UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 9:10-cv-81111-WPD

M.J.,

Plaintiff,

vs.

JEFFREY EPSTEIN and
SARAH KELLEN,

Defendant.
_____/

REPLY IN SUPPORT OF RENEWED MOTION OF DEFENDANT JEFFREY EPSTEIN TO QUASH SERVICE OF PROCESS, RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR A HEARING TO PROVE FRAUD, TO PROVE PROPER SERVICE, TO OBTAIN SANCTIONS FOR EPSTEIN'S SUBMISSION OF A FRAUDULENT AFFIDAVIT, TO OBTAIN A WARNING FORBIDDING FURTHER OBSTRUCTIONS IN THE CASES, AND TO SET AN ACCELERATED SCHEDULE FOR DISCOVERY AND MOTION TO QUASH

Defendant Jeffrey Epstein, by and through undersigned counsel, respectfully submits the following: 1) reply in support of Motion to Quash Service of Process (D.E.7) and Renewed Motion to Quash (D.E.14); 2) response to Plaintiff's Motion for a Hearing to Prove Fraud, to Prove Proper Service, to Obtain Sanctions for Epstein's Submission of a Fraudulent Affidavit, to Obtain a Warning Forbidding Further Obstructions in the Cases, and to Set an Accelerated Schedule for Discovery (D.E. 15); and 3) motion to strike impertinent portions of Plaintiff's response, and states as follows:

I. INTRODUCTION

Plaintiff's response to Mr. Epstein's motion and renewed motion to quash service of process attempts to distort the key issue before the Court with misstatements, misleading

assertions, and scurrilous, unfounded and irrelevant allegations designed solely to smear Mr. Epstein and poison the well. The narrow threshold issue is whether substitute service was made pursuant to Fed. R. Civ. P. 4(e)(2)(B); and not whether discovery misconduct occurred in prior litigation, as claimed by Plaintiff. Plaintiff's injection of unfounded and unproven charges of "obstruction of justice" because two witnesses refused to appear for depositions pushes the envelope of Rule 11, and should not be permitted.

Plaintiff's bluster cannot obscure the fact that Plaintiff has not carried *her* burden of demonstrating that service of process was proper under Fed. R. Civ. P. 4(e)(2)(B). Contrary to Plaintiff's contention, the issue is not whether "M. J. has left a copy of her complaint and other documents with someone at the home", which is all that Plaintiff alleges, or whether Mr. Epstein had actual notice (D.E. 15 at 12), but, rather, whether the suit papers were left with "someone of suitable age and discretion who resides" at 9 East 71st Street, New York. *See* Fed. R. Civ. P. 4(e)(2)(B). In view of the fact that Plaintiff has failed to show that "Mark", the alleged recipient of the suit papers, was of suitable age and discretion and resided at 9 East 71st Street, New York, Mr. Epstein's motion to quash should be granted.

There is no need for the Court to hold an evidentiary hearing because Plaintiff has not made a prima facie showing that so-called "Mark" was "someone of suitable age and discretion who resides" at 9 East 71st Street. The affidavit of Thomas Marsigliano provides no description of "Mark", including Mark's age, other than to state that Mark was a white Male. It provides no indication whatsoever that Mr. Marsigliano even made any attempt to, or did in fact, determine, the relationship of "Mark" to Mr. Epstein or 9 East 71st Street, or whether "Mark" resided at 9 East 71st Street before allegedly delivering suit papers to "Mark". Accordingly, there is no factual dispute

and no need for an evidentiary hearing, particularly when the evidence indicates that no one resided on the premises on October 8, 2010. Assuming *arguendo* that the Court were to conduct an evidentiary hearing, there is certainly no need and indeed no valid reason for Mr. Epstein, who did not submit an affidavit, to testify.

The Court should also deny Plaintiff's motion for Rule 11 sanctions based upon the submission of an allegedly fraudulent affidavit by Mr. Barnett. Plaintiff has not offered any probative evidence of fraud, relying solely on caustic rhetoric. Moreover, Plaintiff has violated the mandatory safe harbor requirements of Fed. R. Civ. P. 11, which violations require denial of her motion.

In addition, Plaintiff has not demonstrated that the Court should establish an "expedited schedule" and cannot point to any exigent circumstances. Mr. Epstein's financial standing does not eradicate due process or the requirements of Fed. R. Civ. P 26(f), as set forth in this Court's Order Requiring Counsel to Meet, File Joint Scheduling Report and Joint Discovery Report. (D.E. 4)

Finally, the Court should enter an Order striking all portions of Plaintiff's response, including the affidavit of Plaintiff's counsel, Brad Edwards, which allege, argue and purport to show an "obstruction of justice" in prior litigation. Such matters are patently irrelevant to the threshold issue of service of process in the instant case, are intended solely to smear Mr. Epstein and are unduly prejudicial.

II. BACKGROUND

1. Plaintiff claims that Mr. Epstein was served on October 8, 2010. Defendant filed a Motion to Quash Service of Process on October 29, 2010 (D.E.7), and a renewed motion to quash

on November 10, 2010. (D.E. 14) Plaintiff filed a response on November 11, 2010. (D.E. 15).

2. The Proof of Service filed by Plaintiff (D.E. 11) states that the process server left the summons at Mr. Epstein's

> residence or usual place of abode with Mark, a person of suitable age and discretion who resides there, on Oct. 8, 2010, and mailed a copy to the individual's last known address;

The Proof of Service does not identify "Mark" or state that he is a caretaker (as alleged by Plaintiff). (*Id.*).

3. Thomas Marsigliano, the process server, stated in an affidavit dated November 5, 2010, that on October 8, 2010, he knocked on the front door of 9 East 71st Street, New York; a person named "Mark" opened the door and took the suit papers from him; and "Mark" appeared to have authority to accept service. (D.E. 15-2, ¶¶5 and 6). Mr. Marsigliano provided no description of "Mark" in his affidavit, other than to describe "Mark" as a white male. Nor did Mr. Marsigliano provide any indication whatsoever in his affidavit that "Mark" specifically advised Mr. Marsigliano or that Mr. Marsigliano specifically inquired of "Mark" as to any relationship between "Mark" and Mr. Epstein or between "Mark" and 9 East 71st Street. According to Mr. Marsigliano's affidavit, based on a brief encounter with "Mark," without ever making any specific inquiries, and on Mr. Marsigliano's "observations," alone, it was somehow "obvious" to Mr. Marsigliano that ""Mark" was familiar with Jeffrey Epstein, had authority to answer the door of Mr. Epstein's residence and accept service for Mr. Epstein." Most importantly, Mr. Marsigliano provided no indication whatsoever in his affidavit that he asked, was told or even made any attempt to determine that "Mark" *resided* at 9 East 71st Street, New York, New York. (*Id.*). Nor did Mr. Marsigliano state the time of day that he allegedly delivered the papers to "Mark". (*Id.*)

4. Plaintiff has not submitted any evidence that "Mark" resided at 9 East 71st Street, New York, New York or, indeed, that anyone else resided at that address on October 8, 2010.

5. Richard Barnett, the property manager at 9 East 71st Street, did not reside, and has never resided, at 9 East 71st Street. (Ex. A). On October 8, 2010, no individual resided at that address. (*Id.*). Mr. Epstein was not present at 9 East 71st Street on October 8, 2010. (*Id.*).

6. Plaintiff asserts that "Epstein's counsel admit they have received proof of service from Mr. Marsigliano attesting that he left M.J.'s complaint with the caretaker at Epstein's residence or usual place of abode." (D.E. 15 at p. 11). This assertion is false. Defendant has never admitted that the proof of service states that Mr. Marsigliano left the Summons and Complaint with "the caretaker" and, more importantly, Mr. Marsigliano, himself, has never attested to leaving the papers with a "caretaker."

7. Plaintiff asserts that "Epstein concedes the materials were left at his "vacation home." (*Id.*) This assertion is misleading. Mr. Barnett's affidavit states only that the suit papers were discovered in the mailbox at 9 East 71st Street, New York, New York. (D.E. 7)

8. Paragraphs 14-22 of Plaintiff's "Factual Background" contain allegations regarding a "Pattern of Obstruction in Other Similar Cases Against Him," based largely on the affidavit of Brad Edwards, Plaintiff's counsel, submitted in the instant case. (*See* D.E. 15, ¶¶ 14-22 and D.E. 15-1). As set forth below, these allegations, as well as Mr. Edwards' affidavit in support of same, a purported "message" to Mr. Epstein, and a Motion for an Order to Show Cause in another case (D.E. 15-1, D.E. 15-3 and D.E.- 4 respectively) should all be stricken. They pertain to witnesses and depositions in *prior* litigation, are entirely irrelevant to the motion to quash, and were filed for an improper purpose.

III. ARGUMENT

A. PLAINTIFF DID NOT EFFECT SUBSTITUTE SERVICE ON MR. EPSTEIN PURSUANT TO FED. R. CIV. P. 4(e)(2)(B) AND HAS NOT CARRIED HER BURDEN OF PROVING THAT THERE WAS VALID SERVICE

Plaintiff has tacitly conceded that no service was made on Mr. Epstein in New York pursuant to Florida or New York law.[1] Plaintiff has not carried her burden of establishing that service was effected on Mr. Epstein pursuant to Fed. R. Civ. P. 4(e)(2)(B), which permits substitute service only if the Summons and Complaint are left at the defendant's "dwelling or usual place of abode with someone of suitable age and discretion *who resides there*." (Emphasis added) *See, e.g., Trovarello v. McMonagle,* 1998 U.S. Dist. LEXIS 18529, at *4 (E.D. Pa. Nov. 16, 1998) ("Once the sufficiency of service of process is challenged, the party on whose service was made bears the burden of establishing the validity of service.").

Although Plaintiff claims that service was proper merely because the papers were left with an individual named "Mark" at Mr. Epstein's house (D.E. 15 at 12), Plaintiff has not carried her burden of making a prima facie showing that the suit papers were left with someone *of suitable age and discretion who resided* at 9 East 71st Street on October 8, 2010, as clearly required by Rule 4(a)(2)(B). Significantly, Plaintiff's response, and the November 5, 2010 affidavit of Mr. Marsigliano, are *totally silent* on this essential requirement. Plaintiff's failure to submit *any* probative evidence that "Mark" or anyone else *resided* at 9 East 71st Street on October 8, 2010, alone requires that service of process be quashed. This conclusion is further supported by the supplemental affidavit of Mr. Barnett in which he stated that on October 8, 2010, *no one* resided at

[1]Plaintiff has not refuted Mr. Epstein's argument that service was not effected pursuant to Florida or New York law. Accordingly, the only issue on the table, as Plaintiff has conceded, is whether substitute service was effected pursuant to Fed. R. Civ. P. 4(e)(2)(B). (*See* D.E. 15, ¶ 8).

Mr. Epstein's vacation home in New York. Given the fact that *no one* resided at 9 East 71st Street on the date on question, service of process must be quashed. *See, e.g., Trovarello,* 1998 U.S. Dist. LEXIS 18529, at *2-3 ("Numerous cases make clear that when service is made by leaving copies of the summons and complaint "with some person of suitable age and discretion then residing therein," the person with whom the papers are left must actually be a resident of defendant's home, and not merely present at the time of service."); *Hardy v. Kaszycki & Sons Contractors, Inc.*, 842 F. Supp. 713, 717 (S.D.N.Y. 1993) (service on recipient under former Rule 4(d)(1)(now Rule 4(e)) was insufficient where nothing indicated that recipient resided in defendant's apartment); *Franklin America, Inc. v. Franklin Cast Prods., Inc.*, 94 F.R.D. 645, 647 (E.D. Mich. 1982) (Rule 4(d)(1) requires the recipient to live in the same place as the party to be served).

As in *Trovallero*, in which service was quashed where the plaintiff presented "no evidence that Maureen was a resident of Defendant McAleer's home or an adult person in charge who could accept service of process on his behalf," 1998 U.S. Dist. LEXIS 18529, at *5, service of process in the instant case is likewise invalid because Plaintiff has not presented evidence of "Mark's" age, or his relationship to Mr. Epstein or 9 East 71st Street, New York, New York, or that "Mark" was a resident of 9 East 71st Street, New York, New York.

B. THERE IS NO NEED TO HOLD AN EVIDENTIARY HEARING

Plaintiff argues (D.E. 15 at 9-10) that an evidentiary hearing is necessary to resolve a factual dispute as to whether a representative of Mr. Epstein was served, and seeks permission to question Mr. Marsigliano, Mr. Barnett and Mr. Epstein at the hearing. Defendant submits that no evidentiary hearing is necessary because, as previously demonstrated, Plaintiff has not made a prima facie showing that Mr. Marsigliano served a person *of suitable age and discretion* who

resided at 9 East 71st Street, New York. Absent a factual dispute, there is no need for an evidentiary hearing.

Should the Court conclude that an evidentiary hearing is required, then there is certainly no reason to require Mr. Epstein to testify at such a hearing. Mr. Epstein has not submitted an affidavit in this case and Plaintiff has not shown any legitimate reason for him to testify at a hearing on service of process. Plaintiff's baseless contention (D.E. 15 at 10) that Mr. Epstein should be permitted to testify to his involvement in "orchestrating" a false statement by Mr. Barnett demonstrates the outrageous lengths to which Plaintiff will go to poison the well and attempt to deflect the Court's attention from the substantive service issues. Unsubstantiated allegations regarding witnesses or discovery conduct *in prior proceedings not involving this Plaintiff* are patently irrelevant to the issues presented here. Moreover, evidence of other "crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b). Plaintiff should not be permitted to examine Mr. Epstein at an evidentiary hearing in order to inject collateral and highly impertinent matters.

C. ACTUAL NOTICE DOES NOT OBVIATE COMPLIANCE WITH FED. R. CIV. P. 4

Although Plaintiff contends that Rule 4 should be liberally construed when there has been actual notice (D.E. 15 at 12), Plaintiff cites no case which holds that service is deemed proper under Rule 4(a)(2)(B) absent proof that the suit papers were delivered to an individual *of suitable age and discretion residing* at the defendant's house, as explicitly required by the rule. This is not a matter of mere technical non-compliance. Actual notice cannot be used to override the basic requirements of Rule 4(e)(2)(B). As the Eleventh Circuit has noted, "actual notice of a suit does not dispose of the requirements of service of process." *Jackson v. Warden, FCC Coleman-USP*,

259 Fed. Appx 181, 182 n.2 (11th Cir. 2007). *See also Precision Etchings & Findings v. LGP Gem,* 953 F.2d 21, 24 (1st Cir. 1992)("The federal courts have made it abundantly clear that actual notice itself, without more, is insufficient to satisfy the requirements of Fed. R. Civ. P. 4(d)(1))(now 4(e)(2)(B)").

D. NO BASIS FOR IMPOSING SANCTIONS ON MR. EPSTEIN

Citing Fed. R. Civ. P 11, Plaintiff seeks to impose sanctions on Mr Epstein on the ground that he is responsible for the filing of a knowingly false affidavit by Mr. Barnett. Plaintiff's baseless motion for sanctions is improper, if not itself sanctionable. Plaintiff has not offered even a scintilla of evidence that Mr. Barnett submitted a knowingly false affidavit, and has levied such scurrilous charges merely to harass Mr. Epstein and obfuscate the issues.

In addition, Plaintiff has violated Fed. R. Civ. P. 11(c)(2) by not filing a separate motion for sanctions after giving the Defendant twenty-one (21) days in which to respond to the allegations. Non-compliance with the mandatory safe harbor provisions of Rule 11 mandates denial of the motion. *See, e.g., Olmsted v. Defosset,* 205 F. Supp. 2d 1316, 1334 (M.D. Fla. 2002).

Accordingly, Plaintiff's motion for sanctions should be stricken or denied.

E. NO EXPEDITED SCHEDULE IS NEEDED

Plaintiff has offered no valid reason for expediting the proceedings in this case. There are no exigent circumstances which justify an accelerated schedule. The Court should address scheduling matters after review of the parties Joint Scheduling Report.

IV. THE COURT SHOULD STRIKE PARAGRAPHS 14-22 OF PLAINTIFF'S RESPONSE AND EXHIBITS 1,3 AND 4 THERETO

Mr. Epstein hereby moves to strike paragraphs 14-22 of the "Factual Background" of Plaintiff's response, as well as Exhibits 1, 3 and 4 thereto (*see* D.E. 15 at pp. 6-9, D.E.15- 1, 3 and 4) on the grounds that Plaintiff's allegations, the affidavit from Plaintiff's counsel pertaining to witnesses and depositions in *prior* litigation involving Mr. Epstein, and Motion for Order to Show Cause submitted in *prior* litigation were submitted in the instant case solely to harass the Defendant and create a tempest in a teapot.[2] Conduct involving two witnesses in *prior* litigation, neither of whom is Richard Barnett, is patently irrelevant to the narrow, threshold issue of whether substitute service was properly made in the instant case, and should not be considered by the Court.[3] Accordingly, Defendant's motion to strike should be granted.

V. CONCLUSION

WHEREFORE, Defendant Jeffrey Epstein respectfully requests that service of process be quashed, that Plaintiff's motion be denied in all respects, that portions of Plaintiff's response be stricken as set forth hereinabove, and that the Court grant such other and further relief as deemed necessary and proper.

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[2]Plaintiff's counsel, Brad Edwards, submitted his own two-page single-spaced affidavit in which he stated *inter alia* that: 1) in prior litigation two business associates and friends of Mr. Epstein allegedly avoided having their depositions taken; 2) in prior litigation, Mr. Epstein allegedly invoked his right against self-incrimination; and 3) in prior litigation, Mr. Epstein allegedly failed to produce certain correspondence with the United States government. (*See* D.E. 15-1). It is impossible to fathom how any of this is even remotely relevant to the issue of whether substitute service was properly made on Mr. Epstein in the instant case.

[3]Should the Court not strike these portions of Plaintiff's submission with respect to alleged misconduct in prior litigation, Mr. Epstein would request an opportunity to respond to the allegations on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/Lilly Ann Sanchez
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SERVICE LIST
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