

No. 19-1122

IN THE

Supreme Court of the United States

HONG TANG

Petitioner

V.

THE UNIVERSITY OF BALTIMORE, et al.

Respondents

On Petition For Writ of Certiorari

To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR REHEARING

HONG TANG

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PETITION FOR REHEARING

ARGUMENTS

Pursuant to Supreme Court Rule 44.2, *pro se* petitioner Hong Tang ("petitioner") respectfully petitions this Court for an order (1) granting rehearing, (2) vacating the Court's May 18, 2020, order denying certiorari, and (3) redispensing of this case by granting the petition for a writ of certiorari, and remanding to the Fourth Circuit for the purpose(s) of clarifying the Fourth Circuit's August 7, 2019, judgment for expressly directing the district court to apply the federal tolling principles to the petitioner's subsequently re-filed suit in the district court (*Hong Tang v. Kurt L. Schmoke*, et al., Civil Action No. SAG-19-2965 (United States District Court for the District of Maryland)), and/or of further modifying the district court's dismissal order to show that the service on one of the seven defendants, The University of Baltimore, was proper and sufficient.

This suit was brought by *pro se* litigant against the University of Baltimore and five current and former university officials of the University of Baltimore, pursuant to 42 U.S.C. § 1983 on July 18, 2018.

On August 7, 2019, the United States Court of Appeals for the Fourth Circuit affirmed the district court's dismissal order but modified the order to show that the

dismissal was solely based on jurisdictional grounds and is without prejudice, and specifically allows the petitioner to cure the jurisdictional deficiency.

The Fourth Circuit issued the mandate on October 9, 2019. Petitioner re-filed the suit in the same district court on October 10, 2019. [See *Hong Tang v. Kurt L. Schmoke*, et al., Civil Action No. SAG-19-2965 (United States District Court for the District of Maryland)].

Upon the re-filing of the suit, the district court immediately issued an order to show cause, directing the petitioner to show cause why the re-filed suit should not be dismissed. Petitioner timely responded to the order and the district court allowed the re-filed suit to proceed and issued new summons accordingly.

However, respondents filed a motion to dismiss in the re-filed suit, alleging that the statute of limitations was not tolled during the pendency of the first suit and thus the re-filed suit is time-barred. Pursuant to the district court's order dated May 27, 2020, petitioner's response to the motion to dismiss is due on or before June 15, 2020. (See Appendix 1).

Although the Fourth Circuit's August 7, 2019, judgment apparently does not intend to prematurely dismiss the case with prejudice, intends to afford the petitioner an opportunity to cure the jurisdictional defect, and should be construed as express

reservation of petitioner's right to maintain the second action, the Fourth Circuit did not expressly direct the district court to apply the federal tolling principles to the subsequently re-filed suit in the district court and thus expressly allow the re-filed suit to proceed free from statute of limitations considerations. *Tang v. Univ. of Baltimore*, Case No. 19-1146 (4th Cir. 2019) ["...This requirement prevents a court without jurisdiction from prematurely dismissing a case with prejudice. *Id.* The court's dismissal of a plaintiff's case because the plaintiff lacks jurisdiction is not a determination of the merits and does not prevent the plaintiff from pursuing a claim in a court that does have proper jurisdiction or otherwise curing the jurisdictional defect. *Id.*; see also *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 109 (1998) ('However desirable prompt resolution of the merits . . . question may be, it is not as important as observing the constitutional limits set upon courts.').... Accordingly, we modify the district court's order to show that the dismissal is based on jurisdictional grounds and is without prejudice and affirm as modified."].

In the re-filed suit, the defendants' motion to dismiss challenged the court's jurisdiction based on Maryland statute of limitations and Maryland tolling rules (alleged Maryland's lack of an equitable tolling rule).

Petitioner's Response to defendants' motion to dismiss has been filed in the district court on June 11, 2020. [See *Hong Tang v. Kurt L. Schmoke, et al.*, Civil Action No.

SAG-19-2965 (United States District Court for the District of Maryland), ECF No. 14].

Given the Fourth Circuit's clear intents and express reservation of petitioner's right to maintain a second action in this matter, it would be inequitable to preclude petitioner from asserting a claim under the principle of time-barred, where, as in the instant case, **purely due to the Circuit Court judgment's lack of an express direction to the district court to expressly permit a re-filed action to proceed.** See *Cf. Parker v. Blauvelt Volunteer Fire Company, Inc.*, 93 N.Y.2d 343, 690 N.Y.S.2d 478, 712 N.E.2d 647 (N.Y. 1999) ["... In addition, the Supreme Court dismissed the civil rights claims 'without prejudice to [plaintiffs] commencement of the appropriate plenary action.' It would be inequitable to preclude a party from asserting a claim under the principle of res judicata, where, as in this case, '[t]he court in the first action has expressly reserved the plaintiff's right to maintain the second action' (Restatement [Second] of Judgments § 26[1][b]). Thus, a rigid application of res judicata in this instance, rather than preventing plaintiff from obtaining two days in court, would unjustly 'deprive him of one' (Matter of Reilly v. Reid, *supra*, 45 N.Y.2d, at 28)."].

Further, in this case, neither in the initial claim/action nor in the second claim/action (the re-filed suit), respondents-defendants ever challenged the timely

filing of the initial claim/action on July 18, 2018 or the validity of the service of the summons and the original complaint on the University of Baltimore on September 12, 2018 in the initial claim/action. It should also be noted that although the Fourth Circuit found improper service in the initial claim/action, the finding was limited to the first amended complaint (FAC) and the subsequently-issued summons to the six additional defendants (all six additional defendants were sued in both individual and official capacities, except one of whom was sued in her official capacity only.).

As mentioned earlier, the validity of the service of the original complaint and the summons upon the defendant, The University of Baltimore, was unchallenged and undisputed, the defense to which was otherwise not asserted and thus was deemed to have been waived by the respondents-defendants. See *Tang v. Univ. of Baltimore*, Civil Action No. JKB-18-2200 [ECF #11, "NOTICE of Appearance by Matthew Paul Reinhart on behalf of The University of Baltimore"]; Fed. R. Civ. P. 12.

Moreover, besides the aforementioned proper and sufficient service of the summons and original complaint on defendant The University of Baltimore, the first amended complaint (FAC) was also properly served on the defendant through the district court's CM/ECF system. Fed. R. Civ. P. 5(b)(2)(E). The validity of such kind of service is duly recognized and confirmed by the sister district court within the same federal circuit. See Appendix 2: Memorandum Opinion dated January 5, 2011 in the case *Agency Funding, LLC v. Brian Fillweber, et al.*, Civil Action NO. 3:10cv00027

(United States District Court for the Western District of Virginia) ["courts may provide for electronic service of subsequent pleadings. Fed. R. Civ. P. 5(b)(2)(E) – 5(b)(3). Under this court's local rules, a party agrees to service by electronic means when it participates in the court's CM/ECF system. W.D.Va.Gen.R. 7(h). As Defendants are participants in CM/ECF, they are deemed to consent to electronic service of process. Therefore, electronic service of the second amended complaint, including the attached loan agreement, was proper."].

The federal district court sitting in Maryland has the same rules with regard to electronic service of process through the court's CM/ECF system. See Appendix 3: Electronic Case Filing Policies and Procedures Manual (United States District Court for the District of Maryland) [I. INTRODUCTION... These electronic case filing policies and procedures are issued pursuant to Local Rules 102 and 202 and apply to all cases subject to electronic filing.; E. Consent to Electronic Service Registration as an electronic filing user in this Court constitutes consent to receive and make electronic service under Fed. R. Civ. P. 5 and Fed. R. Crim. P. 49 of all documents governed by these Electronic Case Filing Procedures. This agreement is applicable to all cases, present and future, where the registered user is counsel of record."]; See Appendix 4: Administrative Order 2003-8 (Misc. No. 00-308) (United States District Court for the District of Maryland) ["2) Service by counsel: If a party is represented by at least one attorney who is a registered user of the electronic filing system, electronic service on that attorney constitutes service on the party. As

long as a document is electronically served on at least one attorney for a party, service need not be made on any other attorney for that party who is not a registered user of the electronic filing system.”]; Also See Appendix 3: Electronic Case Filing Policies and Procedures Manual (United States District Court for the District of Maryland) [H. Certificate of Service... a Certificate of Service is not required when the document is served electronically through CM/ECF as to all parties. See Local Rule 102.1.c.”].

In addition, the amendment (effective December 1, 2018) to the Federal Rules of Civil Procedure eliminated the requirement to obtain consent for electronic service when papers are served, using the court’s e-filing system, on registered users of that system.

Therefore, in the light of the valid service of the summons and original complaint upon defendant The University of Baltimore, since the respondents-defendants’ counsel did receive a copy of the first amended complaint (FAC) through the court’s CM/ECF system, the service on one of the seven defendants, The University of Baltimore, should have been deemed proper and sufficient.

Moreover, since the Fourth Circuit’s judgment expressly reserved the petitioner-plaintiff’s right to maintain the second/subsequently re-filed action to cure the jurisdictional defect, this determination is material and significant.

CONCLUSION

For the foregoing reasons, petitioner respectfully petitions this Court for an order (1) granting rehearing, (2) vacating the Court's May 18, 2020, order denying certiorari, and (3) redispensing of this case by granting the petition for a writ of certiorari, and remanding to the Fourth Circuit for the purpose(s) of clarifying the Fourth Circuit's August 7, 2019, judgment for expressly directing the district court to apply the federal tolling principles to the petitioner's re-filed suit in the district court (*Hong Tang v. Kurt L. Schmoke, et al.*, Civil Action No. SAG-19-2965 (United States District Court for the District of Maryland)) and thus expressly allow the re-filed suit to proceed free from statute of limitations considerations, and/or of further modifying the district court's dismissal order to show that the service on one of the seven defendants, The University of Baltimore, was proper and sufficient, and the finding of improper service was restricted to the other six defendants.

Respectfully submitted,

Dated: June 11, 2020



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APPENDIX

1. District Court's Order dated May 27, 2020, in the re-filed suit.
2. Memorandum Opinion dated January 5, 2011 in the case *Agency Funding, LLC v. Brian Fillweber, et al.*, Civil Action NO. 3:10cv00027 (United States District Court for the Western District of Virginia).
3. Electronic Case Filing Policies and Procedures Manual (United States District Court for the District of Maryland).
4. Administrative Order 2003-8 (Misc. No. 00-308) (United States District Court for the District of Maryland).

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
STEPHANIE A. GALLAGHER
UNITED STATES DISTRICT JUDGE

101 WEST LOMBARD STREET
BALTIMORE, MARYLAND 21201
(410) 962-7780

May 27, 2020

LETTER TO PLAINTIFF AND COUNSEL

RE: Hong Tang v. Kurt L. Schmoke, et al.
Civil Case No. SAG-19-2965

Dear Mr. Tang and Counsel:

This letter will clarify the deadlines set in this case for responding to Defendants' Motion to Dismiss, ECF 11. Plaintiff's response to the Motion is due on or before **June 15, 2020**. Defendants' reply is due on or before **June 29, 2020**.

Despite the informal nature of this letter, it constitutes an Order of the Court and will be docketed as such.

Sincerely yours,

/s/

Stephanie A. Gallagher
United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA**
CHARLOTTESVILLE DIVISION

AGENCY FUNDING, LLC,

Plaintiff

v.

BRIAN FILLWEBER, *et al.*,

Defendants.

CIVIL NO. 3:10cv00027

MEMORANDUM OPINION

JUDGE NORMAN K. MOON

Defendants seek reconsideration of this court's order denying their motions to dismiss for lack of jurisdiction. (docket no. 39). Defendants urge that *Danik v. Housing Authority of Baltimore City*, No. 09-2240, 2010 WL 3681274 (4th Circuit 2010) (unpublished opinion) is determinative. However, as explained more fully below, *Danik* does not provide any reason to reconsider this court's earlier order. Therefore, Defendants' motion will be denied.

On June 6, 2010, Plaintiff filed its complaint, asserting certain claims arising out of a loan agreement. (docket no. 1). Before serving the original complaint, Plaintiff filed its first amended complaint on June 10, 2010. (docket no. 5). Each Defendant was served with a summons and a copy of the first amended complaint in late July 2010. While the first amended complaint purported to incorporate the loan agreement as an exhibit, Plaintiff neither filed the exhibit with the court, nor served the exhibit on Defendants. Asserting that Plaintiff's failure to attach the loan agreement resulted in improper service of process, Defendants then moved to dismiss. (docket no. 12).

Upon discovering that Plaintiff had failed to properly assert the citizenship of the parties for jurisdictional purposes, the court issued an order *sua sponte* granting Plaintiff leave to amend

its complaint. Plaintiffs then filed a second amended complaint through the court's electronic filing system, CM/ECF, on October 12, 2010. (docket no. 29). The filing included the loan agreement as an exhibit. Reasoning that the second amended complaint mooted Defendants' motion to dismiss, the court denied the motion without prejudice. (docket no. 30). Defendants then filed renewed motions to dismiss, asserting that they had not received personal service of the second amended complaint or the fully incorporated loan agreement. (docket nos. 31 and 32). After a telephonic hearing on December 14, 2010, the court denied the motions. Defendants now seek reconsideration of that order.

Under Federal Rule of Civil Procedure 4(e), commencement of an action requires proper service of a summons and complaint. In *Danik*, the Fourth Circuit explained that "[t]he federal rules require that a defendant be served with the *complete pleading*" 2010 WL 3681274, at *1 (emphasis added). Under Rule 10(c), "a copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes." In light of Rule 10(c), the Fourth Circuit has concluded that "in addition to her substantive complaint, all exhibits [a plaintiff] attached when she filed her complaint are part of that pleading." 2010 WL 3681274, at *1. Thus, if a plaintiff fails to serve a document attached to his complaint, he fails to serve the complete pleading, and service is improper.

Danik does not provide reason to reconsider this court's order denying Defendants' motions to dismiss. Unlike in *Danik*, the Plaintiff served Defendants with the complete first amended complaint. While the first amended complaint purported to incorporate the loan agreement as an exhibit, Plaintiff did not actually attach the loan agreement to its court filing. Accordingly, Plaintiff was not required to serve Defendants with the loan agreement, as it was

not a constituent part of the complete pleading.¹ Therefore, service of the first amended complaint was proper.

In general, the original complaint and summons may not be served electronically. *See* Fed. R. Civ. P. 4(e)(2). However, courts may provide for electronic service of subsequent pleadings. Fed. R. Civ. P. 5(b)(2)(E) – 5(b)(3). Under this court's local rules, a party agrees to service by electronic means when it participates in the court's CM/ECF system. W.D.Va.Gen.R. 7(h). As Defendants are participants in CM/ECF, they are deemed to consent to electronic service of process. Therefore, electronic service of the second amended complaint, including the attached loan agreement, was proper.

In light of the above, Defendants' motion to reconsider will be denied in an accompanying order.

The Clerk of the Court is directed to send a certified copy of this memorandum opinion and the accompanying order to all counsel of record.

Entered this 5th day of January, 2011.


NORMAN K. MOON
UNITED STATES DISTRICT JUDGE

¹ Defendants have invoked Virginia and Florida procedural law for the proposition that a contract that is the subject of the litigation must be attached to the complaint. However, state procedural law is not binding on this court.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND



ELECTRONIC CASE FILING POLICIES AND PROCEDURES MANUAL (CM/ECF version 6.1)

December 2019

**Updates are available online at
www.mdd.uscourts.gov/electronic-case-filing-information**

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	USE OF ELECTRONIC FILING SYSTEM	1
A.	Registration	1
1.	General Requirements	1
2.	Registration Process	1
3.	Checking Your Login and Password	2
B.	Maintain Your Email Account	2
C.	Password Maintenance	2
1.	Changing Your Password	2
2.	I Forgot My Password	3
D.	Updating Attorney Contact Information	3
1.	Your CM/ECF Account.....	3
2.	My Name Has Changed. What Should I Do?	4
3.	How Do I Update or Change My Email Information in CM/ECF?	4
4.	How Do I Add a Secondary Email Address?	5
5.	How Do I Delete a Secondary Email Address?	5
6.	How Do I Update My Contact Information?	6
E.	Consent to Electronic Service	7
F.	PACER and CM/ECF Accounts	8
1.	Public Access to Court Electronic Records (PACER)	8
2.	CM/ECF Accounts and PACER Accounts are Different	8
III.	ELECTRONIC FILING AND SERVICE OF DOCUMENTS.....	10
A.	Electronic Filing Process	10
1.	Document Requirements and Formatting	10
2.	Convert a Document to PDF	14
3.	Document Margins	16
4.	Lengthy Documents	16
5.	Scanned Documents	17

I. INTRODUCTION

The United States District Court for the District of Maryland uses the CM/ECF case management system for accepting most court documents for filing, for entering orders from the court, and for otherwise managing the court's case docket. Civil cases, except for those filed by self-represented parties, first started on CM/ECF on March 3, 2003; criminal cases started on CM/ECF on August 8, 2008.

These electronic case filing policies and procedures are issued pursuant to Local Rules 102 and 202 and apply to all cases subject to electronic filing.

II. USE OF ELECTRONIC FILING SYSTEM

A. Registration

1. General Requirements

There is no charge for registering to use the electronic filing system. However, only a member in good standing of the bar of this Court or entitled by statute or Local Rule to practice without being a member of our bar may be issued electronic filing credentials. Since January 2012, all active members of the bar must register for CM/ECF. Since April 2015, all newly admitted members of our bar are automatically issued local CM/ECF credentials at the time of admission. Additional information about bar membership is available on our website at <http://www.mdd.uscourts.gov/attorney-information/>.

CM/ECF credentials will not be issued to paralegals, secretaries, or other paraprofessionals.

2. Registration Process

All active attorneys in good standing without local CM/ECF credentials may register for electronic filing on our website at <http://www.mdd.uscourts.gov/electronic-case-filing-registration>. As part of the registration process, attorneys consent to electronic service under the Federal Rules.

Office: John M Doe PA
Address 1: The Garrison Bldg
Address 2: 200 E Judicial Ave Ste 123
City: Baltimore State: MD Zip: 21202-0001
Country: USA County:
Phone: 4105559999 Fax: 4105552345

- k) When you have finished updating your contact information, click **Submit** to save your changes.
- l) The system then prompts you to select the cases to be updated. Click **Update All**, then **Submit**, so that all cases to which you are linked will be updated.
- m) A confirmation screen will be displayed.

E. Consent to Electronic Service

Registration as an electronic filing user in this Court constitutes consent to receive and make electronic service under Fed. R. Civ. P. 5 and Fed. R. Crim. P. 49 of all documents governed by these Electronic Case Filing Procedures. This agreement is applicable to all cases, present and future, where the registered user is counsel of record.

Moreover, counsel is responsible for both regularly checking the email address connected with the registered account and for keeping a working email address connected with the account. The Clerk's Office is not responsible for filings not received due to an incorrect or inoperative email account, and the Clerk's Office does not monitor whether a properly sent email from CM/ECF is rejected by the receiver's server ("bounce backs"). See Notice Regarding Email Bounce Back Monitoring at <http://www.mdd.uscourts.gov/news/notice-regarding-email-bounce-back-monitoring-2012-01-27t000000>.

H. Certificate of Service

When you are required by statute, federal rule, or local rule to serve a document other than original process on a party who is not a registered CM/ECF user, you must serve it in accordance with Fed. R. Civ. P. 5 and electronically file a Certificate of Service with the Clerk's Office. However, a Certificate of Service is not required when the document is served electronically through CM/ECF as to all parties. See Local Rule 102.1.c.

Any party to a case subject to electronic filing who is represented by counsel is expected to have at least one attorney who is a registered user of CM/ECF. In cases subject to electronic filing, the Clerk's Office will not mail paper copies of documents to attorneys.

If a party is represented by at least one attorney who is a registered user of CM/ECF, electronic service on that attorney constitutes service on the party. As long as a document is electronically served on at least one attorney for a party, service need not be made on any other attorney for that party even if the other attorney is not a registered user of CM/ECF.

Pro se parties must be served by paper as they usually are not registered users of CM/ECF.

The Certificate of Service may be filed as a part of the document or as a separate document.

1. As a Part of the Document

Before converting your document to PDF and filing it electronically, check to see which parties will not be electronically noticed.

- Click on **Utilities, Mailings, Mailing Info for a Case**, and enter your case number. The system will show who will be electronically noticed and who will not be noticed.
- Add a traditional Certificate of Service to your document, stating specifically who copies were mailed to (or served by other means). It is not sufficient to state that copies will be mailed to any party not electronically noticed. Then file your document using the standard filing procedure.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE: ELECTRONIC FILING

:
: MISC. NO. 00-308
:

...o0o...

ADMINISTRATIVE ORDER 2003-8

On March 3, 2003 the court began requiring electronic filing in all non-exempt civil cases. One of the benefits to counsel and the court is that documents are electronically served on registered users, eliminating the need to mail paper copies.

Members of the bar have been able to register to use the electronic filing system since February 2003. Registration is available on-line and there is no fee. While most attorneys with active cases subject to electronic filing have registered to use the electronic filing system, some have not. Mailing paper copies to these attorneys is imposing an excessive burden on both other counsel and the court.

Accordingly, effective February 1, 2004, in any case subject to electronic filing:

1) Service by the court:

Any party to a case subject to electronic filing who is represented by counsel is expected to have at least one attorney who is a registered user of the electronic filing system. In cases subject to electronic filing the court will no longer mail paper copies of documents to attorneys.

2) Service by counsel:

If a party is represented by at least one attorney who is a registered user of the electronic filing system, electronic service on that attorney constitutes service on the party. As long as a document is electronically served on at least one attorney

for a party, service need not be made on any other attorney for that party who is not a registered user of the electronic filing system.

3) Responsibility of co-counsel:

It is the responsibility of counsel who are registered users of the electronic filing system to provide copies, electronic or paper, and/or notification of filings, to any co-counsel who is not a registered user.

12/15/2003

Date

/s/

Benson Everett Legg
Chief Judge

CERTIFICATE OF *PRO SE* PETITIONER

HONG TANG

Petitioner

V.

THE UNIVERSITY OF BALTIMORE, et al.

Respondents

I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Supreme Court Rule 44.2.

Executed on June 11, 2020

A handwritten signature in black ink, appearing to read 'Hong Tang', is written over a horizontal line.

HONG TANG