UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PHOENIX ENTERTAINMENT PARTNERS, LLC Plaintiff, -v.- SING SING BELL INC et al., Defendants.	MEMORANDUM ORDER 15 Civ. 3517 (GWG)

GABRIEL W. GORENSTEIN, UNITED STATES MAGISTRATE JUDGE

Plaintiff Phoenix Entertainment Partners, LLC ("Phoenix") has made an application for an award of its costs for service of process on the defendants and attorney's fees under Fed. R. Civ. P. 4(d)(2).[1]

Federal Rule of Civil Procedure 4(d)(1) imposes "a duty to avoid unnecessary expenses of serving the summons" on certain individual and corporate defendants. The rule provides that a plaintiff "may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons." Fed. R. Civ. P. 4(d)(1). If, having been so notified, a defendant within the United States fails to waive service without good cause,

> the court must impose on the defendant:
> **(A)** the expenses later incurred in making service; and
> **(B)** the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.

Fed. R. Civ. P. 4(d)(2).

[1] See Letter from Philip Z. Kimball, filed Dec. 23, 2015 (Docket # 28) ("First Pl. Ltr."); Letter from Philip Z. Kimball, filed Dec. 24, 2015 (Docket # 30) ("Second Pl. Ltr."); Letter from Sun Ah Park, filed Dec. 31, 2015 (Docket # 31) ("D. Ltr."); Letter from Philip Z. Kimball, filed Jan. 6, 2016 (Docket # 32) ("Reply Ltr.").

In May 2015, Phoenix sent ten of the defendants a notice requesting that each waive service. See Ex. B to Reply Ltr. The notices complied with the requirements of Fed. R. Civ. P. 4(d)(1). Each notice also included a waiver form to be signed by the recipient and returned to Phoenix. Id. The waiver form contained language informing the recipient of its "Duty to Avoid Unnecessary Expenses of Serving a Summons." See Ex. C to Second Pl. Ltr.

The notices were sent to defendants by Federal Express ("FedEx"). See First Pl. Ltr. at 2; FedEx Tracking Notices, appended as Ex. D to Second Pl. Ltr. There were four notices addressed to individual defendants: Ae Sook Choi, Jin E. An, Ok Soon Lee, and Sun Chul Lim. Ex. B to Reply Ltr. There were six notices addressed to corporate defendants: West LA Inc., M&S Music Studio Inc., 6 Saint Marks Inc., 54 East Entertainment Inc., Sing Sing Bell Inc., and SingSing Media Inc. Id. While all the notices were delivered by the end of May 2015, see Ex. A to Reply Ltr., Phoenix did not receive any executed waiver forms, First Pl. Ltr. at 1. Consequently, it effected formal service on all defendants in August 2015. See Affidavits of Service, appended as Ex. E to Second Pl. Ltr. ("Affidavits of Service").

The defendants make four objections to Phoenix's request for the costs of service and for its attorney's fees in making the instant application. First, they argue that Rule 4 is only satisfied when waivers are sent through first-class mail, not FedEx. D. Ltr. at 2. We reject this argument. The rule does not require the use of first-class mail. To the contrary, it provides that waivers must "be sent by first-class mail or other reliable means." Fed. R. Civ. P. 4(d)(1)(G) (emphasis added). Defendants do not explain why FedEx does not qualify as a reliable means of delivery. As one case has noted, "[a] delivery receipt from Federal Express, evidencing delivery of a demand to a proper recipient, is as persuasive and reliable today as a registered or certified mail receipt." Secreto v. Internat'l Bus. Machs. Corp., 194 Misc. 2d 512, 513 (Sup. Ct. Dutchess

Cnty. 2003) (finding FedEx appropriate for service of notice under N.Y. C.P.L.R. 3216(b)(3)).

Noting that Phoenix's initial letter to the Court did not enclose the waiver form, and citing to the case of Simanonok v. Lamontagne, 181 F.3d 80, 1998 U.S. App. LEXIS 31210, at *5 (1st Cir. Dec. 7, 1998) (unpublished table decision) (per curiam), the defendants also argue that Phoenix was required to "provide the court with the actual copy of the request for waiver form served on the defendants." D. Ltr. at 1-2. While we disagree with the defendants' reading of Simanonok, it is not necessary to analyze it because Phoenix ultimately filed a copy of the waiver forms. See Ex. A to Reply Ltr.

Somewhat mysteriously, defendants argue in a single sentence that the individual defendants "were never personally served." D. Ltr. at 2. It is unclear what point defendants are trying to make. The individual defendants were served at their homes or at their places of business by leaving the complaint with a person of suitable age and discretion and complying with the other requirements of N.Y. C.P.L.R. 308(2), which is a permissible method of service under Fed. R. Civ. P. 4(e)(1). See Affidavits of Service. Perhaps defendants are arguing that Rule 4(d)(2)(A) does not permit the costs of service to be recovered if service is not made by handing the summons and complaint to the defendant personally. If this is the argument, it is rejected. Rule 4(d)(2)(A) provides only that a court must impose on a defendant the expenses later incurred by a plaintiff in making "service." There is no requirement that the service be "personal" service.

Finally, defendants argue that, with respect to the corporate defendants, the notices were addressed to the corporation, not to an individual corporate officer or agent. D. Ltr. at 1, 2. Rule 4(d) provides that, in the case of a corporate defendant, the notice and request for waiver of service "must" be addressed "to an officer, a managing or general agent, or any other agent

authorized by appointment or by law to receive service of process." Fed. R. Civ. P. 4(d)(1)(A)(ii). Phoenix failed to comply with this provision. Phoenix argues that it should be excused from compliance because New York State does not require corporations to register agents and thus it did not have the names of some of the agents. Reply Ltr. at 2. But Phoenix does not explain how we can ignore the mandatory language of Rule 4(d)(1)(A)(ii). Nor do we see how Phoenix's lack of knowledge affects the mandatory nature of the rule. While we are aware of one case that excused the naming of a corporate officer or agent on the ground that the defendant had not shown any prejudice from the omission, Stapo Indus., Inc. v. M/V Henry Hudson Bridge, 190 F.R.D. 124, 125-26 (S.D.N.Y. 1999), the case does not explain why Rule 4(d)(1)(A)(ii)'s clear requirement may be disregarded. Thus, we respectfully disagree with its conclusion. We agree instead with the case law concluding that a court must enforce the rule as written. See Steinberg v. Quintet Pub. Ltd., 1999 WL 459809, at *2 (S.D.N.Y. June 29, 1999); Spivey v. Board of Church Extension, 160 F.R.D. 660, 663 (M.D. Fla. 1995).

Accordingly, Phoenix is entitled to the cost of making service on the individual defendants but not the corporate defendants. Because Phoenix does not break down the costs between individual defendants and corporate defendants, see Receipt from United Process Service, Inc., appended as Ex. A to First Pl. Ltr., Phoenix is directed to make a new submission on this point.

As for attorney's fees, the award of such fees are mandatory under Fed. R. Civ. P. 4(d)(2)(B). Phoenix states it has incurred $900 in attorney's fees for work associated with filing its application. See Declaration of Omar Malik in Support of Phoenix Entertainment Partners, LLC's Motion for Reimbursement of Service Expenses and Attorneys' Fees Against Defendants, appended as Ex. B to First Pl. Ltr. Defendants have not contested the reasonableness of this

amount. Accordingly, the Court is prepared to award this amount as attorney's fees once the amounts for the cost of service on the corporate defendants have been determined.[2]

SO ORDERED.

Dated: January 19, 2016
New York, New York

GABRIEL W. GORENSTEIN
United States Magistrate Judge

[2] The Court will not deny defendants the opportunity to contest the $900 in attorney's fees if they wish to argue that this amount includes in some fashion the time Phoenix spent to make its now-denied application for service costs on the corporate defendants. It is probably in the defendants' interest, however, to forgo this argument. If defendants contest this amount, the Court will be constrained to give Phoenix the opportunity to claim fees for the hours they expended in supplementing their initial application and in filing a reply letter — fees that have not been claimed to date. To be sure, the Court will reduce all these amounts to account for the unsuccessful application for service costs on the corporations. But it is not likely that the amount ultimately awarded will be much different from $900. Accordingly, the Court suggests that it is best to leave the attorney fee award as is.