

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

|                                             |   |                  |
|---------------------------------------------|---|------------------|
| -----X                                      |   |                  |
| ALICIA ETHEREDGE-BROWN and ROBERT BROWN,    | : |                  |
|                                             | : |                  |
| Plaintiffs,                                 | : |                  |
|                                             | : | 13-CV-1982 (JPO) |
| -v-                                         | : |                  |
|                                             | : | <u>ORDER</u>     |
| AMERICAN MEDIA, INC. and DERRICK HANDSPIKE, | : |                  |
|                                             | : |                  |
| Defendants.                                 | : |                  |
| -----X                                      |   |                  |

J. PAUL OETKEN, District Judge:

Alicia Etheredge-Brown and Robert Brown (together, “Plaintiffs”) bring this action for defamation. They now move for a default judgment against Derrick Handspike, the sole remaining defendant. For the reasons that follow, Plaintiffs’ motion for default judgment is denied without prejudice, and Plaintiffs are ordered to show cause why this case should not be dismissed under Rule 4(m) of the Federal Rules of Civil Procedure.

**I. Background**

Plaintiffs filed this diversity action on or around March 25, 2013, asserting defamation claims against Handspike and American Media, Inc. (“AMI”),<sup>1</sup> the owner of a publication called the “National Enquirer.” (Dkt. No. 1.) In March 2014, the Court denied a motion for summary judgment by AMI on the grounds of the statute of limitations (Dkt. No. 17), and ultimately the claims against AMI were dismissed with prejudice (Dkt. No. 25).

---

<sup>1</sup> This entity was designated “America Media, Inc.” in the complaint.

Plaintiffs did not serve Handspike with process until May 30, 2014.<sup>2</sup> (Dkt. No. 23.) Handspike failed to respond. The Clerk of the Court entered a certificate of default as to Handspike on January 5, 2015 (Dkt. No. 30), and on January 14, 2015, Plaintiffs filed this motion for default judgment (Dkt. No. 32).

## II. Discussion

As pertinent here, Rule 4(m) provides:

If a defendant is not served within 120 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

Fed. R. Civ. P. 4(m). The rule “give[s] wide latitude to courts in deciding when to grant extensions on time to serve, including permitting courts to grant extensions even absent good cause.” *Gerena v. Korb*, 617 F.3d 197, 212 (2d Cir. 2010). However, while a court “*may* grant an extension in the absence of good cause, . . . it is not required to do so.” *Zapata v. City of New York*, 502 F.3d 192, 197 (2d Cir. 2007). “To obtain a discretionary extension absent a showing of good cause, ‘the plaintiff must ordinarily advance some colorable excuse for neglect.’” *Smith v. Bray*, No. 13 Civ. 7172 (NSR) (LMS), 2014 WL 5823073, at \*6 (S.D.N.Y. Nov. 10, 2014)

---

<sup>2</sup> There are discrepancies in the record as to the date on which Handspike was served. On the one hand, the Clerk’s Certificate of Default states that Handspike was served on May 30, 2013; the Court notes, however, that the final digit in the year of service appears to be handwritten. (Dkt. No. 30.) Additionally, Plaintiffs’ motion for entry of default states that Handspike was served on May 30, 2013. (Dkt. No. 32 ¶ 2.) On the other hand, the affidavit of Plaintiffs’ counsel states that Handspike was served on May 30, 2014. (Dkt. No. 33 ¶ 3.) Finally, and most importantly, the affidavit of service filed by Plaintiffs states that Handspike was served on May 30, 2014, at 4:06 p.m. (Dkt. No. 23.) Thus, the Court considers the record to reflect that service on Handspike was effected on May 30, 2014.

(quoting *Zapata*, 502 F.3d at 198 n.7); see also *Stewart v. City of New York*, No. 06 Civ. 15490 (RMB) (FM), 2008 WL 1699797, at \*7 (S.D.N.Y. Apr. 9, 2008) (declining to grant an extension of time *nunc pro tunc* “because [the plaintiff] took no steps to extend the Rule 4(m) deadline for service within a reasonable time after its expiration”).

In this case, Plaintiffs did not serve Handspike until more than 400 days after filing the complaint, well beyond the 120-day window provided by Rule 4(m). Plaintiffs have made no effort to account for this failure in their moving papers. Plaintiffs must show good cause for the late service on Handspike, or at least “some colorable excuse for neglect,” or the claims against him will be dismissed. See *Zapata*, 502 F.3d at 199 (affirming dismissal of claim under Rule 4(m) where plaintiff “made no effort to effect service within the service period, neglected to ask for an extension within a reasonable period of time, and has advanced no cognizable excuse for the delay”). Plaintiffs’ motion for default judgment is denied without prejudice, and may be refiled in the event that the overdue service on Handspike is not fatal to these claims.

### III. Conclusion

For the foregoing reasons, Plaintiffs’ motion for default judgment against Handspike is DENIED without prejudice. Within 30 days of this order, Plaintiffs must show cause why the claims against Handspike should not be dismissed for Plaintiffs’ failure to serve Handspike within the time provided by Rule 4(m).

The Clerk of the Court is directed to close the motion at docket number 32.

SO ORDERED.

Dated: April 16, 2015  
New York, New York

  
J. PAUL OETKEN  
United States District Judge