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

EDWARD C. COWART,	FILED	CONSOLIDATED UNDER MDL 875
Plaintiff,	AUG 31 2015	
v.	MICHAEL E. KUNZ, Clerk By Dep. Clerk	
FOSTER WHEELER COMPANY, ET AL.,	:	E.D. PA CIVIL ACTION NO. 2:11-45885-ER
Defendants.	:	

O R D E R

AND NOW, this **28th** day of **August, 2015**, it is hereby **ORDERED** that the Motion to Dismiss of Defendant Atlantic Richfield Company (as filed by Coughlin Duffy LLP) on grounds that the Court lacks personal jurisdiction due to improper service (Doc. No. 67) is **DENIED**; and the Motion to Dismiss of this same Defendant (as earlier filed by Mendes & Mount LLP) on grounds that the Court lacks personal jurisdiction due to improper service (Doc. No. 43) is **DENIED** as duplicative and, thus, moot.[1]

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[1] This case was transferred in August 2011 from the United State District Court for the District of the Virgin Islands to the United States District Court for the Eastern District of Pennsylvania, where it became part of the MDL-875 MARDOC docket.

Plaintiff alleges that he was exposed to asbestos while working aboard various ships, and that he developed an asbestos-related illness as a result of that exposure. Plaintiff brought claims against various defendants, including claims against Defendant Atlantic Richfield Company ("Defendant" or "Atlantic Richfield") for unseaworthiness under the general maritime law, and for negligence under the Jones Act.

Defendant has moved for dismissal of this action, arguing that the Court lacks personal jurisdiction over it due to improper service of process.

I. Background

The Court has previously addressed the issue of improper service of process in MARDOC cases filed in federal court in Ohio. See In re Asbestos Products Liability Litig. (No. VI), 965 F. Supp. 2d 612 (E.D. Pa. Aug. 26, 2013) (Robreno, J.); In re Asbestos Products Liability Litig. (No. VI), 2014 WL 1885101 (E.D. Pa. March 19, 2014) (Hey, M.J.) (Report and Recommendation to Robreno, J.)(the "March 2014 R&R"). The present motion involves the issue of improper service of process in a single case filed in the Virgin Islands.

This action was first filed in the United States District Court for the District of the Virgin Islands at some point on or prior to February 11, 1993. As indicated by the electronic docket entry opening the electronic docket in the Virgin Islands, there was, apparently, a hard copy file for the case that preceded the use of electronic dockets. (See ECF No. 4 (first electronic entry, upon creation of electronic docket, identifying date of February 11, 1993 for first entry, stating "See docket card for previous entries").) Unlike the large number of asbestos cases that were pending in the Northern District of Ohio during the 1990s (with Judge Lambros presiding), the present action apparently sat idle in the Virgin Islands, with no orders or other activity occurring therein, until it was transferred to the current MDL in the Eastern District of Pennsylvania in 2011. (See ECF No. 4.) As such, this case, unlike those in Ohio, was not part of (or subject to) various proceedings that occurred in the Northern District of Ohio pertaining to service of process (see, e.g., ECF Nos. 74-1, 74-2, and 74-3), including a 1995 order in which Judge Lambros directed the Ohio plaintiffs to retain green cards evidencing service of process in their files - and explicitly prohibited them from filing them with the court as part of the docket. (ECF No. 74-3 at 2.)

On June 24, 2013, Defendant filed the present motion, contending that Plaintiff has not complied with Federal Rule of Civil Procedure No. 4 or Virgin Islands local law pertaining to service of process (the "June 2013 Motion"). (ECF No. 67.) In particular, Defendant asserts that, under Virgin Islands

procedure, "proof of service in the form of an affidavit attesting to service and the signed receipt must be presented to sustain the service. 5 V.I.C. § 4911(a)(3); 4911(b)." (ECF No. 67 at 6.) According to Defendant, the proper remedy is dismissal of the case.

In its reply brief, Defendant contends further that Plaintiff has not shown "good cause" as to why an enlargement of time should be allowed for proper service of process. In support of this argument, Defendant asserts that Plaintiff has refused to come forward with proof of proper service, has not offered any excuse as to why timely service was not made, and has not sought an enlargement of time to properly effect service. (ECF No. 81.)

On July 29, 2013, Plaintiff opposed the motion, arguing that, in the Virgin Islands, service of process by certified mail, return receipt requested, is valid service. (ECF No. 74.) Plaintiff contends that, contrary to Defendant's assertion, neither an affidavit nor signed returned receipt is required under Virgin Islands law and that, instead, only "actual notice" is required. Plaintiff cites specifically to 5 V.I.C. § 4911(a)(3). According to Plaintiff, actual notice to Defendant of the present action cannot be disputed and, therefore, service was proper under Virgin Islands procedure. In addition, Plaintiff requests that, if the Court should deem service not properly effected, that it be permitted time to cure any such deficiency now.

On October 29, 2013, Magistrate Judge Hey issued an Order directing that (1) Defendant first identify any cases for which it was raising the issue of improper service of process, (2) Plaintiff then provide to Defendant proof of proper service (which generally consisted of certified mail return receipt "green cards" evidencing delivery of the Summons and Complaint), and (3) Defendant then file a motion in any case for which it was challenging the genuineness and authenticity of a green card, specifically identifying the defect that it was challenging. (02-md-875, ECF No. 3382.)

In response to Magistrate Judge Hey's Order, on January 15, 2014, Defendant filed a group motion pertaining to 70 cases (as identified in the form of a list constituting an exhibit to the motion), setting forth reasons for challenging service of process in these cases (the "January 2014 Motion"). (ECF No. 95.) Defendant set forth specific reasons for

challenging Plaintiff's proof of service of process in 15 of the 70 cases, including one category designated for cases in which no "green card" was presented by Plaintiff. However, despite having filed the motion on the individual docket for the present case, Defendant did not even mention the present case in its motion, much less specifically identify the defect in service of process that it alleges to be present. Without any explanation as to why it did not mention 55 of the 70 cases, Defendant concluded its motion with a summary request that the Court dismiss all 70 cases contained in the exhibit's list. While many (and perhaps all) of the pertinent defendants in the 54 other cases not addressed by Defendant in its motion were later dismissed by way of Plaintiff's request for a voluntary discontinuance (see, e.g., 02-cv-11-33585, Doc. No. 117 (dismissing Defendant Atlantic Richfield Company in an action brought by Plaintiff Earl Johnson, also included in the exhibit to Defendant's January 15th motion in the present case, but not addressed individually therein)), Plaintiff's claims against Defendant still stand, apparently awaiting disposition of Defendant's motion.

In a response to Defendant's January 2014 motion, Plaintiff filed an opposition on March 10, 2014. (ECF No. 101.) In this filing, Plaintiff addresses each of the cases for which Defendant's motion set forth a challenge. However, apparently because Defendant did not identify in its motion any deficiency in the service of process in the present case, Plaintiff (like Defendant) has not discussed the present case.

Apparently, Plaintiff has not provided to Defendant a "green card" for the present case (or any other documentation of service). By way of affidavits of two of its law firm personnel, Plaintiff has described the process by which Defendants were served in the MARDOC cases, and how their handling of proof of such service has taken place (including entering information about returned "green cards" into a computer system and either filing "green cards" with the court or storing them in hard copy files). (02-md-875, ECF Nos. 4150-3, 4150-15, and 4150-16.) With one of these affidavits, Plaintiff asserts that "[t]he only reason why a green card cannot be produced at this time would be because [1] it cannot presently be located among the hundreds of thousands of green cards or [2] was destroyed in the flood," which occurred in one of the firm's storage rooms during the 2000s, "completely destroying the files in there." (02-md-875, ECF No. 4150-16 at ¶¶ 15, 17.)

However, in an earlier filing (originally made in November of 2012 when represented by different counsel), Defendant Atlantic Richfield conceded that "service of process" had been accomplished in the present case. (02-md-875, ECF No. 4150-3 at 32 ¶¶ 3-4, and 57 (Law Firm Declaration and accompanying Exhibit B, identifying Defendant Atlantic Richfield in the present case as a case "where service of process is acknowledged" (as opposed to being a case in Exhibit C "where service of process is disputed)).)

II. Discussion

The parties agree that the provision of Virgin Islands local procedure that pertains to service upon Defendant in this action is 5 Virgin Islands Code § 4911, which reads as follows:

> (a) When the law of this territory authorizes service outside this territory, the service, **when reasonably calculated to give actual notice**, may be made:
>
> (1) by personal delivery in the manner prescribed for service within this territory;
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> (2) in the manner prescribed by the law of the place in which the service is made for service in that place in an action in any of its courts of general jurisdiction;
>
> (3) **by any form of mail** addressed to the person to be served and requiring a signed receipt;
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> (4) as directed by the foreign authority in response to a letter rogatory; or
>
> (5) as directed by the court.
>
> (b) Proof of service outside this territory **may be made by affidavit** of the individual who made the service or in the manner prescribed by the law of this territory, the order pursuant to which the service is made, or the law of the place in which the service is made for proof of service in an action in any of its courts of general jurisdiction. **When service is made by mail, proof of service shall include a receipt signed by the addressee or other evidence of personal delivery to the addressee satisfactory to the court**.

5 V.I.C. § 4911 (emphasis added).

The Defendant in this case has raised a proper jurisdictional objection on the basis of improper service of process by filing a motion to dismiss. In cases where no evidentiary hearing is held, "[i]n deciding a motion to dismiss for lack of personal jurisdiction, a court is required to accept a plaintiff's allegations as true, and is to construe disputed facts in favor of the plaintiff." Metcalfe, 566 F.3d at 330; see also Pinker, 292 F.3d at 368. In response, Plaintiff has provided affidavits explaining that (1) service in all cases was attempted by way of certified mail, return receipt requested, (2) prior to 1997, the returned "green cards" were routinely filed with the court, and (3) "[t]he only reason why a green card cannot be produced [from Plaintiff's files] at this time would be because [a] it cannot presently be located among the hundreds of thousands of green cards or [b] was destroyed in the flood," which occurred in one of the firm's storage rooms during the 2000s, "completely destroying the files in there." (02-md-875, ECF No. 4150-16 at ¶¶ 6, 13, 15, 17; ECF Nos. 4150-3 and 4150-15.) The Court has construed the evidence in favor of Plaintiffs and, as it must in a case where no hearing is held, has determined that, under the circumstances, this evidence - along with Defendant's undisputed actual notice of the action and concession that service was, at some point, made upon it - constitutes "other evidence of personal delivery to the addressee satisfactory to the court." 5 V.I.C. § 4911 (emphasis added). As such, the Court has personal jurisdiction over Defendant in this action.

This action is distinguishable from those addressed by this Court's decisions regarding improper service pursuant to Ohio law in terms of both the law and the facts. Unlike Ohio law regarding service of process, Virgin Islands law permits a court to exercise discretion in deciding whether and when service has been effected - even without the traditional types of evidence of such service (e.g., "green cards"). See 5 V.I.C. § 4911(b); compare with Ohio Civ. R. 4.1. In terms of facts, the plaintiffs in the cases filed in Ohio were explicitly ordered by Judge Lambros to retain copies of proof of service in their files (and were prohibited from filing such proof as part of the court docket), whereas the plaintiff herein was not ordered to keep a copy of proof of service in his file (and was not prohibited from filing such proof as part of the court docket).

AND IT IS SO ORDERED.

EDUARDO, C. ROBRENO, J.

Given that the Court finds that service was effectuated in this case, it need not consider whether an extension of time to effectuate service nunc pro tunc is warranted.

IV. Conclusion

Defendant's motion to dismiss for lack of personal jurisdiction (due to improper service) is denied.