

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

CHARLESTON DIVISION

CHRISTINA MARTIN,

Plaintiff,

v.

CIVIL ACTION NO. 2:16-cv-06788

MILTON MOODY, et al.,

Defendants.

ORDER

Pending before the court is the defendant Milton Moody's Partial Motion to Dismiss for Insufficient Service of Process [ECF No. 8], filed on September 1, 2016.

This action was removed to federal court on July 28, 2016. Notice of Removal [ECF No. 1]. On August 4, 2016, the plaintiff filed her Motion to Remand [ECF No. 5], which was denied by the court's September 21, 2016, Memorandum Opinion & Order [ECF No. 23].

At the time Moody filed his Motion, service of process had not been perfected under West Virginia law. As grounds for his Motion, Moody states that the "[p]laintiff has failed to serve Mr. Moody within ninety (90) days of the February 25, 2016 filing of her Complaint [in state court], in violation of Rule 4(m) of the Federal Rules of Civil Procedure." Mem. Supp. Mot. Dismiss 5 [ECF No. 10]. Moody, however,

misunderstands federal removal procedure as it relates to incomplete service of process at the time of removal.

The applicable provision of the United State Code states the following:

In all cases removed from any State court to any district court of the United States in which any one or more of the defendants has not been served with process or in which the service has not been perfected prior to removal, or in which process served proves to be defective, such process or service may be completed or new process issued in the same manner as in cases originally filed in such district court.

28 U.S.C. § 1448. “In removed cases, the Rule 4(m) time period starts to run upon removal to the federal district court, not the date the action was originated in state court” 4B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1137 (4th ed. 2015); *see also Randolph v. Hendry*, 50 F. Supp. 2d 572, 579–80 (S.D. W. Va. 1999) (Goodwin, J.) (“When no defendant has been served, in an action removed to federal court from state court, Rule 4(m) of the Federal Rules of Civil Procedure requires the plaintiff to serve the summons and complaint upon the defendant within 120 days from filing of the Notice of Removal in the federal court.”).¹ “[I]n the context of removal, the federal court does not obtain an interest in the action—and cannot therefore dictate the terms of service—until the Notice of Removal is filed.” *Randolph*, 50 F. Supp. 2d at 580. “It is premature to make a motion challenging service until the plaintiff’s time to effect service, as governed by Rule 4, has expired.” 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and*

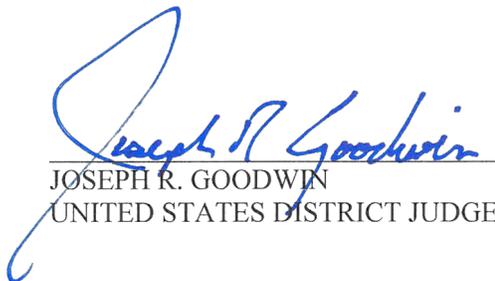
¹ As of December 1, 2015, the presumptive deadline for serving the summons and complaint was reduced to 90 days after filing the complaint.

Procedure § 1353 (3d ed. 2004); *see also McGinnis v. Shalala*, 2 F.3d 548, 551 (5th Cir. 1993) (“Indeed, until that 120–day period has expired, any attempt to seek dismissal on the grounds of defective service clearly would be premature.”).²

Because the defendants removed this action to federal court on July 28, 2016, the plaintiff has until October 26, 2016, to perfect service under Rule 4(m) of the Federal Rules of Civil Procedure. Accordingly, I **ORDER** that the defendant Milton Moody’s Partial Motion to Dismiss for Insufficient Service of Process [ECF No. 8] is **DENIED AS PREMATURE**.

The court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party. The court further **DIRECTS** the Clerk to post a copy of this published opinion on the court’s website, www.wvsd.uscourts.gov.

ENTER: October 14, 2016



JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE

² The plaintiff failed to raise any of these arguments in her Response.