defendant CIGNA Healthcare of New Jersey, Inc., is a health insurance carrier in Jersey City, New Jersey. (*Id.* ¶ 4.) Advanced Surgery Center has allegedly

provided necessary surgery to patients with health benefits plans or policies that are provided or administered by the defendants. (*Id.* ¶¶ 1, 8.) According to the Complaint, the defendants have wrongfully denied payment on the plaintiffs' claims and reimbursement to Advanced Surgery Center because it is not a proper type of provider. (*Id.* ¶¶ 1, 8, 10) The patients have assigned their denied claims to Advanced Surgery Center. (*Id.* ¶¶ 1, 8–9.)

B. Procedural History

In an “unrelated matter,” on December 9, 2011, a claims resolution manager employed by the defendants emailed a paralegal of the counsel for Advanced Surgery Center. (Pl.'s Br. 3, 5, Ex. D, June 1, 2012, ECF No. 9.) The claims resolution manager stated, in pertinent part, that “[i]f I understood your question you wanted the proper entity name to serve its Connecticut General Life Insurance Company. You can send it certified to my attention or serve through our NJ process server and that's CT Corp.” (Pl.'s Br. Ex. D.)

In present matter, on January 17, 2012, Advanced Surgery Center filed the Complaint in the Superior Court of New Jersey, Law Division, Civil Part, Passaic County, against Connecticut General Life Insurance Company and CIGNA Healthcare of New Jersey. (Notice of Removal Ex. F, May 7, 2012, ECF No. 1–7.)

On February 2, 2012, Advanced Surgery Center personally served the managing agent of CIGNA Healthcare of New Jersey at its office in Jersey City, New Jersey. (Notice of Removal ¶ 3, May 7, 2012, ECF No. 1.) On the same day, Advanced Surgery Center personally served an employee of Connecticut General Life Insurance Company at its office in Bloomfield, Connecticut, namely, Donna Gaudet, the Incoming Legal Coordinator. (Notice of Removal ¶ 3, Ex. B; Pl.'s Br. Ex. C.)

On March 27, 2012, a series of emails crossed between a paralegal for counsel for Advanced Surgery Center and a claims resolution manager for defendants. The paralegal advised the claims resolution manager that the time to answer had expired and attached the February 2, 2012 proof of service and the Complaint. (Pl.'s Br. Ex. E.) The claims resolution manager responded that she had forwarded the email to the defendants' in-house counsel and stated: “Thanks very much for not filing the dismissal ... [sic].” (*Id.*) In a later email that same day, the claims resolution manager apologized for the “internal mix-up with this lawsuit” and stated, “[w]e have

someone looking at this right away, can we please have a 15 day extension?" (Pl.'s Br. Ex. F.)

*2 On March 29, 2012, an attorney for Advanced Surgery Center emailed the defendants' counsel for the purpose of transmitting contact information and noted that the Complaint contained a notice to produce. (Pl.'s Br. Ex. G.) On March 30, 2012, the defendants' counsel emailed a response and wrote in pertinent part:

Per our conversation, please see the attached stipulation to extend time to answer or otherwise respond. If it meets your approval, please sign and send it back to me. I will file it with the court along with our response. Also per our conversation, I note that the agreed upon extension is not meant for removal purposes; the time to remove has expired in any event.

(*Id.*) On April 5, 2012, a paralegal for Advanced Surgery Center forwarded to defendants' counsel a signed stipulation extending time to answer, move, or otherwise respond to the Complaint until May 7, 2012. (Pl.'s Br. Ex. H.) In pertinent part, the stipulation stated: "The parties acknowledge this Stipulation in no way extends Defendants' time to remove this action to federal court." (*Id.*) The stipulation was signed only by counsel for Advanced Surgery Center. (*Id.*) The stipulation was never filed.

On May 7, 2012, the defendants removed this action to the United States District Court, District of New Jersey. The defendants ground their removal in federal question jurisdiction under ERISA or, alternatively, in diversity jurisdiction along with assertions that CIGNA Healthcare of New Jersey was fraudulently joined. (Notice of Removal ¶¶ 10–26.) The defendants stated in their notice of removal that Connecticut General Life Insurance Company was never properly served and therefore its thirty-day opportunity for removal had never begun. (*Id.* ¶ 37.)

Later on May 7, 2012, the defendants applied for a Clerk's extension of time to answer, move, or otherwise respond to the Complaint. (Appl. & Proposed Order, May 7, 2012, ECF No. 3.) The extension request asserted that the defendants' time to answer had not expired and that they had not waived any defenses. (*Id.*) The Clerk of the Court granted the extension. (Clerk's Text Order, May 9, 2012.)

On May 29, 2012, the defendants moved to dismiss the Complaint for failure to state a claim under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#). (Mot. to Dismiss, May 29, 2012, ECF No. 6.)

On June 1, 2012, Advanced Surgery Center filed the present motion to remand this action to the Superior Court of New Jersey, Civil Part, Law Division, Passaic County. (Mot. to Remand, June 1, 2012, ECF No. 9.) On July 2, 2012, the defendants filed their opposition to the motion. (Opp'n Br., July 2, 2012, ECF No. 14.) On July 9, 2012, Advanced Surgery Center filed its reply. (Reply Br., July 9, 2012, ECF No. 15.) On July 16, 2012, the defendants filed a letter requesting leave to file a sur-reply, contending that Advanced Surgery Center has raised a new legal argument for the first time in its reply. (Defs.' Letter, July 16, 2012, ECF No. 17.)¹

¹ On the same day, Advanced Surgery Center filed errata sheets regarding the tables of contents and authorities in its briefing materials. (Notice of Errata, July 16, 2012, ECF No. 18.)

*3 On July 17, 2012, Advanced Surgery Center filed a letter opposing the request for a sur-reply and asking for permission to file a sur-sur-reply if the request is granted. (Pl.'s Letter, July 17, 2012, ECF No. 19.) On July 18, 2012, the Court granted permission to file the sur-reply and permitted Advanced Surgery Center to file a sur-sur-reply. (Text Order, July 18, 2012, ECF No. 20.) On July 24, 2012, Advanced Surgery Center filed its sur-sur-reply. (Pl.'s Letter, July 24, 2012, ECF No. 23.)

III. DISCUSSION

As an initial matter, the Court notes that a decision to remand is dispositive. *In re U.S. Healthcare*, 159 F.3d 142, 146 (3d Cir.1998) (“[A]n order of remand is no less dispositive than a dismissal order of a federal action for lack of subject matter jurisdiction where a parallel proceeding is pending in the state court.”) Accordingly, the Undersigned makes the following report and recommendation to the assigned United States District Judge, the Honorable Jose L. Linares.

A. Motion for Remand²

² Although not raised by the parties, the Court notes that Congress recently passed the Federal Courts Jurisdiction and Venue Clarification Act of 2011, [Pub.L. No. 112–63, 125 Stat. 758](#) (Dec. 7, 2011), which amended [28 U.S.C. § 1446](#), among others statutes. The law sought

to “bring[] more clarity to the operation of Federal jurisdictional statutes and facilitate[] the identification of the appropriate State or Federal court where actions should be brought.” H.R. 122–10, at 1–2 *reprinted in* 2011 U.S.C.C.A.N. 576, 577. Under Section 205, the Act took effect “upon the expiration of the 30–day period beginning on the date of [its] enactment.” Pub.L. No. 112–63, § 205, 125 Stat. 758. § 205 H.R. 394, Pub.L. No. 112–61. As the President signed the bill into law on December 7, 2011, the Act took effect upon the expiration of January 6, 2012. Accordingly, the revised statute applies to this case.

Title 28, Section 1441(a) of the United States Code permits a defendant to remove a civil action in state court to a federal court where the action could have been filed originally, that is, where the federal court has subject matter jurisdiction over the action. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). Section 1446 outlines the procedures for removal, and Section 1447 outlines the procedures following removal. 28 U.S.C. §§ 1446, 1447. Defects in removal may be procedural or jurisdictional. Under 28 U.S.C. § 1446(b)(1), a defendant has thirty days to remove a case, and this time limit “is a procedural provision, not a jurisdictional one.” *Farina v. Nokia Inc.*, 625 F.3d 97, 114 (3d Cir.2010) (citing *Ariel Land Owners, Inc. v. Dring*, 351 F.3d 611, 614 (3d Cir.2003)). In turn, a plaintiff’s “motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a).” 28 U.S.C. § 1447(c). Jurisdictional defects, however, may be raised at any time. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 69, 117 S.Ct. 467, 136 L.Ed.2d 437 (1996).

Defendants bear the burden of demonstrating that removal was proper as they are the parties asserting federal jurisdiction. *Frederico v. Home Depot*, 507 F.3d 188, 193 (3d Cir.2007); *see also Brown v. Jevic*, 575 F.3d 322, 326 (3d Cir.2009) (describing burden as “heavy”). The removal statutes “are to be strictly construed against removal and all doubts should be resolved in favor of remand.” *Boyer v. Snap-On Tools Corp.*, 913 F.2d 108, 111 (3d Cir.1990) (citing *Steel Valley Auth. v. Union Switch & Signal Div.*, 809 F.2d 1006, 1010 (3d Cir.1987)).

Here, the fundamental issue is whether there was a procedural defect in the notice of removal, namely, whether the defendants’ notice of removal was timely.

B. Removal's Thirty Day Time Limit

*4 Title 28, Section 1446(b)(1) of the United States Code states that “[t]he notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based....” 28 U.S.C. § 1446(b)(1). The Supreme Court has held that “a named defendant’s time to remove is triggered by simultaneous service of the summons and complaint, or receipt of the complaint, ‘through service or otherwise,’ after and apart from service of the summons, but not by mere receipt of the complaint unattended by any formal service.” *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347–48, 119 S.Ct. 1322, 143 L.Ed.2d 448 (1999). The Court based this interpretation of Section 1446 “in light of a bedrock principle” that “[a]n individual or entity named as a defendant is not obliged to engage in litigation unless notified of the action, and brought under a court’s authority, by formal process .” *Murphy*, 526 U.S. at 347. Accordingly, “the removal period for a defendant does not begin to run until that defendant is properly served or until that defendant waives service.” *Di Loreto v. Costigan*, 351 F. App’x 747, 751 (3d Cir.2009) (citing *Murphy*, 526 U.S. at 350.). Whether a defendant has waived service so as to trigger the removal period is a question of state law. *See Di Loreto*, 351 F. App’x at 752 (“Since Costigan was never officially served in accordance with the Pennsylvania Rules of Civil Procedure, we must determine when he waived service so as to trigger his removal period.”). In addition, the Third Circuit has interpreted the words “initial pleading” to mean the complaint. *See Sikirica v. Nationwide Ins. Co.*, 416 F.3d 214, 222–23 (3d Cir.2005).

C. Analysis

This motion requires the Court to consider three issues. First, the Court must determine whether Advanced Surgery Center properly served process on Connecticut General Life Insurance Company. Second, regardless of whether service was proper, the Court must determine whether simultaneous receipt of the summons and complaint triggered the thirty-day period for removal. Third, the Court must consider whether service was nonetheless effected by waiver, consent, or otherwise, thereby triggering the removal period.

1. Whether Service of Process was Proper

It is undisputed that, if the February 2, 2012 service of process on Connecticut General Life Insurance Company was effective, then its thirty day clock to remove began on that day. *See* 28 U.S.C. § 1446(b)(1); *Murphy Bros.*,

526 U.S. at 347–48. Connecticut General Life Insurance Company is a Connecticut corporation doing business in New Jersey and, pursuant to [N.J. Stat. Ann. 17B:23–2\(c\)](#), has designated the New Jersey Department of Banking and Insurance as its registered agent for service of process in New Jersey. (See Compl. ¶ 3; Notice of Removal ¶¶ 17, 30–31.) According to Advanced Surgery Center's affidavit of service, its service processor went to the office of Connecticut General Life Insurance Company in Bloomfield, Connecticut, and personally served a Donna Gaudet, who is the Incoming Legal Coordinator. (Pl.'s Br. Ex C.)³

³ The process server also indicated the box stating that he “[l]eft a copy with a person authorized to accept service, e.g. managing agent, registered agent, etc. (indicate name & official title at right).” (Pl.'s Br. Ex. C.) Connecticut General Life Insurance Company's notice of removal attaches the declaration of Donna Gaudet who stated that she indeed “personally accepted in-hand service, on behalf of CGLIC, of the Summons and Complaint in the above-captioned matter at CGLIC's office in Bloomfield, Connecticut.” (Notice of Removal Ex. B.) No party has raised concerns that Ms. Gaudet was a person who was not authorized to receive service. Notably, however, “New Jersey has adopted the federal rule ‘that the plaintiff has the burden of showing that an alleged agent has specific authority, express or implied, for receipt of process.’” [Lee v. Genuardi's Family Markets, L.P.](#), Civ. No. 10–1641, 2010 WL 2869454, at *4 (D.N.J. July 19, 2010) (quoting [Zoning Bd. of Adjustment of Sparta Twp. v. Serv. Elec. Cable](#), 198 N.J.Super. 370, 377, 487 A.2d 331 (App.Div.1985)).

*5 Connecticut General Life Insurance Company argues that, since it is a non-resident corporation, Advanced Surgery Center could have served its in-state registered agent and failed to make a diligent effort and inquiry before seeking to effect service outside the state. (Notice of Removal ¶¶ 30–36; Opp'n Br. 5–9.). Advanced Surgery Center argues that service is proper notwithstanding any “technical violation” of the New Jersey Court Rules. (Reply Br. 4–6.) Specifically, it argues that propriety of service is governed by due process concerns and “inquiry as to proper service turns wholly upon whether due process has been afforded to the defendant by meeting the constitutional requirements set out by Justice Jackson in [Mullane v. Central Hanover Bank & Trust Co.](#), 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950)].” (Reply Br. 5.) In this regard, Advanced Surgery Center looks to [Rosa v. Araujo](#), 260 N.J.Super. 458, 616 A.2d 1328 (App.Div.1992), wherein a motion to vacate a default judgment was denied, notwithstanding defective

service on an in-state defendant, because the defendant had received the summons and complaint and turned it over to his attorney before default judgment was entered. *Id.* at 463, 616 A.2d 1328. Advanced Surgery Center contends that service was proper because Connecticut General Life Insurance Company “received the summons and complaint, w[as] aware of the nature of the lawsuit, and had turned the matter over to an attorney who actively participated in the representation.” (Reply Br. 6.)

Under New Jersey law, personal service is the primary method of effecting service. See [N.J. Ct. R. 4:4–4\(a\)](#), [4:4–5\(a\)](#). [New Jersey Court Rules 4:4–3](#) and [4:4–4\(a\)](#) prescribe the methods of effecting personal service within the state. In pertinent part, [New Jersey Court Rule 4:4–4\(a\)\(6\)](#) describes how to serve a domestic corporation and states that service is made by personally serving a copy of the summons and complaint

- on any officer, director, trustee or managing or general agent, or any person authorized by appointment or by law to receive service of process on behalf of the corporation,
- or on a person at the registered office of the corporation in charge thereof,
- or, if service cannot be made on any of those persons, then on a person at the principal place of business of the corporation in this State in charge thereof,
- or if there is no place of business in this State, then on any employee of the corporation within this State acting in the discharge of his or her duties, provided, however, that a foreign corporation may be served only as herein prescribed subject to due process of law

[N.J. Ct. R. 4:4–4\(a\)\(6\)](#) (bullet points added for clarity).

When personal service cannot be effected within the state, [Rule 4:4–4\(b\)](#) permits substituted or constructive service to obtain personal jurisdiction over a defendant. See [N.J. Ct. R. 4:4–4\(b\)](#). [Rule 4:4–4\(b\)\(1\)\(A\)](#) permits personal service in other states in the United States and the District Columbia “in the same manner as if service were made within this State.” Substituted or constructive service, however, requires an affidavit demonstrating “diligent effort and inquiry” that satisfies the requirements specified in [New Jersey Court Rule 4:4–5\(b\)](#). [N.J. Ct. R. 4:4–4\(b\) \(1\)](#) (“By Mail or Personal Service Outside the State. If it appears by affidavit satisfying the requirements of R. 4:4–5(b) that despite diligent effort and

inquiry personal service cannot be made in accordance with paragraph (a) of this rule, then, consistent with due process of law, *in personam* jurisdiction may be obtained over any defendant as follows:”).

*6 The Appellate Division of the New Jersey Superior Court has stated that “[t]he filing of an affidavit of inquiry is not a mere technicality—it is a mandatory jurisdictional requirement.” *Burgos v. Int'l Vacation Club, Ltd.*, Docket No. L-1721-09, 2012 WL 787385, at *2 (N.J.Super.Ct.App.Div. Mar.13, 2012) (finding that the failure to file an affidavit of service was one of “several fatal defects in service of process”).⁴ “If a defendant cannot be personally served within the State, in personam jurisdiction can only be obtained by mail or personal service outside the State ‘[i]f it appears by affidavit satisfying the requirements of R. 4:4–5(b) that despite diligent effect and inquiry personal service cannot be made in accordance with [Rule 4:4–4(a)].’ ” *Burgos*, 2012 WL 787385, at *2 (quoting N.J. Civ. R. 4:4–4(b) (1)) (alteration in *Burgos*). Notably, the failure to include an affidavit of diligent inquiry will not support a default or default judgment. *See, e.g., Mettle v. First Union Nat'l Bank*, 279 F.Supp.2d 598, 603–04 (D.N.J.2003) (setting aside default for failures to effect service, among which included failure to file affidavit of due diligence); *Burgos*, 2012 WL 787385, at *2–3 (vacating default judgment, notwithstanding defendant's actual notice of suit, because service defects, including failure to file affidavit of due diligence, did not allow court to obtain in personam jurisdiction); *Sobel v. Long Island Entm't Prods., Inc.*, 329 N.J.Super. 285, 290–95, 747 A.2d 796 (App.Div.2000) (same); *Durham v. Ramada, Inn*, Docket Nos. L-8022-02, L-1312-05, 2007 WL 1649896, at *1 (N.J.Super.Ct.App.Div. June 8, 2007) (affirming decision to vacate default where service was improper for failing to file affidavit of diligent inquiry). This same failure can result in dismissal of a case for defective service. *See, e.g., Chhparwal, M.D. v. W. Va. Univ. Hosps., Inc.*, Civ. No. 07–3608, 2008 WL 1809392, at *2–4 (D.N.J. Apr. 22, 2008); *Signs by Tomorrow–USA, Inc. v. G.W. Engel Co.*, Civ. No. 05–4353, 2006 WL 2224416, at *3–5 (D.N.J. Aug. 1, 2006); *Cf. Mettle*, 279 F.Supp.2d at 603–05 (considering dismissal for failure to serve but granting extension because of plaintiff's pro se status). Accordingly, the failure to file an affidavit of diligent inquiry is not a mere technicality, but error that deprives a court of jurisdiction.⁵

⁴ “The purpose of the rule requiring an affidavit of diligent inquiry is to assure the court that it has personal jurisdiction to enter judgment and that the defendant's

right to due process has not been violated.” *Arianna Holding Co. v. Cummings*, Docket No. F-31268-08, 2011 WL 2671805, at *3 (N.J.Super.Ct.App.Div. July 11, 2011) (Finding affidavit deficient and rejecting argument that due process and substituted service by mail were satisfied “if the facts later show that the defendant actually resided at the address to which process was mailed”).

⁵ Advanced Surgery Center's extensive reliance on *Rosa v. Araujo*, 260 N.J.Super. 458, 616 A.2d 1328 (App.Div.1992), does not change this result. Advanced Surgery Center's argument incorrectly posits that due process, notice, service of process, and personal jurisdiction mean the same thing. Actual notice may comport with due process, *see Sobel*, 329 N.J.Super. at 292–94, 747 A.2d 796, but substantial deviations from the service of process rules will not guarantee that a court has jurisdiction over a party. *Id.* at 293–94, 747 A.2d 796. Notwithstanding actual notice and sufficient time to respond to a complaint, failure to comply with the rules of service may deprive a court of *in personam* jurisdiction. *Id.* at 294, 747 A.2d 796 (“The defendant had actual notice of the suit, but neither of the methods of service which were used complied with the applicable rules for obtaining *in personam* jurisdiction.”). As described above, Advanced Surgery Center's flaw in service was such a fatal failure whereas in *Rosa* it was not.

Thus, Advanced Surgery Center's service on Connecticut General Life Insurance Company was defective.

2. Whether Improper Service Triggers Thirty–Day Removal Period

Advanced Surgery Center also contends that, regardless of the propriety of service, the simultaneous receipt of the summons and complaint is all that is required to start the thirty-day removal clock under the United States Supreme Court's decision in *Murphy Brothers*. (Reply Br. at 7.) In support, Advanced Surgery Center points to *Granovsky v. Pfizer, Inc.*, 631 F.Supp.2d 554, 562 (D.N.J.2009), and *MacDonald v. Township of Wall Police Department*, Civ. No. 11–1598, 2011 WL 1740410, at *2 (D.N.J. May 4, 2011). From these cases, Advanced Surgery Centers argues that when the thirty-day removal clock begins is a federal inquiry “not triggered by state service rules regarding personal jurisdiction” and that “it is simply the receipt of the summons and complaint [that] triggers the 30–day removal clock, even if such service is not ‘effective’ under state law for purposes of obtaining personal jurisdiction.” (Reply Br. at 8.)

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