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SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

Flexibility Within Limits: Federal Rules Governing Service of Process

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The Federal Rules of Civil Procedure have charted a deliberate course toward a more flexible, cooperative system for service of process, reducing some of the gamesmanship that used to accompany the opening act of a lawsuit filed in federal court. But, as several recent cases from the U.S. District Court for the Southern District of New York make clear, service of process must still be done very much by-the-book, and the flexibility embodied in the rules only goes so far.

Waiver of Service

In 1993, Federal Rule of Procedure 4, which governs service of process, was amended to ease the financial burdens and delay of serving a summons and complaint on a civil defendant. This effort to streamline service of process included the addition of Rule 4(d), providing for waiver of actual service upon consent of the defendant. Rule 4(d)(1) allows a plaintiff to send by first class mail or other reliable means of delivery the complaint, along with a request for waiver of service. The rule affords additional time to answer for a defendant who executes the waiver.[1] If a defendant fails, without good cause, to execute the waiver, the plaintiff can seek, and the court is required to impose, the costs incurred in effecting actual service.[2]

This "cost-saving practice" ensures that defendants who "magnify costs of service by requiring expensive service not necessary to achieve full notice of an action brought against them are required to bear the wasteful costs."[3] However, as illustrated by Southern District Magistrate Judge Kevin Nathaniel Fox's recent decision in *Rodriguez v. It's Just Lunch Int'l*,[4] to obtain the benefit of this cost-shifting provision, a plaintiff must carefully comply with the rule's requirements. Plaintiffs in *Rodriguez* had sought to serve a group of franchise defendants through an attorney who ultimately appeared for them in the litigation, but who at the time of attempted service represented only the franchise defendants' parent company.

Judge Fox cited two reasons for refusing to impose the cost of service on defendants after that attorney declined to accept service on their behalf. First, he found that plaintiffs had not complied with Rule 4(d)(1) and had, in fact, never explicitly requested that service be waived, but only that service be accepted by the law firm. Second, he noted that even if waiver had been requested properly, that request would have been misaddressed, inasmuch as the parent company's attorney was not an "officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process," as required by Rule 4(d)(1)(A)(ii).[5]

> Courts will not exercise their discretion simply to allow counsel to bypass the sometimes inconvenient requirements of the rules.

Defendants Not in U.S.

International service can pose the double headache of locating a defendant whose whereabouts are difficult to ascertain and complying with a foreign sovereign's rules for service in addition to the Federal Rules. Rule 4(f) tries to address these concerns. It provides for international service on an individual by any internationally agreed to means, such as those contained in the Hague Convention.[6]

Where such means do not exist or are vaguely defined, subsection 4(f)(2) allows service by a method reasonably calculated to give notice (such as those defined under a foreign country's laws, letters rogatory, or, unless prohibited, by delivery in person or by mail with return receipt requested).[7] Finally, Rule 4(f)(3) serves as a kind of catchall, providing that an individual may be served with process internationally "by other means not prohibited by international agreement, as the court orders." Service under this provision must satisfy constitutional notions of due process, "which require 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'"[8]

Courts have authorized a variety of service methods under 4(f)(3), including "publication, ordinary mail, mail to the defendant's last known address, delivery to the defendant's attorney, telex, and most recently, email."[9] Recently, in *Prediction Company v. Rajgarhia*,[10] Judge Shira A. Scheindlin authorized service pursuant to Rule 4(f)(3) on a defendant who lived in India at an unknown address. Plaintiff sought an order permitting service on defendant's New York attorney, who acknowledged he was in contact with the defendant about the lawsuit, but disclaimed authority to accept service or knowledge of his client's address. Plaintiff also proposed sending the summons and complaint to an e-mail address previously used by defendant to communicate with plaintiff.

Judge Scheindlin found that plaintiff had satisfied its threshold burden of making a reasonable effort to effectuate service before seeking the court's assistance, by actively, albeit unsuccessfully, attempting to learn the defendant's address. She noted that without an address, the defendant could not be served under the Hague Convention. Because the defendant had recently been in contact with his New York attorney, and was already aware of the suit, Judge Scheindlin concluded that the plaintiff's proposed method of sending the documents through counsel was reasonably calculated to apprise the defendant of the action and afford him an opportunity to respond. She further found it reasonably likely that the defendant would receive the summons and complaint via the recently used e-mail account.[11]

Although subsection 4(f)(3) is not a "last resort" or "extraordinary relief," but rather "merely one means among several which enables service of process on an international defendant,"[12] as Judge Scheindlin noted, a plaintiff may nevertheless be required to make a threshold showing of reasonable

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efforts to effect service before obtaining court intervention. Failure to meet that threshold burden resulted in denial of an application for alternative service under Rule 4(f)(3) in *Madu, Edozie & Madu, P.C. v. Socketworks Limited Nigeria*.[13] In that breach of contract case, plaintiffs sued a corporation and four individual defendants, some of whom were located in Africa.

Plaintiffs served one defendant—Anthony Nwachukwu—in Connecticut, and sought an order under Rule 4(f)(3) permitting them to serve the remaining defendants through Mr. Nwachukwu's attorneys. They contended that service on Mr. Nwachukwu's lawyers was appropriate because those attorneys were actively litigating the matter for Mr. Nwachukwu and had represented both the corporate defendant and one individual defendant in other matters. They argued that the remaining two individual defendants were shareholders of the corporate defendant, which could presumably contact its own shareholders.[14]

In seeking to show reasonable efforts at service, plaintiffs represented that they had hired a Nigerian law firm to serve the Nigerian individual and corporate defendants, who refused to acknowledge service. Southern District Judge Peter K. Leisure found that plaintiffs had not demonstrated that this method of service was consistent with Nigerian law. Without specifying what methods they had attempted, plaintiffs contended summarily that they had been unable to serve the remaining two individuals in their respective countries of Uganda and Ghana. They also argued that use of letters rogatory would be prohibitively expensive and futile, asserting, without evidentiary support, that the foreign process serving agency employed by the Department of Justice had never succeeded with this method in serving individuals in Nigeria, Uganda or Ghana.

Judge Leisure found these unparticularized and unsupported assertions insufficient to demonstrate reasonable attempts to effect service.[15] He also concluded that plaintiffs' proposed alternative method of service would not satisfy the due process requirement of adequate notice, because the law firm plaintiffs proposed to serve was not in communication with all of the defendants.

120-Day Rule

Rule 4(m) provides another example of Rule 4's general approach of flexibility within limits. Under Rule 4(m), if a defendant is not served within 120 days of filing the complaint, the court must dismiss the action without prejudice or order that service be made within a specified time. "[I] f the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period."

In determining the existence of good cause, courts consider whether the plaintiff made reasonable efforts to serve the defendant and whether the defendant was prejudiced by the delay. "Good cause or excusable neglect is generally found only in exceptional circumstances where plaintiff's failure to serve process in a timely manner was the result of circumstances beyond his control."[16] Even in the absence of good cause a court may, in its discretion, extend the time to serve, based on factors including whether: 1) the statute of limitations would bar refiling; 2) the defendant had actual notice of the claims; 3) the defendant attempted to conceal the defect in service; or 4) the defendant would be prejudiced by an extension of the time to serve.[17]

In *DeLuca v. AccessIT Group, Inc.*,[18] Judge Leisure granted such a discretionary extension, denying defendant's motion to dismiss under Rule 12(b)(5) for insufficient service of process. Plaintiff initially served defendant with a copy of the complaint, but no summons. He did not cure this defect within 120 days after filing the complaint as required by Rule 4(m), but subsequently attempted to serve a summons 14 days after that deadline. Even then, however, the summons did not bear the required clerk's signature and seal of the court.

Plaintiff sought to have the court approve, nunc pro tunc, his belated and unsuccessful attempt to serve the summons. Judge Leisure noted that technical errors in a summons generally do not render service invalid unless the error actually results in prejudice to the defendant or demonstrates a flagrant disregard of Rule 4. He recognized a split within courts in the Second Circuit as to whether an unsigned and unsealed summons is merely a technical defect or rises to the level of "flagrant disregard."[19]

Without resolving this question, Judge Leisure held that "even if [plaintiff's] failed efforts at serving process amount to a flagrant disregard of the Rule, the Court uses its discretion under Rule 4(m)" to grant him additional time for service. In support of this extension, Judge Leisure cited the balance of equities and the general preference for deciding cases on the merits, as well as defendant's actual notice of the action, its counsel's failure to mention the defective summons, and the lack of any claimed prejudice from the delay.[20]

In *United States v. Maimonides Medical Center*,[21] Chief Southern District Judge Loretta A. Preska declined to extend plaintiff's time to serve. Plaintiff in that qui tam case waited to serve the summons and complaint until 226 days after the 120-day period had expired. Admitting that the delay was voluntary and not dictated by any external circumstances, plaintiff's counsel attributed the delay to substantive discussions with the government in another case which might have prompted him to delete certain claims from the complaint in this action.

Opining that it was "not Plaintiff's counsel's prerogative to decide when [] not to comply with the Federal Rules of Civil Procedure," Judge Preska found that "[t]he proper course of conduct would have been to serve the complaint in a timely manner and put [defendant] on notice of the claims against it, regardless of whether some of those claims would ultimately be voluntarily dismissed." In the alternative, plaintiff could have sought an extension of time from the court. Because plaintiff failed to do either, Judge Preska dismissed the complaint without prejudice pursuant to Rule 12(b)(5).[22]

Collateral Consequences

Defendants may also get tripped up by failing to heed the collateral rules related to service. In *Cotter v. Milly LLC*,[23] plaintiff sued his former employer in state court, serving the defendant by delivering the summons and complaint to the New York Secretary of State, the statutory agent for service of process. The Secretary of State mailed the documents to defendant's official address of record, which defendant had failed to change when it moved to a different address. Because the Secretary of State had the incorrect address, the defendant corporation was unaware of the litigation until almost two months after the complaint was filed. After defendant removed the action to federal court, plaintiff successful moved for remand, arguing that removal was untimely because it had not been accomplished within 30 days after service of the summons and complaint.

Noting that federal courts typically require actual receipt of pleadings before the 30-day clock begins to run, Southern District Judge Paul G. Gardephe reasoned that the "'actual notice' requirement is intended to protect defendants from errors committed by, or delay attributable to, the Secretary of State's office or some other third party, not to insulate defendants from the consequences of their own negligence."[24] Because the delay was the result of defendant's failure to comply with its statutory obligations, Judge Gardephe, granted plaintiff's motion to remand the case to state court.

Conclusion

Where the technical requirements for service pose an actual impediment, rather than just an inconvenience or burden, the federal rules in some instances allow courts to inject some flexibility into the process. As demonstrated by the cases discussed above, however, courts will not exercise their discretion simply to allow counsel to bypass the sometimes inconvenient requirements of the rules.

1. Fed. R. Civ. P. 4(d)(3) (a defendant who returns the waiver has 60 days to answer from the date the waiver was sent (or 90 days if the waiver was sent to a defendant outside of the United States)).
2. Fed. R. Civ. P. 4(d)(2).
3. Fed. R. Civ. P. 4, Advisory Committee Notes (1993 Amendments).
4. 2010 WL 1407980 (SDNY April 6, 2010).
5. Id. at *2.
6. Fed. R. Civ. P. 4(f)(1).
7. Fed. R. Civ. P. 4(f)(2).
8. *Prediction Company v. Rajgarhia*, 2010 WL 1050307, *1 (SDNY March 22, 2010) (Scheindlin, J.) (citing *Luessenhop v. Clinton County, N.Y.*, 466 F.3d 259, 269 (2d Cir. 2006) (internal citations omitted)).
9. Id. at *1 (citing *Rio Props. v. Rio Int'l Interlink*, 284 F.3d 1007, 1016 (9th Cir. 2002)).
10. 2010 WL 1050307.
11. Id. at *2.
12. Id. at *1.
13. 265 FRD 106 (SDNY 2010).
14. Although Judge Leisure held that Mr. Nwachukwu did not have standing to oppose plaintiffs' motion on behalf of the other defendants, the court considered the attorney's declaration submitted with Mr. Nwachukwu's motion papers, given that the relationship between the attorneys and the four other defendants was "particularly relevant." Id. at 114-115.
15. Judge Leisure also found that plaintiffs' failure to attempt service in the United States on two of the defendants was unjustified and unreasonable. The Nigerian individual was a permanent resident alien residing in Texas, service on whom was governed exclusively by Rule 4(e), and the corporate defendant had both a U.S. subsidiary and a corporate officer who resided in the United States. Id. at 117, 119.
16. *McKibben v. Credit Lyonnais*, 1999 WL 604883, at *3 (SDNY Aug. 10, 1999) (Preska, J.).
17. *DeLuca v. AccessIT Group, Inc.*, ___ F.Supp.2d ___, 2010 WL 447114, *9 (SDNY Feb. 9, 2010).
18. Id.
19. Id. at *8 (citations omitted).
20. Id. at *9-10.
21. 2010 WL 890236 (SDNY March 9, 2010),
22. Id. at *6.
23. 2010 WL 286614 (SDNY Jan. 22, 2010).
24. Id. at *5 (citing *Rowland v. Giftcertificates.com, Inc.*, 195 F.Supp.2d 509, 512 (SDNY 2002) (Sand, J.)