

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GREGORY BENDER,
Plaintiff,
v.
INTERSIL CORPORATION,
Defendant.

No. C 09-01155 CW
ORDER DENYING
DEFENDANT INTERSIL
CORPORATION'S MOTION
TO DISMISS (Docket
No. 12)

_____/

Defendant Intersil Corporation moves to dismiss Plaintiff Gregory Bender's patent infringement suit, arguing it was not properly served. Plaintiff Gregory Bender opposes this motion. The motion was decided on the papers. Having considered all of the papers filed by the parties, the Court denies the motion to dismiss.

BACKGROUND

On March 16, 2009, Plaintiff filed his patent infringement suit against Defendant. In the complaint, Plaintiff alleges that Defendant infringed U.S. Patent No. 5,103,188 (the '188 patent) and that he suffered damages as a result. Compl. ¶¶ 8-11.

Plaintiff's agent Mr. Micah Yospe first attempted to serve process on Defendant on July 13, 2009. Mr. Yospe went to Defendant's offices and spoke to an unidentified individual at the

1 receptionist's desk.¹ Yospe Decl. ¶¶ 1, 3. Mr. Yospe asked the
2 receptionist to find either an officer or a managing agent.
3 Id. ¶ 3. The receptionist made several telephone calls and replied
4 that she could not reach any managers or personnel in the legal
5 department. Id. Mr. Yospe called Plaintiff's counsel, who told
6 him to leave and try again the next morning. Id. ¶ 4.

7 On July 14, 2009, Mr. Yospe returned to Defendant's offices
8 and spoke with the same receptionist. Id. The receptionist stated
9 that she now "knew who to call." Id. When she inquired into Mr.
10 Yospe's purpose, he responded that he intended to serve process on
11 Defendant. Id. She then contacted Ms. Debbie Johnson, who met Mr.
12 Yospe and identified herself as "Administration Manager for
13 Intersil Corporation." Id. Thereafter, Ms. Johnson accepted a
14 package that Mr. Yospe identified to Ms. Johnson as containing
15 Plaintiff's legal process. Id.

16 LEGAL STANDARD

17 A federal court lacks personal jurisdiction over a defendant
18 if service of process is insufficient. Omni Capital Int'l v.
19 Rudolf Wolff & Co., 484 U.S. 97, 104 (1987). A court may dismiss
20 the action without prejudice pursuant to Federal Rule of Civil
21 Procedure 12(b)(5). Once a defendant challenges service, a
22 plaintiff "bear[s] the burden of establishing that service was
23 valid under [Federal Rule of Civil Procedure 4]." Brockmeyer v.
24 May, 383 F.3d 798, 801 (9th Cir. 2004).

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27 ¹ The Court notes that the unnamed individual was not
28 identified as a receptionist. Nevertheless, for ease of reference,
the Court describes the individual as a receptionist throughout
this order.

DISCUSSION

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2 Federal Rule of Civil Procedure 4(h) governs service on a
3 corporate defendant like Intersil. Under Rule 4(h)(1)(b), a
4 plaintiff may serve a defendant "by delivering a copy of the
5 summons and of the complaint to an officer, a managing or general
6 agent, or any other agent authorized by appointment or by law to
7 receive service of process" Fed. R. Civ. P. 4(h)(1)(B).
8 Whether an individual constitutes a "managing or general agent"
9 requires a factual analysis of "that person's authority within the
10 organization." Direct Mail Specialists, Inc. v. Eclat Computerized
11 Techs., 840 F.2d 685, 688 (9th Cir. 1988). Service would be proper
12 upon an individual "so integrated with the organization that he
13 will know what to do with the papers." Id. In determining whether
14 the proper individual was served, a court considers whether the
15 individual "stands in such a position as to render it fair,
16 reasonable and just to imply the authority on his part to receive
17 service." Id. (citations omitted) Though a plaintiff must
18 substantially comply with Rule 4, the rule "should be liberally
19 construed so long as a party receives sufficient notice of the
20 complaint." Id.

21 Defendant argues that it was not properly served by Plaintiff
22 because Ms. Johnson's title of "Administration Manager" alone does
23 not make her a managing or general agent as required by Rule 4(m).
24 Plaintiff argues that service upon an individual holding Ms.
25 Johnson's title is proper.

26 Mr. Yospe's undisputed declaration shows that Defendant made
27 several representations, albeit inadvertent given Defendant's
28 current motion, that Ms. Johnson had the authority to accept

1 service. This case turns primarily on Mr. Yospe's interactions
2 with the unnamed receptionist. During Mr. Yospe's first visit, the
3 receptionist said that she unsuccessfully tried to reach personnel
4 in the legal department, which demonstrates knowledge of Mr.
5 Yospe's purpose. Upon Mr. Yospe's return the following day, the
6 receptionist directly inquired into his purpose, to which Mr. Yospe
7 replied that he intended to serve process. Now with clear
8 knowledge of Mr. Yospe's purpose, the receptionist contacted
9 Administrative Manager Johnson. Ms. Johnson then appeared and
10 accepted the package after Mr. Yospe told her that it contained
11 legal process. These facts make it "fair, just, and reasonable to
12 imply" that Ms. Johnson had the authority to receive service.
13 Direct Mail Specialists, 840 F.2d at 688. Defendant cannot allow
14 individuals at its offices to represent to a process server that a
15 particular individual has authority to accept process and then
16 later complain that service was insufficient. In finding
17 sufficient service upon Defendant through Ms. Johnson, the Court
18 relies not only upon Ms. Johnson's title but also the
19 receptionist's implicit identification of Ms. Johnson as a proper
20 individual to receive service.

21 Unlike in the cases it relies upon, Defendant has remained
22 silent on whether Ms. Johnson had proper authority. In Chapman v.
23 EEOC, the court found insufficient service when the plaintiff
24 served the defendant's employee who later declared that she was
25 unauthorized to receive process. 2008 WL 782599, at *3 (N.D.
26 Cal.). In Audio Toys, Inc. v. Smart AV Pty Ltd., the plaintiff
27 served the defendant's employee at a trade show after observing the
28 employee provide informational brochures and product

1 demonstrations. 2007 WL 1655793, at *4 (N.D. Cal.). The employee
2 also later declared that he lacked the authority to receive
3 process. 2007 WL 1655793, at *1 (N.D. Cal.). No such declaration
4 has been submitted in this case.

5 Brahmana v. Lembo, 2009 WL 1424438 (N.D. Cal.), is another
6 case relied upon by Defendant that is readily distinguishable. In
7 Brahmana, the court found that service upon a ten-percent
8 shareholder in the defendant's company was insufficient. Id. at
9 *4. The court stated that a mere ten percent ownership in the
10 defendant company did not create sufficient authority to receive
11 service. Id. Here, as stated above, the Court rests its
12 conclusion upon Ms. Johnson's status as implied by her title, along
13 with Mr. Yospe's interactions with the receptionist. Thus,
14 Brahmana is inapposite.

15 Defendant points out that Plaintiff has not yet filed proof of
16 service as required by Rule 4(1). However, Rule 4(1)(3) provides,
17 "Failure to prove service does not affect the validity of service"
18 and a "court may permit proof of service to be amended." While
19 Plaintiff's proof of service is dilatory, the Court will allow
20 Plaintiff to file proper proof of service within three days of this
21 order.

22 Even though Plaintiff unwisely waited until the last day to
23 serve process, the undisputed evidence shows he served process in
24 compliance with Federal Rule of Civil Procedure 4.

25 CONCLUSION

26 For the foregoing reasons, the Court DENIES Defendant's motion
27 to dismiss for insufficient service of process (Docket No. 12).
28 Plaintiff must provide proof of service within three days of this

1 order being issued. Failure to provide proper proof of service
2 will result in dismissal of Plaintiff's case without prejudice.

3 IT IS SO ORDERED.

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5 Dated: September 14, 2009



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CLAUDIA WILKEN
United States District Judge