

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
Alexandria, Virginia

United States Securities and Exchange)
Commission,)
)
Plaintiff,)
)
v.)
)
International Fiduciary Corp., S.A.,)
et al.)
)
Defendants.)
_____)

C.A. No. 1:06cv1354

REPORT AND RECOMMENDATION

This matter is before the court on plaintiff’s motion for entry of default judgment as to defendants Daniel Eric Byer and Malcom Cameron Boyd Stevenson (docket no. 38). Upon consideration of the complaint, plaintiff’s motion for default judgment, and the supporting declarations, the magistrate judge makes findings as follows, and recommends that default judgment be entered against defendants Byer and Stevenson.

Fact Summary

Defendant International Fiduciary Corporation (“IFC”) is a Virginia corporation. Defendants Stevenson and Byer are individual residents of British Columbia; defendant Pinkett is an individual resident of Virginia. The three individual defendants were the principals of defendant IFC. Plaintiff alleges that since at least July 2003, defendants have fraudulently raised at least \$18.2 million from 182 investors. They offered contracts to “invest” at least \$100,000 in a non-existent debt trading operation in what plaintiff calls a classic pyramid scheme. Defendants misrepresented multiple material facts to secure investments and never applied the

money they collected as promised. Defendants have been ordered to cease trading as IFC by authorities in Canada.

Plaintiff's four count complaint alleges that defendants: 1) violated Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934; 2) violated Section 17(a)(1) of the Securities Act of 1933; 3) violated Sections 17(a)(2) and (3) of the Securities Act of 1933; and 4) violated Section 5(c) of the Securities Act of 1933.

Procedural Summary

Plaintiff filed the complaint in this action on December 4, 2006. On the same day, Judge Lee issued a temporary restraining order and other emergency relief against defendants which provided, among other things, that service of the temporary restraining order, the summons and the complaint could be made by various means, including any manner authorized by Rule 5 of the Federal Rules of Civil Procedure. A preliminary injunction (docket no. 14) was entered by Judge Lee on December 12, 2006, finding that plaintiff had made a sufficient showing of a *prima facie* case, a strong likelihood of success at trial on the merits, i.e. that defendants had in fact engaged in the alleged illegal conduct. On January 19, 2007, Judge Lee entered an order directing appointment of a receiver over defendant IFC (docket no. 25).

Defendant Byer was personally served on January 3, 2007.

Plaintiff seeks to establish service on defendant Stevenson pursuant to Judge Lee's temporary restraining order and Fed. R. Civ. P. 4(f)(3), which provides that for a defendant outside the United States, service may be made by "by other means not prohibited by international agreement as may be directed by the court." A copy of the summons, complaint, and temporary restraining order were sent by Federal Express ("FedEx") to Stevenson's last known address in Abbotsford, British Columbia, on December 5, 2006. Declaration of Eric

Felker (docket no. 10). These materials were returned. On January 23, 2007, process was given to Stevenson's children at two addresses in British Columbia, one of which is also the known address for Stevenson's wife and the mailing address of a business associated with him.

Declaration of A. David Williams (docket no. 41).

Defendant Stevenson has made filings in response to the complaint. On March 1 (docket nos. 42, 43) and March 5 (docket nos. 45, 46), he filed copies of the same document styled "Affidavit of Malcolm Cameron Boyd Stevenson in Support of a Notice and Demand to Dismiss for Lack of Personal Jurisdiction." In it he argues that the court does not have jurisdiction over him and that he has not been served with process.

Findings

The major issue at this juncture in the litigation is whether the defendant Stevenson has been properly served with process. Defendants International Fiduciary Corporation and Preston David Pinkett II are currently defending this action. Plaintiff is seeking default judgment as to liability and immediate injunctive relief against Byer and Stevenson and asks that it be allowed to wait to prove the appropriate amounts of disgorgement and statutory damages. Therefore this report and recommendation will focus on the present issue of service on defendant Stevenson.

The temporary restraining order (docket no. 7), entered by Judge Lee on December 4, 2006, provides alternative service as follows:

Service of this order, the summons and complaint may be made by facsimile, mail, overnight delivery to the business address of any defendant, or personally by any employee of the Securities & Exchange Commission who is not counsel of record in this matter . . . or in any other manner authorized by Rule 5 of the Federal Rules of Civil Procedure and may be made on any registered agent, officer, or director of defendants, or by publication.

“In order to implement [alternative service under] Rule 4(f)(3) the means of service must be 1) directed by the Court, and 2) not prohibited by international agreement, including the Hague Convention referenced in Rule 4(f)(1).” *FMAC Loan Receivables v. Dagra*, 228 F.R.D. 531, 534 (E.D. Va. 2005). Plaintiff has complied with the direction of the court by mailing, via FedEx overnight delivery,¹ service to defendant Stevenson’s last known address. Service by mail pursuant to Fed. R. Civ. P. 5 was clearly authorized by Judge Lee’s order. Service by mail is complete upon mailing. Fed. R. Civ. P. 5(b)(2)(B). The address the materials were sent to was provided by the British Columbia Securities Commission and appeared on defendant’s driver’s license at the time. *See* Felker Declaration, ¶¶ 4-7. British Columbia, Canada does not prohibit authorization of alternative means of service. *See* British Columbia Supreme Court R.12(1)²; *D’Aquisto v. Triffo*, 2006 WL 44057, *2 (E.D. Wis. 2006).

The second condition under 4(f)(3) is that the manner of service not be prohibited by international agreement. Canada and the United States are signatories to the Hague Convention on the Service of Judicial and Extra-judicial Documents in Civil Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638 (the “Hague Convention”). The Hague Convention is a multinational, self-executing treaty concerned with the service of process on foreign defendants. As a ratified treaty, service abroad effected pursuant to the Hague Convention supercedes the

¹Given the broad scope of Judge Lee’s order, the magistrate judge finds that overnight delivery constitutes a proper method of service in this case and need not consider whether overnight delivery is a “mailing” under Rule 5. *Compare United States v. 63-29 Trimble Rd.*, 812 F.Supp. 332, 334 (E.D.N.Y. 1992) (mailing includes use of private courier such as FedEx) *with Magnuson v. Video Yesteryear*, 85 F.3d 1424 (9th Cir. 1996) (mailing does not include private courier).

² “[W]here for any reason it is impracticable to serve a document as set out in Rule 11, the court may order substituted service, whether or not there is evidence that the document will probably reach the person to be served or will probably come to the person’s attention or that the person is evading service”.

requirements of Rule 4. See *McClenon v. Nissan Motor Corp.*, 726 F. Supp. 822, 823-26 (N.D. Fla.1989); *Itel Container Int'l Corp. v. Atlantrafik Express Serv., Ltd.*, 686 F.Supp. 438, 444 n. 9 (S.D.N.Y.1988); *Cooper v. Makita, U.S.A ., Inc.*, 117 F.R.D. 16, 16-18 (D. Me.1987). The Hague Convention applies in “all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.” *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988); Federal Rules of Civil Procedure Advisory Committee Notes, 1993 Amendments, subdivision (f) (“[u]se of the Convention procedures, when available, is mandatory if documents must be transmitted abroad to effect service”). The principal method for service set out by the treaty involves each member country designating a “Central Authority” to receive documents from another member country, and allows the receiving country to impose certain requirements with respect to those documents. See Hague Convention, art 2; art. 5.

Plaintiff cites to *S.E.C v. International Swiss Investment Corp.*, 895 F.2d 1272 (9th Cir. 1990) for the proposition that, under the language of 15 U.S.C. § 78aa³, the “SEC [is not] required to comply with requirements under international law for service of process.” See Memorandum and Points of Authority in Support of Plaintiff’s Motion for Default Judgment” (docket no. 48, at 3). However, the court in *International Swiss Investment Corp.* explicitly differentiates between the Hague Convention and the treaty at issue in that case, the Inter-American Convention on Letters Rogatory. At that time, the Inter-American Convention on Letters Rogatory had not been ratified, which was the basis for the court’s ruling that the Federal Rules, and not the Convention, controlled the proper methods of service of process. The

³That section provides for service wherever “the defendant is an inhabitant or wherever the defendant may be found.” The court also held that since the statute does not specify a method of service, it is necessary to turn to the Federal Rules. 895 F.2d at 1275.

clear implication of the decision is that the Hague Convention would have controlled had it been the relevant treaty.

The magistrate judge finds that the Hague Convention applies in this case, as plaintiff seeks to establish service through transmission of documents abroad. The magistrate judge disagrees with plaintiff's reading of *International Swiss Investment Corp.* and in any event that decision is not controlling.

The question therefore becomes whether service by mail to a defendant abroad is valid under the Hague Convention. Article 10(a) of the Convention states, "Provided the State of destination does not object, the present Convention shall not interfere with . . . (a) the freedom to send judicial documents, by postal channels, directly to persons abroad." The question whether the word "send" incorporates the ability to serve process is a matter of some controversy in the federal courts. The Fifth and Eighth Circuits, as well as a number of district courts, have held that Article 10(a) does not authorize service of process by mail. *See, e.g., Bankston v. Toyota Motor Corp.*, 889 F.2d 172, 173-74 (8th Cir.1989) (reasoning that use of the word "service" in other sections of the treaty is evidence that the drafters intended to distinguish between transmitting judicial documents to a defendant after a lawsuit has been commenced and "serving" process on the defendant in order to initiate a lawsuit). This line of cases holds that "Article 10(a) merely provides a method for sending subsequent documents after service of process" has been accomplished by some other means." *Id.* at 174.

The Second and Ninth Circuits, and a number of other district courts, have held that Article 10(a) permits service of a summons by mail where such service is otherwise authorized. *See, e.g., Ackerman v. Levine*, 788 F.2d 830, 838 (2d Cir.1986). Relying significantly on the

history and purpose of the Hague Convention, these courts interpret the word “send” in Article 10(a) to include the service of process to commence a lawsuit. *Id.*

At least two district courts in Virginia have treated the issue and reached conflicting conclusions. In *Fleming v. Yamaha Motor Corp., USA, et al.*, 774 F.Supp. 992, 993 (W.D. Va. 1991), the plaintiff attempted to effect service on a Japanese corporation using substitute service under Virginia law, pursuant to which the summons and complaint were transmitted directly to the corporation rather than to the designated Central Authority. After determining that the Hague Convention applied, the court considered the language of Article 10(a), noted the split of authority, and found that:

Following . . . principles of treaty interpretation, the court must afford meaning to the drafters’ textual distinction between the phrase “to send judicial documents,” contained in article 10(a), and the phrase “to effect service of judicial documents,” contained in articles 10(b) and 10(c). The drafters used the word “service” throughout the Hague Convention . . . The plain language of article 10(a) only provides for the sending of judicial documents after a foreign party is properly served; it does not prescribe an additional method for service of process.

Id. at 994-96.

Conversely, in *Weight v. Kawasaki Industries Ltd., et al.*, 597 F.Supp. 1082 (E.D. Va. 1984), Judge Cacheris, in an almost identical factual situation, found that service through transmittal of process directly to a Japanese corporation was valid, noting that Japan had not objected to service through postal channels, and finding that “under Article 10(a) . . . [service on] a Japanese corporation, was effective by the direct mail procedure pursuant to Virginia Code Section 8.01-329.” *Id.* at 1085-86.

The magistrate judge finds the *Ackerman* line of cases, including Judge Cacheris’s *Weight* opinion, *supra*, persuasive at least in the circumstances presented here. Courts have specifically

found that service by mail on a defendant in Canada is valid under the Hague Convention. *See Curcuruto v. Cheshire*, 864 F.Supp. 1410, 1412-13 (S.D. Ga. 1994); *Heredia v. Transport S.A.S., Inc.*, 101 F. Supp. 2d. 158, 161-62 (S.D.N.Y. 2000);

Service must also satisfy constitutional due process. The Supreme Court held in *Mullane v. Central Hanover Bank & Trust Co.*, 399 U.S. 306, 314 (1950) that an “elementary and fundamental requirement of due process in any proceeding . . . is 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.” If, “with due regard for the practicalities and peculiarities of the case these conditions are met, the constitutional requirements [of due process] are satisfied.” *Id.* The constitutional standard is intended to be flexible. *See Schroeder v. City of New York*, 371 U.S. 208, 212 (1962).

The magistrate judge finds that the service methods used in this case have been reasonably calculated to apprise defendant of this lawsuit against him.

Moreover, the record clearly shows that he is in fact aware of this suit. The declarations submitted by plaintiff detail the significant efforts it has undertaken to serve defendant Stevenson. It is apparent that he is evading service. Given the nature of lawsuits brought by the S.E.C., there is a long line of cases in which courts have approved and upheld alternate means of serving elusive foreign defendants. *See, e.g., S.E.C. v. Unifund Sal*, 910 F.2d 1028 (2d Cir. 1990). The filing made by defendant makes clear, and the magistrate judge finds, that he is aware of this lawsuit. It is appropriate for a court to consider the fact that defendant has demonstrated awareness of a suit when assessing whether service has been effective. *See Aviance v. Corriea*, 705 F.Supp. 666, 685 (D.D.C. 1989).

The magistrate judge finds for all of the above reasons that plaintiff has effected proper service on defendant Stevenson pursuant to Judge Lee's order and Rule 4(f)(3).

With service established as to both defendants Byer and Stevenson, the magistrate judge finds that the injunctive relief requested by plaintiff is appropriate. By defaulting, defendants are deemed to have admitted all of plaintiff's well-pled allegations of fact, which then form the basis for judgment against defendants. The magistrate judge finds that plaintiff has provided an appropriate basis for judgment through the well-pled complaint and the declarations in support of default judgment. The findings made by Judge Lee in his preliminary injunction order (docket no. 14) provide the appropriate basis for entry of the permanent injunctive relief now sought, where defendants have admitted to the allegations of the complaint by virtue of their default.

Recommendation

The magistrate judge recommends that the court enter the "Proposed Final Judgement Of Default against Defendant Daniel Eric Byer" and "Proposed Final Judgement Of Default against Defendant Malcolm Cameron Boyd Stevenson," attachments B and C to the motion for entry of default judgment (docket no. 38). The magistrate judge further recommends that plaintiff be allowed to prove amounts of disgorgement and statutory damages at an appropriate time.

The filing by defendant Stevenson should be treated as a motion to quash service. *See Vorhees v. Fischer and Krecke*, 697 F.2d 574, 576 (4th Cir. 1983). For the reasons discussed above, that motion should be denied.

Notice

By mailing copies of this report and recommendation, the parties are notified as follows. Objections to this report and recommendation must be filed within ten (10) days of service on

