

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD LORD and HELEN LORD : CIVIL ACTION
 :
 v. :
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 :
 LIVING BRIDGES, et al. : NO. 97-6355

MEMORANDUM ORDER

This is a "wrongful adoption" case. Plaintiffs allege that defendants intentionally, recklessly or negligently misled plaintiffs about the children whose adoption by plaintiffs was arranged or facilitated by defendants. Plaintiffs allege that defendants concealed the fact that these children had been seriously abused and were therefore likely to have significant psychological problems despite being told by plaintiffs that they were not capable of caring for adopted children with special needs. Presently before the court is the motion of defendant Sara del Valle to "dismiss service of process" which the court construes as a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(4) & (5) for insufficiency of process and of service.

Ms. del Valle is a citizen and resident of Mexico. She asserts that the attempted manner of service violated Mexican law, Article 8 of the Inter-American Convention on Letters Rogatory, Jan. 30, 1975, S. Treaty Doc. No. 27, 98th Cong., 2d Sess. (1984) and Article 4 of the Additional Protocol to the Inter-American Convention on Letters Rogatory, May 8, 1979, S.

Treaty Doc. No. 98-27, 58 Fed. Reg. 31, 132 (1988). See 28 U.S.C. § 1781. Defendant's averments that the papers were served on an employee of Ms. del Valle's brother and contained no information regarding her time to respond or the consequences of a failure to respond are uncontroverted. No return of service was filed with the Clerk.

Plaintiffs submitted well beyond the time limit provided by L. R. Civ. P. 7.1(c) a response captioned "reply certification" which consists of a two-page affidavit by Kim Lizotte, a secretary employed by plaintiffs' counsel, and several referenced documents. Ms. Lizotte avers that on February 13, 1997 she spoke with an individual named Marco Tedesco at the Mexican consulate in Washington about the requirements for serving foreign process in Mexico. Ms. Lizotte avers that Mr. Tedesco faxed to her forms of letters rogatory and advised her to complete them, forward them to the Clerk of the Court and the United States Department of Justice for signature and then, upon their return, to forward them to the consulate in Washington for service in Mexico.

Ms. Lizotte avers that on April 17, 1997, she forwarded the letters rogatory to the Clerk of the Court and then upon their return forwarded "the Complaints and Letters Rogatory to the U.S. Department of Justice for service." She avers that on June 13, 1997 the pleadings were returned to counsel by the

Justice Department with instructions that all pleadings had to be "in both english and mexican." Ms. Lizotte avers that counsel then "sent the paperwork out to be translated" and that "same was returned to us on May 13, 1998." Ms. Lizotte provides no explanation for why it took eleven months to have the documents translated. Ms. Lizotte states that "through all of this, I was directly working with Rufino Colt at the Office of Foreign Litigation and then to present [sic] with Marcella Chloe with regard to the requirements of this service." Ms. Lizotte avers that counsel then forwarded the letters rogatory to the Justice Department but they were returned on June 5, 1998 with a request for additional copies. Ms. Lizotte states that counsel sent the letters rogatory out at an unspecified later time and that on December 16, 1998, the Justice Department returned certification of service as to all of the Mexican defendants.

Fed. R. Civ. P. 4(f) governs service of process on individuals in foreign countries. Under Rule 4(f), service of process is proper "by any internationally agreed means reasonably calculated to give notice" such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents. The United States is a signatory to the Hague Convention. Mexico is not. Both countries are signatories to the Inter-American Convention on Letters Rogatory. Article 8 of the Inter-American Convention provides that:

Letters rogatory shall be accompanied by the following documents to be delivered to the person on whom process, summons or subpoena is being served . . .

Written information identifying the judicial or other adjudicatory authority issuing the letter, indicating the time-limits allowed the person affected to act upon the request, and warning of the consequences of failure to do so.

Inter-American Convention, Art. 8, § b.

Ms. Lizotte refers only to forwarding "the Complaints" with the letters rogatory. It appears that plaintiffs failed to forward a summons with notice of the pleading requirement and of the consequence of a failure to comply, let alone a summons translated into Spanish. As the documents which were served failed to provide notice of the time to respond or the consequences for failing to respond, the process was facially defective.

The Inter-American Convention is reprinted in every copy of the annotated United States Code. That counsel chose to rely on the understanding of others cannot excuse compliance with the Convention's provisions.

Article 4 of the Additional Protocol suggests that service must be made in a manner authorized by the law of the receiving state. Defendant submits that service on an employee of Ms. del Valle's brother is inconsistent with pertinent provisions of the Mexican Federal Code of Civil Procedure and

Code of Civil Procedure for the Federal District of Mexico. Defendant has submitted copies of code provisions which, as they acknowledge, are "untranslated." Plaintiffs, however, have not questioned defendant's representation about the propriety of service on an employee of her brother. Once challenged, a plaintiff bears the burden of showing that service of process was sufficient. See, e.g., Grand Entertainment Group, Ltd. v. Star Media Sales, Inc., 988 F.2d 476, 488 (3d Cir. 1993). Plaintiffs have not done so.

Although not mentioned by either party, some courts have suggested that the Inter-American Convention is not the only permissible way to effect service of process on a defendant in another signatory country. See Kreimerman v. Casa Veerkamp, S.A. de C.V., 22 F.3d 634, 644 (5th Cir.) (concluding that Convention does not preclude other forms of service while declining to decide what other methods, if any, might suffice), cert. denied, 513 U.S. 1016 (1994); Tucker v. Interarms, --- F.R.D. ---, 1999 WL 170755, *2 (N.D. Ohio Jan. 8, 1999); Mayatextil, S.A. v. Liztex U.S.A., Inc., 1994 WL 198696, *5 (S.D.N.Y. May 19, 1994); Pizzabioche v. Vinelli, 772 F. Supp. 1245, 1249 (M.D. Fla. 1991). Even assuming that a permissible alternate method of service exists, however, plaintiffs have made no showing that any such alternate method was attempted or that their deficient attempt to

serve process by means of letters rogatory was sufficient under a permissible alternate method of service.

Perhaps most importantly, the complaint in question was superseded by an amended complaint in which plaintiffs asserted two new claims. See Austin v. Ford Models, Inc., 149 F.3d 148, 155 (2d Cir. 1998) (amended complaint supersedes original complaint and "renders it of no legal effect"); Duda v. Board of Educ. of Franklin Park Public School Dist. No. 84, 133 F.3d 1054, 1057 (7th Cir. 1998); Phillips v. Dalton, 1997 WL 24846, *5 n.12 (E.D. Pa. Jan. 22, 1997), aff'd, 157 F.3d 1026 (3d Cir. 1998). There is no evidence or suggestion of service on defendant del Valle of the amended complaint. Indeed, a summons was issued on the amended complaint and forwarded to plaintiffs' counsel six months after Ms. Lizotte states a translation of the original complaint was forwarded with letters rogatory for service.

Because proper service of process on defendant del Valle would still appear to be feasible, the court will not dismiss the claims against her. Rather, the court will quash the defective service and give plaintiff a final opportunity properly to effect service. See Umbenhauer v. Woog, 969 F.2d 25, 30 (3d Cir. 1992). Consistent with Fed. R. Civ. P. 4(f)(3), plaintiffs will be given 90 days properly to serve defendant del Valle by any means not prohibited by international agreement or applicable Mexican law.

ACCORDINGLY, this day of July, 1999, upon consideration of the Motion of defendant Sara del Valle to Dismiss Service of Process (Doc. #26) and plaintiffs' response thereto, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** in that the process served upon Ms. del Valle's brother's employee is **QUASHED** and plaintiffs shall have an additional 90 days properly to effect service of process in Mexico.

IT IS FURTHER ORDERED that although plaintiffs appear to have been less than diligent in pursuing the discovery in Mexico they say they need despite the assurance of cooperation in conducting discovery by Barbara Strickland, Esq., who represents the Mexican Ministry of Foreign Affairs, DIF and other Mexican governmental parties, the discovery deadline is extended to November 5, 1999 for the purpose of completing any necessary discovery in Mexico.

BY THE COURT:

JAY C. WALDMAN, J.