

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

DR. GERALD H. BEMIS, SR., D.C.,)
individually and as the representative of a)
class of similarly situated persons,)
)
Plaintiffs,)
)
v.)
)
MERCHANT ADVANCE EXPRESS, INC.,)
et al.,)
)
Defendants.)

Case No. 3:15-cv-1365-DRH-DGW

ORDER

WILKERSON, Magistrate Judge:

This matter is before the Court on Plaintiff’s motion for alternate service and extension of time to serve Defendants Mass Marketing Solutions, Inc., Email Blast USA Inc., Luis Schupbach, Patrick Thomas, and Walton Rosenthal (Doc. 80). For the reasons set forth below, the Motion is **GRANTED.**

PROCEDURAL BACKGROUND

Plaintiff Dr. Gerald H. Bemis, Sr., D.C. (“Plaintiff”), filed this proposed class action lawsuit on December 14, 2015 against Defendant Merchant Advance Express, Inc. (“Merchant Advance Express”) and John Does 1-12. In accordance with the Scheduling Order, Plaintiff sought leave to file an amended complaint. Plaintiff’s motion was granted and his amended complaint was filed on February 8, 2017 (Doc. 50). The amended complaint names as additional defendants to this lawsuit Mass Marketing Data, Inc., d/b/a Mass Marketing Solutions, Inc., Email Blast USA Inc., d/b/a Mass Marketing Data Inc., Luis Schupbach, Patrick Thomas, and Walton Rosenthal. Since the filing of the amended complaint, Plaintiff has attempted service on each of

the newly named defendants, but to no avail. Plaintiff now asks the Court to allow alternate service on these defendants and seeks an extension of time to do so. Defendant Merchant Advance Express, Inc. did not file a response to Plaintiff's motion.

DISCUSSION

A district court may not exercise personal jurisdiction over a defendant unless the defendant has been properly served with process. *U.S. v. Ligas*, 549 F.3d 497, 500 (7th Cir. 2008). Acceptable methods for service on an individual are specified in Rule 4 of the Federal Rules of Civil Procedure. *Id.* While the preferred approach for service is delineated in Rule 4(d), wherein the plaintiff would mail the defendant a copy of the complaint and summons and obtain a waiver of personal service, “[u]nless federal law provides otherwise, an individual ... may be served in a judicial district of the United States by following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made.” FED. R. CIV. P. 4(e). Rule 4(h) provides that under normal circumstances a corporation must be served: (1) in the manner prescribed by Rule (4)(e)(1) for serving an individual; or (2) by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and ... by also mailing a copy of each to the defendant.

Here, Plaintiff has pled that the corporate defendants are incorporated in Arizona with their principal place of business in Arizona and that the individual defendants are Arizona residents — therefore Arizona would be “where service is made.” Accordingly, Arizona law controls.

Under Arizona law, when personal service has become impracticable, Rule 4.1(k) of the Arizona Rules of Civil Procedure authorizes service by alternate means. Although “impracticability” is not clearly defined, it has been interpreted to mean that circumstances

“demonstrate that service of process through the usual means would have been ‘extremely difficult or inconvenient’.” *Blair v. Burgener*, 226 Ariz. 213, 219 (Ariz. Ct. App. 2010) (quoting *Pacific Fire Ins. Co. v. Reiner*, 45 F.Supp. 703, 708 (E.D. La. 1942)). Further, in *Blair*, the court approvingly cited language from a New York case on a similar issue in which it concluded that three attempts at service on three different days constituted sufficient efforts to warrant alternative means of service. *Blair*, 226 Ariz. at 219; see *BMO Harris Bank, N.A. v. D.R.C. Investments, L.L.C.*, No. CV-13-1692-PHX-LOA, at *4 (D. Ariz. Sept. 9, 2013).

Plaintiff has provided sufficient evidence demonstrating that personal service has become impracticable on defendants Mass Marketing Data, Inc., Email Blast USA Inc., Luis Schupbach, Patrick Thomas, and Walton Rosenthal insofar as the usual means of service have proved to be “extremely difficult or inconvenient.” In particular, Plaintiff has submitted evidence establishing five separate attempts at service on Mass Marketing Data, Inc. on four separate days that were unsuccessful (*see* Docs. 64 and 74). Plaintiff’s attempts to ascertain additional information on Mass Marketing Data via subpoena were unsuccessful. With regard to Email Blast USA, Inc. (“Email Blast”), Plaintiff has demonstrated four failed attempts on four separate days to effect service (*see* Docs. 66 and 73). Again, Plaintiff’s efforts to obtain more information regarding Email Blast via subpoena were unsuccessful.

As to the individual defendants Luis Schupach, Patrick Thomas, and Walton Rosenthal, Plaintiff has provided sufficient evidence to demonstrate his inability to serve these defendants by the methods enumerated under Rule 4(d) of the Arizona Rules of Civil Procedure, set forth as follows:

- (1) Delivering a copy of the summons and the pleading being served to that individual personally;

- (2) Leaving a copy of each at that individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or
- (3) Delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

In particular, Plaintiff attempted service on Luis Schupbach at his only known addresses on four separate occasions, but to no avail (*see* Docs. 65, 72, and 75). Plaintiff also attempted service on Patrick Thomas at his only known address on four separate occasions, but was unsuccessful (*see* Docs. 67 and 71). Finally, Plaintiff attempted service on Walton Rosenthal on four separate occasions at his only known address, but was unsuccessful again (*see* Docs. 63 and 76). Plaintiff represents that he has no other leads on addresses at which to serve Defendants and asserts that Defendants purposely utilize mail boxes and defunct addresses to evade service of process.

In light of the failed prior service attempts and apparent attempt by the above-mentioned Defendants to evade service, the Court finds that personal service is "impracticable." Pursuant to Rule 4.1(k) of the Arizona Rules of Civil Procedure, under these circumstances service may be accomplished in "another manner." In particular, if a court allows service by alternate means, "the serving party must make a reasonable effort to provide the person being served with actual notice of the action's commencement" and "mail the summons, the pleading being served, and any court order authorizing an alternative means of service to the last-known business or residential address of the person being served." ARIZ. R. CIV. P. 4(k)(2). The Arizona Rules of Civil Procedure also allow for service by publications provided specific requirements are met and procedures followed.

For the above-mentioned reasons, the Court hereby **GRANTS** Plaintiff's motion and authorizes service on Defendants Mass Marketing Data, Inc., Email Blast USA, Luis Schupbach,

Walton Rosenthal, and Patrick Thomas by mailing a copy of the summons, Amended Class Action Complaint, and this Order to the last known business or residential address of each Defendant. The Court also **ORDERS** Plaintiff to attempt service by publication in accordance with the procedures set forth in the Arizona Rules of Civil Procedure. *See* ARIZ. R. CIV. P. 4(l). The Court finds that such service is reasonably calculated to inform Defendants of the pendency of this action and to present their case. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Furthermore, the Court finds good cause exists to extend time for service on Defendants Mass Marketing Data, Inc., Email Blast USA Incorporated, Walton Rosenthal, Luis Schupach, and Patrick Thomas pursuant to Rule 4(m) of the Federal Rules of Civil Procedure. Accordingly, service must be completed by **September 5, 2017**.

IT IS SO ORDERED.

DATED: July 17, 2017



DONALD G. WILKERSON
United States Magistrate Judge