SUPREME COURT OF THE UNITED STATES

Amir M. Hamza, Petitioner,

v.

William Yandik, Stephen Yandik, Eileen Yandik, Green Acres Farm, Respondent.

No. _____

Motion for Leave to Proceed *In Forma Pauperis*

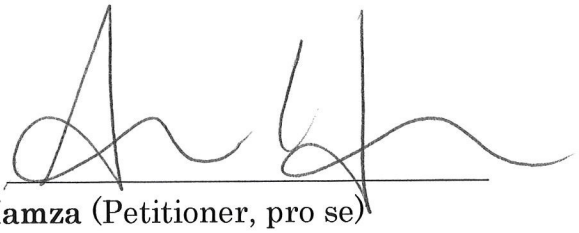
Petitioner **Amir M. Hamza** respectfully moves, pursuant to **Supreme Court Rule 39** and **28 U.S.C. § 1915**, for leave to proceed **in forma pauperis** in this Court.

In support, Petitioner states:

1. He is unable to pay the filing fee or printing costs associated with this matter.
2. He proceeds **pro se** and is indigent.
3. He has been granted leave to proceed **in forma pauperis** in the **U.S. District Court for the Northern District of New York** and in the **U.S. Court of Appeals for the Second Circuit** and understands that this Court requires a separate submission under Rule 39, which he now files.
4. The accompanying **Affidavit/Declaration of Indigency and Issues Presented** sets forth his financial status and the issues he seeks to present for review.

Respectfully submitted,

Date: 18 September 2025

Signature: 

Amir M. Hamza (Petitioner, pro se)
16 Elm Street, P.O. Box 281
Philmont, NY 12565
Tel: 702-592-2647
Email: amirmhamza@gmail

No. _____

In The

Supreme Court of the United States

AMIR M. HAMZA

Petitioner

v.

EILEEN YANDIK, STEPHEN YANDIK, WILLIAM YANDIK, and GREEN ACRES FARM

Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a *pro se* litigant proceeding *in forma pauperis*, who is ordered by a district court to rely on the U.S. Marshals Service for service of process pursuant to 28 U.S.C. § 1915(d) and Fed. R. Civ. P. 4(c)(3), may have their case dismissed for failure to serve when the Marshals fail to effectuate service and the court does not *sua sponte* extend the deadline despite equitable factors favoring an extension, including actual notice to defendants and potential statute-of-limitations bar.

Whether a defendant who, engages in evasive and misleading conduct and in a separate state Family Court proceeding, files a petition containing direct quotations from a pending federal district court complaint—thereby demonstrating actual knowledge of the federal action—may be deemed to have been properly served in that federal case; and, if so, whether such conduct (1) warrants sanctions under Federal Rule of Civil Procedure 4(d)(2) for refusing, without good cause, to sign and return a waiver of service; (2) permits retroactive validation of service under Rule 4(l)(3); and (3) supports entry of default under Rule 55.

PARTIES TO THE PROCEEDINGS

Petitioner is Amir Mahmoud Hamza, plaintiff-appellant below.

Respondents are Eileen Yandik, Stephen Yandik, William Yandik, and Green Acres Farm, defendants-appellees below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes & Rules

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is unpublished but is reprinted in the Appendix (Appendix 1–9). The mandate was issued on March 14, 2025. The district court's opinion is unpublished and reprinted in the Appendix (Appendix 9–23). The order denying rehearing and rehearing *en banc* is reprinted in the Appendix (Appendix. 24).

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on February 21, 2025. The court denied a timely petition for rehearing on March 28, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V (Due Process Clause)

Fifth Amendment to the United States Constitution (Due Process Clause)

28 U.S.C. § 1254(1)

28 U.S.C. § 1915(d)

Federal Rule of Civil Procedure 4(c)(3)

Federal Rule of Civil Procedure 4(d)(2)

Federal Rule of Civil Procedure 4(l)(3)

Federal Rule of Civil Procedure 4(m)

STATEMENT OF THE CASE

Petitioner Amir M. Hamza, proceeding *pro se* and *in forma pauperis,* filed suit in the Northern District of New York against Respondents alleging violations of the Fair Labor Standards Act, New York Labor Law, and related state-law claims for unpaid wages. The district court directed the U.S. Marshals Service to serve the summons and complaint pursuant to 28 U.S.C. § 1915(d) and Fed. R. Civ. P. 4(c)(3).

The Marshals attempted service by mailing waiver-of-service requests, which Respondents declined. The Marshals made no further service attempts within the initial 90-day period. After Petitioner personally served Respondents' counsel, the district court deemed that service ineffective but granted a 60-day extension and instructed Petitioner on how to proceed if the Marshals again failed.

Petitioner did not file proof of service within the extended deadline due to personal hardship and reliance on the United States Marshals. Furthermore, Defendants purposely, along with their attorney, aimed to avoid service of process. Service was ultimately completed by the Columbia County Sheriff's Department at the expense of Petitioner after the court's deadline. The district court dismissed the action under Rule 4(m) for untimely service, and the Second Circuit affirmed.

REASONS FOR GRANTING THE WRIT

I. The Circuits Are Split on Rule 4(m) Dismissals When Indigent Litigants Rely on Marshals.

- The Second Circuit (following *Meilleur v. Strong*, 682 F.3d 56 (2d Cir. 2012)) requires indigent plaintiffs to repeatedly seek extensions, even when service failures are attributable to the Marshals.
- The Seventh and Ninth Circuits hold the opposite: that a Marshal's failure constitutes "good cause" requiring extension. *Graham v. Satkoski*, 51 F.3d 710, 713 (7th Cir. 1995); *Puett v. Blandford*, 912 F.2d 270, 273 (9th Cir. 1990).

II. The Question Is Critically Important to Access to Justice.

- Congress enacted § 1915(d) to ensure indigent litigants are not denied their day in court because of failures outside their control.
- Dismissing cases in these circumstances penalizes the most vulnerable litigants and undercuts the remedial purpose of § 1915.

III. The Decision Below Conflicts with the Text and Purpose of Rule 4(m).

- Rule 4(m) authorizes extensions for "good cause," and even without good cause, allows discretionary extensions to prevent injustice.
- Here, Respondents had actual notice, were actively evading service, and dismissal effectively barred the claims under the statute of limitations.

IV. Defendants' Conduct Demonstrates Notice and Undermines the Dismissal.

- Petitioner and Respondents were simultaneously engaged in multiple Family Court proceedings, during which Respondents filed a petition that quoted directly from the pending federal complaint—conclusively demonstrating their actual notice of the suit
- Furthermore, Respondents used direct quotations from the federal complaint in the Family Court petition and conferences to undermine Petitioner in Family Court proceedings to damage Petitioner's relationship with his son.
- Finally, both the United States Court of Appeals for the Second Circuit and the United States District Court for the Northern District of New York failed to acknowledge that Respondents engaged in evasive and misleading conduct undertaken solely to avoid proper service.
- This conduct undermined the integrity of the proceedings and effectively denied Petitioner his right to a fair adjudication on the merits.
- Under Federal Rule of Civil Procedure 4(d)(2), a defendant who refuses, without good cause, to waive service is subject to cost-shifting sanctions.

- Moreover, Rule 4(l)(3) authorizes courts to retroactively validate service where, as here, the defendant's actual notice of the lawsuit is undeniable.
- Courts have long recognized that technical objections to service cannot defeat jurisdiction when the defendant has received actual notice and engaged in conduct designed to obstruct service. See *Henderson v. United States*, 517 U.S. 654, 672 (1996) (emphasizing that the rules governing service are to be construed liberally to effectuate service and ensure adjudication on the merits); *Mann v. Castiel*, 681 F.3d 368, 373–74 (D.C. Cir. 2012) (holding that dismissal for failure of service was inappropriate where defendants had actual notice and engaged in evasive tactics); *Armco, Inc. v. Penrod-Stauffer Bldg. Sys., Inc.*, 733 F.2d 1087, 1089–90 (4th Cir. 1984) (recognizing that defendants may not "evade service and then later rely on technical defects to seek dismissal").
- By overlooking Respondents' bad faith refusal to accept or waive service, despite clear evidence of actual notice, the lower courts not only departed from the text and purpose of Rule 4 but also sanctioned an outcome that rewards obstruction and frustrates the orderly administration of justice.
- Courts have recognized that such conduct weighs heavily against dismissal. See *Novak v. World Bank*, 703 F.2d 1305, 1310 (D.C. Cir.

1983); *Chapman v. N.Y. State Div. for Youth*, 227 F.R.D. 175, 179 (N.D.N.Y. 2005).

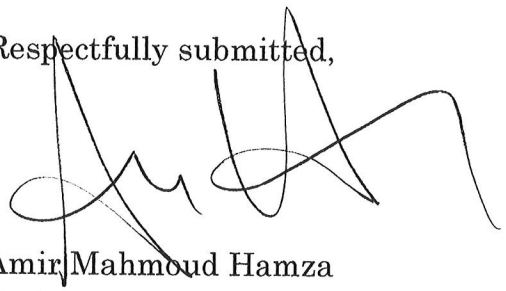
V. This Case Is an Ideal Vehicle.

- The issue is cleanly presented, the facts are undisputed, and the resolution will have national impact on indigent litigants' access to justice.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



Amir Mahmoud Hamza
Petitioner, pro se
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amirmhamza@gmail.com

CERTIFICATE OF SERVICE

I, **H.E. Amir M. Hamza**, Petitioner **pro se**, hereby certify that on this 20th day of August 2025, I caused to be served three copies of the foregoing **Petition for a Writ of Certiorari in *Hamza v. Yandik***, together with the appendix thereto, by first-class mail, postage prepaid, addressed to each of the following:

William Yandik
96 Water Street
Hudson, NY 12534

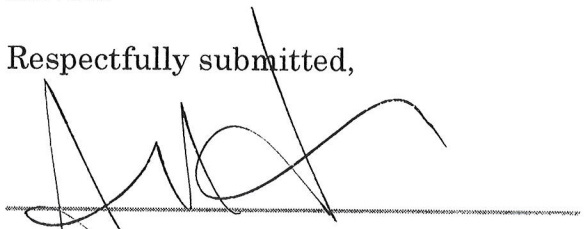
Eileen Yandik
96 Water Street
Hudson, NY 12534

Stephen Yandik
96 Water Street
Hudson, NY 12534

Green Acres Farm
96 Water Street
Hudson, NY 12534

I further certify that all parties required to be served have been served.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

Pursuant to Supreme Court Rule 33.1(h), I certify that this Petition for a Writ of Certiorari contains **1,613 words**, excluding the parts of the Petition that are exempted by Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Respectfully submitted,

H.E. Amir M. Hamza
Petitioner, pro se
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Philmont, NY 12565
702-592-2647
amirmhamza@gmail.com

SUPREME COURT OF THE UNITED STATES

AMIR M. HAMZA,
Petitioner,

v.

WILLIAM LAWRENCE YANDIK, et al.,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

CONTENTS OF APPENDIX

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 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 21st day of February, two thousand twenty-five.

PRESENT: ROBERT D. SACK,
GERARD E. LYNCH,
RAYMOND J. LOHIER, JR.,
Circuit Judges.

AMIR M. HAMZA,

Plaintiff-Appellant,

v. No. 23-1197-cv

EILEEN YANDIK, STEPHEN YANDIK, WILLIAM YANDIK, GREEN ACRES FARM,

Defendants-Appellees.

FOR APPELLANT: Amir M. Hamza, *pro se*, Philmont, NY

FOR APPELLEES: No brief.

Appeal from a judgment of the United States District Court for the Northern District of New York (Lawrence E. Kahn, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED.

Amir Hamza, proceeding *pro se*, appeals from a judgment of the United States District Court for the Northern District of New York (Kahn, *J.*) dismissing his action against Appellees Eileen Yandik, Stephen Yandik, William Yandik, and Green Acres Farm for failure to serve them with adequate and timely process under Rule 4 of the Federal Rules of Civil Procedure. *See Hamza v. Yandik*, No. 19-CV-447, 2023 WL 5336812 (N.D.N.Y. Aug. 18, 2023). In his operative complaint, Hamza alleges that Appellees failed to pay him for work he completed as an employee on their farm, in violation of the Fair Labor Standards Act, New York Labor Law, and New York common law relating to breach of contract.[1] We assume the parties' familiarity with the underlying facts and the

[1] The District Court previously dismissed Hamza's other claims under 28 U.S.C. § 1915(e)(2). *See Hamza v. Yandik*, No. 19-CV-447, 2021 WL 326208, at *2, *9 (N.D.N.Y. Jan. 29, 2021).

record of prior proceedings, to which we refer only as necessary to explain our decision to affirm.

On January 29, 2021, the District Court, in view of Hamza's status as a litigant proceeding *in forma pauperis*, directed the United States Marshals Service to effectuate service on his behalf. The Marshals Service apparently mailed Appellees copies of the complaint and summonses, along with a form requesting that they waive service of process. Appellees declined to waive service, and the Marshals Service made no further attempt to serve them. In May 2021 Hamza served the complaint and summonses on Appellees' lawyers at their office.

Appellees moved to dismiss Hamza's case on the ground that Hamza's attempts at service were untimely and inadequate. The District Court denied their motion, extended Hamza's service deadline by 60 days, directed the Marshals Service to attempt service a second time, and informed Hamza that if the Marshals Service was again unable to effectuate service, he could move for leave to serve Appellees through alternative means. *See Hamza v. Yandik*, No. 19-

CV-447, 2022 WL 976888, at *6–9 (N.D.N.Y. Mar. 31, 2022).[2] Neither Hamza nor the Marshals Service filed anything within 60 days of the District Court's order.

On August 26, 2022, several months after the deadline had lapsed, the Court directed Hamza to provide a status update regarding service, but Hamza failed to respond. On December 2, 2022, the Court gave Hamza a final, 14-day deadline to show good cause for his failure to serve Appellees or request an alternate means of service. Hamza again failed to respond within the 14-day period. On December 19, 2022 (the next business day after the deadline), Hamza responded by letter that he had not effectuated service because the Marshals Service had failed to serve Appellees, and because he had suffered several personal setbacks in the preceding months that contributed to his delay. He attached to his letter forms signed by a process server stating that the Appellees

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[2] Appellees swore to the fact that they did not authorize their attorneys to receive service on their behalf. Appellees therefore argued that Hamza's service of their attorneys in May 2021 was insufficient. When the District Court extended Hamza's deadline to effect service of process, it declined to "rule on the validity of that . . . attempt at service of process," holding that the issue was moot in light of the court's further extension of the deadline. *Hamza*, 2022 WL 976888, at *8. That was incorrect; if the service on the attorneys was effective, there would have been no need for an extension, and the case could have proceeded. Given, however, that "plaintiff is responsible for having the summons and complaint served within the time allowed," and that Hamza never established that Appellees' attorneys were authorized to accept service on Appellees' behalf, Hamza's effort to serve Appellees through their attorneys was insufficient. Fed. R. Civ. P. 4(c)(1).

had been personally served at their lawyers' address that same day. Further, approximately a month later, Hamza filed proof that the Deputy Sheriff of Columbia County had served process on Appellees.

Appellees filed a second motion to dismiss for Hamza's failure to render timely service under Rule 4(m), which the District Court granted on August 18, 2023. *Hamza*, 2023 WL 5336812, at *6. This appeal followed. We review such dismissals for abuse of discretion. *Gerena v. Korb*, 617 F.3d 197, 201 (2d Cir. 2010).

A district court abuses its discretion "if it has (1) based its ruling on an erroneous view of the law, (2) made a clearly erroneous assessment of the evidence, or (3) rendered a decision that cannot be located within the range of permissible decisions." *Lynch v. City of New York*, 589 F.3d 94, 99 (2d Cir. 2009) (quotation marks omitted). Rule 4(m) gives a plaintiff 90 days to effectuate service. Fed. R. Civ. P. 4(m). If a district court finds that a plaintiff has shown "good cause" for failing to meet this deadline, then it "must extend the time for service for an appropriate period." *Id.* Alternatively, even in the absence of good cause, a district court has discretion to extend a plaintiff's service deadline if it concludes that such an extension is warranted. *Zapata v. City of New York*, 502 F.3d 192, 196 (2d Cir. 2007). Either way, Rule 4(m) "involve[s] a weighing of

overlapping equitable considerations." *Id.* at 197. We will conclude that the district court acted within its discretion if there are "sufficient indications on the record that the district court weighed the impact that a dismissal or extension would have on the parties." *Id.*

We conclude that the District Court did not abuse its discretion when it declined to grant Hamza another extension to serve Appellees and dismissed his case. We appreciate that Hamza expected the Marshals Service to effectuate service given the District Court's orders.[3] "The failure of the U.S. Marshals Service to properly effect service of process constitutes 'good cause' for failure to effect timely service, within the meaning of . . . Rule . . . 4(m)." *Walker v. Schult*, 717 F.3d 119, 123 n.6 (2d Cir. 2013). Here, however, the District Court gave Hamza a 60-day extension and advised him how to proceed in the event that the Marshals Service could not effectuate service. *See Hamza*, 2022 WL 976888, at *6–8, *11. At that point, after it became "apparent that the Marshals w[ould] not

[3] Appellees declined to waive service at the Marshals Service's request. Hamza argues that a defendant is "required, by law, to either return the Waiver of Service or provide the Court with a 'good cause' for their failure to return the Waiver of Service." Appellant's Br. 29. We disagree. A district court must impose the cost of service on a defendant who declines to waive service without good cause, but a defendant need not show good cause in order to insist on formal service. *See* Fed. R. Civ. P. 4(d)(2). None of Hamza's other attempts at service were made within Rule 4(m)'s initial 90-day deadline or the District Court's 60-day extension of time.

[serve defendants] . . . by the Rule 4(m) or court-ordered deadline," Hamza should have "advise[d] the district court that [he was] relying on the Marshals to effect service and request[ed] a further extension of time for them to do so." *Meilleur v. Strong*, 682 F.3d 56, 63 (2d Cir. 2012). Hamza failed to do this; he also failed to otherwise serve Appellees within the District Court's deadline, as his further attempts at service on December 19, 2022, and in January 2023 through the sheriff's office, were both after the District Court's deadline.

The District Court also weighed the equities before dismissing Hamza's case. First, the District Court acknowledged the developments in Hamza's personal life that contributed to the delay, the fact that Appellees had actual notice of Hamza's complaint, and the fact that the relevant statutes of limitations would likely bar Hamza's claims if he refiled. *Hamza*, 2023 WL 5336812, at *4–5. The District Court determined, however, that these factors were outweighed by the duration of Hamza's delay, his failure to comply with multiple orders, and the fact that he had been advised about what to do if the Marshals Service could not serve Appellees in time. *Id.* at *5–6. Thus, there are "sufficient indications on the record that the district court weighed the impact that a dismissal or extension would have on the parties." *Zapata*, 502 F.3d at 197. We recognize that this is a

harsh and unfortunate result. But based on the particular facts and circumstances presented in this case, even if "we might well have exercised discretion differently were it for us to decide in the first instance," we cannot conclude that the District Court's decision to hold Hamza to its oft-extended deadline was "a reversible abuse of discretion." *Meilleur*, 682 F.3d at 63. [4]

All of Hamza's pending motions, including his request that this Court consider new evidence that was not presented to the District Court, are denied. *Int'l Bus. Machs. Corp. v. Edelstein*, 526 F.2d 37, 45 (2d Cir. 1975) ("[A]bsent extraordinary circumstances, federal appellate courts will not consider rulings or evidence which are not part of the trial record.").

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[4] While it was within the discretion of the District Court to dismiss Hamza's case, we are mindful of our obligation to "afford a special solicitude to *pro se* litigants." *Rosa v. Doe*, 86 F.4th 1001, 1007 (2d Cir. 2023). We note accordingly that the dismissal of Hamza's case was without prejudice, meaning there is no preclusive effect on a subsequent claim. *See Camarano v. Irvin*, 98 F.3d 44, 47 (2d Cir. 1996). The District Court acknowledged that statutes of limitations applicable to the Fair Labor Standards Act, New York Labor Law, and breach of contract claims likely bar Hamza's refiling of those claims. *Hamza*, 2023 WL 5336812, at *5 & n.1. We do not decide whether the relevant statutes of limitations may be equitably tolled in Hamza's case. *See Smalls v. Collins*, 10 F.4th 117, 145 (2d Cir. 2021) ("Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." (quotation marks omitted)). We do, however, note that if it is Hamza's intention to bring his claims in a new action, he should consider first consulting with the Pro Se Assistance Program, a program of the Northern District of New York Federal Court Bar Association, which, we gather, provides free legal advice and assistance to *pro se* litigants.

We have considered Hamza's remaining arguments and conclude that they are without merit. For the foregoing reasons, the judgment of the District Court is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JUDGMENT IN A CIVIL CASE

Amir M. Hamza
Plaintiff(s)

vs.

CASE NUMBER: 1:19-cv-447 (LEK/DJS)

Eileen Yandik, Stephen Yandik, Green Acres Farm, William Yandik
Defendant(s)

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED: ORDERED, that Defendants Cross-Motion to Dismiss the Second Amended Complaint pursuant to Federal Rule of Civil Procedure 4(m) (Dkt. No. 64) is GRANTED; and it is further ORDERED, that this action is DISMISSED without prejudice; and it is further ORDERED, that the remaining motions (Dkt. Nos. 57, 68, 75, and 76) are DENIED as moot; and it is further ORDERED, that the Clerk of the Court shall enter a judgment of dismissal without prejudice and close this case. IT IS SO ORDERED.

All of the above pursuant to the order of the Honorable **Lawrence E. Kahn**, dated August 18, 2023.

DATED: August 18, 2023

John Domurad
Clerk of Court

s/Kathy Rogers
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

AMIR M. HAMZA,

Plaintiff,

-against- 1:19-CV-0447 (LEK/DJS)

EILEEN YANDIK, *et al.*,

Defendants.

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Plaintiff Amir Hamza commenced this action against Eileen Yandik, William Yandik, Stephen Yandik, and Green Acres Farm (collectively, "Defendants") on April 15, 2019. Dkt. No. 1 ("Complaint"). The following month, the Court granted Plaintiff's application to proceed in forma pauperis ("IFP"). Dkt. No. 5. Plaintiff filed a second amended complaint on August 28, 2020, and an addendum to this second amended complaint on December 18, 2020. Dkt. Nos. 19, 21 (collectively, "Second Amended Complaint"). On January 29, 2021, the Court determined that Plaintiff's Fair Labor Standards Act ("FLSA") and New York Labor Law ("NYLL") claims against Green Acres Farm and breach of contract claims against all Defendants survived sua sponte review pursuant to 28 U.S.C. 1915(e)(2), and thus required a response. Dkt. No. 22 at 11–12, 19 ("January 2021 Order"). Now before the Court are the following motions: (1) Plaintiff's motion for an order requiring Defendants to pay Plaintiff's costs for serving the Second Amended Complaint, Dkt. No. 57; (2) Plaintiff's second motion for a default judgment against Defendants, Dkt. No. 75; (3) Plaintiff's request to withdraw his second motion for default judgment; (4) Defendants' cross-motion to dismiss the Second Amended Complaint pursuant to Federal Rules of Civil Procedure 4(m) and 41(b), Dkt. No. 64 ("Defendants' Cross-Motion to

Dismiss"); and (5) a motion from Defendants' counsel seeking leave to withdraw from their representation, Dkt No. 68. For the reasons set forth below, the Court grants Defendants' Cross-Motion to Dismiss pursuant to Rule 4(m) and directs the Clerk of the Court to enter judgment. The Court denies all other pending motions as moot.

II. PROCEDURAL HISTORY

A. Factual Allegations

The Court assumes familiarity with Plaintiff's factual allegations, which the Court summarized in the January 2021 Order. See Jan. 2021 Order at 2–4.

B. Procedural History

The Court also assumes familiarity with Plaintiff's attempts to serve Defendants prior to March 2022, which the Court detailed in an order dated March 31, 2022. Dkt. No. 49 ("March 2022 Order") at 2–4.

In the March 2022 Order, the Court denied Defendants' motion to dismiss the Second Amended Complaint for insufficient service of process pursuant to Rule 12(b)(5), id. at 21, and granted Plaintiff an extension of time to effectuate proper service upon Defendants pursuant to Rule 4(m), id. at 16 (finding that "Plaintiff has shown good cause" for an extension). Given that "Defendants ha[d] actual notice of the case pending against them," id. at 19, the Court also ordered that:

> [I]f the United States Marshal fails to serve process on Defendants within **sixty (60) days** of [the March 2022] Order, Plaintiff is permitted to enter a motion with the Court under FRCP 4(e)(1) and CPLR § 308(5) requesting substitute service of process on Defendants through an alternative means, describing Plaintiff's earlier efforts to effect service of process on Defendants, and indicating why these earlier efforts were impracticable[.]

Id. at 22. Shortly after the Court issued the March 2022 Order, the Clerk of the Court issued summons as to all Defendants. Dkt. No. 50.

After the Clerk issued the summons, Plaintiff did not file anything on the docket for nearly five months. Therefore, on August 26, 2022, the Honorable Daniel J. Stewart directed Plaintiff "to advise [the Court] as to the status of service upon the Defendants in this matter by September 9, 2022." Dkt. No. 51. Plaintiff did not file a status report by this deadline. Dkt. No. 52. Then, after nearly three more months had passed without any communication from Plaintiff, the Court issued an order on December 2, 2022, granting Plaintiff a final fourteen days "to submit a filing with the Court showing good cause for failure to serve process on Defendants." Id. The Court added that "[i]f Plaintiff does not submit a filing by December 16, 2022, showing good cause for the failure to effect service, Plaintiff is advised that the Court shall dismiss this action without prejudice pursuant to Rule 4(m)." Id. (citing Fed. R. Civ. P. 4(m)).

Three days after the final deadline to show good cause for the failure to effect service, Plaintiff filed a letter with the Court explaining (1) why he failed to effect service within the time allotted and (2) why an alternative means of service is necessary. Dkt. No. 53 at 1.

Then, on December 27, 2022, Plaintiff filed a motion for an order requiring Defendants to pay Plaintiff's costs for serving the Second Amended Complaint, Dkt. No. 57, and a motion for a default judgment against Defendants, Dkt. No. 58. Plaintiff then filed four affidavits from the Columbia County Sheriff's Office on January 17, 2023, representing that the Defendants were personally served with a summons and complaint between December 20, 2022, and December 29, 2022. Dkt. Nos. 59–63.

In their opposition to both motions, Defendants filed a timely response to Plaintiff's motions in which they argue that dismissal is warranted due to Plaintiff's failures to comply with

this Court's deadlines and orders. See Dkt. No. 64-1 at 3–5. Defendant also moves for dismissal on the basis that Plaintiff had still failed to file timely and proper service. See id. at 5–6. Finally, Defendants argued that Plaintiff's motions for default judgment and payment of fees should be denied for lack of merit. See id. at 7. Plaintiff then filed a timely reply to Defendants' response and cross-motion. Dkt. No. 67.

Separately, and shortly thereafter, Defendants' counsel filed a motion to withdraw. Dkt. No. 68. The Court has not yet ruled on this motion.

On May 25, 2023, this Court issued a Text Order denying Plaintiff's motion for default judgment but deferring any ruling on the remaining outstanding motions. Dkt. No. 70. Specifically, the Court denied Plaintiff's motion for default judgment on the basis that Plaintiff had not yet secured entry of default, as required by Local Rules 55.1 and 55.2(b). See id. Plaintiff then sought and received entry of default on May 31, 2023. See Dkt. No. 73. The next day, however, the Court instructed the Clerk to vacate the entry of default pending resolution of the outstanding motions, noting that the entry was not permitted because the question of proper service had not yet been resolved. See Dkt. No. 74. The Court also instructed Plaintiff not to request entry of default or file any motion for default judgment until the Court had done so. See id. However, prior to receiving this Order, Plaintiff had already mailed a second motion for default judgment to the Court. See Dkt. No. 75. Upon receipt of the Court's Order vacating the entry of default, Plaintiff filed a subsequent request to withdraw his second motion for default judgment. Dkt. No. 76.

III. LEGAL STANDARD

"If a defendant is not served within 90 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 the defendant or order that service be made within a specified time." Fed. R. Civ. P. 4(m). However, "if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period." Id.

The plaintiff bears the burden of proof in showing that it had good cause in not timely serving the defendant. See AIG Managed Mkt. Neutral Fund v. Askin Cap. Mgmt., L.P., 197 F.R.D. 104, 108 (S.D.N.Y. 2000). "Good cause is 'generally found only in exceptional circumstances where the plaintiff's failure to serve process in a timely manner was the result of circumstances beyond its control.'" E. Refractories Co. v. Forty Eight Insulations, Inc., 187 F.R.D. 503, 505 (S.D.N.Y. 1999) (quoting Nat'l Union Fire Ins. Co. v. Sun, No. 93-CV-7170, 1994 WL 463009, at *3 (S.D.N.Y. Aug. 25, 1994)). "District courts consider the diligence of plaintiff's efforts to effect proper service and any prejudice suffered by the defendant as a consequence of the delay." Id. "In particular, a court should look to whether 'the plaintiff was diligent in making reasonable efforts to effect service, including but not limited to whether plaintiff moved under FRCP 6(b)' for an extension of time in which to serve the defendant." AIG, 197 F.R.D. at 108 (quoting Gordon v. Hunt, 835 F.2d 452, 453 (2d Cir. 1987)).

If a plaintiff proceeding pro se and in forma pauperis chooses to rely on the United States Marshals Service to effective service on the defendants, "the Marshals' failure to effective service automatically constitutes good cause within the meaning of Rule 4(m)." Ruddock v. Reno, 104 F. App'x 204, 206–07 (2d Cir. 2004) (collecting cases); see also Jaiyeola v. Carrier Corp., 242 F.R.D. 190, 192 (N.D.N.Y. 2007) (Kahn, J.) ("[T]he Second Circuit has noted that a plaintiff's *in forma pauperis* status 'shift[s] responsibility for serving the complaint from [the plaintiff] to the Court.'" (alteration in original) (quoting Wright v. Lewis, 76 F.3d 57, 59 (2d Cir. 1996))). However, a plaintiff's reliance on the Marshals to effect service does not excuse a

plaintiff's responsibility to ensure that service has in fact been effectuated. See Meilleur v. Strong, 682 F.3d 56, 63 (2d Cir. 2012). For instance, if "it becomes apparent that the Marshals will not accomplish [service] by the Rule 4(m) or court-ordered deadline, [the plaintiff] must advise the district court that she is relying on the Marshals to effectuate service and request a further extension of time for them to do so." Id.

Even in the absence of good cause, a district court retains broad discretion "to enlarge the time for service." Henderson v. United States, 517 U.S. 654, 658 n.5 (1996) (quoting Fed. R. Civ. P. 4(m) advisory committee's note to 1993 amendment); see also Zapata v. City of New York, 502 F.3d 192, 196 (2d Cir. 2007) ("We hold that district courts have discretion to grant extensions even in the absence of good cause.").

> In determining whether a discretionary extension is appropriate in the absence of good cause, district courts generally consider: "(1) whether any applicable statutes of limitations would bar the action once refiled; (2) whether the defendant had actual notice of the claims asserted in the complaint; (3) whether defendant attempted to conceal the defect in service; and (4) whether defendant would be prejudiced by extending plaintiff's time for service."

George v. Pro. Disposables Int'l, Inc., 221 F. Supp. 3d 428, 435 (S.D.N.Y. 2016) (quoting DeLuca v. AccessIT Grp., Inc., 695 F. Supp. 2d 54, 66 (S.D.N.Y. 2010)). "Where . . . good cause is lacking, but the dismissal without prejudice in combination with the statute of limitations would result in a dismissal *with* prejudice," the Second Circuit "will not find an abuse of discretion . . . so long as there are sufficient indications on the record that the district court weighed the impact that a dismissal or extension would have on the parties." Zapata, 502 F.3d at 197 (footnote omitted). In addition, "district courts may, in their discretion, deem it desirable in some cases to inquire as to *pro se* plaintiffs' compliance (or lack thereof) with their instructions before dismissing their actions." Meilleur, 682 F.3d at 63 n.6.

IV. DISCUSSION

This Court previously credited Plaintiff for his diligence in attempting to effectuate service through the United States Marshals Service. See Mar. 2022 Order at 15. In fact, Plaintiff's diligence was one of the primary reasons this Court granted Plaintiff an additional sixty days to effectuate service on Defendants via the United States Marshals Service. Id. at 16, 22. Recognizing that the United States Marshals Service might fail to serve process on Defendants a second time, the Court also granted Plaintiff leave to enter a motion with the Court "requesting substitute service of process on Defendants through an alternative means" should the Marshals not effect service within those sixty days. Id.

However, after the Court issued the March 2022 Order, Plaintiff did not take any affirmative steps to properly serve Defendants *for nearly nine months*. After the United States Marshals Service again failed to serve Defendants in the additional sixty days allotted by the Court, Plaintiff did not request a further extension of time to effectuate service via the United States Marshals Service. Nor did Plaintiff enter a motion with the Court requesting the direction of substitute service of process on Defendants through an alternative means, as specifically permitted by the Court in the March 2023 Order. See Mar. 2023 Order at 22.

Given Plaintiff's silence throughout the summer, Judge Stewart ultimately directed Plaintiff on August 26, 2022, "to advise [the Court] as to the status of service upon the Defendants in this matter by September 9, 2022." Dkt. No. 51. Plaintiff did not comply with this order, and another two months passed without any update from Plaintiff regarding service on Defendants. Plaintiff's inaction finally spurred the Court to issue an ultimatum, instructing Plaintiff that his action was at risk for dismissal pursuant to Rule 4(m) if he did not "submit a filing with the Court showing good cause for failure to serve process on Defendants" within

fourteen days—i.e., December 16, 2022. Dkt. No. 52. Yet again, Plaintiff failed to comply with this deadline.

Plaintiff ultimately filed a status update three days after the third and final deadline set by the Court. See Dkt. No. 53; see also Ioele v. City of New York, No. 18-CV-10904, 2020 WL 1503506, at *3 n.2 (S.D.N.Y. Mar. 30, 2020) (noting that papers filed by non-incarcerated pro se litigants are deemed filed on the day on which the papers are received and file-stamped by the clerk of the district court (citing Fed. R. Civ. P. 3, 5(d)(2))); Nearhood v. Tops Mkts., Inc., 76 F. Supp. 2d 304, 305 (W.D.N.Y. 1999) ("It is well established . . . that when papers are mailed to the clerk's office, filing is complete only upon the clerk's receipt of those papers, and that filings reaching the clerk's office after a deadline are untimely, even if they are mailed before the deadline." (citing United States v. White, 980 F.2d 836, 845 (2d Cir. 1992)) (other citations omitted)). That failure to show good cause within the time allotted by the Court is enough to preclude a finding of good cause. But even if the Court were to credit the contents of Plaintiff's late filing, the Court would still find that Plaintiff has failed to show good cause for his failure to properly serve Defendants by December 16, 2022.

In his late filing, Plaintiff argues that good cause exists for his failure because "the Clerk did not attempt service on the Defendants as was previously ordered." Dkt. No. 53 at 1. The Court presumes that by referring to "the Clerk," Plaintiff is highlighting the United States Marshals Service's failure to effect service on Defendants within the additional sixty days allotted by the Court after the Clerk issued the summons. See id. Plaintiff is correct that the Marshals' failure to effect service within that additional sixty-day period would have automatically entitled Plaintiff to another extension to properly serve Defendants. See Ruddock, 104 F. App'x at 206–07. Yet Plaintiff is wrong to suggest that the Marshals' failure to serve the

Second Amended Complaint during those sixty days entitled Plaintiff to an indefinite extension of time to properly serve Defendants without Plaintiff ever having to take any further steps to ensure that service had in fact occurred. See Meilleur, 682 F.3d at 63 (stating that if "it becomes apparent that the Marshals will not accomplish [service] by the Rule 4(m) or court-ordered deadline, [the plaintiff] must advise the district court that she is relying on the Marshals to effectuate service and request a further extension of time for them to do so").

To date, Plaintiff has not provided cognizable reasons to the Court explaining why—in the nearly seven months following the expiration of the sixty-day deadline for the United States Marshals Service to effectuate service—Plaintiff (1) never asked for further extensions of time to effectuate service given the Marshals' failure, (2) never moved the Court to direct substitute service of process on Defendants through an alternative means, and (3) never provided any other meaningful update to the Court about the status of service on Defendants in this case. These actions would have required little effort on Plaintiff's part—particularly given that the Court has generally excused him, as a pro se litigant, from complying with the local rules. See, e.g., Jan. 2021 Order at 2 (recognizing that "Plaintiff's Second Amended Complaint is not a complete pleading" and resorting to factual allegations from earlier Second Amended Complaints to assess whether Plaintiff stated claims upon which relief may be granted). Plaintiff does state that he faced certain obstacles, including "the health of [his] family members, numerous repairs to [his] home, [and] other legal proceedings," Dkt. No. 53 at 1, and that he "do[es] not receive USPS mail at [his] home," Dkt. No. 67-1 at 2 ¶ 7. However, even if the Court were to assume that all of the aforementioned "circumstances [were] beyond [P]laintiff's control," George, 221 F. Supp. 3d at 432, Plaintiff never explains how any of these circumstances resulted in his failure to effectuate service or otherwise ask the Court for further extensions for nearly nine months.

Therefore, the Court finds that Plaintiff has failed to show good cause as to why he was unable to effectuate service on Defendants before December 16, 2022.

Accordingly, the Court need only inquire whether it wishes to afford Plaintiff another extension to properly serve Defendants *in the absence of good cause*. See Henderson, 517 U.S. at 658 n.5; Zapata, 502 F.3d at 196. Despite Plaintiff's failure to demonstrate good cause, the fact that the applicable statutes of limitations for Plaintiff's FLSA, NYLL, and breach of contract claims would likely bar the action once refiled does weigh in favor of yet another extension.[1] See DeLuca, 695 F. Supp. 2d at 66–67. Also weighing in favor of an extension is the fact that "Defendants have actual notice of the case pending against them," Mar. 2022 Order at 19, and thus would not be prejudiced in defending against the claims on the merits if Plaintiff eventually served them, see AIG, 197 F.R.D. at 11 (noting that actual notice of an action favors against a finding of prejudice since the "core function" of service is to supply notice "in a manner and at a time that affords the defendant a fair opportunity to answer the complaint and present defenses and objections").

But these factors alone do not require this Court to grant yet another extension to Plaintiff. See Knorr v. Coughlin, 159 F.R.D. 5, 7 (N.D.N.Y. 1994) (noting that the expiration of the statute of limitations does not require a court to use its discretion to grant an extension of time for service in every time-barred case). The Second Circuit has explicitly declined to adopt such a categorical rule. See Zapata, 502 F.3d at 198. That is because, "in the absence of good cause, no weighing of the prejudices between [a plaintiff and defendant] can ignore that the

[1] The complained-of conduct giving rise to these claims occurred from 2013 to 2016. Jan. 2021 Order at 2–4, 11–14. "The FLSA has a two-year statute of limitations that extends to three years for willful violations," id. at 11 (citing 29 U.S.C. § 255), and Plaintiff's state-law claims must be brought within six years after they accrue, see N.Y. Lab. Law § 663; N.Y. C.P.L.R. § 213(2).

situation is the result of the plaintiff's neglect." Id. That is likely why the Second Circuit has also permitted district courts "to inquire as to *pro se* plaintiffs' compliance (or lack thereof) with their instructions before dismissing their actions" pursuant to Rule 4(m). Meilleur, 682 F.3d at 63 n.6. This lack of compliance in the nine months after the Court issued the March 2023 Order favors dismissal.

In the March 2022 Order, the Court provided Plaintiff with a clear roadmap for how he might effectuate service in the event that the United States Marshals Service failed yet again to properly serve Defendants. See Mar. 2022 Order at 16–19. While the Court was inclined to provide this leniency given Plaintiff's pro se status, there comes a time when such leniency is no longer appropriate—for instance, when a pro se plaintiff no longer acts reasonably or diligently to effectuate proper service. See Nat'l Union Fire Ins. Co., 1994 WL 463009, at *4 ("For though leniency may sometimes be appropriate for those who have in good faith attempted timely service, to afford it to litigants who have failed to make even the most basic efforts would turn Rule 4(m) into a toothless tiger."). To allow Plaintiff yet another extension of time to effectuate proper service here after he stopped litigating this action for nearly nine months would undermine Rule 4(m) and rob Defendants of its procedural protections, which would certainly prejudice Defendants.

Despite having filed new motions in the new year for the reimbursement of the costs of service and for a default judgment, process has not "been properly served" on Defendants, given Plaintiff's repeated delays and missed deadlines.[2] Meilleur, 682 F.3d at 63. Nor has Plaintiff

[2] The affidavits filed by Plaintiff on January 17, 2023, indicate that service by the Columbia County Sheriff's took place between December 20, 2022, and December 29, 2022—after the third and final deadline set by this Court. See Dkt. Nos. 59–63. Because Plaintiff did not establish good cause for missing (or otherwise comply with) the three deadlines that followed the

successfully petitioned this Court to direct substitute service on Defendants through alternative means.[3] Accordingly, the Court grants Defendants' Cross-Motion to Dismiss the Second Amended Complaint pursuant to Rule 4(m) and denies the other pending motions in this case as moot.

V. CONCLUSION

Accordingly, it is hereby:

ORDERED, that Defendants' Cross-Motion to Dismiss the Second Amended Complaint pursuant to Federal Rule of Civil Procedure 4(m) (Dkt. No. 64) is **GRANTED**; and it is further

ORDERED, that this action is **DISMISSED without prejudice**; and it is further

ORDERED, that the remaining motions (Dkt. Nos. 57, 68, 75, and 76) are **DENIED as moot**; and it is further

ORDERED, that the Clerk of the Court shall enter a judgment of **dismissal without prejudice** and close this case; and it is further

ORDERED, that the Clerk shall serve a copy of this Memorandum-Decision and Order on the parties in accordance with the Local Rules of Practice.

IT IS SO ORDERED.

March 2022 Order, this service was not timely. The Court does not otherwise consider the adequacy of this service.

[3] In Plaintiff's reply to Defendants' Cross-Motion to Dismiss, Plaintiff requests that the Court "deem proof of service based on the acknowledgement made by the Defendants in a sworn Petition to Modify Custody in the New York State Family Court in Columbia County." Dkt. No. 67 at 2 ¶ 7. Plaintiff should note that "courts have repeatedly held that 'actual notice of the action will not, in itself, cure an otherwise defective service.'" In re Teligent Servs., Inc., 324 B.R. 467, 474–75 (Bankr. S.D.N.Y. 2005), aff'd, 372 B.R. 594 (S.D.N.Y. 2007) (quoting Omni Capital Int'l v. Rudolf Wolff & Co., 484 U.S. 97, 104 (1987)). Moreover, to the extent that the Court could construe this as a motion to direct substitute service of process on Defendants, that request is denied as the Court is unwilling to grant Plaintiff yet another extension to effectuate service.

DATED: August 18, 2023
Albany, New York

LAWRENCE E. KAHN
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

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 7th day of March, two thousand twenty-five,

Before: ROBERT D. SACK,
GERARD E. LYNCH,
RAYMOND J. LOHIER, JR.,
Circuit Judges.

Amir M. Hamza,

Plaintiff - Appellant,

v.

Eileen Yandik, Stephen Yandik, Green Acres Farm, William Yandik,

Defendants - Appellees.

ORDER
Docket No. 23-1197

Appellant having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court