IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JEFFREY and CHERYL STEVENS,

Plaintiffs,

v.

DALE SMITH, NATIONAL FIDELITY and IRVING STEINER,

Defendants.

ORDER

04-C-985-X

Before the court is a Motion To Dismiss for Lack of Personal Jurisdiction filed by defendant Howard Olson, a/k/a Irving Steiner, d/b/a National Fidelity ("Olson"). *See* dkt. 8.[1] Notwithstanding the motion title, the motion itself alleges insufficiency of process and insufficiency of service of process, *see* F.R.Civ. Pro. 12(b)(4) & (5); then the incorporated brief focuses solely on Olson's claim that plaintiffs failed to serve him in the manner required by federal rules and California state law. *See* Dkt. 8. For the reasons stated below, I am denying Olson's motion.

In his opening brief, Olson alleges that no qualified person ever handed him a copy of the summons and complaint, and no one ever mailed him a copy. Olson claims that "he was handed a copy of the Summons and Complaint by a postal worker who works in the

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[1] At the time Olson filed his motion to dismiss, he had not yet revealed his true identity, instead proceeding under his alias of "Irving Steiner."

United States Post Office where his designated post office box is located." Dkt. 8 at 6. Olson further avers that "to the best of his knowledge, no efforts were ever made by plaintiffs to serve him at his principal place of business." *Id*. According to Olson, this constituted de facto ineffective service in violation of F.R. Civ. Pro. 4(e)(1)&(2), and California Code of Civil Procedure §§ 415.10 and 415.20(a)&(b).

Olson has included verbatim recitations of these rules in his brief;[2] by way of brief synopsis, Rule 4(e) provides that service upon individuals may be accomplished pursuant to the law of the state in which service is effected, or by delivering a copy of the summons and complaint to the individual personally or by leaving copies at the individual's dwelling house or usual place of abode. (Since no one contends that plaintiffs attempted personal service, Rule 4(e)(2) drops out of the equation).

Cal. Code Civ. Pro. § 415.20(b) provides that if a copy of the summons and complaint cannot with reasonable diligence be personally delivered to a defendant, then a summons may be served by leaving a copy of the summons and complaint at the defendant's usual mailing address "other than a United States Postal Service post office box" in the presence of a person apparently in charge of this place of business or usual mailing address who shall be informed of the contents thereof; plaintiff must follow up by mailing the summons and complaint to the person to be served at the place where the copies of the

[2] He also sets forth F.R. Civ. Pro. 4(a)&(b), although he makes no claim in his motion or supporting brief that there were defects as to the form or issuance of the Summons and Complaint. More on this below.

complaint and summons were left. Service by either of these methods is deemed complete on the tenth day after the mailing. *See* Dkt. 8 at 3-5.

The quoted language regarding United States postal employees becomes important in light of Olson's attempt to mislead this court. In his motion, Olson averred that:

> The owner of National Fidelity [*i.e., Olson*] has related to counsel under oath that he was at no time ever handed the Summons or Complaint in this matter. Nor was he ever mailed a copy thereof. He was handed a copy of the Summons and Complaint by a postal worker who works in the United States Post Office where his designated post office box is located. To the best of his knowledge, no efforts were ever made by plaintiffs to serve him at his principal place of business.

Dkt. 8 at 5-6.

Counsel's report in his brief of information related to him by his client purportedly "under oath" is hearsay. But it is clear in hindsight why Olson employed this technique: no United States postal workers actually were involved in the service that took place. Olson initially tailored his story so that dismissal would appear appropriate under the California Code but he didn't want to commit to this version under oath. In a subsequent affidavit and at his deposition, Olson changed his story, testifying that his wife actually picked up the summons and complaint at the private postal service.[3] But the owner of the private postal service, who has no reason to lie, submitted an affidavit in which she states that she saw Olson personally pick up the summons and complaint and that she personally explained to

[3] *See* Olson's June 17, 2005 affidavit, Dkt. 24 at ¶¶ 5-6; transcript of Olson's July 21, 2005 deposition, Dkt. 29, Ex. A at 22.

him what they were. Having considered the totality of the circumstances and for the purposes of deciding the pending motion to dismiss, I accept the owner's version of events.

The credible affidavits and documents in the record establish that plaintiffs effected substituted service on Olson pursuant to Cal. C. Civ. Pro. § 415.20(b). On March 22, 2005, plaintiffs' process server, Michael Gonzalez, went to the mailing address listed by Olson (known then only as "Irving Steiner") on the letterhead of National Fidelity's correspondence. Gonzalez discovered that this was not an office location for National Fidelity but a "Mail Max Postal Center" franchise. In other words, it was *not* a United States Post Office/United States Postal Service station, and the mail boxes were not USPS boxes. The Mail Max owner and operator, Sandy Brown, identified herself to Gonzalez as being in charge of the location. Gonzalez explained who he was and why he was there: to serve "Irving Steiner" and National Fidelity with a Summons and Complaint. Gonzalez left the summons and complaint with Brown. *See* May 25, 2005 affidavit of Michael Gonzalez, attached to August 12, 2005 affidavit of Briane E. Pagel, Dkt. 29.

Brown knew that Howard Olson was the holder of the box listed on the National Fidelity letterhead. Brown placed the summons and complaint in Olson's box. Brown was present when Olson retrieved the summons and complaint. Olson brought them to Brown at the counter and asked her what they were. Brown explained to Olson that the documents were a summons and complaint that had been left at the Mail Max for service on Olson. Brown saw Olson holding the summons and complaint in his hands. Brown further averred

that she has been in business in California for eighteen years and always has performed service of process in this same manner. *See* May 23, 2005 affidavit of Sandy Brown, attached to Pagel affidavit, Dkt. 29.

Plaintiffs did *not* then follow through by mailing copies of the summons and complaint to Olson at this Mail Max post box address. Only after Olson filed his motion to dismiss on April 22, 2005 did plaintiffs' attorney research California law and discover that he needed to follow up with a mailing. So, he did. By plaintiffs' count, 133 days passed from the filing of their complaint in this court to the date California law considered service to be complete.

This sequence of events establishes proper service under the applicable federal rules and California procedures. Although Olson filed an affidavit on June 17, 2005 in which he implies that he has other concerns, and although in his reply brief Olson latches onto concerns fronted by plaintiffs in their response, all of these additional concerns are waived. F.R. Civ. Pro. 12(h)(1) provides that any defense of insufficiency of process or insufficiency of service of process is waived if not timely presented under Rule 12(b)(4) and 12(g). It is the law of this circuit that "objections to the sufficiency of process must be specific and must point out in what manner the plaintiff has failed to satisfy the service provision utilized." *O'Brien v. R.J. O'Brien & Assoc., Inc.*, 998 F. 2d 1494, 1400 (1993). Olson did not raise any of these complaints in his initial motion or supporting brief. He cannot sandbag the plaintiffs by raising them later. *See F.T.C. v. World Media Brokers*, 415 F.3d 758, 766 (7th Cir.

2005) (perfunctory or undeveloped arguments are waived; so are arguments raised for the first time in a reply brief).

In any event, Olson's late complaints would not undermine the validity of plaintiffs' service of process. First, plaintiffs admit that they did not complete service within 120 days as presumptively required by Rule 4. Rule 4(m), however, provides that the court has discretion to extend this deadline for no reason, and that the court *shall* extend the deadline if plaintiff shows good cause. *Panaras v. Liquid Carbonic Indus. Corp.*, 94 F.3d 338, 340-41 (7th Cir. 1996). As the Supreme Court noted, "the 120-day provision operates not as an outer limit subject to reduction, but as an irreducible allowance." *Henderson v. United States*, 517 U.S. 654, 661 (1996).

Here, plaintiffs had good cause for much of the delay. First, plaintiffs unsuccessfully attempted to obtain a waiver of service, pursuant to F.R. Civ. Pro. 4(d). Plaintiffs then unsuccessfully attempted service through the San Bernardino Sheriff's Court Services, which declined to serve because of an arcane oversight (plaintiffs' letter of instruction did not include "Steiner's" address). Finally, plaintiffs hired the private process server, who delivered the summons and complaint to Olson's mailbox site.[4]

Plaintiffs then dropped the ball by not immediately mailing another copy of the summons of complaint to Olson's address as required by California statute, but this

[4] This time line also establishes why substituted service was necessary. To this day, it is not clear where Olson actually lives and works, and there is no indication that these addresses can be determined from public sources.

suspenders-with-a-belt requirement is neither obvious nor logical and it does not negate good cause. In his reply brief, Olson excoriates plaintiffs for not even researching California law on this point until after Olson filed his motion to dismiss, but his outrage is disproportionate to the offense. Plaintiffs acted in good faith every step of the way but were stymied several times by events out of their control. Had they not squandered a chunk of their 120 days waiting in vain for Olson to waive service, then they easily would have completed timely service.[5]

Neither am I moved by Olson's suggestion that plaintiffs' attorney could have avoided all of these hassles simply by calling Olson (then known as "Steiner") at the toll-free number on National Fidelity's letterhead to ask him to waive service. Olson has fought service and has resisted the proceedings in other ways. One example is his histrionic response to the request for a preliminary deposition; another is his actual performance at this July 21, 2005 deposition: Olson established that he is acutely suspicious and he jealously guards his personal and business information. Notwithstanding counsel's after-the-fact suggestion, there is no logical reason now to believe that Olson (or his attorney) would have been more receptive to a telephone call than to the other attempts to get this lawsuit out of the starting blocks. It would not have hurt plaintiffs' attorney to pick up the telephone, if only to make a record, but Olson is not entitled to dismissal because of this omission.

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[5] Olson implies in his reply brief that he never received plaintiffs' request to waive service. I address this below.

Even if there were some doubt whether plaintiffs had established good cause for exceeding the 120 day deadline, this court would exercise its discretion and allow the extra time. This is not a case in which plaintiffs were sitting on their hands, and they missed the deadline by less than two weeks. There was no prejudice to Olson because he and his attorney had appeared in this lawsuit, were aware of its nature and were vigorously defending against it. This did not constitute a waiver of Olson's right to contest service, but it shows that there are no equities favoring dismissal.

Olson also complains of facial defects in the summons he received: it had the wrong case number (erroneously assigned by this court) and it listed only co-defendant Dale Smith. (The attached complaint had the correct case number and listed "Steiner" and National Fidelity as defendants). As noted, Olson has waived these arguments, but even if he had not, they would not support dismissal under these circumstances.

The incorrect case number is a nonstarter. As plaintiffs point out, F.R.Civ.Pro. 4 does not even require placing the case number on the summons. In his motion to dismiss, Olson used the proper case number and case caption, so clearly he was aware of the actual number. This error could not lead to dismissal.

The missing names on the summons actually received by Olson could have been more problematic. Plaintiffs previously had mailed the complaint and a request for waiver to "Steiner," which probably put Olson on notice. However, the Seventh Circuit does not

recognized an "actual knowledge" exception to the requirements of Rule 4.[6] Even so, to the extent that the "substantial compliance" doctrine has any validity in this federal circuit, it may be applied to prevent a purely technical error in the form of the documents from invalidating an otherwise proper and successful delivery of process. *Mid-Continent Wood Products, Inc. v. Harris*, 936 F.2d 297, 302 (7th Cir. 1991). Where, as here, the complaint properly named "Steiner" and National Fidelity, where the codefendant (Dale Smith) was Olson's client on whose behalf Olson had sent the challenged dunning letters to plaintiffs and had exchanged correspondence with their first attorney, and where an intelligent person objectively would realize what the summons and complaint were intended to accomplish, then the failure to name "Steiner" in the summons could be viewed as a forgivable technical error. *See Veremis v. Interstate Steel Co.*, 163 F.R.D. 543, 544-45 (N.D. Ill. 1995).

In sum, Olson is not entitled to dismissal of the complaint against him.

Moving to a related issue, on February 23, 2005, plaintiffs asked this court to order both defendants (Olson and Dale Smith, since defaulted) to reimburse them for the costs of service. *See* February 23, 2005 letter of Attorney Pagel, dkt. 3. Pursuant to Rule 4(d), because Olson failed to comply with plaintiffs' request for a waiver, he is liable to plaintiffs

[6] On the other hand, the State of California considers compliance with statutory procedures for service of process "essential," but nevertheless construes substitute service procedures liberally in favor of effectuating service and upholding jurisdiction if the defendant has received actual notice. *See Ellard v. Conway*, 94 Cal. App. 4th 540, 544-45, 114 Cal. Rptr. 2nd 399, 401-02 (Cal. App. 4th Dist. 2001).

for the costs they subsequently incurred to serve him unless Olson can show good cause for the failure.[7]

In Olson's reply brief on dismissal he implies that he never received the request for waiver, and he claims that "extreme frustration" with plaintiffs' failure to telephone him drove him to insist on actual service. *See* dkt. 31 at 2. Duly noted, although an attorney's recitation in a brief of his client's state of mind is not evidence. Therefore, I will allow Olson a brief opportunity to flesh this out if he wishes in order to make his best case for good cause.

ORDER

For the reasons stated above it is ORDERED that:

1) The motion to dismiss filed by defendant Howard Olson, a/k/a Irving Steiner, d/b/a National Fidelity is DENIED.

2) Olson may have Until October 11, 2005 to show good cause why he should not reimburse plaintiffs the costs they incurred effecting service on him. Plaintiffs may have until October 18, 2005 to reply.

Entered this 26th day of September, 2005.

BY THE COURT:
/s/
STEPHEN L. CROCKER
Magistrate Judge

[7] Obviously, a defendant's failure to waive service is temporally and conceptually distinct from that defendant's challenge to any attempt at service that follows.