

## Recent developments in defense of insufficiency-of-service-of-process

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The recent case *Raposo, et al. v. Evans*, 71 Mass. App. Ct. 379 (2008), serves as a warning to defense counsel regarding the insertion of boilerplate affirmative defenses pursuant to Rule 12 Mass. R. Civ. P., such as insufficiency-of-service-of-process when responding to a complaint. It also serves as an indication as to how such defenses might be treated by the courts in the future when challenged on the basis of waiver.

The case is one of first impression and eviscerates the longstanding practice engaged in by many defense counsel of asserting numerous boilerplate affirmative defenses in an answer and then taking no action to pursue such defenses.

### The rules

Pursuant to Rule 12(b)(5) Mass. R. Civ. P., the defense of insufficiency-of-service-of-process may be asserted in a responsive pleading (typically an answer to a complaint) if one is required or, at the option of the pleader, may be made by way of motion prior to the deadline for the filing of an answer. The defense is often asserted in light of Rule 4(j) Mass. R. Civ. P., requiring that if service of the summons and complaint is not made on a defendant within 90 days of the filing of the complaint, and the plaintiff cannot show good cause why service has not been made during that period of time, the action shall be dismissed without prejudice on the court's own initiative.

### The case

*Raposo, et al. v. Evans*, 71 Mass. App. Ct. 379 (2008), serves as both a cautionary instruction and a prediction as to how our courts will handle the defense of insufficiency-of-service-of-process (and quite possibly other affirmative defenses) when timely asserted in a responsive pleading, but not pursued timely through a motion seeking dismissal of a complaint. *Raposo* involved an automobile collision that occurred on May 23, 1998. A complaint was filed on April 12, 2001. The deputy sheriff's return of service indicated that service was made on May 8, 2001, by leaving a copy of the summons and complaint at the last and usual place of abode of the defendant. An answer was filed on Aug. 22, 2001, on behalf of the defendant, containing nine affirmative defenses, including the defense of insufficiency-of-service-of-process pursuant to Rule 12(b)(5) Mass. R. Civ. P. A motion seeking to dismiss the complaint on those grounds was filed at that time. However, the case was stayed from January 2002 until September 2003.

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On Oct. 14, 2003, defense counsel wrote to plaintiffs' counsel indicating that the defendant had not been properly served. That argument was reiterated in opposition to the plaintiffs' motion to compel the defendant to appear at a deposition in May 2004.

The motion to dismiss for insufficiency-of-service-of-process was denied on Nov. 9, 2004, because no evidence was provided to rebut the deputy sheriff's affidavit and return of service indicating that the defendant had been properly served. The parties subsequently agreed to a discovery schedule and a trial date was set. Various discovery motions were filed. The parties submitted a joint pre-trial memorandum on Jan. 23, 2006. On Feb. 27, 2006, a default judgment (as to liability only) was entered against the defendant, pursuant to Rule 33(a) Mass. R. Civ. P., whereas he had failed to answer the interrogatories.

On March 6, 2006, counsel for the defendant filed a second motion seeking to dismiss the Complaint for insufficiency-of-service-of-process, arguing that the initial service of the Complaint on the defendant was made at a restaurant and, therefore, could not have been made at his last and usual place of abode. An affidavit was filed with the second motion from the restaurant owner indicating that there was no residential apartment at the location of the restaurant. The second motion to dismiss was denied on Aug. 1, 2006, and damages were ultimately assessed against the defendant.

#### **The issue**

The issues presented to the Appeals Court were whether a defendant, who properly challenges service of process in an answer, has the additional obligation to move to dismiss on such grounds within a reasonable time, prior to substantially participating in discovery and litigating the merits of the case, and whether the defense may be waived for the failure to do so.

#### **Holding**

While noting that it was a case of first impression and that federal jurisdictions were split on the issue, the Appeals Court in *Raposo* ultimately held that a defendant who challenges service of process in an answer must move to dismiss within a reasonable time, prior to substantially participating in discovery and litigating the merits of the case. The Court noted that what constitutes a "reasonable amount of time" must be determined by the facts of the case and is left to the discretion of the trial court.

#### **Discussion**

In holding that a defendant challenging the sufficiency of service of process in an answer incurs an additional obligation to move within a reasonable time to dismiss the complaint prior to substantially participating in discovery and litigating the merits of the case, the Appeals Court considered a number of factors and decisions from other jurisdictions. In reviewing a number of federal cases discussing the issue, the Court emphasized that the defendant had delayed substantially in pursuing the defense via motion after the commencement of the action. The Court also highlighted that the defendant had agreed to a discovery schedule and had participated in motion practice as well as a pre-trial conference ultimately holding that, notwithstanding that the defense of insufficiency-of-service-of-process had properly been raised in the defendant's answer as required, the defense had been waived by virtue of the defendant's delay in moving to dismiss the Complaint on such grounds; participating in discovery and motion practice; agreeing to a discovery schedule; and in appearing for a pre-trial conference.

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The Appeals Court found the case of *Burton v. North Dutchess Hospital*, 106 F.R.D. 477 (S.D.N.Y. 1985), instructive. The *Burton* Court noted that the defendants had failed to avail themselves of opportunities to contest sufficiency of service of process for a period of three-and-one-half years following the commencement of the litigation; consented to the establishment of a discovery schedule; engaged in extensive discovery; and had repeatedly joined the plaintiff in requests for extensions of discovery deadlines. The *Burton* court further noted that the defendants failed to include objections to service of process in a Rule 56 Motion for Summary Judgment, thus failing to take advantage of the opportunity to contest service of process.

#### **Conclusion**

Perhaps the most important lesson to be learned from *Raposo* is that, henceforth, our courts will be reluctant to condone or accept the longstanding tradition of asserting boilerplate affirmative defenses in an answer to a complaint and failing to affirmatively move to dismiss the complaint based on those defenses expeditiously, prior to the commencement/completion of discovery and trial. The Court did not limit its ruling to the defense of insufficiency-of-service-of-process, and its ruling likely will be applied to other affirmative defenses in the future. *Raposo* should be viewed as a warning to defense counsel that the routine assertion of affirmative defenses pursuant to Rule 12(b) Mass. R. Civ. P., followed by the failure to prosecute such defenses by appropriate motion, may result in such defenses being waived. There exists little doubt that *Raposo* and its progeny will have a profound impact on how and when defense counsel assert and pursue affirmative defenses, ultimately resulting in more efficient, expeditious and meritorious challenges to complaints that are grounded in Rule 12(b) Mass. R. Civ. P.

If you have any questions, please contact Bruce Medoff, Esquire at (617) 770-2214 or [bmedoff@smithbrink.com](mailto:bmedoff@smithbrink.com).

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