

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT IN
AND FOR BROWARD, FLORIDA

CIRCUIT CIVIL DIVISION

CASE NO.: CACE 20-002818 (02)

WILLIAM J. MITCHELL,

Plaintiff,

vs.

BEN SMITH,

Defendant.

MOTION FOR EXTENSION OF TIME TO SERVE THE COMPLAINT

Plaintiff William J. Mitchell ("Mitchell"), by and through the undersigned counsel and pursuant to Fla. R. Civ. P. 1.070(j), hereby requests an extension of time up to and including ninety (90) days to serve the summons and complaint upon Defendant Ben Smith and states:

1. Mitchell brings suit against Ben Smith for defamation because Ben Smith created and posted several YouTube videos which stated at Mitchell cheated, falsified, and lied about Mitchell's records for Donkey Kong and Pac-Man scores. Mitchell set many video game records dating back to the 1980's. Ben Smith created and posted these YouTube videos under his alias Apollo Legend.

2. Ben Smith, who resides in Oregon, even flew to South Florida attend a video-game event in Broward County that Mitchell attended. Ben Smith dressed up as Mitchell and recorded the event without Mitchell's consent and then used the content in at least one YouTube video where Ben Smith called Mitchell a cheater and a liar.

3. Mitchell filed suit on February 14, 2020 and, until recently, was appearing pro

se. Mitchell, via the undersigned, then promptly sought issuance of an eSummons with the intent to serve Ben Smith on an expedited basis. Ex. 1.

4. However, the 120 days to serve a complaint per Fla. R. Civ. P. 1.070(j) will soon run on June 15, 2020 and Mitchell hereby requests an extension up to and including ninety days to effect service, which will allow for service on an out of state resident.

5. Fla. R. Civ. P. 1.070(j) provides:

(j) Summons; Time Limit. If service of the initial process and initial pleading is not made upon a defendant within 120 days after filing of the initial pleading directed to that defendant *the court, on its own initiative after notice or on motion, shall direct that service be effected within a specified time or shall dismiss the action without prejudice or drop that defendant as a party; provided that if the plaintiff shows good cause or excusable neglect for the failure, the court shall extend the time for service for an appropriate period.* When a motion for leave to amend with the attached proposed amended complaint is filed, the 120-day period for service of amended complaints on the new party or parties shall begin upon the entry of an order granting leave to amend. A dismissal under this subdivision shall not be considered a voluntary dismissal or operate as an adjudication on the merits under rule 1.420(a)(1).

Id. (emphasis added).

6. Due to the two-year statute of limitations under § 95.11(4)(g) Fla. Stat., one of YouTube videos that gives rise to the claim would become time-barred if a dismissal occurs. Under such circumstances, Florida courts extend the time for service so that Rule 1.070(j) does not prevent cases from being decided on the merits or operate as a dismissal with prejudice. In *Mitschke-Collande v. Skipworth Properties*, 201 So. 3d 660, 662-664 (Fla. 3d DCA 2016), the Third DCA held that the trial court should have extended time for service even if good cause or excusable neglect was not present because the statute of limitations ran:

The heirs, on the other hand, argued that even if they had not acted diligently and failed to demonstrate either good cause or excusable neglect, the court still had the discretion to allow service, and its discretion should normally be exercised in favor of extending the time for service of process where, as here, the statute of limitations will have run against SwissPartners. The trial court accepted the narrower

construction of the rule advanced by SwissPartners and dismissed the Second Amended and Supplemented Complaint insofar as it pertains to SwissPartners, with prejudice. We conclude the trial court misapplied the rule, and reverse and remand the case for further proceedings.

Id.; *Roberts v. Stidham*, 19 So. 3d 1155, 1157-1158 (Fla. 5th DCA 2009) (“However, even when there has been no showing of good cause or excusable neglect and the statute of limitations has run, discretion should be exercised in favor of allowing the plaintiff an extension to accomplish service.”); *Sly v. McKeithen*, 27 So. 3d 86, 87-88 (Fla. 5th DCA 2009) (“In situations where the statute of limitations has run, the trial court should normally exercise discretion in favor of giving the plaintiff additional time to perfect service. Where the statute of limitations has run, ‘[d]iscretion in these circumstances must be exercised with the understanding that Florida has a longstanding policy in favor of resolving civil disputes on the merits. Because the statute of limitations had run and service had been obtained prior to the hearing on the motion to dismiss, we conclude that the trial court abused its discretion in granting the motion to dismiss.’”).

7. Good cause or excusable neglect are present because Mitchell is no longer pro se and is taking active steps to serve Ben Smith and this motion is filed prior to the end of the 120 period, though good cause or excusable neglect are not required for an extension of time. *Premier Capital, LLC v. Davalle*, 994 So. 2d 360, 362 (Fla. 3d DCA 2008) (“However, we do not address whether the trial court abused its discretion in determining that no showing of good cause was made during the 120-day service period. We do find error in the trial court's failure to consider that it was permitted to grant an extension of time for service, even without a showing of good cause.”).

8. Accordingly, Mitchell requests an additional ninety days to serve the summons and complaint upon Ben Smith.

Wherefore, Plaintiff William J. Mitchell respectfully requests an extension of time up to

and including ninety (90) days to serve the summons and complaint upon Defendant Ben Smith.

Date: June 15, 2020

Respectfully submitted,

Law Offices of James A. Stepan, P.A.
8570 Stirling Road Suite 102-161
Hollywood, FL 33024
(305) 607-0678

/s/ James A. Stepan
James A. Stepan
Florida Bar No. 0184896
jstepan@stepanlaw.com