

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Trials&TRIBULATIONS

Court 'likes' service of process via Facebook

On Sept. 18, the Richmond County Family Court became the first New York state court to order service of process on a party via Facebook pursuant to NY CPLR §308(5) by sending a digital copy of the Summons and Petition to the respondent's Facebook account. While service of process via Facebook has been authorized in other jurisdictions, including federal courts, other state courts and courts outside the U.S., this is the first time a New York state court has acknowledged that, under the proper circumstances, service via Facebook can satisfy the requirements of due process.

In *Matter of Noel v. Maria*, F-00787-13/14B, NYLJ 120267031776, at *1 (Fam. RI Co., Sept. 12, 2014), the petitioner filed an action seeking to modify the existing order of child support. The petitioner had unsuccessfully attempted to serve the respondent at her last known address because the respondent had moved and provided no forwarding address.

The petitioner appeared before the court and described under oath his unsuccessful efforts to locate the respondent and to effectuate service, including contacting her children. He also testified that the respondent had an active Facebook account from which she had "liked" a number of the petitioner's spouse's photos as recently as July 2014. The petitioner requested authorization to serve process on the respondent through Facebook under the alternate service provision set forth in CPLR §308(5).

Pursuant to CPLR §308(5), where it is impracticable to effect service by either: personal service, service to person of suitable age and discretion at the residence or place of business of the person to be served, or mailing and affixing the document to the party's last known residence, the court may order an alternate form of service in "such manner as the court" directs, CPLR §308(1), (2) & (4).

In *Matter of Noel*, the court determined that service under any of these methods was impracticable and the petitioner had been

unable to locate the respondent, despite diligent efforts to do so. The court then authorized service of process by means of the respondent's Facebook account along with mailing the petition to the respondent's last known address.

The court acknowledged there were no other published New York state decisions authorizing service of process via Facebook and relied on precedent from other jurisdictions, including the U.S. District Court for the Southern District of New York, see *Federal Trade Commission v. PCCare247 Inc.*, No. 12 Civ. 7189, 2013 WL 841037 (SDNY Mar. 7, 2013).

In *PCCare247 Inc.*, the Federal Trade Commission filed an action seeking a temporary restraining order against multiple defendants (five of whom were located in India) for allegedly masterminding a fraudulent scheme that charged American consumers for fixing non-existent problems with their computers through telephone call centers located in India.

The FTC filed a motion pursuant to Federal Rule of Civil Procedure 4(f)(3), seeking to serve the defendants via email, social networking sites and publication. The FTC then narrowed its motion to request that the court authorize leave to serve the defendants through only email and Facebook. The court ultimately authorized the FTC to effectuate service of the Summons and Complaint by "other means" on defendants located abroad pursuant to FRCP 4(f)(3).

Pursuant to FRCP 4(f)(3), "a Court may fashion means of service on an individual in a foreign country, so long as the ordered means of service (1) is not prohibited by international agreement; and (2) comports with the constitutional notions of due process," *Id.* at *2 (internal citations omitted). In granting the FTC authorization to serve the defendants via email and Facebook, the court noted that India is a signatory of the Hague Convention, which does not prohibit service of process by email or



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Facebook.

The court also found that service of the defendants via Facebook and email comported with the notion of due process, which requires “that any means of service be reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections,” *Id.* at *4 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 [1950]). Indeed, “[s]ervice by email alone comports with due process where a plaintiff demonstrates that the email is likely to reach the defendant,” *Id.* (internal citations omitted).

The court found that notification by both email and Facebook would likely reach the defendants. For example, the court noted that the FTC identified email addresses were used by the individual defendants to run the defendant corporation and established that the email address for at least one of the defendants was used recently. The proof also suggested that the Facebook accounts identified belonged to the defendants in question. The accounts listed the defendants’ email addresses and identified the defendants’ job titles within the defendant corporation.

Importantly, serving process by Facebook was supplemental and “for the sake of thoroughness,” *Id.* at *5. Had the FTC proposed service solely via Facebook, the court stated “a substantial question would arise whether that service comports with due process,” *Id.* The court expressed concern that a Facebook profile could be created using information that was false or incomplete, highlighting its earlier decision denying the request to serve process by means of Facebook, *Fortunato v. Chase Bank USA*, No. 11 Civ. 6608, 2012 WL 2086950 (SDNY, June 12, 2012) (denying motion because plaintiff was unable to provide substantiating evidence that the Facebook account discovered by its investigator was in fact used or operated by the defendant).

In contrast, the court in *Matter of Noel* did not face the same concerns. The petitioner was able to confirm the authenticity and recent use of the respondent’s Facebook page based on personal knowledge.

The methods of acceptable alternative service have continually evolved; service of process via Facebook is merely the most recent example. Historically, whenever a party requests a new method of alternative service, courts perform a fact-specific inquiry to determine if the proposed method is “reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections,” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (holding that service by publication satisfied the requirements of due process), see also, *New*

England Merchants National Bank v. Iran Power Generation and Transmission Company, 495 F. Supp. 73, 81 (SDNY 1980) (authorizing substitute service via facsimile along with other methods of service pursuant to FRCP 4 “to make absolutely sure that the state of Iran, its agencies and instrumentalities have notice of the instant actions”).

More recently the Bankruptcy Court for the Northern District of Georgia, became the first U.S. court to authorize service via email on a defendant who was abroad, where the defendant had recently used the same email address to communicate with the bankruptcy trustee, *In re International Telemedia Associates, Inc.*, 245 B.R. 713 (N.D. Ga. 2000).

Since that time, both federal and state courts in New York have authorized service via email pursuant to FRCP 4(f) and CPLR §308(5). In evaluating service via email, courts turn to the framework of due process generated long before the computer age, performing a fact-specific inquiry of all of the circumstances presented by each case, see *Phillip Morris USA Inc. v. Veles Ltd.*, No. 06 cv 2988, 2007 WL 725412 (SDNY Mar. 12, 2007) (granting plaintiff’s request to authorize service via email pursuant to FRCP 4(f)(3) where the defendant communicated “regularly with customers via email.”); *Tishman v. The Associated Press*, No. 05 civ. 4278, 2006 WL 288369 (SDNY Feb. 6, 2006) (authorizing service pursuant to CPLR §308(5) via email to an address advertised in defendant’s real estate listing, based on the likelihood that defendant would monitor that address for communications from potential buyers).

While the methods for service of process may evolve and change, the courts look consistently to the fundamentals of due process. Regardless of the method, “any means of service [must] be reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections,” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Any court considering service via a Facebook will be mindful of these due process considerations. The same fact-specific inquiry applied to service of process via email is instructive. Thus, courts will likely consider factors including evidence that the account is legitimate, belongs to the defendant, and is regularly monitored or used by the defendant.

Depending on the facts and circumstances of a given case, a litigator dealing with an international or elusive defendant may want to consider moving to serve process via Facebook or other social media, at least as a supplement to email or some other method of alternative service.

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