

Dec 2021 | [Blog: The Westchester Litigator](#)

You've Been ("Deemed") Served!: The Court's Discretion to Overlook Improper Service

In the current age of technology, service of process can be effectuated in minutes, if both parties agree to electronic service. Lawyers, however, tend to traditional processes, and as long as the parties are not engaging in gamesmanship, each side has every right to request "proper" service under applicable federal and state rules. A recent case from the Southern District of New York analyzes the scope of service under federal law, specifically whether a court can "deem" service proper when a party is on notice of the action, albeit not through perfectly executed statutory avenues.

The Case: Sauer v. Town of Cornwall

In *Sauer v. Town of Cornwall*, 2021 WL 4066848 (S.D.N.Y. September 7, 2021), the plaintiff brought an action under 42 U.S.C.1983 in the Southern District of New York, claiming the defendants wrongfully arrested him for "peddling" sweet corn, which he gave away for free from his truck parked on the side of the road. The plaintiff mailed the complaint and a waiver of service form to the municipality, rather than following CPLR 311's dictates for personal service on a town. After securing extended time to respond to the complaint, the defendants moved to dismiss for improper service. The plaintiff conceded that "formal service was never effected," but argued that the court should "deem" service proper because the defendants were unrefutably on notice of the action. Additionally, the plaintiff alleged that by not executing a waiver of service, the defendants were engaging in "gamesmanship."

Judge Nelson Román analyzed whether service could be "deemed" proper, and second, if not, whether granting an extension of service was proper under the circumstances. The court determined that a simple miscommunication between counsel, not gamesmanship, had occurred, and because the plaintiff provided no authority to support the theory of "deeming" service proper without compliance with state and/or federal process laws, ultimately declined to find the service effective.

However, Judge Román concluded that affording the plaintiff extra time to properly serve the defendant was warranted. In so holding, the court considered the expiration of the statute of limitations to be an important factor in granting the extension, as dismissal would have effectively been with prejudice. Further, the defendants were clearly on notice of the action and so would not be prejudiced by the extension. Accordingly, the court granted the plaintiff a 60-day extension to effect proper service.

Takeaway

The day may come when electronic or other means of service will be codified as proper service in New York, but for now, rules are rules and litigators would be wise to follow the applicable procedural laws when effecting service.