IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Candace Bell, et al.,

Plaintiffs,

Case No. 1:23-cv-5063-MLB

v.

Pony Tail, Inc. d/b/a Club Onyx,

Defendant.

_____/

ORDER

Plaintiffs sued Defendant for violations of the Fair Labor Standards Act (FLSA). (Dkt. 1.) Defendant moves to dismiss. (Dkt. 6.) Plaintiff opposes. (Dkt. 7.) The Court grants Defendant's motion but dismisses without prejudice.

I. Standard of Review

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for

the misconduct alleged." *Id.* This requires more than a "mere possibility of misconduct." *Id.* at 679. Plaintiff's well-pled allegations must "nudge[] [her] claims across the line from conceivable to plausible." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

II. Discussion

Defendant says Plaintiffs' complaint must be dismissed for failure to perfect timely service. (Dkt. 6 at 1.) And, according to Defendant, because Plaintiffs' claims now fall outside the two-year statute of limitations, the Court should dismiss their claims with prejudice. (*Id.*)

A. Service

Under Rule 4 of the Federal Rules of Civil Procedure, if a plaintiff does not serve a defendant within 90 days of filing his or her complaint, the court "must dismiss the action without prejudice against that defendant or order that service be made within a specified time." Fed. R. Civ. P. 4(m). The court "must" extend the time for service only "if the plaintiff shows good cause for the failure." *Id.* "[S]ervice of process that is not in 'substantial compliance' with the requirements of the Federal Rules is ineffective to confer personal jurisdiction over the defendant, even when a defendant has actual notice of the filing of the suit." *Abele*

v. City of Brooksville, Fla., 273 F. App'x 809, 811 (11th Cir. 2008).[1] "When a defendant challenges service of process, 'the serving party bears the burden of proving its validity or good cause for failure to effect timely service.'" *Aaron v. Gwinnett Cty. Sch. Dist.*, 2014 WL 4094142, at *2 (N.D. Ga. Aug. 19, 2014) (citation omitted).

Plaintiffs filed their complaint on November 2, 2023. (Dkt. 1.) They failed to serve Defendant before the 90-day deadline. Instead, on March 12, 2024—131 days after they filed their complaint—Plaintiffs moved to extend the deadline for service until March 22, 2024. (Dkt. 5.) The Court granted Plaintiffs' motion on March 22, directing them to perfect service by the end of the day. Plaintiffs failed to do that. In fact, it appears Plaintiffs still have not properly served Defendant. So there is no dispute that Plaintiffs did not serve—and have not served—Defendant within either the 90-day deadline set by the Federal Rules or the March 22 extended deadline set by the Court. The only question remaining is

[1] The Court recognizes *Abele* is unpublished and not binding. The Court cites it and other unpublished cases nevertheless as instructive. *See Searcy v. R.J. Reynolds Tobacco Co.*, 902 F.3d 1342, 1355 n.5 (11th Cir. 2018) ("Unpublished cases do not constitute binding authority and may be relied on only to the extent they are persuasive.").

whether Plaintiffs have shown good cause for their failure.

"Good cause exists 'only when some outside factor, such as reliance on faulty advice, rather than inadvertence or negligence, prevented service.'" *Lepone-Dempsey v. Carroll Cty. Com'rs*, 476 F.3d 1277, 1281 (11th Cir. 2007) (cleaned up) (citation omitted). "[A] lawyer's negligence" is not "'good cause' for purposes of Rule 4." *Reis v. Comm'r of Soc. Sec.*, 710 F. App'x 828, 829 (11th Cir. 2017).

Plaintiffs don't meet their burden of showing good cause. They describe three ways they purportedly tried to effect service on March 22, 2024. First, they say they tried to contact Defendant's lawyer by email and telephone to arrange service but that he declined to do so. (Dkt. 7 at 3.) Plaintiffs don't attach any emails or provide a sworn affidavit describing any telephone conversation. And, even if they did, Defendant was not required to cooperate. Second, Plaintiffs say they contacted Defendant's registered agent "requesting that he accept service" but the agent never responded. (Dkt. 7 at 4–5.) Again, Plaintiffs fail to attach or cite any evidence. Third and finally, Plaintiffs say they sent a process server to the home of Defendant's secretary, who refused to accept

service. (Dkt. 7 at 5.)[2] Since then, it appears Plaintiffs have not tried to serve Defendant.

As an initial matter, the Court declines to consider Plaintiffs' descriptions of her communications with Defendant's attorney or registered agent because Plaintiffs offers no evidence in support. No declaration, no email, no recording—nothing. The Court will not simply take Plaintiffs' word for it. Because it is their burden to establish good cause, they had to come forward with admissible evidence proving their attempts to serve failed for good cause. As for their single attempt to serve Defendant's secretary, the Court concludes this is not sufficient to show good cause because personally serving the secretary of a corporation at her home is not a proper method for serving a corporation in Georgia. Instead, Plaintiffs should have served the secretary "by registered or certified mail or statutory overnight delivery" at Defendant's "principal office." O.C.G.A. § 14-2-504(b). They did not even try to do that. Nor, after failing to personally serve the secretary, did they ask the Court for

[2] More than three months after filing their response to Defendant's motion to dismiss, Plaintiffs filed an affidavit from the process server describing her failed attempt to serve Defendant's secretary. (Dkt. 9.)

an additional extension or otherwise try again to perfect service. It appears they have done nothing since March 22, 2024. Plaintiffs have failed to show good cause for their failure to comply with Rule 4.

B. Statute of Limitations

Defendant says the Court not only should dismiss Plaintiffs' complaint for their failure to comply with Rule 4, it should do so with prejudice because those claims fall outside the FLSA's two-year statute of limitations. (Dkt. 6 at 5–6.) Plaintiffs say that, because they allege Defendant willfully violated the FLSA, the applicable statute of limitations is three years and their claims would not be time-barred. (Dkt. 7 at 3.)[3]

As an initial matter, Defendant's argument misses the mark. Whenever a court dismisses a complaint for failure to perfect timely service, it must do so without prejudice. *See Marcus v. Postmaster General, U.S. Postal Service Southeast Area*, 461 Fed. App'x 820, 823

[3] Plaintiffs fail to cite any law at all in support of their argument—much less the specific FLSA provision setting a three-year statute of limitations for claims of willfulness. The Court did Plaintiffs' work for them here but admonishes Plaintiffs' counsel for filing a response devoid of any citations to law or evidence.

(11th Cir. 2001) (explaining Rule 4(m) "only allows for dismissal of the action without prejudice"). In fact, when a plaintiff fails to show good cause to timely effect service, a court "must still consider whether any other circumstances warrant an extension of time based on the facts of the case." *Lepone-Demsey*, 476 F.3d at 1282. Specifically, courts should look to whether "the applicable statute of limitations would bar the refiled action." *Horenkamp v. Van Winkle And Co., Inc.*, 402 F.3d 1129, 1132 (11th Cir. 2005). So, Defendant's argument actually cuts against it—if Plaintiffs' complaint would be barred by the statute of limitations upon dismissal, that warrants in favor of granting Plaintiffs another extension of time to serve Defendant rather than dismissing the litigation.

The FLSA typically provides for a two-year statute of limitations. 29 U.S.C. § 255(a). Claims arising from willful violations, however, are subject to a three-year limitations period. *Id.* "The three-year statute of limitations may apply even when the employer did not knowingly violate the FLSA; rather, it may apply when it simply disregarded the possibility that it might be violating the FLSA." *Allen v. Bd. of Public Educ. for Bibb Cty.*, 495 F.3d 1306, 1324 (11th Cir. 2007).

Plaintiffs claim three of them worked for Defendant from February to December 2021 and the fourth worked from February 2021 to January 2022. (Dkt. 1 ¶¶ 39–42.) They allege that, during this period, Defendant "knew or showed reckless disregard for the fact that it misclassified" them as independent contractors rather than employees "and accordingly, failed to pay these individuals minimum wage at the required rate under the FLSA." (Dkt. 1 ¶ 45.) So, because they allege Defendant willfully violated the FLSA, Plaintiffs had three years from at least the earliest violation (until December 2024) to bring their claims. At this point, the Court concludes Plaintiffs have alleged their claims are not barred by the statute of limitations. So dismissal without prejudice would not prevent them from refiling their complaint. The Court offers no opinion as to whether Plaintiffs have adequately pled a willful violation or simply made a conclusory assertion of that conduct. No one raises that issue. But, if Plaintiff's decide to refile their complaint, they ought to consider whether their allegations are sufficient to establish a willful violation to take advantage of the extended statute of limitations. Again, that issue is not before the Court and the Court simply accepts Plaintiffs' rather naked assertion of willfulness in deciding dismissal is

appropriate.

In arguing otherwise, Defendant says the Court should estop Plaintiffs from arguing that the three-year limitations period governs their claims because, in their motion for extension of time to perfect service, they said dismissal would "'bar Plaintiffs' recovery under the FLSA's two-year statute of limitations'." (Dkt. 8 at 3 (citing Dkt. 5 ¶ 14).) According to Defendant, had Plaintiff not misrepresented this issue in their motion for extension of time, the Court would have denied that motion and dismissed their claims without prejudice at that point. (Dkt. 8 at 3.)

Regardless of whether Plaintiffs misrepresented their claims in the extension motion, the Court looks only to the allegations of the complaint in determining whether the statute of limitations bars (or would bar) their claims. *See Mesones v. Estevez*, 2021 WL 3721324, at *5 (11th Cir. Aug. 23, 2021) ("A statute of limitations defense may be raised on a motion to dismiss where it is clear *from the face of the complaint* that the statutory period has expired.") (emphasis added). As explained above—given the procedural posture of the case—the Court accepts the sufficiency of the allegations without precluding reassessment if

Defendant properly raises the issue.

In any event, Plaintiffs' complaint is subject to dismissal without prejudice. Should Plaintiffs still seek to pursue their claims, they will have to refile their complaint within the applicable three-year limitations period. The Court warns Plaintiff that it appears that limitations period is almost up. Plaintiffs should act quickly.

III. Conclusion

The Court **GRANTS** Defendant's Motion to Dismiss Plaintiffs' Complaint (Dkt. 6) and **DISMISSES WITHOUT PREJUDICE** this litigation.

SO ORDERED this 7th day of November, 2024.

MICHAEL L. BROWN
UNITED STATES DISTRICT JUDGE