UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
Baltimore Division

ALBERT SNYDER, :

Plaintiff : Civ. No. 1:06-cv-01389-RDB

FRED PHELPS, et al, :

Defendant. :

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR AWARD OF COSTS AND FEES

I. INTRODUCTION

For the following grounds, Defendants Fred Phelps and Westboro Baptist Church, Inc. ("WBC") oppose Plaintiff's "Motion for Award of Costs and Fees Pursuant to Federal Rule of Civil Procedure 4(d)" ("Motion").

II. ARGUMENT

A. PLAINTIFF IS NOT ELIGIBLE FOR COSTS AND ATTORNEY'S FEES REGARDING HIS EFFORTS TO OBTAIN WAIVER OF SERVICE.

Fed. R. Civ. P. 4(d) sets forth strict procedures that must be followed before attorneys fees and costs are available for not waiving service of process. *Norlock v. Garland,* 768 F.2d 654, 656-657 (5th Cir. 1985) (Once "the validity of service of process has been contested, the plaintiff "'must bear the burden of establishing its validity'"). Plaintiff has failed to meet the following procedures:

1. **Plaintiff failed to send its waiver request to either Defendant.** Plaintiff did not meet Fed. R. Civ. P. 4(d)'s

requirement to send a waiver request to the defendant, officer, managing or general agent, or other agent authorized by appointment or law to receive service of process. Fed. R. Civ. P. 4(d)(2)(A).

The waiver notice and request "(A) shall be in writing and shall be addressed directly to the defendant, if an individual, or else to an officer or managing or general agent (or other agent authorized by appointment or law to receive service of process) of a defendant subject to service under subdivision (h)." *Id.* In this instance, Plaintiff only sent his waiver notice and request to Margie Phelps and Rachel Hockenbarger. Neither of these two women are defendants, and neither is an officer or managing or general agent or other agent authorized by appointment or law to receive service of process. Fed. R. Civ. P. 4(d)(2)(A).

The law is clear that sending a service waiver to a defendant's lawyers ordinarily is insufficient for obtaining costs and attorney's fees when the defendant does not waive service. *Lewis v. ACB Bus. Servs.*, 1994 U.S. Dist. LEXIS 21318, *slip op.* at 7 (S.D. Ohio 1994).

Just as a defendant cannot avoid attorney's fees and costs by complaining that the waiver request was not sent to his attorney, nor can a plaintiff ordinarily be eligible for

attorney's fees and costs by failing to send the waiver request directly to the defendant, rather than to an attorney. This is clearly illustrated in *Lewis v. ACB Bus. Servs.*, 1994 U.S. Dist. LEXIS 21318, *slip op.* at 7:

> First, it does not automatically follow that because ACB is represented by counsel in other, unrelated litigation that it would be represented by the same counsel in newly initiated litigation. Second, there is no indication, nor does ACB argue, that it has authorized or appointed its present counsel as its agent for service. *See*, Fed. R.Civ. P. 4(d)(2)(A); *see also*, Fed.R.Civ.P. 4(h)(1). Third, Lewis clearly complied with the requirement of Rule 4(d)(2)(A) by addressing the notice and request directly to ACB's president.

Id.

If the rule drafters intended to allow service waiver requests to be sent to attorneys rather than to defendants, Rule 4(d) would have said so. Instead, Fed. R. Civ. P. 4(d) clearly sets forth the parties who can be sent waiver requests, and they are not lawyers. Similarly, Fed. R. Civ. P. 4(h) sets forth who may be served to effectuate service on serve corporations (Defendant Westboro Baptist is a corporation, as conceded in the Complaint), listing the same kinds of persons listed in Fed. R. Civ. P. 4(d), and none of them are lawyers, either.

Clearly, then, defendants cannot ordinarily be eligible to pay attorney's fees and costs under Fed. R. Civ. P. 4(d) where

notice is mailed to an attorney and not to the defendants. The Federal Circuit made this abundantly clear in 1997 as follows:

> The mere relationship between a defendant and his attorney does not, in itself, convey authority to accept service. *See, e.g., Grandbouche v. Lovell*, 913 F.2d 835, 837 (10th Cir. 1990); *Ransom v. Brennan*, 437 F.2d 513, 518-19 (5th Cir. 1971); *United States v. General Int'l Mktg. Group,* 14 C.I.T. 545, 742 F. Supp. 1173, 1177 (Ct. Int'l Trade 1990); *see also* 4A Wright & Miller § 1097, at 85-86 ("Defendant's attorney probably will not be deemed an agent appointed to receive process absent a factual basis for believing that an appointment of this type has taken place."). Even where an attorney exercises broad powers to represent a client in litigation, these powers of representation alone do not create a specific authority to receive service. See, e.g., *Santos v. State Farm Fire & Cas. Co.,* 902 F.2d 1092, 1094 (2d Cir. 1990) (no basis for inferring that client had authorized its attorney to accept service); *Schultz v. Schultz*, 436 F.2d 635, 639-40 (7th Cir. 1971) (general grant of authority to attorney is not enough to imply authority to receive process). **Instead, the record must show that the attorney exercised authority beyond the attorney-client relationship, including the power to accept service**.

U.S. v. Ziegler Bolt & Parts Co., 111 F.3d 878, 882 (Fed. Cir. 1997) (emphasis added). *Accord*, *Wilson v. Prudential Fin.,* 332 F. Supp. 2d 83, 88-89 (D.D.C. 2004).

Consequently, Plaintiff is ineligible for costs and fees for non-waiver, because he sent his waiver request to the wrong person. *See supra.*

Plaintiff incorrectly invokes Md. RPC 4.2 to fix his failure to send his waiver notice directly to individual

Defendant Fred Phelps and corporate Defendant Westboro Baptist Church's officer or managing or general agent or other agent authorized by appointment or law to receive service of process. Md. RPC 4.2(a) provides only that "a lawyer shall not communicate about the subject of the representation with a person who the lawyer knows is represented in the matter by another lawyer unless the lawyer has the consent of the other lawyer or is authorized by law or court order to do so." *Id.* In this instance, the waiver request is not a communication about the "subject" of the representation any more than serving a summons and complaint on a defendant is a communication about the subject of the representation.

It is commonplace and proper for plaintiff lawyers to have summons and complaints served directly on defendants that they know to be represented by counsel in the matter covered by the complaint. Here, Plaintiff's counsel continued trying to serve the Summons and Complaint on Defendants Fred Phelps and WBC even after receiving the below-described June 12 letter from Margie Phelps and Rachel Hockenbarger that the Motion so heavily focuses on, from June 16 through July 18, 2006. *See* Affidavit of Special Process Server, Motion at Ex. C. In other words, by the time Plaintiff's counsel continued trying to serve Defendants directly rather than through any lawyer, after receiving the

June 12 letter described below, Plaintiff's counsel either (1) recognized that making such service did not amount to communicating about the subject of the representation with a person who the lawyer knows is represented in the matter by another lawyer and/or (2) recognized that Defendants were not represented by counsel in the matter. Consequently, Plaintiff's counsel should not now be heard to say that Plaintiff's counsel somehow should have been permitted or forgiven for incorrectly sending the waiver request not to Defendant Fred Phelps nor WBC, but to lawyers Margie Phelps and Rachel Hockenbarger.

In any event, when Plaintiff sent the waiver request to attorney Margie Phelps rather than to the Defendants, Plaintiff did not know that Defendants Fred Phelps or Westboro Baptist Church, Inc., was "represented in the matter by another lawyer." Md. RPC 4.2(a).

Plaintiff's sole – and insufficient -- explanation for not sending the waiver request directly to Fred Phelps and Westboro Baptist Church, Inc., is the attached (Exhibit 1) June 12, 2006, letter ("June 12 letter") from attorneys Margie Phelps and Rachel Hockenbarger. However, said letter from attorneys Margie Phelps and Rachel Hockenbarger does not purport to defend or otherwise represent Defendants Fred Phelps nor Westboro Baptist in the instant lawsuit (and demonstrates, at page three, that

Margie Phelps and Rachel Hockenbarger did not know that the instant lawsuit had been filed yet).

Instead, the attached June 12 letter complains about matters going well beyond the four corners of the instant lawsuit, including complaining to the lawyers listed in the Certificate of Service, *infra*, that they have defamed WBC members (*see also* pages 6-7 of June 12 letter), have invaded WBC members' privacy, have conspired to violate the civil rights of WBC members, and have abused the legal process, by planning an overall campaign to silence WBC member. June 12 letter at 8.

The June 12 letter threatens the possibility that WBC will file a lawsuit, but nowhere says that the authors of the June 12 letter defend or otherwise represent Defendant Fred Phelps nor WBC in the instant litigation. Moreover, as supported by the June 12 letter's letterhead, Neither Margie Phelps nor Rachel Hockenbarger are even authorized (absent a *pro hac vice* order) to appear to defend this instant action in this Court, in that they are neither members of the Maryland Bar, nor are they admitted to practice before this Court.

In fact, undersigned counsel – who entered his appearance as the first and sole defense counsel in this litigation in late August 23, and never had any contact with Defendants Fred Phelps, WBC, nor any member, representative or agent of WBC

before August 2006 – is the sole and only attorney entered in this litigation for Defendants Fred Phelps and WBC, and is assisting Fred Phelps and WBC for no other matter. Undersigned counsel understands that WBC has never been sued for defamation before, and undersigned counsel was hired by Defendants Fred Phelps and WBC subsequent to undersigned counsel's many years defending First Amendment rights, including getting the following defamation case dismissed in this Court this year: *Dring v. Sullivan*, 423 F. Supp. 2d 540 (D.Md. 2006). In other words, when they wrote their June 12 letter, Margie Phelps and Rachel Hockenbarger did not signify they would be entering their appearance in this litigation, and did not intend to enter such an appearance. Their June 12 letter was for the different purpose of telling the letter's recipients of the possibility of filing a lawsuit against the recipients (and not a counterclaim to the instant lawsuit).

Still and all, even assuming, *arguendo*, that Margie Phelps and Rachel Hockenbarger's June 12 letter made known to its recipients that they represented Defendants Fred Phelps and WBC in this instant litigation – which they did not – that still does not overcome that "the record must show that the attorney exercised authority beyond the attorney-client relationship, including the power to accept service" before the attorney can

replace the client for receiving the waiver request. *U.S. v. Ziegler Bolt & Parts Co.,* 111 F.3d at 882.

Moreover, if the rule drafters wished to authorize delivering waiver requests to attorneys, Rule 4(d) could have said so, but it does not. Furthermore, even assuming, *arguendo*, that Md. RCP 4.2 prohibited Plaintiff from sending its waiver request to Defendants Fred Phelps and WBC – which this rule does not, as discussed above – the Maryland RPC 4.2 is not consequently permitted to alter Fed. R. Civ. P. 4(d) to allow what Rule 4(d)'s language simply does not allow, which is the mailing of the waiver request to the June 12 letter's signers rather than to Defendants Fred Phelps and WBC. Clearly, a state's professional conduct rule drafters have no authority to alter Fed. R. Civ. P. 4(d) nor any other federal civil procedural rule. Finally, Plaintiff has failed to show that Defendant Fred Phelps and WBC even knew about the waiver request before they received service pursuant to the Court's alternative service Order.

2. Plaintiff should not be heard to complain about knowing who to serve on behalf of WBC. Not that it should be of any importance for purposes of Plaintiff's motion, but Plaintiff certainly should not be heard to complain about not knowing who to serve on behalf of WBC. For instance, Plaintiff needed to

look no further for WBC's registered agent than the website of the Kansas Secretary of State (http://www.accesskansas.org/srv-corporations/index.do) to find at http://www.accesskansas.org/srv-corporations/getRecord.do?number=0235903 the following WBC registered agent information: Abigail R. Phelps, 3636 SW Churchill Road, Topeka, Ks 66604-0000.

3. Plaintiff's waiver notice does not put the recipient on sufficient notice of exposure to attorney's fees. The Waiver of Service of Summons form that is attached to the Motion tells of the exposure to bear the cost of service if waiver is not given, but is silent about exposure to paying attorney's fees. *See* Fed. R. Civ. P. 4(d)(2)(D) (requiring notice to Defendant of the consequences of failure to comply with the waiver request). Even if the waiver form sent by Plaintiff duplicates the one issued by the federal court system, the form is insufficient to put a defendant on notice of exposure to attorney's fees, which ordinarily are much greater than costs. Defendants have no obligation to suffer for any inadequacy of the court-issued form, and it would be a violation of Defendants' Fifth Amendment due process rights to do otherwise. Moreover, the ordinary meaning of costs excludes attorneys fees, which is why the costs that a losing party in civil litigation ordinarily are required

to pay are narrowly circumscribed to such expenses as filing fees. Consequently, Plaintiffs certainly should not be eligible for attorney's fees here.

4. Plaintiff's waiver request omitted a prepaid means of compliance in writing. The Motion attaches everything that was sent with Plaintiff's waiver request; no prepaid means of compliance in writing (*i.e.* a self-addressed stamped envelope) is attached. *See* Fed. R. Civ. P. 4(d)(2)(G) (requiring providing a prepaid means of compliance in writing). Whether or not this failure in and of itself does not preclude Plaintiff's eligibility for costs and attorneys fees, it further supports Defendants' overall arguments to deny Plaintiff's Motion.

B. PLAINTIFF IS NOT ELIGIBLE FOR ATTORNEY'S FEES FOR HIS EFFORTS TO OBTAIN ALTERNATIVE SERVICE OF PROCESS.

Although Fed. R. Civ. P 4(d)(G) specifically provides for reasonable attorney's fees for "any motion required to collect the costs of service" for failure to waive service of process, no rule or other provision of law provides for recovering attorney's fees for filing a motion for alternative service of process. *McCarthy, et al., V. Wolfeboro Restaurant Services, Inc.*, 132 F.R.D. 613 (D. Ma. 724) ("the Federal Rules of Civil Procedure are quite uniform in always following the word 'expenses' or the word 'costs' with the phrase 'including

attorney's fees' whenever the drafters intended that attorney's fees be recoverable").

Attorney's fees for the motion for alternative service and for the fee waiver motion are particularly unavailable here where instead of deciding whether to seek a waiver of service of process or alternative service, Plaintiff almost simultaneously engaged in both, by first trying to serve Defendants by private process service beginning June 12, 2006 (seven days after the Summons was issued), *See* Affidavit of Special Process Server, Motion at Ex. C, followed by sending the waiver request on June 22, 2006, followed by continuing to attempt private process service through July 18, 2006, which actually falls within the thirty-day period afforded to respond to the waiver request under Fed. R. Civ. P. 4(d)(2)(F). Plaintiff should not be heard to seek reimbursement for **both** seeking a waiver seventeen days after the summonses were issued **plus** next seeking alternative service on August 2, which was only eleven days after the thirty days expired for agreeing to waive service of process.

Additionally, Defendant expects to argue in its Motion to Dismiss (due September 18, 2006), with all due respect, that the Order for alternative service had no sufficient basis in law or fact.

D. **PLAINTIFF'S REQUESTED COSTS AND ATTORNEY'S FEES ARE UNREASONABLE, EXCESSIVE, AND, IN THE INSTANCE OF ATTORNEY'S FEES, ARE UNITEMIZED.**

Plaintiff's Motion seeks $490 for costs of service, $3078 for preparing the motion for alternative service, and $2375 for preparing the Motion.

Costs for service should not be allowed here. Motion Exhibit B includes a bill for $390 that covers June 12 to July 18, 2006 for attempted locates. However, this time period embraces the thirty-day period from the June 22 waiver request through the July 22 deadline for waiving. The governing rules and law certainly do not contemplate being able to recover costs for locate attempts during said thirty-day period, nor for locate attempts before the sending of the waiver request. The rest of Exhibit B is a $100 bill apparently for effectuating alternative service of process. Defendants expect to argue in the Motion to Dismiss why the alternative service order was improvidently granted; if that argument is accepted by the Court, then this $100 service cost also should not be charged to Defendants.

Motion Exhibit D is Plaintiff's attorney Scott Summers's unitemized assertion that he spent 16.2 hours preparing the motion for alternative service, and 12.5 hours preparing the motion for costs. Rule 4(d)(5) only provides for recovery of "a

reasonable attorney's fee" for any motion to collect the cost of service of process. Above, Defendants have already demonstrated why the cost of service of process should not be recoverable, so nor should attorney's fees be recoverable.

Defendants already have demonstrated above why the law does not permit recovery of attorney's fees for preparing a motion for alternative service. Moreover, Plaintiff's Motion does not demonstrate that the 16.2 and 12.5 hours expended are reasonable, does not include an itemization of work performed to show reasonableness (e.g. time performing legal research versus time discussing the motion with others versus time actually drafting the motion). Additionally, the 12.5 hours claimed for the Motion far exceeds the 4.6 hours granted and allowed as reasonable for drafting a similar motion in *Lewis v. ACB Bus. Servs.*, 1994 U.S. Dist. LEXIS 21318, *slip op.* at 8, Neither of Plaintiff's motions are complex, nor did they call for complexity; the requested number of hours are unreasonably high.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, Defendants move to deny Plaintiff's Motion, and, if that is not granted in full, alternatively move to deny costs and attorney's fees for the alternative service motion, move to deny attorney's fees without obtaining more detailed justification (e.g., billing records)

for the requested fees, and move to sharply reduce the requested hours as representing unreasonably lengthy time sought for reimbursement.

Respectfully submitted

MARKS & KATZ, L.L.C.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Opposition was served by the CM/ECF filing system on September 15, 2006, to:

Paul W. Minnich, Esquire
Rees Griffiths, Esquire
Craig T. Trebilcock, Esquire
Sean E. Summers, Esquire

___/s/ Jonathan L. Katz_____
Jonathan L. Katz