

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

JANET JENKINS, for herself and as
next friend of ISABELLA MILLER-
JENKINS, A/K/A ISABELLA
MILLER,

Plaintiffs

v.

Civil No. 2:12-cv-184-wks

KENNETH L. MILLER, LISA ANN
MILLER, F/K/A LISA MILLER-
JENKINS, TIMOTHY D. MILLER,
RESPONSE UNLIMITED, INC., for itself
and as an agent of LIBERTY COUNSEL,
LLC, PHILIP ZODHIATES, individually
and as agent for RESPONSE UNLIMITED,
INC., VICTORIA HYDEN, f/k/a
VICTORIA ZODHIATES, individually
and as agent for both RESPONSE
UNLIMITED, INC., LINDA M. WALL,
MATHEW D. STAVAR, individually and
as agent for LIBERTY COUNSEL, LLC,
RENA M. LINDEVALDSEN, individually
and as agent for LIBERTY COUNSEL,
LLC, and LIBERTY COUNSEL, LLC,

Defendants

DEFENDANT TIMOTHY D. MILLER’S REPLY
TO PLAINTIFF’S RESPONSE IN OPPOSITION TO DEFENDANT’S
MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND
INSUFFICIENT SERVICE OF PROCESS

In support of his Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(5), Defendant, Timothy D. Miller (“Timo”), by and through his attorneys, Wadleigh, Starr & Peters, P.L.L.C., hereby replies to Plaintiff’s Response in Opposition to his motion.

Plaintiff has failed to meet her burden of establishing that Timo was properly served and that this Court has personal jurisdiction over him. The Motion to Dismiss should be granted.

A. Timo has not been properly served in the six years that this lawsuit has been pending.

“On a Rule 12(b)(5) motion to dismiss, the plaintiff bears the burden of establishing that service was sufficient.” *Khan v. Khan*, 360 F. App’x. 202, 203 (2d Cir. 2010). Courts in this circuit have required plaintiffs to carry this burden with, at a minimum, credible evidence. *See, e.g., Corrado v. N.Y. Unified Court Sys.*, 163 F.Supp.3d 1, 14 (E.D.N.Y. 2016) (“When a defendant challenges service of process, the plaintiff bears the burden of proving, *through admissible evidence*, the adequacy of service.” (emphasis added)); *Marosan v. Trocaire College*, 2013 WL 505423, at *3 (W.D.N.Y. Feb. 8, 2013) (noting parenthetically that “plaintiff bears the burden of proving, by a preponderance of the *credible evidence*, that service was adequate” (emphasis added) (citing *Almonte v. Suffolk Cnty.*, 2012 U.S. Dist. LEXIS 69465 (E.D.N.Y. 2012))).

1. **The plain language of Pennsylvania Rule of Civil Procedure 402 authorizes service upon defendants and their representatives only**

Plaintiff argues that Pennsylvania’s Rule of Civil Procedure 402(a)(2)(iii) permitted service upon Attorney Conrad’s receptionist, Kathy Amaro. Plaintiff’s Response in Opposition to Defendant Timothy D. Miller’s Motion to Dismiss, ECF 341, at 5. But the plain language of the Rule authorizes service only upon “defendant[s]” and their representatives, and Plaintiffs proffer no law in support of reading the rule differently. *See id.* To the contrary, under Pennsylvania law, the Rules of Civil Procedure are interpreted first by their plain language. *Horwath v. DiGrazio*, 142 A.3d 877, 880 (Pa. Super. Ct. 2016) (explaining that, in interpreting the Rules of Civil Procedure, the court “look[s] to the tools of statutory construction In

analyzing the intent of [Pennsylvania’s] Supreme Court, the best indication of said intent is the plain language of a rule.” (citations, quotations, and brackets omitted). “When the words of a rule are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.” *Id.* (quotations and brackets omitted). The plain language of Rule 402(a)(2)(iii) does not authorize Plaintiff’s attempted service upon Ms. Amaro.

2. Plaintiff cannot meet her burden of establishing by credible evidence that service was proper under Pennsylvania’s Rule of Civil Procedure 402

Even if Plaintiff were correctly applying Rule 402(a)(2)(iii) to Attorney Conrad rather than a “defendant,” Plaintiff has failed to meet her burden of proving by credible evidence that service upon Ms. Amaro satisfied the rule. Plaintiffs assert, citing no evidentiary support, that “Amaro . . . was ‘the person for the time being in charge’ of Conrad’s office for purposes of the rule.” Plaintiff’s Response, ECF 341, at 5. But the return of service contradicts that assertion. *See* Ex. 1, Return of Service, at 3 (previously filed as ECF 193). The process server had the option of checking “Agent or person in charge of Defendant’s office or usual place of business.” *Id.* Instead, the process server selected “Other” and explained that he “[s]erved Kathy Amaro, secretary.” *Id.* Thus, the available evidence suggests that Ms. Amaro was *not* in charge of Attorney Conrad’s office, and service upon her was therefore improper.

Plaintiff also attempts to meet her burden of establishing that service was sufficient by submitting an affidavit from her attorney attesting to a conversation he had with an unidentified individual at Shinkowsky Investigations. Plaintiff’s Response, ECF 341, at 5; Soto Decl., ECF 341-1, at ¶¶ 2-3. That unnamed person reportedly told Attorney Soto that Shinkowsky Investigations’ process servers customarily hand a summons and a complaint to a third party “only if that third party represents that she is authorized to accept service for the individual to be served.” Soto Decl., ECF 341-1, at ¶ 3. As a result, Plaintiff argues that, *as a matter of fact*, the

process server would not have handed the summons and complaint to Ms. Amaro in 2015 “had she not represented to the process server that she had authorization to accept service for [Attorney] Conrad.” Plaintiff’s Response, ECF 341, at 6. But the process server who handed the complaint to Ms. Amaro no longer works for Shinkowsky Investigations, Soto Decl., ECF 341-1, at ¶ 5, and there is no evidence that the practice described in Attorney Soto’s declaration was *his* practice.

Moreover, one Shinkowsky Investigations representative has said that, when serving an individual’s receptionist or secretary, the firm “follow[s] the instructions of the client.” Ex. 2, Declaration of Elizabeth E. Ewing, at ¶ 3. That representative declined to answer whether the process servers would necessarily ask a secretary or receptionist whether they were authorized to accept service. *Id.* at ¶ 4. This information calls into question the basic premise upon which Plaintiff invites the Court to speculate: that the process servers hired by Shinkowsky Investigations always ask if a receptionist is authorized to accept service. *See* Plaintiff’s Response, ECF 341, at 6. Plaintiff’s evidence thus falls far short of credibly establishing that Ms. Amaro was authorized to accept service for Attorney Conrad, and Plaintiff has failed to meet her burden of establishing by credible evidence that Timo was properly served.

3. Plaintiff should not be granted a retroactive, three-and-a-half year extension to serve Timo.

In the alternative, Plaintiff argues in a footnote that she should be extended yet more time to serve Timo. Plaintiff’s Response, ECF 341, at 5 n.1. The Court authorized Plaintiff to serve Timo through Attorney Conrad in March of 2015 – more than three and a half years ago. *See* ECF 183 (“ORDER granting as unopposed 178 Motion For Alternate Service” on March 6, 2015). Plaintiff’s most recent unsuccessful attempt to serve Timo was also more than three and a half years ago. *See* Ex. 1 at 3 (dating affidavit of service April 1, 2015). Plaintiff asserts that the

Court has discretion to extend the time for service of process, whether or not good cause exists – which, while true, elides the salient point that this case has been pending since August of 2012, more than six years ago. Complaint, ECF 1. Plaintiff had two and a half years in which to effect proper service of process after filing her initial complaint. Order, ECF 183. She was even authorized to do so by alternative means that she proposed. *Id.*

“A district court *may* grant an extension in the absence of good cause, but it is not required to do so.” *Zapata v. City of New York*, 502 F.3d 192, 197 (2d Cir 2007) (emphasis in original). Here, given that more than half a decade has passed since this lawsuit was initiated, the Court should not grant Plaintiff an extension. Contrary to Plaintiff’s assertion that there will be no prejudice to Timo if she is granted a retroactive three-and-a-half year extension, “[i]t is obvious that any defendant would be harmed by a generous extension of the service period beyond the limitations period for the action,” even if the defendant had actual notice of the existence of the complaint before the time period for service expired. *Id.* “[I]n the absence of good cause, no weighing of the prejudices between the two parties can ignore that the situation is the result of the plaintiff’s neglect.” *Id.* at 198.

B. Timo’s contacts with Vermont do not justify this Court’s exercise of personal jurisdiction over him.

Plaintiff offers no new information in support of her argument that Timo has had sufficient minimum contacts with Vermont. The facts remain that Plaintiff’s alleged injury does not arise from Timo’s two fleeting contacts with Vermont; it arises instead from Timo’s alleged conduct that was aimed at Virginia, Canada, and Nicaragua. Rev’d. Second Amended Complaint (“RSAC”) ¶¶ 24, 38, 45, 48, 56-57. The only connection between Timo’s conduct and Vermont

is the fact that Plaintiff lives there and was deprived of the company of Isabella there.¹ Timo's knowledge that the impact of his conduct could be felt in Vermont is not sufficient. *See Walden v. Fiore*, 571 U.S. 277, 289 (2014) ("Petitioner's actions in Georgia did not create sufficient contacts with Nevada simply because he allegedly directed his conduct at plaintiffs whom he knew had Nevada connections."). As set forth more fully in Defendant's Memorandum of Law in Support of His Motion to Dismiss, ECF 337-1, at 6-8, this connection is not sufficient to support an exercise of personal jurisdiction as a matter of law.

WHEREFORE, Defendant, Timothy D. Miller, respectfully requests that this Honorable Court:

- A. DISMISS the Complaint; and
- B. GRANT such other relief as may be just and necessary.

Respectfully submitted,
Timothy D. Miller
By his attorneys,

WADLEIGH, STARR & PETERS, P.L.L.C.

Dated: November 9, 2018

By /S/ Michael J. Tierney
Michael J. Tierney – VT Bar No. 5275
95 Market Street
Manchester, NH 03101
(603) 669-4140
mtierney@wadleighlaw.com

¹ Despite the characterizations of Timo's testimony in Plaintiff's Response in Opposition to Defendant's Motion to Dismiss, Timo never testified that he was assisting Lisa to avoid Vermont's courts' orders. The word Vermont appears five times in his deposition: twice as part of the case caption, once in Attorney Cowles' address, once in reference to the criminal charges against Timo that were dropped, and once in the word index. Deposition Transcript, ECF 342-2, at 1:2; 2:5; 4:14; 75:13; 99.

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Vermont

Janet Jenkins, et al,

Plaintiff(s)

v.

Kenneth Miller, et al,

Defendant(s)

Civil Action No. 2:12-cv-00184

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) Timothy Miller
c/o Jeffrey Conrad, Esq.
Clymer Musser & Conrad, P.C.
408 West Chestnut Street
Lancaster, PA 17603

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney,

whose name and address are: Emily J. Joselson, Esq.
Katherine B. Kramer, Esq.
Langrock Sperry & Wool, LLP
111 South Pleasant Street
P.O. Drawer 351
Middlebury, VT 05753-0351

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: 03/10/2015

Risa Wright

Signature of Clerk or Deputy Clerk

AO 440 (Rev. 06/12) Summons in a Civil Action (Page 2)

Civil Action No. 2:12-cv-00184

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

I personally served the summons on the individual at *(place)* _____
on *(date)* _____; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
on *(date)* _____; or

I returned the summons unexecuted because _____; or

Other *(specify)*:

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

United States District Court for the District of Vermont

CASE NO.: 2:12-cv-00184

AFFIDAVIT OF SERVICE

Janet Jenkins, et al.

vs.

Kenneth Miller, et al.

Commonwealth of Pennsylvania
County of Dauphin ss.

I, Robert Calantropio, a competent adult, being duly sworn according to law, depose and say that at 1:01 PM on 03/30/2015, I served Timothy Miller c/o Jeffrey Conrad, Esq. at Clymer Musser and Conrad, P.C., 408 West Chestnut Street, Lancaster, PA 17603 in the manner described below:

- Defendant(s) personally served.
Adult family member with whom said Defendant(s) reside(s).
Relationship is
Adult in charge of Defendant(s) residence who refused to give name and/or relationship.
Manager/Clerk of place of lodging in which Defendant(s) reside(s).
Agent or person in charge of Defendant's office or usual place of business.
an officer of said Defendant's company.
Other: Served Kathy Amaro, secretary.

a true and correct copy of Summons in a Civil Action; Motion for Alternate Service of Timothy Miller; Exhibits A - C; Certificate of Service; Revised Second Amended Complaint and Demand for Trial by Jury; Letter dated March 18, 2015 issued in the above captioned matter.

Description:

Sex: Female - Age: 40 - Skin: Hispanic - Hair: Black - Height: 5' 04" - Weight: 130

Sworn to and subscribed before me on this 1st day of April, 2015.

Signature of Notary Public

NOTARY PUBLIC

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
Brittany Edcius, Notary Public
Lower Paxton Township, Dauphin County
My commission expires April 11, 2018

X
Robert Calantropio
Shinkowsky Investigations
PO Box 126538
Harrisburg, PA 17112
(800) 276-0202

Atty File#: - Our File# 38147

Law Firm: Langrock Sperry and Wool, LLP
Address: 111 South Pleasant Street, Post Office Box 351, Middlebury, VT, 05753
Telephone: (802) 388-6356

Shinkowsky Investigations
 4511 Jonestown Road, 2nd Floor
 Post Office Box 126538
 Harrisburg, PA 17112-6538
 Ph: (800) 276-0202 --- Fax: (800) 996-1246

Langrock Sperry and Wool, LLP
 111 South Pleasant Street, Post Office Box 351
 Middlebury, VT 05753

INVOICE FOR SERVICE

IN RE: Janet Jenkins, et al. vs. Kenneth Miller, et al.
 Court Case#: 2:12-cv-00184

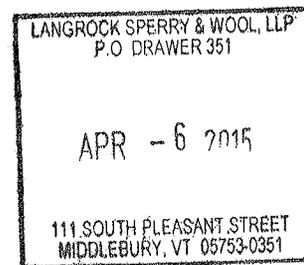
Invoice#: 30809 Link#: 38147 Your Ref#: DATE: 03/31/2015

Item	Servee	Desc	Amount	PD
PROCESS SERVICE - LANCASTER COUNTY	Timothy Miller c/o Jeffrey Conrad, Esq.	Job Closed At: 03/30/2015 @ 01:01 PM Service Type: OTHER Address: Clymer Musser and Conrad, P.C., 408 West Chestnut Street, Lancaster, PA, Person Left With: Kathy Amaro, Secretary	\$65.00	YES

TOTAL: \$0.00

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT**

JANET JENKINS, for herself and as
next friend of ISABELLA MILLER-
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MILLER,
Plaintiffs

v.

Civil No. 2:12-cv-184-wks

KENNETH L. MILLER, LISA ANN
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and as agent for both RESPONSE
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MATHEW D. STAVER, individually and
as agent for LIBERTY COUNSEL, LLC,
RENA M. LINDEVALDSEN, individually
and as agent for LIBERTY COUNSEL,
LLC, and LIBERTY COUNSEL, LLC,
Defendants

DECLARATION OF ELIZABETH E. EWING

I, Elizabeth E. Ewing, declare under penalty of perjury under the laws of the United States of America that the following is true and correct:

1. I am an associate attorney at Wadleigh, Starr & Peters, P.L.L.C., which represents Defendant, Timothy “Timo” Miller in this matter.

2. On November 8, 2018, I spoke with John (last name unknown) at Shinkowsky Investigations, the private investigation agency that Plaintiff hired to serve process upon Timo in March of 2015, at the phone number (717) 540-0631.

3. I asked John how his process servers handled serving a receptionist or secretary when the person to be served was out of the office. He responded, “We follow the instructions of the client.”

4. I then asked John if that meant they would not necessarily ask whether the receptionist or secretary was authorized to accept service. John declined to answer the question and terminated the call.

Dated: November 9, 2018

/S/ Elizabeth E. Ewing
Elizabeth E. Ewing, N.H. Bar No. 269009
Wadleigh, Starr & Peters, P.L.L.C.
95 Market Street
Manchester, NH 03101
(603) 669-4140

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

JANET JENKINS, for herself and as
next friend of ISABELLA MILLER-
JENKINS, A/K/A ISABELLA
MILLER,

Plaintiffs

v.

Civil No. 2:12-cv-184-wks

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JENKINS, TIMOTHY D. MILLER,
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as agent for LIBERTY COUNSEL, LLC,
RENA M. LINDEVALDSEN, individually
and as agent for LIBERTY COUNSEL,
LLC, and LIBERTY COUNSEL, LLC,

Defendants

CERTIFICATE OF SERVICE

I, Michael J. Tierney, certify that on this date Defendant Timothy D. Miller's Reply to Plaintiff's Response in Opposition to Defendant's Motion to Dismiss for Lack of Personal Jurisdiction and Insufficient Service of Process and accompanying Summons in a Civil Action and Declaration of Elizabeth E. Ewing were filed through the Court's CM/ECF filing system, and by virtue of this filing notice will be sent electronically to all counsel of record:

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Counsel for Defendant, Liberty University

Respectfully submitted,

Timothy D. Miller

By his attorneys,

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Dated: November 9, 2018

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