

FILED _____

AT _____ O'Clock _____ M
CLERK OF DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

**DARREAN J. DOWREY, a minor child;
REBECCA SMITH, et ux,**

Plaintiffs,

vs.

**CKE RESTAURANTS, dba CARL'S JR
RESTAURANTS, et al.**

Defendants.

Case No. **CV 2006 3664**

**ORDER GRANTING PLAINTIFFS'
"MOTION FOR AN ORDER
DETERMINING SERVICE WAS
PERFECTED UPON DEFENDANT
KOALA PLAY CANADA, LTD., A/K/A
DELTA PLAY [AND UPON
DEMARCO]"**

I. PROCEDURAL HISTORY AND BACKGROUND.

On March 30, 2002, plaintiff Darrean J. Dowrey was injured on the indoor playground at Carl's Jr. in Coeur d'Alene, Idaho. That fast-food restaurant is owned by defendant CKE Restaurants (d.b.a. Carl's Jr.). In 2006, plaintiffs commenced this action against defendants pursuant to I.C. §5-514 (The Idaho Long-Arm Statute).

On October 20, 2009, plaintiffs filed "Plaintiffs' Motion for an Order Determining Service was Perfected Upon Defendant Koala Play Canada, Ltd., a/k/a Delta Play; or in the Alternative Motion to Extend the Time for Service under Rule 4(a)(2)." On November 18, 2009, defendant Delta Play Company and defendant Steve DeMarco filed a Motion for Dismissal of Defendant Delta Play Company and Steve DeMarco. Oral argument was held December 1, 2009. At the conclusion of oral argument, the Court took these cross-motions under advisement.

II. STANDARD OF REVIEW.

An objection under Idaho Rule of Civil Procedure 12(b)(4) concerns the form of the process as opposed to its manner or method of service, while an Idaho Rule of Civil Procedure 12(b)(5) motion challenges the mode of delivery or lack of delivery of the summons and complaint. *Herrera v. Estay*, 146 Idaho 675, 678, 201 P.3d 647, 651 (2009). Review of dismissal for insufficient service of process involves application of the *de novo* standard to legal questions and clear error standard to findings of fact. *Id.* “In such cases, the district court’s findings of fact will be upheld where they are supported by substantial and competent evidence in the record and this Court will freely review the district court’s application of law to its findings of fact.” *Sells v. Robinson*, 141 Idaho 767, 771, 118 P.3d 99, 103 (2005) (citing *Haight v. Dales Used Cars, Inc.*, 139 Idaho 853, 855, 87 P.3d 962, 964 (Ct.App. 2003)). Complaints should not be dismissed under I.R.C.P. 12(b) unless the plaintiff can prove no set of facts which would entitle him to relief. *Dumas v. Ropp*, 98 Idaho 61, 62, 558 P.2d 632, 633 (1977). And any doubts must be resolved in favor of the survival of the complaint. *Gardner v. Hollifield*, 96 Idaho 609, 610-11, 533 P.2d 730, 731-32 (1975). The standard of review on dismissal under I.R.C.P. 4(a)(2) is well-established in Idaho; the rule requires service of summons and complaint within six months of filing the complaint and unless good cause is shown, a court must dismiss the action for failure to so serve. I.R.C.P. 4(a)(2). When reviewing decision to dismiss under the rule, “the appropriate standard of review is the same as that used to review an order granting summary judgment.” *Nerco Minerals, Co. v. Morrison Knudson Corp.*, 132 Idaho 531, 533, 976 P.2d 457, 459 (1999). But, “where there is no dispute as to the factual circumstances, our review consists of ascertaining the effect of the applicable law on the disputed facts.” *Martin v.*

Hoblit, 133 Idaho 372, 987 P.2d 284 (1999).

III. ANALYSIS.

Plaintiffs move this Court for an Order determining that service was perfected upon defendant Delta Play (Delta Play), or in the alternative seek a sixty day extension for service. Plaintiffs' Motion for an Order Determining Service was Perfected, pp. 1-2. The affidavit of Scott Gingras sets forth the actions taken by plaintiffs to serve Delta Play, a Nova Scotia Corporation. Affidavit of Scott Gingras in Support of Motion for an Order Determining Service was Perfected, pp. 2-5. Beginning in June 2009, plaintiffs attempted to serve Delta Play via service upon: 1) Jeffrey Vigil, a former corporate officer of Delta Play who testified in his deposition to not having been employed by Delta Play since 2007; and 2) Charles Reagh, a Canadian attorney who once represented Delta Play, but had filed an "Unappoint Agent" in October 2008. *Id.*, pp. 3-4. In addition, plaintiffs sent the summons and complaint to the last known registered office of Delta Play by certified registered mail, service by mail was upon Mr. Raegh again, although he no longer represented Delta Play and was no longer its agent for service of process. *Id.*, p. 3.

The Idaho Rules of Civil Procedure contemplate service upon a foreign corporation pursuant to Rule 4(d)(4). Service may be made by personally serving an officer or agent. I.R.C.P. 4(d)(4)(A). Where no designated agent resides in Idaho, or where an agent registered with the Idaho Secretary of State has died, moved, or cannot be found "after due diligence", service may be made by mailing the summons and complaint "to the corporation addressed to its registered place of business and to the president or secretary of the corporation at the addresses shown on the most current annual statement filed with the Secretary of State." I.R.C.P. 4(d)(4)(B). Here, service

was made personally upon two individuals who were neither officers nor agents of Delta Play; service by certified mail was to “the address for the last recognized/registered agent for service of process for Koala Play Canada, LTD., Mr. Charles Reagh, attorney for Stewart McKelvey in Halifax, Nova Scotia Canada.” Affidavit of Scott Gingras in Support of Motion for an Order Determining Service was Perfected, pp. 2-3. Plaintiffs did not claim any attempt to serve Steve DeMarco was made.

Following their attempts at service, plaintiffs corresponded with Delta Play’s attorney of record (Mr. McFarland who specially appeared on June 22, 2009) regarding discovery on the issue of whether service had been effective. *Id.*, p. 4. As of October 20, 2009, “Koala Play Canada, LTD., a/k/a Delta Play’s current status is ‘Revoked for Non-Payment,’ and still list[s] as its Registered Office the address Plaintiff sent via certified mail the complaint [and] summons.” *Id.*, p. 5. It is likely plaintiffs exercised the requisite due diligence required in Rule 4(d)(4)(B). Exhibit 3 to Mr. Gingras’ Affidavit provides the Court with a copy of the Registered Mail receipt and return receipt. However, the Court file does not appear to contain “a return certificate indicating compliance with the provision of this rule and attaching a receipt of the mailing.” I.R.C.P. 4(d)(4)(B). Importantly, plaintiffs have not indicated any attempt to comply with Rule 4(d)(4)(B) by serving both the corporation at its registered place of business *and* the President or Secretary of the corporation at the address shown on the most recent annual statement. *See, id.*

Delta Play argues in its motion to dismiss the service of process was defective, and that no good cause exists for why service was not made within the six month period required by Rule 4(a)(2). Therefore, Delta Play requests the Court dismiss the claims against it and Steve DeMarco. Memorandum in Opposition to Plaintiffs’ Motion to Effect

Service/Extend Time and in Support of Defendants' Motion to Dismiss, p. 3. Delta Play argues the requirements of I.R.C.P. 4(d)(4)(A), (B) for service upon a foreign corporation, were not met, and to some extent could not be met through personal service because "Delta Play has been defunct for a number of years, and it is not believed that any officers, managing or general agents, or other agents exist." *Id.*, p. 4. Delta Play states no good cause exists for the Court to extend the six month deadline set forth in Rule 4(a)(2) because plaintiffs opted not to utilize an alternate statutory procedure, i.e. service of process by publication pursuant to I.C. §§ 5-508, 5-509, and only attempted personal service upon two individuals who no longer had involvement with Delta Play. *Id.*, p. 6.

Plaintiffs respond to Delta Play by arguing: (1) Delta Play submitted itself to the Court's jurisdiction, waiving any issues of ineffective service of process, by responding to discovery and initiating its own discovery motion; (2) plaintiffs requested additional time to serve Delta Play *during* the six-month time period for service and good cause exists where both Mr. Gingras and Mr. McKinney suffered "sudden illnesses"; and (3) if the Court remains unconvinced, plaintiffs move to shorten time and for leave to amend its recent Amended Complaint to rename Delta Play as a party despite its prior voluntary non-suit of Delta Play under Rule 41. Plaintiffs' Response to Delta Play's Motion to Dismiss, pp. 2-7. This Court finds the first of these three arguments is dispositive.

Delta Play replies dismissal of DeMarco remains proper as plaintiffs have made no showing of attempting to serve DeMarco. Reply RE: Motion to Dismiss, p. 2. This would only apply to the second argument, regarding plaintiffs' argument that good cause exists to allow plaintiffs additional time to serve defendants by publication.

Again, plaintiffs' first argument is that Delta Play submitted itself to the Court's jurisdiction, waiving any issues of ineffective service of process, by responding to discovery and initiating its own discovery motion. Plaintiffs' Response to Delta Play's Motion to Dismiss, pp. 2-4. This Court finds Delta Play and DeMarco have entered a voluntary appearance under I.R.C.P. 4(i)(2), when they failed to file a motion to dismiss pursuant to I.R.C.P. 12(b) [(2) lack of jurisdiction over the person, (4) insufficiency of process, or (5) insufficiency of service of process] within fourteen days after the filing of their notice of special appearance. The fact that Delta Play and DeMarco responded to discovery and initiated its own discovery motion, while true, do not enter into the analysis under Idaho Rule of Civil Procedure 4(i)(2)

On June 22, 2009, a "Special Notice of Appearance" was filed, which reads:

COME NOW Defendants DELTA PLAY (U.S.), INC.; DELTA PLAY; and STEVE DEMARCO, and herewith enter an appearance in the above-entitled action through Michael E. McFarland, Jr., of Evans, Craven & Lackie, P.S., attorneys of record

* * *

The Defendants here by specifically reserve all defenses as to lack of jurisdiction, improper venue, insufficiency of process or any other defenses available to the Defendants. Further, the undersigned counsel is specifically not authorized to accept service of process on behalf of any named Defendant.

Special Notice of Appearance, pp. 1-2. Idaho Rule of Civil Procedure 4(i)(2) sets forth the situations where a party may make a special appearance:

(2) Motion or Special Appearance to Contest Personal Jurisdiction.

A motion under Rule 12(b)(2), (4) or (5), whether raised before or after judgment, a motion under Rule 40(d)(1) or (2), or a motion for an extension of time to answer or otherwise appear does not constitute a voluntary appearance by the party under this rule. The joinder of other defenses in a motion under Rule 12(b)(2), (4) or (5) does not constitute a voluntary appearance by the party under this rule. After a party files a motion under Rule 12(b)(2), (4) or (5), action taken by that party in responding to discovery or to a motion filed by another party does not constitute a voluntary appearance. If, after a motion under Rule 12(b)(2), (4), or (5) is denied, the party pleads further and defends the

action, such further appearance and defense of the action will not constitute a voluntary appearance under this rule. The filing of a document entitled “special appearance,” which does not seek any relief but merely provides notice that the party is entering a special appearance to contest personal jurisdiction, does not constitute a voluntary appearance by the party under this rule if the party files a motion under Rule 12(b)(2), (4), or (5) within fourteen (14) days after filing such document, or within such later time as the court permits.

It is the last sentence of the rule which is dispositive. Delta Play and DeMarco have submitted to the jurisdiction of this Court because they filed a “special appearance”, which did “not seek any relief” but merely provided notice that the parties were “entering a special appearance to contest personal jurisdiction.” According to the last sentence of I.R.C.P. 4(i)(2), that sort of “special appearance” “does not constitute a voluntary appearance by the party [parties] under this rule *if the party files a motion* under Rule 12(b)(2), (4), or (5) within *fourteen (14) days after filing such document.*” I.R.C.P. 4(i)(2). (emphasis added). Thus, under that rule, Delta Play and DeMarco had until July 6, 2009 (fourteen days after the June 22, 2009, filing of their “Special Notice of Appearance”) within which to file a motion to dismiss under I.R.C.P. 12(b). Once July 6, 2009, passed without Delta Play and DeMarco filing a motion under I.R.C.P. 12(b), Delta Play and DeMarco entered a voluntary appearances. Delta Play and DeMarco did not file their “Motion for Dismissal of Defendant Delta Play Company and Steve DeMarco” on November 18, 2009.

Delta Play goes on to argue it properly raised and did not waive its insufficient service of process defense because:

Plaintiff’s interpretation of I.R.C.P. 4(i) would lead to the absurd result of the defendant being required to sit back and fail to respond to motions and discovery for a period of six (6) months until the time permitted for service under I.R.C.P. 4(a)(2) elapsed. In the alternative, a defendant would be required to make a motion before the six month period had elapsed, only to be defeated on the grounds that the plaintiff had additional time to effectuate service of process. Instead, the record

establishes that Delta Play properly raised the defense in its Special Notice of Appearance and raised the issue immediately upon the expiration of the six month service period which ended on or about October 29, 2009.

Reply Memorandum Re: Motion to Dismiss, p. 2. Delta Play states it responded to discovery on the issue of service of process and joined in a defense motion to set the terms of an I.R.C.P. 35 examination of plaintiff, both occurring after its Special Appearance was filed, evincing its intent to contest service of process. *Id.*, pp. 2-3. A reading of I.R.C.P. 4(i)(2) shows that after the special appearance is filed, the filing party only has fourteen days within which to file a motion to dismiss, otherwise that party has voluntarily entered an appearance. It could well be that had Delta Play and DeMarco filed a motion to dismiss, they could have also then responded to discovery, joined in a motion and taken other action in this case. But those are not the facts. Delta Play and DeMarco did not file a motion to dismiss within fourteen days of June 22, 2009. When Delta Play and DeMarco filed their "Motion for Dismissal of Defendant Delta Play Company and Steve DeMarco" on November 18, 2009, they did so more than four months too late. By operation of I.R.C.P. 4(i)(2), Delta Play and DeMarco voluntarily entered an appearance in this action on July 6, 2009, fourteen days after filing their special appearance.

In Idaho, a motion sufficient to constitute a voluntary appearance following a special appearance may include: a motion for extension of time, a motion to change venue, or a motion to strike and dismiss because of the doctrine of laches, *inter alia*. *Rhino Metals, Inc. v. Craft*, 146 Idaho 319, 320, 193 P.3d 866, 868 (2008). Idaho Rule of Civil Procedure 4(i)(1) provides a voluntary appearance or service of any pleading by a party constitutes voluntary submission to the court's personal jurisdiction with three exceptions, all found within I.R.C.P. 4(i)(2): (1) filing a motion under Rule 12(b)(2), (4),

or (5); (2) filing a motion asserting any other defense if that motion is joined with a motion under Rule 12(b)(2)(4) or (5); and (3) filing a pleading and defending the lawsuit after the court denies a party's motion under Rule 12(b)(2)(4) or (5). *Rhino*, 146 Idaho 319, 322, 193 P.3d 866, 869. Here, Delta Play never filed a specific motion under Rule 12(b)(2)(4) or (5) until *after* plaintiffs filed plaintiffs' motion to perfect service or extend time for service of process. Thus, Delta Play's argument, *supra*, that filing such a motion would have alerted plaintiffs to the fact it had not yet perfected service is unsound. But again, it is the language of I.R.C.P. 4(i)(2) which controls this Court's decision.

Idaho Rule of Civil Procedure 4(i)(2) specifically states:

...The filing of a document entitled "special appearance", which does not seek any relief but merely provides notice that the party is entering a special appearance to contest personal jurisdiction, does not constitute a voluntary appearance by the party under this rule if the party files a motion under Rule 12(b)(2), (4) or (5) within fourteen (14) days after filing such a document, or within such later time as the court permits.

I.R.C.P. 4(i)(2). Clearly, the filing of its motion to dismiss on November 18, 2009, far exceeded fourteen days from the filing of Delta Play's Special Appearance on June 22, 2009. Idaho rule of Civil Procedure 7(b)(1) defines a motion as an application to the Court for relief or an Order sought. No portion of Delta Play's Special Appearance requested any relief or other Order. That is, there was no request for an extension of the fourteen day time limit set forth in Rule 4(i) whatsoever. It cannot be said that the Special Appearance was a "motion" under Rule 12(b)(2), (4), or (5) within the meaning of the Idaho Rules of Civil Procedure. And there was no compliance with Rule 4(i) as Delta Play did not file any motion under Rule 12(b)(2), (4) or (5) until November 18, 2009. That fact alone accomplishes a voluntary appearance by Delta Play and DeMarco. The fact that Delta Play responded to discovery and joined in a defense

motion, only add to the conclusion that Delta Play entered a voluntary appearance as argued by plaintiffs. See *Rhino*, 146 Idaho 319, 320-21, 193 P.3d 866, 867-68. (“Insofar as is relevant to this case, after Craft filed his motion under Rule 12(b)(2) to dismiss for lack of in personam jurisdiction, Rule 4(i) permitted him to respond to discovery or to a motion filed by Rhino without such action constituting a voluntary appearance...”).

As mentioned above, plaintiffs requested additional time to serve Delta Play *during* the six-month time period for service and plaintiffs argue good cause exists where both Mr. Gingras and Mr. McKinney suffered “sudden illnesses” Plaintiffs’ Response to Delta Play’s Motion to Dismiss, pp. 2-7. Delta Play argues the illnesses of Mr. McKinney and Mr. Gingras do not amount to good cause where three attorneys represent plaintiffs and no request for service by publication was made. Reply Memorandum Re: Motion to Dismiss, p. 4. A discussion of these claims is moot due to this Court’s dispositive finding, *supra*, that by operation of I.R.C.P. 4(i)(2), Delta Play and DeMarco voluntarily entered an appearance in this action on July 6, 2009, fourteen days after filing their special appearance.

IV. CONCLUSION AND ORDER.

For the reasons stated above, this Court finds defendants Delta Play and DeMarco voluntarily entered an appearance in this action on July 6, 2009, fourteen days after filing their special appearance.

IT IS HEREBY ORDERED plaintiffs’ “Motion for an Order Determining Service was Perfected Upon Defendant Koala Play Canada, Ltd., a/k/a Delta Play” is GRANTED, not only as to Delta Play, but as to DeMarco as well, by operation of I.R.C.P. 4(i)(2), Delta Play and DeMarco voluntarily entered an appearance in this action on July 6, 2009, fourteen days after filing their special appearance.

IT IS FURTHER ORDERED plaintiffs' "Alternative Motion to Extend the Time for Service under Rule 4(a)(2)" is not discussed as it is moot, given the Court's granting plaintiffs' "Motion for an Order Determining Service was Perfected Upon Defendant Koala Play Canada, Ltd., a/k/a Delta Play" [and DeMarco].

IT IS FURTHER ORDERED defendant Delta Play and DeMarco's "Motion for Dismissal of Defendant Delta Play Company and Steve DeMarco", is DENIED.

Entered this 11th day of January, 2010.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 8th day of January, 2010, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>Fax #</u>	<u>Lawyer</u>	<u>Fax #</u>
Craig Vernon/Scott Gingras	(208) 664-1684	Michael J. Elia/Steven R. Kraft	(208) 336-7031
Richard McKinney	509-327-2504	Michael E. McFarland	(509) 455-3632
		Paul Kirkpatrick/ Patrick Harwood	(509) 624-2081
Andrew C. Bohrsen	(509) 838-2698		

Jeanne Clausen, Deputy Clerk