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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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LORRI J. FORTUNATO, :
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 Plaintiff, :
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 -against- :
 :
 CHASE BANK USA, N.A., :
 :
 Defendant. :
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No. 11 Civ. 6608 (JFK)
Memorandum Opinion & Order

JOHN F. KEENAN, United States District Judge:

Before the Court is Defendant Chase Bank USA, N.A.’s (“Chase” or “Defendant”) motion for an extension of time to complete service of a third-party complaint and for authorization for alternate methods of service on the third-party defendant. For the reasons that follow, the motion is granted in part and denied in part.

I. Background

In an amended complaint dated June 22, 2011, Plaintiff Lorri J. Fortunato (“Lorri” or “Plaintiff”) alleges that another person fraudulently opened a Chase credit card account in her name and proceeded to incur debt without her knowledge or authorization. (Am. Compl. ¶¶ 7-9). When the debt went unpaid, Chase initiated collection proceedings against Lorri in New York Supreme Court on March 4, 2009 by completing service of process at an address in Carmel, New York; Lorri claims that she has never lived at the address where Chase attempted to serve her

notice of the action. (Id. ¶¶ 14-15). On July 31, 2009, Chase obtained a default judgment against Lorri, and on May 24, 2010, Chase began proceedings to garnish her wages. (Id. ¶¶ 20, 23). Chase eventually satisfied the full amount of the default judgment through garnishment of Lorri's wages. (Id. ¶ 27). Lorri brings claims against Chase for violation of the Fair Credit Reporting Act, abuse of process, and conversion. (Id. ¶¶ 33-47).

Lorri initially filed this action in the United States District Court for the District of New Jersey. In an order dated September 14, 2011, Judge Chesler granted Chase's motion to transfer the case to the Southern District of New York pursuant to 28 U.S.C. § 1404(a). Subsequently, on November 16, 2011, this Court granted Chase leave to implead Nicole Fortunato ("Nicole"), Lorri's estranged daughter, into this action. In a third-party complaint filed November 30, 2011, Chase alleges that Nicole opened the credit card account in her mother's name, listed her own address in Carmel, New York in the account application, and proceeded to charge \$1,243.09, which amount was ultimately garnished from Lorri's wages. (Third-Party Compl. ¶¶ 12-14, 20, 22). Chase asserts claims against Nicole for contribution, indemnification, breach of contract, account stated, fraud, and unjust enrichment. (Id. ¶¶ 23-48).

Chase hired an investigator, but has been unable to locate Nicole or a physical address where she may reside. Therefore, Chase now requests that the Court authorize service of process by email, Facebook message, publication, and delivery to Nicole's mother Lorri.

II. Discussion

Rule 4(e) of the Federal Rules of Civil Procedure provides for service of process on an individual in the United States according to the laws of the state where the district court is located. In New York, service of process may be effected by: (1) personal service; (2) delivery to "a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served" and mail; (3) service on an agent; or (4) so-called "nail and mail" service. N.Y. C.P.L.R. 308. However, where service according to these traditional methods proves "impracticable," service may be made "in such manner as the court, upon motion without notice, directs." Id. at 308(5). "Section 308(5) requires a showing of impracticability of other means of service, but does not require proof of due diligence or of actual prior attempts to serve a party under the other provisions of the statute. The meaning of 'impracticability' depends upon the facts and circumstances of the particular case." S.E.C. v. HGI, Inc., No.

99 Civ. 3866, 1999 WL 1021087, at *1 (S.D.N.Y. Nov. 8, 1999) (citations omitted).

Defendant's process server made numerous attempts to serve Nicole at an address in Shandaken, New York: (1) on January 19, 2012 at 9:11 a.m.; (2) on January 25, 2012 at 8:14 p.m. and 8:58 p.m.; and (3) on January 26, 2012 between 7:29 a.m. and 7:45 a.m. and again at 8:25 a.m. However, the process server noted that there were "no obvious signs that the premises were being regularly accessed." (Affidavit of Del R. Simmons). Chase also hired an investigator to try to locate Nicole. The investigator searched the Department of Motor Vehicles records, voter registration records, New York State Department of Corrections records, publicly available wireless phone provider records, and social media websites. (Affidavit of Kathleen Del Casino ¶¶ 7, 9). Based on these searches, the investigator uncovered four potential addresses for Nicole: the Shandaken address, an address in Patterson, New York, an address in Wingdale, New York, and an address in Newburgh, New York. (Id. ¶ 8). However, further research revealed that the Patterson address does not in fact exist, the Wingdale address is where Lorri resides (and Nicole is not living with her mother), service could not be completed at the Shandaken address, and Nicole is not the owner of the Newburgh address. (Id. ¶¶ 9-12). The investigator also located what she believes to be Nicole's

Facebook profile; the profile includes a personal email address and lists Nicole's location as Hastings, New York.

Defendant has demonstrated numerous attempts to effect personal service as well as diligence in its search for an alternate residence where Nicole might be served. This, coupled with Nicole's history of providing fictional or out of date addresses to various state and private parties, satisfies the Court that service of the third-party complaint pursuant to the normal methods provided by C.P.L.R. 308 is impracticable. See S.E.C. v. Nnebe, No. 01 Civ. 5247, 2003 WL 402377, at *3 (S.D.N.Y. Feb. 21, 2003) ("[C]ourts have found service to be impracticable where the defendant could not be located by means of a diligent search.").

In shaping a method of alternate service, the Court must bear in mind that "[c]onstitutional due process requires that service of process be 'reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" Philip Morris USA Inc. v. Veles Ltd., No. 06 Civ. 2988, 2007 WL 725412, at *2 (S.D.N.Y. Mar. 12, 2007) (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)). Defendant argues that service by private Facebook message, email to the address listed on the Facebook profile,

and delivery of the summons and complaint to Lorri are all reasonably calculated to notify Nicole of these proceedings.

The Court cannot agree. Service by Facebook is unorthodox to say the least, and this Court is unaware of any other court that has authorized such service. Furthermore, in those cases where service by email has been judicially approved, the movant supplied the Court with some facts indicating that the person to be served would be likely to receive the summons and complaint at the given email address. See, e.g., id. at *3 (denying motion to dismiss for improper service where the court authorized service by email and fax because "Plaintiff showed that defendants conduct business extensively, if not exclusively, through their Internet websites and correspond regularly with customers via email. Furthermore, defendants do not disclose their physical addresses or location of incorporation. Through its investigation, plaintiff has shown that email and fax correspondence are likely to reach defendants"). Here, Chase has not set forth any facts that would give the Court a degree of certainty that the Facebook profile its investigator located is in fact maintained by Nicole or that the email address listed on the Facebook profile is operational and accessed by Nicole. Indeed, the Court's understanding is that anyone can make a Facebook profile using real, fake, or incomplete information, and thus, there is no way

for the Court to confirm whether the Nicole Fortunato the investigator found is in fact the third-party Defendant to be served.

The Court is similarly skeptical that delivery of the summons and complaint to Lorri is reasonably calculated to apprise Nicole of the proceedings against her. By all accounts, Lorri and Nicole are estranged (unsurprising in light of the fact that Nicole allegedly stole her mother's identity), Lorri has not been in touch with her daughter for years, and Lorri does not have any recent contact information for her daughter. Moreover, the Court does not believe that service on Lorri is appropriate where she and the individual to be served are essentially counterparties in this suit.

The only remaining method of alternate service is service by publication. C.P.L.R. 316(a) provides for service by publication "in two newspapers, at least one in the English language, designated in the order as most likely to give notice to the person to be served, for a specified time, at least once in each of four successive weeks." As Nicole's purported Facebook page lists her location as Hastings, New York, Defendant proposes to effect service on Nicole by publishing notice in a local newspaper in the area of Hastings, New York and in the New York Times. The Court agrees that, under the circumstances presented, a local newspaper is the most likely

means by which to apprise Nicole of the third-party complaint. However, the Court reiterates its concern about the identity of the owner of the Nicole Fortunato Facebook profile, and notes that Hastings, New York - the location provided in that profile - is at least 50 miles away from any of the four physical addresses Defendant's investigator found for Nicole. Thus, the Court will authorize service of the third-party complaint by publication, but directs Defendant to do so in local newspapers in the areas of Shandaken, New York, Patterson, New York, Wingdale, New York, and Newburgh, New York - the four cities where the investigator thought Nicole could be living - as well as in Hastings.

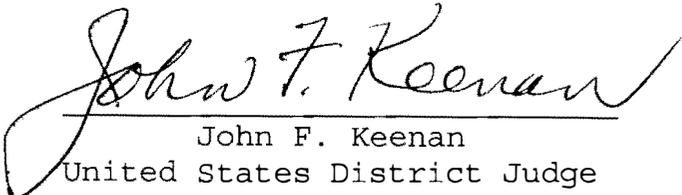
Finally, Defendant seeks an extension of time to complete service of the third-party complaint. Rule 4(m) of the Federal Rules of Civil Procedure provides that if the third-party plaintiff "shows good cause for the failure, the court must extend the time for service for an appropriate period." Defendant's inability to complete service within Rule 4(m)'s 120 day time limit is more than explained by its difficulty locating Nicole, and the Court finds that an additional 60 days is appropriate for completion of service by publication.

III. Conclusion

Defendant's application to serve the third-party complaint by email, Facebook, and delivery to Plaintiff is denied, but the application for alternate service by publication is granted. Defendant's time to effect service of the third-party complaint is extended to August 6, 2012. The Clerk of Court is directed to close the motion at Docket No. 47.

SO ORDERED.

Dated: New York, New York
June 7, 2012



John F. Keenan
United States District Judge