

IN THE UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF TEXAS  
 DALLAS DIVISION

MICHAEL J. QUILLING, Receiver for ABC	§	
VIATICALS, INC., and Related Entities	§	
	§	
Plaintiff,	§	
	§	
v.	§	No. 3:07-CV-1153-P
	§	
ERWIN & JOHNSON, LLP, and	§	
CHRISTOPHER R. ERWIN,	§	
	§	
Defendants and	§	
Third-Party Plaintiffs,	§	
	§	
MILLS, POCZAK & COMPANY,	§	
	§	
Third-Party Defendant.	§	

**ORDER**

Now before the Court is Third-Party Defendant Mill, Potoczak & Company’s Motion to Dismiss, or Alternatively, Motion to Quash Service, filed April 8, 2008. Third-Party Plaintiffs filed their Response on April 29, 2008. After reviewing Third-Party Defendant’s Motion, the evidence, and the applicable law, the Court DENIES as MOOT Third-Party Defendant’s Motion.


On March 10, 2008 Third-Party Plaintiffs each filed answers to the Complaint alleging a counterclaim against Plaintiff and Third-Party Defendant. Third-Party Defendant received a copy of the pleadings on March 19, 2008 but was not served with a summons pursuant to Fed. R. Civ. Proc. 14(a)(1). Accordingly, Third-Party Defendant now moves the Court to dismiss Third-Party Plaintiff’s counterclaim under Fed. R. Civ. Proc. 12(b)(5), or in the alternative, to quash the insufficient service and require Third-Party Plaintiffs to re-serve Third-Party Defendant.

A party to an action may, by its own motion, move to dismiss a claim for insufficient service of process under Rule 12(b)(5). Fed. R. Civ. P. 12(b)(5). If service of process is not effectuated within 120 days of filing the complaint, “the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.” Fed. R. Civ. P. 4(m).

Subsequent to the filing of Third-Party Defendant’s Motion, summons was issued by the Clerk of the Court and served, with a copy of the third-party complaint, on Third-Party Defendant’s registered agent for service in Texas. (Doc. Nos. 34 and 37.) This was done well within 120 days of the filing of Third-Party Plaintiffs’ third-party complaint. Because the deadline for service has not expired and Third-Party Plaintiff has undoubtedly cured the ineffective service, the Court finds that Third-Party Defendant’s Motion is now moot. Thus, the Court DENIES as MOOT Third-Party Defendant’s Motion.

**IT IS SO ORDERED.**

Signed this 20<sup>th</sup> day of July 2008.

  
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JORGE A. SOLIS  
UNITED STATES DISTRICT JUDGE