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April 21, 2006

Honorable P. Kevin Castel
United States District Court for the Southern
District of New York
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
New York, N.Y. 10007-1312

Roy Den Hollander v. Flash Dancers Topless Club, et al.
Southern District Court of New York, CV-03-2717 (PKC), Second Circuit 04-6700-CV

Dear Judge Castel:

Pursuant to your order of April 4, 2006, this is the plaintiff's reply to the Flash Dancers defendants' objection to reimbursing the plaintiff for service of process under Fed. R. Civ. P. 4(d)(5) as a result of Flash Dancers' failure to respond to a request for waiver of service under Fed. R. Civ. P. 4(d).

Flash Dancers claims that the costs for copying the complaint and transportation to deliver the summonses and complaints to the plaintiff's process server are not recoverable under Rule 4(d). The attorney for Flash Dancers, Edward S. Rudofsky, wrongly attributed Rule 4(d)(2) for the quote used on page 2 of his letter. The pertinent part of Rule 4(d)(2) actually states the defendant "has a duty to avoid unnecessary costs of serving the summons" while Fed. R. Civ. P. 4(d)(5) states:

> "The costs to be imposed on a defendant under paragraph (2) for failure to comply with a request to waive service of a summons shall include the costs subsequently incurred in effecting service … together with the costs, including a reasonable attorney's fee, of any motion required to collect the costs of service."

Any reasonable research into the meaning of "costs" in Rules 4(d)(2) & 4(d)(5) would have revealed to Flash Dancers' attorney that

> "In order to encourage utilization of [waiver of service], current subdivision (d) follows former Rule 4(c)(2)(D) by assessing the defendant for those costs that could have been avoided if the defendant had cooperated reasonably in the manner of service prescribed by the waiver provision." Wright & Miller, Fed. Prac. & Proc., Civ. 3d § 1092.1.

Flash Dancers and all the appearing defendants first received a copy of the complaint as part of the plaintiff's request for waiver of service of summons. Flash Dancers chose to ignore the request thereby necessitating that the plaintiff make another set of copies to be served with the summons. Had Flash Dancers and the other defendants abided by the Rule, the plaintiff would have avoided the costs of 13 additional copies and transportation to Gotham Process Service.

Federal district courts have required reimbursement for copying and related costs for serving process when waiver has been refused. In Kennemer v. Jefferson Autoplex, L.L.C., 2004 WL 1291185 *1 (E.D.La.), the court approved costs for copying and postage, and in Graves v. Church of Apostalic Faith, Inc., 2003 WL 21659168 *1 (E.D.Pa.), the court required reimbursement for copying and courier service. Fairness requires that a person who causes another additional and unnecessary expenses in effecting service ought to reimburse the party who was forced to bear the additional costs.

The Flash Dancers' defendants also object that no apportionment was made of the copying and taxi costs. In order to apportion the copying costs, their attorney can simply divide the number of copies served on them by the total number of copies served on all defendants as a result of denials of waiver and multiply that fraction times the total cost. The Flash Dancers defendants were served with four copies and the total number of copies served on all defendants was thirteen. Four thirteenths of $127.30 equals $39.17. As for the cost of taking the taxi to Gotham Process Service, the defendants can apportion that however they wish.

Flash Dancers' attorney additionally objects that "Flash Dancers Topless Club" is a "non-existent entity." When the summons was served, however, it was the name on the signs of the strip bar. Exhibit A. The exact connection between the strip club and Jay-Jay Cabaret was initially unclear. The New York State Division of Corporation did not have, and still does not have, any listing for Flash Dancers. In addition, its Jay-Jay Cabaret listing did not, and still does not, show any connection to the Flash Dancers Topless Club on Broadway. Exhibit B. Service of process on Flash Dancers Topless Club was done in order to avoid a future dispute over adequacy of service.

Flash Dancers' attorney further argues that whatever amount this Court allows for reimbursement should be offset against the amount stated in the Second Circuit's decision to allow Flash Dancers to file late its bill of costs. Mr. Rudofsky, however, failed to provide this Court with the full and accurate procedural status of Flash Dancers' bill of cost motion. True, he included an easy-to-overlook footnote on page 2 of his letter, but even that is not fully explanatory.

The plaintiff filed a motion requesting the Second Circuit consider for rehearing en banc that Flash Dancers' failed to demonstrate good cause[1] for filing its bill of costs late as required by the Federal Rules of Appellate Procedure and decisions by the Courts of Appeals. The motion requesting the Second Circuit to consider whether to rehear en banc the panel's decision was granted on April 11, 2006. Exhibit C. There has been no decision yet as to whether the

[1] Flash Dancers attorney claimed as good cause a trip to California and overlooking the Second Circuit's mail when he returned.

petition for rehearing en banc will be granted or denied. Therefore, contrary to Flash Dancers' representations, there is still no final decision on its bill of costs motion.

Sincerely,

Roy Den Hollander

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Southern District Court of New York, CV-03-2717 (PKC), Second Circuit 04-6700-CV

Dear Judge Castel:

Pursuant to your order of April 4, 2006, this is the plaintiff's reply to the objection of defendants Kuba, Mundy & Associates ("Kuba Mundy"), Nicholas J. Mundy ("Mundy") and Peter Petrovich ("Petrovich") reimbursing the plaintiff for service of process under Fed. R. Civ. P. 4(d)(5), which was caused by the defendants' failure to respond to a request for waiver of service under Fed. R. Civ. P. 4(d).

Bradley E. Dubin has represented the above defendants throughout this case and, assuming he has not lost all or most of the papers submitted, has in his files all the "details or supporting documentation," Dubin Letter, April 11, 2006, p. 2, that show the plaintiff has complied with Rule 4(d)(2). Mr. Dubin's clients chose to ignore their "duty to avoid unnecessary costs of serving the summons," Rule 4(d)(2), and now Mr. Dubin chooses to ignore his duty not to conceal or knowingly fail to disclose pertinent information to this Court, especially when he knows the details and supporting documentation he claims do not exist lie in his filing cabinets. *See* In re Santangelo, 265 A.D.2d 69, 701 N.Y.S.2d 355, 357 (A.D. 1 Dept. 2000)(charges against lawyer "relate[d] more to non-disclosure rather than to the making of affirmatively false or misleading statements….").

Mr. Dubin received, as part of the Plaintiff's Status Report required by your honor for the July 13, 2004 status conference and with the Exhibits to Plaintiff's Opposition to Motions to Dismiss, the affidavits of mailing and manifold certificates of mailing, Exhibit A, of the documents required to be served on the defendants under Rule 4(d)(2). Mr. Dubin also received in the Plaintiff's Status Report the costs of service by Gotham Process Service that the plaintiff incurred by the defendants failure to respond to the waiver of service request. Exhibit B.

Mr. Dubin's objection also falsely implies his clients did respond to the waiver of service request by stating the plaintiff fails to show that the "defendants failed to respond." The plaintiff, a lawyer admitted to this Court, affirms the defendants did not respond; therefore, the burden shifts to Mr. Dubin's clients to show they did. Mr. Dubin's clients can do that by producing copies of the signed and dated Notice of Lawsuit and Request for Waiver of Service of Summons provided each defendant plus an affidavit that it was placed in the U.S. Postal system.

Mr. Dubin wrongly claims that plaintiff "attempted" to serve Petrovich and cites as support plaintiff's memorandum of law, pp. 137-38, in opposition to defendants' motion to dismiss. The memorandum states no such thing; rather it states that under New York law, Petrovich was served.

In New York, the filing of an affidavit of proof of service is prima facie evidence that service was proper and shifts to the defendant the burden of proving that service was defective. *See* Nolan v. City of Yonkers, 168 F.R.D. 140, 144 (SDNY 1995). The affidavit of service on Petrovich was filed with the Court's clerk and is attached as Exhibit C. Mr. Dubin responds that Petrovich "merely served as a translator" for Kuba Mundy, "has never been an employee" and "never maintained his place of business" at that law firm's address. (Dubin Letter, April 11, 2006, pp 2-3). Mr. Dubin uses as support for his statements an affidavit by Petrovich but failed to provide it as an exhibit to his letter. Moreover, the self-serving nature of Petrovich's affidavit makes it suspect when considered in connection with the affidavit of Alan Flacks who is not a party to this action. The attached affidavit of Mr. Flacks, Exhibit D, states that when he called the Kuba Mundy law firm on November 17, 2003 and ask for Petrovich, a female with the first name of Svetlana, told Mr. Flacks that Petrovich was no longer working at the office but from his home. *Id.* ¶¶ 1-4. Petrovich, therefore, had worked in the Kuba Mundy office at 321 Broadway at some prior point in time.

Under New York CPLR 308(2), process can be served by delivering the papers to a person of suitable age at the defendant's "actual place of business" and followed with a mailing of the papers by first class U.S. post to that address. The process server delivered and mailed the Complaint and Summons to Petrovich at the Kuba, Mundy law firm at 321 Broadway on June 10 and 11, 2003 respectively. Exhibit C. No one told the process server that Petrovich did not work there, and the mailing of the papers was not returned as undeliverable. Further, an envelope mailed to Petrovich at the law firm by first class U.S. post on April 20, 2003, which contained the request for a waiver of summons and the Complaint, Exhibit A, was also not returned as undeliverable. The inference is that Petrovich was working at Kuba Mundy when service occurred.

In addition, New York State CPLR 308(6) provides that a defendant's "actual place of business" is any location that the defendant publicly holds out as his place of business. Such a location includes the place where the defendant receives business correspondence although it need not be the same place where the defendant conducts business activities. *See* 1994 Report of the Adv. Comm. on Civ. Prac., reprinted in 2 McKinney's N.Y. Session Laws, 1994, at 3027, 3032. On December 5, 2003, Mr. Flacks telephoned the Kuba Mundy office and was told first by a gentlemen named Yi Feng and then by a female with the first name of Stephanie that any

business correspondence for Petrovich should be sent to the law firm at 321 Broadway. Exhibit D, Flacks's Affidavit ¶¶ 5-8. Since Petrovich was receiving business correspondence at Kuba Mundy as late as December 2003, the inference is that he was also receiving business mail there when the waiver of service was mailed April 20, 2003 and the follow-up service mailing was made on June 11, 2003. All of which means Petrovich was served.

Finally, Mr. Dubin claims that his "logic dictates that plaintiff should not be entitled to recover costs of serving a frivolous action, which has been dismissed with prejudice and affirmed by the Second Circuit." (Dubin Letter, April 11, 2006, pp 2). There's been no finding by any court that this civil RICO action is frivolous. Mr. Dubin's brand of logic is not the law. The Advisory Committee Notes for the 1993 Amendments to Rule 4(d)(2)(B) state:

> "A defendant failing to comply with a request for waiver shall be given an opportunity to show good cause for the failure, but sufficient cause should be rare. It is not good cause for failure to waive service that the claim is unjust…."

The plaintiff requests this Court deny Mr. Dubin's objection and require his clients to reimburse the plaintiff for costs of the service of process.

Sincerely,

Roy Den Hollander

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