

JS - 6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PRUDENT TRUST COMPANY) 2:14-cv-08965-RSWL-MAN
LIMITED; EDI M. O. FAAL,)

Plaintiffs,) **ORDER DISMISSING ACTION**
WITHOUT PREJUDICE

v.)

NIANIA DABO TOURAY;)
PRISTINE CONSULTING)
COMPANY,)

Defendants.)

On March 31, 2015, the Court ordered [19] Plaintiffs Prudent Trust Company Limited and Edi M. O. Faal (collectively, "Plaintiffs") to show cause by April 10, 2015, as to why this Action should not be dismissed for lack of prosecution. Plaintiffs initiated this Action on November 19, 2014, and as of March 31, 2015, Plaintiffs had not filed proofs of service for remaining Defendants Niania Dabo Touray and Pristine Consulting Company (collectively, "Defendants"). See Dckt. # 1; Fed. R. Civ. P. 4(m).

1 On April 10, 2015, Plaintiffs filed a response [23]
2 to the Court's Order [19]. In Plaintiffs' response,
3 Plaintiffs' attorney, Mr. Ronald G. Kim ("Mr. Kim"),
4 declares that Plaintiffs served Niania Dabo Touray and
5 Pristine Consulting Company on April 3, 2015. Kim
6 Decl. ¶¶ 3, 4, ECF No. 23. Mr. Kim explains that
7 Defendant Niania Dabo Touray was served by email on
8 April 3, 2015, due to her unknown location and cites
9 Rio Properties, Inc. v. Rio Int'l Interlink, 284 F.2d
10 1007, 1018 (9th Cir. 2002) for the contention that
11 electronic service is proper "where service cannot be
12 made by other means and the e-mail does not bounce
13 back." Kim Decl. ¶ 3. Mr. Kim declares that Defendant
14 Pristine Consulting Company ("Pristine") was served on
15 April 3, 2015, by certified mail with return receipt
16 requested, as well as by email on April 8, 2015, at an
17 address in Virginia, and that the late service of
18 process on Defendant Pristine was due to Plaintiffs'
19 diligence in "attempting to effectuate service . . . by
20 Hague Convention on Defendant [Pristine] at its office
21 in Gambia." Id. ¶ 4.

22 I. LEGAL STANDARD

23 Rule 4(m) states that "[i]f a defendant is not
24 served within 120 days after the complaint is filed,
25 the court--on motion or on its own after notice to the
26 plaintiff--must dismiss the action without prejudice
27 against the defendant or order that service be made
28 within a specified time." Fed. R. Civ. P. 4(m). Rule

1 4(m) requires the court to extend the time for service
2 to be made "if the plaintiff shows good cause for the
3 failure" to timely serve the defendant. Fed. R. Civ.
4 P. 4(m). Rule 4(m) "does not apply to service in a
5 foreign country under Rule 4(f) or 4(j)(1)."

6 Additionally, courts have the "inherent power to
7 achieve the orderly and expeditious disposition of
8 cases by dismissing actions for failure to prosecute."

9 Chase v. Gen. Growth Prop. Corp., No. CV

10 07-3405-JVS(E), 2008 WL 622036, at *1 (C.D. Cal. Feb.

11 28, 2008); see Link v. Wabash R.R., 370 U.S. 626, 630-

12 32 (1962) (noting that courts have the inherent

13 authority "to clear their calendars of cases that have

14 remained dormant because of the inaction or

15 dilatoriness of the parties seeking relief").

16 **II. DISCUSSION**

17 **A. Defendant Touray**

18 Here, Plaintiffs served Defendant Niania Dabo
19 Touray on April 3, 2015, by email because Defendant
20 Touray's residence is unknown, as she allegedly "'fled
21 from The Gambia in July 2014.'" Kim Decl. ¶ 4.

22 Plaintiffs assert that service by email was proper here
23 under Rule 4 and Ninth Circuit precedent. See id.

24 However, the case Plaintiffs cite in support of their
25 e-service on Defendant Touray holds, contrary to

26 Plaintiffs' contention, that "email service is not

27 available absent a Rule 4(f)(3) court decree," which,

28 in this case was never requested by Plaintiffs. Rio

1 Properties, 284 F.3d at 1018; see also Fed. R. Civ. P.
2 4(f)(3). As such, Plaintiffs' service by email on
3 Defendant Touray is improper.

4 While Rule 4(m)'s 120-day deadline does not apply
5 to foreign service on an individual under Rule 4(f),
6 Fed. R. Civ. P. 4(m), Plaintiffs have not shown any
7 attempt at *proper* service on Defendant Touray under
8 Rule 4(f). Though the Ninth Circuit in Lucas v.
9 Natoli, 936 F.2d 432, 432-33 (9th Cir. 1991) held that
10 the 120-day service deadline in Rule 4(m) was
11 inapplicable to *successful* service in a foreign country
12 under Rule 4(j), Lucas is distinguishable.

13 In Lucas, the Plaintiffs had successfully served
14 the defendants under Rule 4(j) eleven months after the
15 complaint was filed. 936 F.2d at 432. The only
16 question on appeal was "whether the requirement of Fed.
17 R. Civ. P. 4(j) that the complaint be served within 120
18 days after filing applies to service in a foreign
19 country." Id. Lucas should not be extended beyond its
20 holding--that *successful* service of process under Rule
21 4(j) is proper because the Federal Rules do not impose
22 a specific deadline on service of process under Rule
23 4(j)(1) or 4(f). See Fed. R. Civ. P. 4(m); 936 F.2d at
24 432-33. Lucas does not speak to the court's inherent
25 discretion to move a case along when a plaintiff fails
26 to serve a defendant, even a foreign defendant, with
27 reasonable diligence. See, e.g., O'Rourke Bros. Inc.
28 v. Nesbitt Burns, Inc., 201 F.3d 948, 952 (7th Cir.

1 2000) ("It may well be that the provision for dismissal
2 without prejudice under Rule 4(m) does not apply when
3 service is attempted in a foreign country, but it does
4 not follow that a court is left helpless when it wants
5 to move a case along.").

6 Here, unlike in Lucas, Plaintiffs have not
7 successfully served Defendant Touray under any
8 subsection of Rule 4. Plaintiffs have also failed to
9 even *attempt* proper service on Defendant Touray, as
10 email is not an appropriate method of service of
11 process absent a requested court order. Plaintiffs
12 have no excuse for failing to abide by Rule 4's
13 requirements; both Rule 4 and Ninth Circuit precedent,
14 including the Ninth Circuit case cited by Plaintiffs in
15 their Response [23] to the Order to Show Cause, clearly
16 state that a court order must be sought prior to
17 serving a defendant by email.

18 Because Plaintiffs failed to even attempt proper
19 service on Defendant Touray under Rule 4 after the
20 Court's Order to Show Cause, the Court finds that cause
21 has not been shown as to why this case should not be
22 dismissed for failure to prosecute and finds
23 Plaintiffs' actions dilatory. As such, the Court, by
24 its inherent power to manage its cases, **HEREBY**
25 **DISMISSES** without prejudice Defendant Niania Touray
26 from this Action. See Link, 370 U.S. at 630-32.

27 **B. Defendant Pristine Consulting Company**

28

1 Plaintiffs untimely¹ served Defendant Pristine
2 Consulting Company ("Pristine"), which the Court
3 understands to be a foreign corporation with a Virginia
4 location,² on April 3, 2015, by certified mail with
5 return receipt requested, at Pristine's Virginia office
6 address; and by email, on April 8, 2015. Kim Decl. ¶ 4.

7 Plaintiffs' excuse for their late service of
8 process on Pristine is Plaintiffs' "diligence" in
9 "attempting to effectuate service . . . by Hague
10 Convention on Defendant [Pristine Consulting Company]
11 at its office in Gambia." Id. ¶ 4. Such an excuse is
12 untenable. First, Gambia is not a signatory to the
13 1965 Hague Convention on the Service Abroad of Judicial
14 and Extrajudicial Documents ("Hague Convention"). If
15 Plaintiffs were, in fact, being diligent, that fact
16 would have become evident via a quick internet search.

17 However, because Plaintiffs claim they "recently
18 discovered that Defendant PRISTINE has an office
19 located in the State of Virginia," Kim Decl. ¶ 4,
20 Plaintiffs have provided a sufficient excuse to survive
21 dismissal if Plaintiffs' service of process is proper
22 under Rule 4(h).

23 Rule 4(h), which governs service on a domestic or
24 foreign corporation states in relevant part that a

25
26 ¹ Rule 4(m)'s 120-day deadline applies to service of process
under Rule 4(h). Fed. R. Civ. P. 4(h); Fed. R. Civ. P. 4(m).

27 ² See <https://sccfile.scc.virginia.gov/Find/Business;>
28 <http://pristineconsulting.com>.

1 corporation served in the United States must be served
2 "in the manner prescribed by Rule 4(e)(1) for serving
3 an individual." Fed. R. Civ. P. 4(h)(1). Rule 4(e)(1)
4 states in relevant part that service must be made
5 "following state law for serving a summons in an action
6 brought in courts of general jurisdiction in the state
7 where the district court is located or where service is
8 made." Fed. R. Civ. P. 4(e)(1). As such, Plaintiffs'
9 service of process on Defendant Pristine is proper if
10 it complies with either Virginia or California law.

11 1. California Law

12 For mailed service of process on a corporate party,
13 California law requires the mailing to be addressed to
14 an *individual* and not merely to the corporate party.
15 Cal. Code Civ. P. §§ 415.30, 415.40, 416.10. Section
16 416.10 of the California Code of Civil Procedure states
17 that service on a corporate party must be addressed
18 "[t]o the president or other head of the corporation, a
19 vice president, a secretary or assistant secretary, a
20 treasurer or assistant treasurer, a general manager, or
21 a person authorized by the corporation to receive
22 service of process." Cal. Code Civ. P. § 416.10; see
23 Cruz v. Fagor Am., Inc., 52 Cal. Rptr. 3d 862, 867-68
24 (Ct. App. 2007); see also Cal. Code Civ. P. § 417.20
25 (requiring that, when service is made by mail pursuant
26 to Section 415.40, "proof of service shall include
27 evidence satisfactory to the court establishing actual
28

1 delivery to the person to be served, by a signed return
2 receipt or other evidence").

3 Here, Plaintiffs' Proofs of Service for Pristine
4 [20, 24] fail to identify an individual to which the
5 summons and complaint were mailed, but, instead,
6 mention only the corporate entity. Proof of Serv. ¶ 3,
7 ECF No. 20; Proof of Serv. ¶ 3, ECF No. 24. Plaintiffs
8 have also failed to supply the Court with any "evidence
9 satisfactory to the court establishing actual delivery
10 to the person to be served." Cal. Code Civ. P. §
11 417.20; see Cruz, 52 Cal. Rptr. at 868-69; see Ramos v.
12 Homeward Residential, Inc., 168 Cal. Rptr. 3d 114, 120-
13 21 (Ct. App. 2014) (holding that failure to identify
14 *the person* to be served, which means an individual and
15 not a corporate entity, and failure to provide evidence
16 that an individual actually received the summons,
17 resulted in insufficient service of process on a
18 corporation under California's Code of Civil
19 Procedure). As Plaintiffs' Proofs of Service were
20 filed April 10, 2015, the Court has given Pristine
21 sufficient time to return a signed receipt, but, to
22 date, no signed receipt has been provided by
23 Plaintiffs. See Cruz, 52 Cal. Rptr. at 868-70.

24 As such, Plaintiffs' service on Defendant Pristine
25 is insufficient under California law. See Ramos, 168
26 Cal. Rptr. 3d at 120-21.

27 2. Virginia Law

28

1 Virginia law allows substituted service on a
2 corporation, domestic or foreign, by service on one of
3 various permissible persons, but not merely on the
4 corporate entity itself. Va. Code § 8.01-301³; Va. Code
5 § 13.1-766 (allowing substituted service on a
6 corporation's authorized agent or the clerk of the
7 Commission); Va. Code § 13.1-928 (same); Va. Code §
8 8.01-329 (allowing service "on any agent of such person
9 . . . or on the Secretary of the Commonwealth of
10 Virginia"); see Junk v. R.J. Reynolds Tobacco Co., 24
11 F. Supp. 716 (W.D. Va. 1938) ("Corporations can act
12 only through agents and service upon a corporation can
13 be only upon some individual who is the agent of the
14

15 ³ "[S]ervice of process on a foreign corporation may be
16 effected in the following manner:

17 1. By personal service on any officer, director or on the
18 registered agent of a foreign corporation which is
19 authorized to do business in the Commonwealth, and by
20 personal service on any agent of a foreign corporation
21 transacting business in the Commonwealth without such
22 authorization, wherever any such officer, director, or
23 agents be found within the Commonwealth;

24 2. By substituted service on a foreign corporation in
25 accordance with §§ 13.1-766 and 13.1-928, if such
26 corporation is authorized to transact business or affairs
27 within the Commonwealth;

28 3. By substituted service on a foreign corporation in
accordance with § 8.01-329 or by service in accordance with
§ 8.01-320, where jurisdiction is authorized under §
8.01-328.1, regardless of whether such foreign corporation
is authorized to transact business within the Commonwealth;
or

4. By order of publication in accordance with §§ 8.01-316
and 8.01-317 where jurisdiction in rem or quasi in rem is
authorized, regardless of whether the foreign corporation so
served is authorized to transact business within the
Commonwealth.

Va. Code § 8.01-301.

1 corporation."). Thus, under the same analysis set out
2 above, Plaintiffs failed to properly serve Defendant
3 Pristine under Virginia law, as Plaintiffs do not
4 provide any evidence that one of the various
5 permissible persons under Virginia law was served with
6 Pristine's service of process.

7 Plaintiffs' service on Defendant Pristine is not
8 only untimely but also improper under Rule 4. Though
9 Plaintiffs may have an excuse for untimely service on
10 Pristine, Plaintiffs have no excuse for improperly
11 serving Pristine. As such, the Court finds that
12 Plaintiff has failed to show cause as to why this
13 Action should not be dismissed as against Defendant
14 Pristine, and, thus, Defendant Pristine Consulting
15 Company is **HEREBY DISMISSED** without prejudice.

16 **III. CONCLUSION**

17 For the foregoing reasons, this Action is **HEREBY**
18 **DISMISSED WITHOUT PREJUDICE** for failure to prosecute.

19
20 **IT IS SO ORDERED.**

21
22 DATED: May 13, 2015

RONALD S.W. LEW

HONORABLE RONALD S.W. LEW
Senior U.S. District Judge