

Dormant or Discontinued? Service Deadlines and the Statute of Limitations

A plaintiff facing a soon-to-expire limitations period may feel a rush of relief when the complaint is clocked in to the clerk's office on time and the summons is ready for service. Even after filing, though, it's too early to stop watching the clock. Failing to observe Rule 4's time limits on service can also create a statute of limitations problem.

Timing of service and extension of summons. Service of the summons under North Carolina [Rule of Civil Procedure 4\(j\) and \(j1\)](#) must be made within 60 days after the summons is issued. Rule 4(c). If service is not made by the time the 60 days passes, the action is still alive, but the summons itself is "dormant" and cannot be validly served until it is revived by an extension. *Id.*; *Dozier v. Crandall*, 105 N.C. App. 74, 75?6 (1992). The summons may be extended either by an endorsement (see the bottom of the [AOC form summons](#)) or, more commonly, by issuance of alias or pluries summons (see the check box in the [form's](#) caption). Rule 4(d). The deadline to extend the summons is 90 days after issuance of the summons. If a summons has already been extended by either method, it may be extended again and again, and the deadline each time is 90 days after the most recent extension. *Id.* (Note that the extension deadline is two years for a summons to a defendant outside the U.S.—an acknowledgment of how slowly the wheels of international service can turn. A two-year deadline also applies to the first extension in certain tax foreclosure cases.) As long as each extension is obtained on time, the action stays alive.

Impact on statutes of limitations. A serious problem may arise, however, if 90 days passes, there has been no valid service, and the plaintiff has failed to get an extension of the summons. Rule 4(e) (emphasis added) states that:

When there is neither endorsement by the clerk nor issuance of alias or pluries summons within the time specified in Rule 4(d), the action *is discontinued as to any defendant not theretofore served with summons within the time allowed*. Thereafter, alias or pluries summons may issue, or an extension be endorsed by the clerk, but, *as to such defendant, the action shall be deemed to have commenced on the date of such issuance or endorsement*.

Here's a quick timeline:

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if the 90 days passes without proper service and extension of the summons, the action "is discontinued" as to any unserved defendant. A new alias or pluries summons can still be issued in the action (or endorsement obtained), but the new commencement date for the action is the date the new summons is issued. For many cases in which the running of the statute of limitations is not an issue, a new commencement date may not cause serious heartburn. If, however, the underlying limitations period has run prior to the new commencement date, the plaintiff will be faced with the defendant's affirmative defense under the relevant statute of limitations. *See, e.g., Robertson v. Price*, 187 N.C. App. 180, 184?85 (2007); *Johnson v. Lucas*, 168 N.C. App. 515, 521 (2005); *Latham v. Cherry*, 111 N.C. App. 871, 873 (1993).

No retroactive extension. What if a party discovers that it has missed the 90-day extension deadline? May it seek a retroactive extension from the court and avoid this statute of limitations problem? The short answer is no. In *Lemons v. Old Hickory Council*, 322 N.C. 271 (1988), the plaintiff served the summons four days after the service deadline passed and later moved the trial court for a retroactive extension. The Supreme Court ruled that the trial court did indeed have discretionary authority to allow an extension *nunc pro tunc* under the general authority provided by Rule of Civil Procedure 6(b) upon a finding of [excusable neglect](#). *Id.* at 275?76. Rule 6(b) states that, "[u]pon motion made after the expiration of the specified period, the judge may permit the act to be done where the failure to act was the result of excusable neglect." In subsequent cases, however, our appellate courts have made clear that the retroactive extension authorized in *Lemons* does not apply if the plaintiff has failed to extend the unserved summons within the 90-day time limit: "[W]e find no authority in the rule or in *Lemons* to overrule the express language of Rule 4(e) as to the effect of failing to have an endorsement or alias or pluries summons issued 'within the time specified in Rule 4(d).'" *Dozier*, 105 N.C. App. at 78; *see also Russ v. Hedgecock*, 161 N.C. App. 334, 336?37 (2003); *Locklear v. Scotland Mem. Hosp., Inc.*, 119 N.C. App. 245, 248 (1995).

The bottom line: To a plaintiff who foresees a difficult time serving any or all of the defendants, a looming limitations period is relevant even after the case is filed. For as long as service remains incomplete, the plaintiff should keep a close eye on the calendar to ensure compliance with Rules 4(d) and (e).