

## XI. APPENDIX

20-1520  
Black v. Vitello

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

SUMMARY ORDER

**RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 29<sup>th</sup> day of March, two thousand twenty-one.

Present: DENNIS JACOBS,  
ROSEMARY S. POOLER,  
MICHAEL H. PARK,  
*Circuit Judges.*

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SYLVIA BLACK,

*Plaintiff-Counter Defendant-Appellant,*

v.

20-1520-cv

PEACE OFFICER CHRISTINE VITELLO,  
PEACE OFFICER RICK ROSENBERRY, PEACE  
OFFICER BILL HEINE, OF THE SPCA WNY,  
SPCA OF WESTERN NEW YORK,

*Defendants-Counter Claimants-Appellees.*

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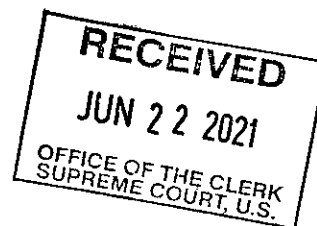
Appearing for Appellant:

Sylvia Black, pro se, Cheektowaga, NY.

Appearing for Appellees:

Alan Donatelli, Amherst, NY.

Appeal from a judgment of the United States District Court for the Western District of New York (Sinatra, J.; Foschio, M.J.).



**ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment of said District Court be and it hereby is **AFFIRMED**.

Appellant Sylvia Black, pro se, sued the Society for the Prevention of Cruelty to Animals of Western New York ("SPCA") and three of its officers under 42 U.S.C. § 1983. Prior to filing the complaint with the district court, Black mailed copies of the complaint to the defendants. She did not later personally serve them with copies of a summons issued by the district court clerk and the filed complaint. The defendants moved to dismiss the complaint and a magistrate judge recommended granting the motion on the ground that the court lacked personal jurisdiction over the defendants due to improper service. The district court adopted the recommendation and dismissed the complaint. On appeal, Black moves to compel the defendants to provide a copy of their appellate brief. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We review de novo district court orders dismissing a complaint for lack of personal jurisdiction. *Chufen Chen v. Dunkin' Brands, Inc.*, 954 F.3d 492, 497 (2d Cir. 2020). We review dismissals based on insufficient service of process for abuse of discretion. *Dickerson v. Napolitano*, 604 F.3d 732, 740 (2d Cir. 2010). "Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied." *Dynegy Midstream Servs. v. Trammochem*, 451 F.3d 89, 94 (2d Cir. 2006) (quoting *Omni Cap. Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987)). Therefore, to survive a motion to dismiss premised on lack of personal jurisdiction and insufficient service of process, the plaintiff must demonstrate that she adequately served the defendants. *See Penguin Grp. (USA) Inc. v. Am. Buddha*, 609 F.3d 30, 34–35 (2d Cir. 2010) ("In order to survive a motion to dismiss for lack of personal jurisdiction, a plaintiff must make a prima facie showing that jurisdiction exists." (internal quotation marks omitted)); *Dickerson*, 604 F.3d at 752 ("When a defendant moves to dismiss under Rule 12(b)(5), the plaintiff bears the burden of proving adequate service." (alteration and internal quotation marks omitted)).

The requirements for service of process are set out in Federal Rule of Civil Procedure 4. Rule 4 requires that a summons, which is valid only when it is signed by the district court clerk and bears the court's seal, be served with a copy of the complaint. Fed. R. Civ. P. 4(a)(1)(F)–(G), (c)(1). Service on an individual defendant must be accomplished by (1) following state law in the state where the district court is located, (2) personally delivering a copy of the summons and complaint to the defendant, (3) leaving a copy of the summons and complaint at the defendant's residence with another resident, or (4) delivering a copy to an agent authorized by appointment or law to receive service of process. Fed. R. Civ. P. 4(e). Service on a corporation or association can be accomplished by the same methods or by delivering a copy of the summons and complaint to an officer, manager, or other authorized agent. Fed. R. Civ. P. 4(h)(1).

Black did not properly serve the defendants. She did not offer any evidence showing that she had served copies of the complaint with a summons signed by the district court clerk or bearing the court's seal. Further, Black did not show that she personally served the individual defendants

or an officer or agent of the SPCA, a non-profit corporation. Although Black provides evidence that she mailed the items to the defendants, mail is not an acceptable method of service under Federal Rule of Civil Procedure 4. Nor does New York law permit service by mail alone; service on a natural person generally requires personal delivery of the summons and complaint to either the individual or a designated agent. *See* N.Y. C.P.L.R. § 308(1), (3). Alternatively, the summons can be delivered to the defendant's residence or place of business and left with "a person of suitable age" if a copy is also mailed to the defendant's residence or place of business. *Id.* § 308(2). Finally, if service cannot be made by these means, it can be effected by affixing a copy of the summons to the defendant's residence or place of business and by mailing it to the same. *Id.* § 308(4). A judge may order an alternative if none of the above methods is practicable. *Id.* § 308(5). Service on a corporation is accomplished by personal delivery of the summons to an officer or agent of the corporation or the New York Secretary of State. N.Y. C.P.L.R. § 311(a). New York allows other avenues of service only when the original methods are impracticable, and the alternative is ordered by the court. *Id.* § 311(b). Black did not serve the defendants pursuant to these methods or obtain permission from the district court to serve the summons and complaint by mail. Therefore, the district court properly dismissed the complaint.

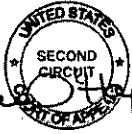
"We review for an abuse of discretion a district court's Rule 4(m) dismissal for failure to serve process." *Zapata v. City of New York*, 502 F.3d 192, 195 (2d Cir. 2007). Absent a showing of good cause, "we generally will not reverse a district court's dismissal of an action for lack of service unless the [plaintiff] can 'advance some colorable excuse for neglect.'" *Meilleur v. Strong*, 682 F.3d 56, 61 (2d Cir. 2012). Here, Black has not provided any explanation for her failure to timely serve Defendants. Moreover, although Rule 4(m) directs district courts to order dismissal "without prejudice" when based on a failure to timely serve process, Fed. R. Civ. P. 4(m), a district court may dismiss a case with prejudice where "[t]he problem with [the plaintiff's] causes of action is substantive" and "better pleading will not cure it," *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000). Upon review of Black's complaint, we hold that it is "beyond doubt that [Black] can prove no set of facts in support of [her] claim which would entitle [her] to relief." *Lerman v. Bd. of Elections*, 232 F.3d 135, 140 (2d Cir. 2000) (internal quotation marks omitted). Amendment to the complaint would thus be futile, and so we find that the district court did not abuse its discretion in dismissing the case with prejudice.

We also deny Black's motion to compel the defendants to provide her with a copy of their brief because they have provided copies of their brief to her. They filed two affidavits of service showing that they twice mailed a copy of the brief to Black's address of record. Further, the defendants provided a receipt from Federal Express showing that the second copy had been delivered and a copy of an email from their attorney to Black that attached a courtesy copy of the brief. Black has not stated that the address used to mail the briefs was incorrect or that she never received the emailed copy. The motion is therefore meritless.

We have considered the remainder of Black's arguments and find them to be without merit. Accordingly, we AFFIRM the judgment of the district court and DENY Black's motion to compel.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

 Catherine O'Hagan Wolfe

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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Sylvia Black,

Plaintiff,

v.

17-cv-393-JLS-LGF

Peace Office Christine Vitello, et al.,

Defendants.

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**DECISION AND ORDER**

On May 9, 2017, *pro se* Plaintiff Sylvia Black commenced this action under 42 U.S.C. § 1983. Dkt. 1. On April 13, 2018, this Court referred this case to United States Magistrate Judge Leslie G. Foschio for all proceedings under 28 U.S.C. § 636(b)(1)(A) and (B). Dkt. 11. On August 14, 2017, Plaintiff moved for a pretrial hearing or scheduling conference. Dkt. 8. On August 25, 2017, Defendants responded and cross-moved to dismiss the complaint for lack of personal jurisdiction based upon improper service. Dkt. 9. Plaintiff responded on May 2, 2018. Dkt. 13. Defendants replied on May 31, 2018. Dkt. 14. Plaintiff filed a second response to Defendants' crossmotion on June 12, 2018. Dkt. 15.

On March 18, 2019, Judge Foschio issued a Report and Recommendation ("R&R") finding that Defendants' motion should be granted and that Plaintiff's motion should be dismissed as moot. Dkt. 18. Plaintiff filed objections to the R&R on March 26, 2019 (Dkt. 20), and again on March 28, 2019 (Dkt. 21), both times realleging her substantive complaints, stating that she "served Defendant[s] within

the legal ramifications of the Law” (Dkts. 20 and 21, at 3), and asserting that Defendants “did not ask for a dismissal on the basis of alleged improper service” (Dkts. 20 and 21, at 3). Defendants responded to the objections on April 2, 2019, documenting their requests for dismissal based on lack of personal jurisdiction arising from Plaintiff’s improper service. Dkt. 19. Plaintiff filed a motion for judgment on April 4, 2019 (Dkt. 22), to which Defendants responded on April 16, 2019 (Dkt. 23).

A district court may accept, reject, or modify the findings or recommendations of a magistrate judge. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3). A district court must conduct a *de novo* review of those portions of a magistrate judge’s recommendation to which objection is made. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3).

This Court has carefully reviewed the R&R, the record in this case, the objection and response, and the materials submitted by the parties. Based on that *de novo* review, the Court accepts and adopts Judge Foschio’s recommendation to grant Defendants’ crossmotion to dismiss and to dismiss Plaintiff’s motion for a hearing as moot. Plaintiff’s motion for judgment (Dkt. 22), which was filed after the R&R was issued and after Plaintiff had twice objected to the R&R, is also dismissed as moot.

For the reasons stated above and in the Report and Recommendation, Defendants’ crossmotion to dismiss (Dkt. 9) is GRANTED and Plaintiff’s motion for a hearing (Dkt. 8) is DISMISSED as moot. Plaintiff’s motion for judgment (Dkt. 22)

is also DISMISSED as moot. The complaint (Dkt. 1) is dismissed; the Clerk of Court is instructed to close this case as dismissed with prejudice.

SO ORDERED.

Dated: April 6, 2020  
Buffalo, New York

s/John L. Sinatra, Jr.  
JOHN L. SINATRA, JR.  
UNITED STATES DISTRICT JUDGE



## UNITED STATES DISTRICT COURT

for the

Western District of NYSylvia Black,Plaintiff

v.

Peace Office Christine Vitello, et al.,DefendantCivil Action No. 17-cv-393-JLS-LGF

## JUDGMENT IN A CIVIL ACTION

The court has ordered that (check one):

☐ the plaintiff (name) \_\_\_\_\_ recover from the defendant (name) \_\_\_\_\_ the amount of \_\_\_\_\_ dollars (\$ \_\_\_\_\_), which includes prejudgment interest at the rate of \_\_\_\_\_ %, plus post judgment interest at the rate of \_\_\_\_\_ % per annum, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant (name) \_\_\_\_\_ recover costs from the plaintiff (name) \_\_\_\_\_

☒ other: Defendants' crossmotion to dismiss is GRANTED and Plaintiff's motion for a hearing is DISMISSED as moot. Plaintiff's motion for judgment is also DISMISSED as moot. The complaint is dismissed and the Clerk of Court is instructed to close this case as dismissed with prejudice.

This action was (check one):

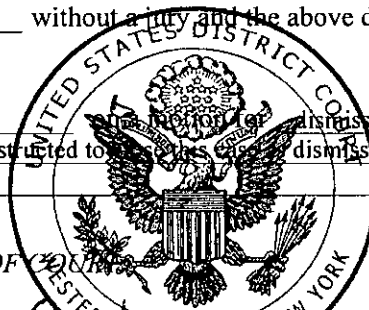
☐ tried by a jury with Judge \_\_\_\_\_ presiding, and the jury has rendered a verdict.

☐ tried by Judge \_\_\_\_\_ without a jury and the above decision was reached.

☒ decided by Judge John L. Sinatra, Jr. in favor of the Defendants'. The complaint is dismissed and the Clerk of Court is instructed to dismiss with prejudice.

Date: 04/07/2020

CLERK OF COURT



Mary C. [Signature]  
Signature of Clerk or Deputy Clerk

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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SYLVIA BLACK,

Plaintiff,

v.

REPORT  
and  
RECOMMENDATION

PEACE OFFICER CHRISTINE VITELLO,  
PEACE OFFICER RICK ROSENBERY,  
PEACE OFFICER BILL HEINE, of the SPCA WNY, and  
SPCA OF WESTERN NEW YORK,

17-CV-00393V(F)

Defendants.

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APPEARANCES: SYLVIA BLACK, *Pro Se*  
3842 Harlem Road  
400-237  
Buffalo, New York 14215

ALAN DONATELLI, Esq.  
Attorney for Defendants  
11 Summer Street  
3<sup>rd</sup> Floor  
Buffalo, New York 14209

**JURISDICTION**

This case was referred to the undersigned by Hon. Lawrence J. Vilaro on April 13, 2018, for all pretrial matters including preparation of a report and recommendation on dispositive motions. The matter is presently before the court on Plaintiff's motion for a hearing filed August 14, 2017 (Dkt. 8), and on Defendants' motion to dismiss filed August 25, 2017 (Dkt. 9).

**BACKGROUND and FACTS**<sup>1</sup>

Plaintiff Sylvia Black ("Plaintiff" or "Black"), proceeding *pro se*, commenced this action on May 9, 2017, by filing the Complaint alleging she was subjected to various civil rights violations by Defendants Society for the Prevention of Cruelty to Animals serving Erie County<sup>2</sup> ("SPCA"), and SPCA Peace Officers Christine Vitello ("Vitello"), Rick Rosenberry ("Rosenberry"), and William Heine ("Heine") (together, "Defendants"). Plaintiff's claims are based on the February 8, 2017, seizure and removal, pursuant to a search warrant Defendant Vitello obtained from Buffalo City Court that same day, of 14 cats from her residence located at 62 Shepard Street, Buffalo, New York ("the residence"). Subsequent to the seizure, Plaintiff was arrested and given an appearance ticket charging her with four (4) misdemeanor counts of animal abuse in violation of N.Y. Agriculture and Markets Law § 353 (McKinney's 2005).<sup>3</sup> Following their removal, several of the cats were euthanized, while the others were provided with veterinary care and boarding by the SPCA.

On May 4, 2017, Plaintiff sent to Defendants SPCA, Vitello, and Rosenberry, via first class mail through the United States Postal Service, copies of the document that Plaintiff, on May 9, 2017, filed as the Complaint. On May 24, 2017, Defendants filed an answer (Dkt. 2), asserting that the animals were found in deplorable conditions, seized, and brought to SPCA facilities where the animals were treated and sheltered. Answer ¶¶ 14-16. Defendants also assert nine affirmative defenses including, as relevant here, a lack of personal jurisdiction over Defendants based on insufficient service of process,

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<sup>1</sup> The Facts are taken from the pleadings and motion papers filed in this action.

<sup>2</sup> In the Complaint, Plaintiff incorrectly refers to this Defendant as the "SPCA of Western New York."

<sup>3</sup> On March 13, 2017, Plaintiff was arraigned on the misdemeanor counts and, on December 5, 2017, Plaintiff pleaded guilty to one count of animal abuse in full satisfaction of the matter.

*id.* ¶¶ 5, 6, and a counterclaim to recoup the costs for medical care and boarding the animals in an amount not less than \$ 10,000. *Id.* ¶¶ 17-18. On June 19, 2017, Plaintiff filed an answer to Defendants' counterclaim. (Dkt. 4). Plaintiff filed copies of discovery demands she maintains were served on Defendants, and to which Defendants had yet to provide answers on June 19, 2017 (Dkt. 5), and August 14, 2017 (Dkt. 7).

On August 14, 2017, Plaintiff filed a motion for a pretrial hearing or scheduling conference (Dkt. 8) ("Plaintiff's motion"), supported by the attached Affidavit of Sylvia Black in Support of Motion (Dkt. 8 at 5-10) ("Plaintiff's Affidavit"). On August 25, 2017, Defendants filed a cross-motion to dismiss the Complaint for insufficient service of process (Dkt. 9) ("Defendants' motion"), attaching the Attorney Affirmation of Alan Donatelli, Esq., in Opposition to Motion and in Support of Cross-Motion (Dkt. 9-1) ("Donatelli Affirmation"), exhibits (Dkts. 9-2 and 9-3), and the Memorandum of Law in Opposition to Plaintiff's Notice of Motion and in Support of the SPCA Defendants' Cross-Motion for Dismissal of the Complaint (Dkt. 9-4) ("Defendants' Memorandum").<sup>4</sup> On May 2, 2018, Plaintiff filed Plaintiff's Opposition to Defendants' Motion to Dismiss (Dkt. 13) ("Plaintiff's Response"). On May 13, 2018, Defendants filed the Attorney Alan Donatelli, Esq. Reply Affirmation in Support of Cross-Motion (Dkt. 14) ("Donatelli Reply Affirmation"), with exhibits (Dkt. 14-1). On June 12, 2018, Plaintiff filed Plaintiff's 2<sup>nd</sup> Opposition to Defendants' 2<sup>nd</sup> Motion to Dismiss (Dkt. 15) ("Plaintiff's Reply"). Oral argument was deemed unnecessary.

Based on the following, Defendants' motion should be GRANTED; Plaintiff's motion should be DISMISSED as moot.

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<sup>4</sup> For unexplained reasons, the Donatelli Affirmation, exhibits, and Defendants' Memorandum were also filed as Dkt. 10, 10-1, 10-2, and 10-3.

### **DISCUSSION**

Defendants seek dismissal of the Complaint on the basis that Plaintiff failed to effect sufficient service of process such that there is no personal jurisdiction over Defendants in this action. Defendants' Memorandum at 1-3. Plaintiff's motion for a pretrial conference is predicated on Defendants' failure to provide responses to discovery demands, which responses Plaintiff maintains will establish the criminal case against her was procedurally infirm based on several irregularities including, *inter alia*, a forged search warrant such that Defendants' entry into her residence to seize the cats constituted a criminal breaking and entering constituting an unreasonable search and seizure in violation of the Fourth Amendment, incorrect dates on various documents, and a court order requiring Plaintiff undergo drug and alcohol treatment despite no evidence that Plaintiff abuses drugs of alcohol. Plaintiff's Memorandum at 2-5.

#### **1. Motion to Dismiss**

Insofar as Defendants argue Plaintiff failed to effect proper service, such motion is pursuant to Fed.R.Civ.P. 12(b)(2) (lack of personal jurisdiction), and (5) (insufficient service of process). Significantly, "[b]efore a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied." *Dynergy Midstream Servs. v. Trammochem*, 451 F.3d 89, 94 (2d Cir. 2006) (quoting *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987)). "[T]he service of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served." *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444-45 (1946). As relevant, Fed. R. Civ. P. 4 ("Rule 4") provides that after filing a complaint, each

defendant must be served with a summons and a copy of the complaint for service of process upon an individual within 90 days. Fed. R. Civ. P. 4(c)(1) and (m). Service may be made by “[a]ny person who is at least 18 years old and not a party . . . .”

Fed.R.Civ.P. 4(c)(2). “[T]he plaintiff bears the burden of proving adequate service.”

*Dickerson v. Napolitano*, 604 F.3d 732, 752 (2d Cir. 2010). “A defendant’s objection to service ‘must be specific and must point out in what manner the plaintiff has failed to satisfy the requirements of the service provision utilized.’” *Stepney v. Rochester Housing Authority*, 2018 WL 3110225, at \* 3 (W.D.N.Y. June 25, 2018) (quoting *Koulikina v. City of New York*, 559 F.Supp.2d 300, 312 (S.D.N.Y. 2008)).

In the instant action, Plaintiff, prior to filing the Complaint and obtaining a docket number and summons, attempted to serve each of the Defendants by mailing copies of the unfiled Complaint by way of the United States Postal Service. See Defendants’ Exhibit, Dkt. 10-1 (copies of Affidavits of Service by Mail for “Civil Court of the City of New York [sic], County of Erie,” indicating that on May 4, 2017, one “Reginald Gray” mailed “the attached papers” to “Gary Willoughby II,” President and C.E.O. of the SPCA W.N.Y. (Dkt. 10-1 at 1), “Peace Officer Rick Rosenberry” (Dkt. 10-1 at 2), “Peace Officer Christine Vitello” (Dkt. 10-1 at 3), and “Peace Officer Bill Heine”) (Dkt. 10-1 at 4).<sup>5</sup>

Defendants argue in support of dismissal that not only did Plaintiff fail to file the Complaint such that no case number was obtained prior to Plaintiff’s attempted service of the Complaint, but that the copies of the Complaint mailed to Defendants were not accompanied by the required summons issued by the Clerk of Court when the

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<sup>5</sup> Although Defendants maintain that Heine never even received the asserted deficient service of the Complaint, Defendants’ Memorandum at 1, the court presumes, for the sake of this discussion, that Heine did receive it.

Complaint is presented for filing, and service by United States mail is not sufficient under either federal or New York law. Defendants' Memorandum at 1-2. Defendants further argue the attempted service of process is fatally flawed such that the court is without personal jurisdiction over Defendants, rendering Plaintiff's motion seeking a pretrial conference moot. *Id.* at 2. In opposing Defendants' motion, Plaintiff does not argue that her attempted service of the Complaint occurred in any manner other than as described by Defendants, but instead reiterates the asserted myriad of illegalities she maintains accompanied Defendants' seizure of cats from her home. Plaintiff's Response at 1-6; Plaintiff's Reply at 1-8.

In this case, Defendants include individuals Heine, Rosenberry, and Vitello, as well as a non-profit corporation, the SPCA. As relevant, Fed.R.Civ.P. 4 ("Rule 4"), provides that the contents of a summons must, *inter alia*, "be signed by the clerk" and "bear the court's seal." Fed.R.Civ.P. 4(a)(1)(F) and (G). Here, Plaintiff's attempted service of the Complaint prior to filing it was not accompanied by the summons and, as such, was insufficient to confer personal jurisdiction over Defendants. See *Barron v. Miami Executive Towers Assocs. Ltd. P'Ship*, 142 F.R.D. 394, 397 (S.D.N.Y. 1992) ("Although strict conformity with Rule 4's provisions is not required in every instance, actual receipt of both the summons and the complaint is a base requirement" (citing *Krank v. Express Funding Corp.*, 133 F.R.D. 14, 17 (S.D.N.Y. 1990))). Even if the court could overlook Plaintiff's failure to serve the copies of the Complaint with summonses, Plaintiff's service of the Complaint did not comply with federal or New York law. In particular, service may be made upon an individual within the United States by

- (1) following state law for *serving a summons* in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or
- (2) doing any of the following:
  - (A) *delivering a copy of the summons and of the complaint* to the individual personally;
  - (B) *leaving a copy of each* at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or
  - (C) *delivering a copy of each* to an agent authorized by appointment or by law to receive service of process.

Fed.R.Civ.P. 4(e) (italics added).

Service on a corporation, like Defendant SPCA, is to be made

- (1) in a judicial district of the United States:
  - (A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or
  - (B) *by delivering a copy of the summons and of the complaint* to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and – if the agent is one authorized by statute and the statute so requires – by also mailing a copy of each to the defendant . . . .

Fed.R.Civ.P. 4(h) (italics added).

A plain reading of Rule 4 establishes that service of process requires service of the summons and complaint, and that service by United States mail is not an approved method for service of process under federal law, and more than 90 days have elapsed since Plaintiff filed the Complaint on May 9, 2017, such that Plaintiff has failed to timely effect proper service under federal law. Nor has Plaintiff timely effected proper service under New York law.

Specifically, similar to Rule 4, New York law provides for personal service upon a natural person, N.Y. Civ.Prac.L.&R. § 308[1], or corporation, N.Y. Civ.Prac.L.&R. § 311, which was not followed here. Although New York law does permit service by first class



mail "as an alternative to the methods of personal service," N.Y. Civ.Prac.L.&R. § 312-a(a), for service attempted by this method to be complete,

the defendant, defendant's attorney or an employee of the attorney must complete the acknowledgement of receipt and mail or deliver one copy of it within thirty (3) days from the date of receipt. Service is complete on the date the signed acknowledgement of receipt is mailed or delivered to the sender. The signed acknowledgement of receipt shall constitute proof of service.

N.Y. Civ.Prac.L.&R. § 312-a(b).

Here, Plaintiff has not produced any signed acknowledgement of receipt of service as proof of service by first class mail. Further, Plaintiff does not argue that a copy of the summons accompanied her attempt to serve the Complaint, nor can she given that the deficient service occurred prior to the filing on the Complaint and, thus, before the Clerk of Court's issuance of summons.

Accordingly, Plaintiff has failed to meet her burden of establishing adequate service, *Dickerson*, 604 F.3d 752, rendering this court without personal jurisdiction over Defendants. *Dynergy Midstream Servs.*, 451 F.3d at 94. Furthermore, "[a] plaintiff's *pro se* status is no excuse for failure to serve the defendant properly and does not automatically amount to good cause for failure to serve within the time allotted by Rule 4(m)." *Jordan v. Forfeiture Support Assocs.*, 928 F.Supp.2d 588, 598 (E.D.N.Y. 2013) (internal quotation omitted). Here, Plaintiff neither alleges nor demonstrates good cause for her failure to effect sufficient service of process and, accordingly, Defendants' motion to dismiss the Complaint for insufficient service of process should be GRANTED.

Furthermore, the dismissal of the Complaint renders Plaintiff's motion moot, and it should be DISMISSED.

**CONCLUSION**

Based on the foregoing, Defendants' motion (Dkt. 9), should be GRANTED; Plaintiff's motion (Dkt. 8), should be DISMISSED as moot. The Clerk of the Court should be directed to close the file.

Respectfully submitted,

*/s/ Leslie G. Foschio*

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LESLIE G. FOSCHIO  
UNITED STATES MAGISTRATE JUDGE

DATED: March 18, 2019  
Buffalo, New York

**ORDERED** that this Report and Recommendation be filed with the Clerk of the Court.

**ANY OBJECTIONS** to this Report and Recommendation must be filed with the Clerk of the Court within fourteen (14) days of service of this Report and Recommendation in accordance with the above statute, Rules 72(b), 6(a) and 6(d) of the Federal Rules of Civil Procedure and Local Rule 72.3.

**Failure to file objections within the specified time or to request an extension of such time waives the right to appeal the District Court's Order.**

*Thomas v. Arn*, 474 U.S. 140 (1985); *Small v. Secretary of Health and Human Services*, 892 F.2d 15 (2d Cir. 1989); *Wesolek v. Canadair Limited*, 838 F.2d 55 (2d Cir. 1988).

Let the Clerk send a copy of this Report and Recommendation to the attorneys for the Plaintiff and the Defendants.

SO ORDERED.

/s/ Leslie G. Foschio

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LESLIE G. FOSCHIO  
UNITED STATES MAGISTRATE JUDGE

DATED: March 18, 2019  
Buffalo, New York