UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 08-CV-80119-MARRA-JOHNSON

JANE DOE NO. 2,

Plaintiff,

vs.

JEFFREY EPSTEIN,

Defendant.
_____/

RESPONSE TO MOTION FOR ORDER COMPELLING CLERK TO ENTER DEFAULT, OR ALTERNATIVELY, FOR ENLARGEMENT OF TIME

Defendant Jeffrey Epstein, pursuant to Fed. R. Civ. P. 55(c), hereby opposes plaintiff Jane Doe No. 2's motion for order compelling clerk to enter default, or alternatively, for enlargement of time to serve process, upon the following showing of "good cause."

Introduction

A clerk's default should not be entered in this case. Service was effected as of June 2. Accordingly the response is due 20 days later, on or before ***June 23.*** *See* Fed. R. Civ. P. 12(a)(1)(A)(i).

The plaintiff, in moving for a clerk's default, implied that service was made in accordance with either federal or Florida procedure. As discussed below, however, service was clearly ineffective under the federal and Florida rules of procedure. Accordingly, the only possibility for valid service was service under New York rules of procedure. *Cf. RCP's Lear, LLC v. Taughannock Aviation Corp.*, No. 5:07-CV-96, 2008 WL 305103, at *4 (N.D.N.Y. Jan. 31, 2008) (observing that "[a]s a threshold matter, the court must [first] address the rules pursuant to which process was served").

Service of process was valid under New York's rule for so-called "substitute-service" (*i.e.*, service in a manner other than delivery in-hand to the defendant herself or himself), but that statute gives the defendant more time to respond than do the federal or Florida rules. *See id.* (acknowledging that Fed. R. Civ. P. 4(e)(2) has a "'resided therein' requirement," unlike "New York's substituted service statute," NY CPLR 308); NY CPLR 308 (providing that service is not deemed effected until ***10 days after*** the process-server's affidavit is ***filed with the Court***).

This is not a motion to quash, or a motion arguing that service was completely ineffective. To the contrary, we acknowledge that service ***was effective*** under New York procedure, but point out that it was ***ineffective*** under Florida and federal procedure. Federal Rule of Civil Procedure 4(e)(1) permits service to be

made according to "state law for serving a summons in . . . the state . . . where service is made" as an alternative to following the federal service method (*i.e.*, Rule 4(e)(2)).

As shown below, under New York's so-called "substituted-service" rule, service was effected on June 2, not May 7 (as the plaintiff and the deputy clerk of court evidently believed). Accordingly, the defendant's response to the complaint is not due ***until June 23***. *See* Fed. R. Civ. P. 12(a)(1)(A)(i) (allowing 20 days from the date of service of process to serve answer).[1]

Facts and Procedural History

1. On May 7, 2008, service was delivered at defendant Epstein's house located at 9 East 71st Street, New York, New York, to Richard Barnett, an employee.

2. Mr. Barnett ***does not reside at that address***. *See* Affidavit of Richard Barnett (attached as Ex. A).

3. Upon the plaintiff's motion,[2] the Clerk of Court denied entry of a clerk's default on June 6, 2008 [D.E. 8].

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[1] In this case, the 20th day falls on a Saturday (June 21). The answer is therefore due on Monday, June 23. *See* Fed. R. Civ. P. 6(a)(3) (establishing that when a deadline falls on Saturday, the "period runs until the end of the next day that is not a Saturday").

[2] Notably, the plaintiff's attorney never mailed Mr. Epstein a copy of his motion for a Clerk's entry of default.

4. On June 11, the plaintiff filed a motion to compel the Clerk of Court to enter default against Mr. Epstein, or in the alternative, for an enlargement of time to serve process [D.E. 9].[3]

Overview of Rules for Service of Process

The Federal Rules of Civil Procedure authorize three distinct methods of service in a diversity action. ***First***, service can be effected in accordance with the procedures "in the state where the district court is located" (here, Florida). *See* Fed. R. Civ. P. 4(e)(1). ***Second***, service can be effected in accordance with the procedures "in the state . . . where service is made" (here, New York). *See* Fed. R. Civ. P. 4(e)(1). ***Third***, service can be effected in accordance with federal

[3] The plaintiff's attorney here previously filed an identical action, captioned *Jane Doe No. 1 v. Epstein*, Case No. 08–80069-KAM, on behalf of a different plaintiff. That action was voluntarily dismissed by the plaintiff's attorney after a motion to intervene was filed by Jane Doe No. 1 (through her mother) indicating that neither Jane Doe No. 1 nor her mother had consented to the attorney's filing the lawsuit on her behalf. *See* Case No. 08–80069-KAM [D.E. 9].

In addition to that action, the same plaintiff's attorney here has filed four other, identical lawsuits against Jeffrey Epstein on behalf of four plaintiffs that are still pending before this Court: *Jane Doe No. 2 v. Epstein*, Case No. 9:08-cv-80119-KAM; *Jane Doe No. 3 v. Epstein*, Case No. 9:08-cv-80232-KAM; *Jane Doe No. 4 v. Epstein*, Case No. 9:08-cv-80380-KAM; and *Jane Doe No. 5 v. Epstein*, Case No. 9:08-cv-80381-KAM. Plaintiff's counsel has sought an entry of default in each case. In the *Jane Doe No. 2* litigation, the deputy clerk, identified on the docket as "tp," declined to enter a default on the grounds that there had been "Improper Service." *See* 9:08-cv-80119-KAM [D.E. 7, 8]. In the *Jane Doe No. 3* litigation, the deputy clerk has not yet ruled upon the plaintiff's motion. *See* Case No. 9:08-cv-80232-KAM [D.E. 5]. In the *Jane Doe No. 4* and *Jane Doe No. 5* litigation, the deputy clerk, identified on both docket sheets as "ail," entered the default. *See* Case No. 9:08-cv-80380-KAM [D.E. 7, 8] and Case No. 9:08-cv-80381-KAM [D.E. 5, 6]. Since then, the plaintiff's attorney has moved for a ***judgment*** of default in those two cases (Jane Doe Nos. 4 and 5). *See* Case No. 9:08-cv-80380-KAM [D.E. 9] and Case No. 9:08-cv-80381-KAM [D.E. 7].

procedure. *See* Fed. R. Civ. P. 4 (e)(2). *Cf.* David D. Siegel, Practice Commentary on Rule 4 of the Federal Rules of Civil Procedure, Commentary C4-22 (observing that "***there is no priority between*** the [authorized methods of service]") (emphasis added).

Thus, when a diversity action is brought in the Southern District of Florida, and service is made in New York, service is effective when it complies with either Florida law or New York law, or alternatively, with federal procedure.

As discussed below, because New York ***does not have a residency requirement*** for the person to whom substitute-service is delivered (and Florida and the federal rules do), service was effective ***only*** in accordance with New York procedure. *Cf. RCP's Lear, LLC*, 2008 WL 305103, at *4 (resolving parties' dispute concerning the intended method of service, and applicable procedure). Stated differently, service ***did not comply*** with either federal procedure or Florida procedure.

New York Procedure—CPLR 308 (no residency requirement)

Under New York law, service of process can be effected by delivering the summons "to a person of suitable age and discretion at the . . . dwelling place or usual place of abode of the [defendant]," and when the summons is "mailed to the [defendant] at his or her last known residence or . . . mail[ed] . . . by first class mail to the [defendant] at his or her actual place of business" in accordance with

specific technical instructions. N.Y. C.P.L.R. § 308(2) (McKinney 2008). As an additional requirement, "proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later." *Id.*

In accordance with New York procedure, such substituted service "shall be complete ***ten days after such filing***." *Id.* (emphasis added). Accordingly, New York ***does not use*** the date of delivery to the person at the defendant's "abode" as the date service is effected. This was the point of error for the deputy clerk and the plaintiff's attorney.

Florida Procedure—Fla. Stat. § 48.031 (residency requirement)

Under Florida law, service of process can be effected "by leaving the copies [of the summons and complaint] at [the defendant's] usual place of abode with any person ***residing therein*** who is 15 years of age or older and informing the person of their contents." Fla. Stat. § 48.031(1)(a) (2007) (emphasis added). Service is deemed effected as of the date of delivery.

Federal Procedure—Fed. R. Civ. P. 4 (e)(2)(B) (residency requirement)

Service is effective, under federally authorized procedures, when copies of both the summons and the complaint are "le[ft] . . . at the individual's dwelling or usual place of abode with someone of suitable age and discretion ***who resides there***." Fed. R. Civ. P. 4 (e)(2)(B). Again, service is deemed effected as of the

date of delivery.

Discussion

Defendant Jeffrey Epstein's response to the complaint is not due until June 23. Accordingly, the clerk's entry of default was premature. For the following "good cause," it should be set aside. Fed. R. Civ. P. 55(c) ("The court may set aside an entry of default for good cause.").

A. Service was not made on someone who "resided" at the subject address.

Substituted service was attempted on Richard Barnett at a house owned by Mr. Epstein located at 9 East 71st Street, New York, New York. *See* Affidavit of Service [D.E. 4]. Mr. Barnett has never lived there.[4] (Barnett Aff. ¶ 3.)

B. Because service was not made on someone who "resided" at the subject address, service was effective *only* in accordance with New York procedure.

Of the three possible methods of service in this case—New York service, Florida service, and federal-rules service—only New York rules allow substituted service on someone who does not "reside" at the service address. *Compare* Fla. Stat. § 48.031(1)(a) (authorizing substituted service of process only on a person meeting certain criteria who "reside[s]" at the service address), *and* Fed. R. Civ. P.

[4] Indeed, in a motion for an order compelling the Clerk to enter default against Mr. Epstein, filed in connection with the *Jane Doe No. 2* litigation, the plaintiff's attorney characterized Mr. Barnett simply as an "Assistant and House Staff Employee," ***not a resident of the property***. Case No. 9:08-cv-80119-KAM [D.E. 9 at 2].

4 (e)(2)(B) (same), *with* NY CPLR 308(2) (authorizing so-called "leave-and-mail" substituted service, which ***does not*** require delivery to a person who actually resides the service address).

Because Mr. Barnett was not a resident of 9 East 71st Street, logically, service could have been effected ***only in accordance with New York procedure***.

C. Service was effective as of *June 2*, not earlier.

As noted above, Fed. R. Civ. P. 4 permits service according to the law "in the state . . . where service is made," here, New York. *See* Fed. R. Civ. P. 4(e)(1). While New York permits substitute service on a non-resident at the defendant's "abode," such substituted service is ***not complete*** until 10 days ***after*** the affidavit reciting the method of service is actually ***filed with the Court***. *See* NY CPLR 308(2).

Although the summons was left with Mr. Barnett at Epstein's New York home on May 7, the affidavit of service was not ***filed with the Court*** until May 22. Accordingly, under NY CPLR 308(2), service is not deemed complete until 10 days later, which was ***June 2***. Counting 20 days more according to Fed. R. Civ. P. 12(a)(1)(A)(i) and 5, Mr. Epstein's response is still not due until ***June 23***. Accordingly, the plaintiff's motion for default was almost three weeks early and the default was entered improperly.

D. "Actual" notice is irrelevant.

In the related *Jane Doe No. 2* case, the plaintiff advances the untenable position that the service rules are trumped simply because Epstein had "actual notice" of the complaints. *See* D.E. 9 at 4, ¶ 9 (*Jane Doe No. 2 v. Epstein*, Case No. 9:08-cv-80119-KAM) ("Defendant Epstein had actual notice of the filing of the Complaint, and the Plaintiff has exercised diligence and good faith in attempting to serve Defendant Epstein with process. Accordingly, entry of default is appropriate."). The Eleventh Circuit is clear, however, that "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) (*citing Mfrs. Hanover Trust Co. v. Ponsoldt*, 51 F.3d 938, 940 (11th Cir.1995)).

Conclusion

We do not dispute that service was effective. We only dispute the date that it became effective. Since service was ineffective under both Florida law and the federal-rules alternative (because the recipient of the service did not "reside" at the address), the only service law that could apply is New York's. New York's rule for substituted-service does not start the 20-day clock for responding to the complaint until 10 days after the process-server's affidavit is filed with the Court.

Accordingly, the 20-day clock did not start to tick (*i.e.*, service was not deemed to have been effected) until June 2. Counting time as provided by Fed. R. Civ. P. 6(a)(3), Epstein has until June 23 to serve a response to the complaint.

WHEREFORE, "good cause" having been showing under Fed. R. Civ. P. 55(c), the clerk's default should not be entered.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7

Counsel for defendant has conferred in good faith with counsel for the Plaintiff, who opposes the relief requested in this motion.

/s/ Jack A. Goldberger
Jack A. Goldberger

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 13, 2008, 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 counsel of record identified below by facsimile and U.S. Mail.

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