

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division**

FILED
U.S. DISTRICT COURT
DISTRICT OF MARYLAND

2015 DEC 28 P 1:51

CLERK'S OFFICE
AT GREENBELT
BY _____ DEPUTY

FAIRNESS LIPENGA,

Plaintiff,

v.

Case No.: GJH-14-3980

JANE N. KAMBALAME,

Defendant.

* * * * *

MEMORANDUM OPINION

Presently before the Court is a Motion for Entry of Default or Order Permitting Alternate Service filed by Plaintiff, Fairness Lipenga. ECF No. 16. For the reasons stated below, construing the Motion as one for alternate service, the Motion is granted.

I. BACKGROUND

On December 19, 2014, Ms. Lipenga filed the Complaint in the present action alleging that she was illegally trafficked to the United States and was forced into labor, for which she was not paid fair wages, by Defendant, Jane N. Kambalame. *See* ECF No. 1. The Complaint alleges violations of the Victims of Trafficking and Violence Protection Reauthorization Act, 18 U.S.C. §§ 1589, 1590, the Fair Labor Standards Act, 29 U.S.C. § 206(f), Maryland Wage & Hour Laws, Md. Code Ann., Labor & Emp. §§ 3-413, 4-415, as well as common law tort claims of false imprisonment, intentional infliction of emotional distress, fraud, breach of contract, and unjust enrichment. *See* ECF No. 1 at ¶¶ 34–63.

A summons was issued on December 19, 2014. ECF No. 3. On April 23, 2015, the Court issued an Order to Show Cause as to why the Complaint should not be dismissed for failure to

prosecute on the ground that Plaintiff failed to effect service on Defendant within 120 days, as required by Federal Rule of Civil Procedure 4(m). ECF No. 11. Plaintiff responded to that Order on April 29, 2015, indicating that the case should not be dismissed because the 120-day limit imposed by Rule 4(m) “does not apply to service in a foreign country under [Federal] Rule [of Civil Procedure] 4(f)” Fed. R. Civ. P. 4(m). Plaintiff indicated that Defendant currently resides in Zimbabwe, where she is in diplomatic service for the Republic of Malawi under the auspices of the Malawian Ministry of Foreign Affairs. ECF No. 12 at 1; *see also* ECF No. 1 at ¶ 10. Plaintiff further represented that, from December 19, 2014 through March 24, 2015, Plaintiff sought to identify and serve Defendant at her personal address in Malawi, but that she was unable to find Defendant’s personal address. ECF No. 12 at 2.

Unable to uncover Defendant’s personal address, Plaintiff identified a provision of Malawian law which permits service of process upon the employer of a public official. *See* Courts Act, Ch. 0302, O. VIII, r. 2(3) (Malawi), available at http://www.malawilii.org/files/mw/legislation/consolidated-act/3:02/courts_act_pdf_20355.pdf (“Where the person to be served is in the Public Service, the Court shall ordinarily serve him by sending the process in duplicate to the Head of the Office in which such person is employed and such Head shall thereupon cause the process to be served”). On March 26, 2015, Plaintiff’s counsel sent a Request for Service to the Malawian Central Authority in accordance with Rule 4(f) of the Federal Rules of Civil Procedure and Articles 3 and 5 of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *opened for signature* Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638 (“Hague Service Convention”), to which both the United States and Malawi are signatories. *Id.*; *see also* ECF No. 16 at 2; ECF No. 16-4. On April 22, 2015, the Central Authority orally confirmed receipt of the documents and

stated that service of process would be effected by the end of the week by dispatching an officer of the court to serve the documents. ECF No. 16-5.

Pursuant to the Hague Service Convention, once service has been effected, the Central Authority of the receiving state must complete a certificate detailing how, where, and when service was made, or explaining why service was prevented, and return that certificate directly to the applicant. Hague Service Convention, *supra*, art. 6. On May 27, 2015, having not yet received such certificate, counsel for Plaintiff contacted Mr. Joseph Chigona, a representative of the Malawian High Court, via email,¹ to inquire whether service had been effected and whether a certificate had been sent. ECF No. 16-6 at 6-7; *see also* ECF No. 16-5. Mr. Chigona responded on May 28, stating: “Verily I assure you that service was effected. I will be forwarding to you a certificate of service shortly.” ECF No. 16-6 at 6. The certificate, however, has yet to be received by Plaintiff, despite several other email inquiries from Plaintiff’s Counsel to Mr. Chigona through the middle of August, 2015. *See* ECF No. 16-6.

Defendant has previously communicated with Plaintiff’s counsel via email using an aol.com email address. ECF No. 16-7. This email address was identified as Defendant’s official email address for her work, ECF No. 16-8 at 7, and Plaintiff uncovered evidence that the email address was in use as of October 2014, ECF No. 16-9. Plaintiff also represents that Defendant maintains a Facebook account on which, before recently being set to a private profile, Plaintiff had seen regular activity. ECF No. 16-1 at ¶ 14; ECF No. 16-10.

Relying on Mr. Chigona’s assurance that service had been effected, because Defendant has not appeared to defend in this action, Plaintiff moves for an entry of default pursuant to Rule 55(a) of the Federal Rules of Civil Procedure. In the alternative, Plaintiff seeks an Order to

¹ The email address to which this inquiry was sent appears to be Mr. Chigona’s personal yahoo.com email account. *See* ECF No. 16-6 at 5.

permit alternate service via Defendant's email and Facebook account in accordance with Rule 4(f)(3) of the Federal Rules of Civil Procedure.

II. STANDARD OF REVIEW

In serving process on an individual in a foreign country, a federal plaintiff must comply with both constitutional due process notice requirements and Rule 4(f) of the Federal Rules of Civil Procedure. *Enovative Techs., LLC v. Leor*, No. CIV. JKB-14-3956, 2014 WL 7409534, at *1 (D. Md. Dec. 24, 2014) (quoting *WhosHere, Inc. v. Orun*, No. 1:13-CV-00526-AJT, 2014 WL 670817, at *2 (E.D. Va. Feb. 20, 2014)). In order for service to satisfy due process, the method of service must provide “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.” *Plemons v. Gale*, 396 F.3d 569, 573 (4th Cir. 2005) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652 (1950)). Rule 4(f) governs service of process on an individual in a foreign country and provides three mechanisms of service:

- (1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;
- (2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by [certain specified methods outlined in the Rule] reasonably calculated to give notice . . . ; or
- (3) by other means not prohibited by international agreement, as the court orders.

Fed. R. Civ. P. 4(f)(1)–(3). “Rule 4(f) does not denote any hierarchy or preference of one method of service over another, and permitting service by alternative means is neither a last resort nor extraordinary relief.” *U.S. ex rel., UXB Int’l, Inc. v. 77 Insaat & Taahhut A.S.*, No. 7:14-CV-00339, 2015 WL 4208753, at *2 (W.D. Va. July 8, 2015) (quoting *BP Prods. N. Am., Inc. v. Dagra*, 232 F.R.D. 263, 264 (E.D. Va. 2005); *Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1015 (9th Cir. 2002)).

When applying Rule 4(f)(3), the Court can order any means of service “so long as it provides reasonable assurance that defendant will be notified of the lawsuit and is not prohibited by international agreement.” *WhosHere*, 2014 WL 670817, at *2 (citing *Rio Props.*, 284 F.3d at 1016–17; *BP Prods. N. Am.*, 232 F.R.D. at 265; *Liberty Media Holdings, LLC v. Sheng Gan*, No. 11–CV–02754–MSK–KMT, 2012 WL 122862 at * 2 (D.Colo. Jan. 17, 2012)). “Ultimately, the decision whether to order alternative service of process under Rule 4(f)(3) is within the sound discretion of the court.” *Id.* (citing *Henry Teichmann v. Caspian Flat Glass OJSC*, 2013 WL 1644808, at *1 (W.D. Pa. April 16, 2013); *BP Prods. N. Am.*, 236 F.R.D. at 271).

Once a defendant has been properly served, an entry of default is appropriate when that party “has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise” Fed. R. Civ. P. 55(a). A party has no duty to defend, however, unless it has been served with the summons and complaint, or waives such service, pursuant to Rule 4 of the Federal Rules of Civil Procedure. *See Murphy Bros., Inc. V. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350, 119 S.Ct. 1322 (1999) (holding “one becomes a party officially, and is required to take action in that capacity, only upon service of a summons”); *see also Direct Mail Specialists, Inc. v. Eclat Computerized Technologies, Inc.*, 840 F.2d 685, 688 (9th Cir. 1988) (“A federal court does not have jurisdiction over a defendant unless the defendant has been served properly under [Rule 4].”). Rule 55(a) gives the clerk authority to enter a default, but it is not a limitation on the power of the Court to do so. 10A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 2682 (3d ed. 1998); *see also Jackson v. Beech*, 636 F.2d 831, 835 (D.C. Cir. 1980) (“Once a defendant fails to file a responsive answer, he is in default, and an entry of default may be made by *either the clerk or the judge.*” (emphasis added)). “The Court’s entry of an Order of

Default is within the discretion of the Court,” *Marschauser v. Travelers Indem. Co.*, 145 F.R.D. 605, 610 (S.D. Fla. 1992), and, in the exercise of that discretion, the Court is mindful of the strong policy that, “as a general matter, defaults be avoided and that claims and defenses be disposed of on their merits.” *Colleton Preparatory Acad., Inc. v. Hoover Universal, Inc.*, 616 F.3d 413, 417 (4th Cir. 2010).

III. DISCUSSION

In her Motion, Plaintiff primarily seeks an entry of default against Defendant pursuant to Rule 55(a) and Article 15(2) of the Hague Service Convention, which provides:

Each Contracting State shall be free to declare that the judge . . . may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled –

- a) the document was transmitted by one of the methods provided for in this Convention,
- b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,
- c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

Hague Service Convention, *supra*, art. 15(2). Plaintiff contends that she has satisfied each of these three conditions because she submitted a request for service of process to the Malawian Central Authority on March 26, 2015, more than six months ago, requesting that the documents be served by a method that is proper under Malawian law, and that she has made “every reasonable effort” to obtain a certificate by regularly corresponding with representatives at the Malawian Central Authority. ECF No. 16 at 8.

Nevertheless, at this juncture, the Court concludes that it would not be appropriate to enter default against Defendant until Plaintiff has exhausted all reasonable means of assuring that Defendant has received notice of the instant lawsuit. Although Plaintiff’s counsel received

emails from an unofficial address from an individual purportedly representing Malawi's High Court "assuring" that service had been effected, there is no indication, formal or otherwise, that Defendant has, in fact, been made personally aware of this pending suit.² In light of the strong preference for deciding cases on their merits, the Court will exercise its discretion and deny without prejudice Plaintiff's request for an entry of default. The Court will, however, revisit this issue, if, after alternate service is effected, Defendant still fails to plead or otherwise defend in this action.³

Because Plaintiff has been unable to obtain proof of service from the Malawian Central Authority, the Court will permit Plaintiff to use an alternate method of service to attempt to give Defendant notice of this action. Under the circumstances, the Court believes that alternate service via email and Facebook is appropriate. Service through these channels comports with due process because it is reasonably calculated to provide Defendant notice of this suit. Plaintiff has presented evidence that Defendant was, at least until recently, actively using the email account jkambalame@aol.com and actively using a Facebook account under her name. *See* ECF No. 16-1 at ¶ 14; ECF No. 16-7; ECF No. 16-8 at 7; ECF No. 16-9; ECF No. 16-10; *see also U.S. ex rel., UXB Int'l*, 2015 WL 4208753, at *2 (finding that service by email was reasonably calculated to provide notice where party had previously contacted plaintiff through his personal email, suggesting that this was a "preferred method[] of communication which he regularly uses" (internal quotation marks and citation omitted)). Moreover, prior to filing the lawsuit, Plaintiff's

² In support of the Motion, Plaintiff cites to cases that which indicate that, in interpreting Article 15(2), courts have concluded that a plaintiff need not show proof of actual service in order to obtain an entry of default. *See Marschauser*, 145 F.R.D. at 610; *Thomas v. Biocine Sclavo*, No. C1VA94CV1568RSP/DNH, 1998 WL 51861, at *2 (N.D.N.Y. Feb. 4, 1998). Even so, because, as will be further explained, alternate methods of service are available here, it would be imprudent to enter default at this time.

³ For this reason, the Court also orders that a copy of this Memorandum Opinion and accompanying Order be served on Defendant when alternate service is effected so that Defendant has notice of the repercussions if she fails to respond to the Complaint.

counsel electronically communicated with Defendant about the basis for Plaintiff's allegations in an attempt to negotiate an "amicable resolution" to her claims, and forewarned that Plaintiff was "forced to seek other avenues of redress." ECF No. 16-7 at 2-3; *see also WhosHere*, 2014 WL 670817, at *4 (noting that "[i]n tailoring alternative methods of process pursuant to Rule 4(f)(3), courts have taken into consideration whether defendant already possessed either knowledge of suit or that [s]he may be the subject to a suit" (citing *BP Prods. N. Am.*, 236 F.R.D. at 272)).

Further, the Court finds no evidence that alternate service by email and social media websites is prohibited by international agreement. Article 10 of the Hague Service Convention allows for service of process through alternative means such as "postal channels" and "judicial officers," provided that the destination state does not object to those means. Hague Service Convention, *supra*, art. 10; *see also F.T.C. v. PCCare247 Inc.*, No. 12 CIV. 7189 PAE, 2013 WL 841037, at *3 (S.D.N.Y. Mar. 7, 2013) (noting that, where country did not object to service by Facebook, service through the social media website was permitted); *WhosHere*, 2014 WL 670817, at *3 (noting that "[s]everal courts have permitted service of process by email and other electronic communications" (citing cases)). Malawi has not objected to Article 10 of the Hague Service Convention, nor has it objected to service of process through alternate channels including email and social media websites. Thus, service via email and Facebook is appropriate in this case under Rule 4(f)(3), and, accordingly the Court will order that process be served through those channels.

IV. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Entry of Default or Order Permitting Alternate Service, ECF No. 16, construed as a Motion for Alternate Service, is **GRANTED**. A separate Order follows.

Dated: December 28, 2015



GEORGE J. HAZEL
United States District Judge