

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MALKA REIZY MOSKOVITZ, et al.,

Plaintiffs,

-against-

LA SUISSE , SOCIETE D'ASSURANCES SUR
LA VIE now known as Merger as SCHWEIZERISCHE
LEBENSVERSICHERUNGS-UND RENTENANSTALT,

06 Civ. 4404 (LAP)(GAY)

Defendant and Third-Party Plaintiff,

-against-

MOSES KRAUS and CARUSO AG,

Third-Party Defendants.

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REPORT AND RECOMMENDATION

TO THE HONORABLE LORETTA A. PRESKA, Chief U.S. District Judge:

I. Procedural History

On or about March 20, 2008, a copy of a summons and third-party complaint filed by La Suisse, Societe D'Assurances Sur La Vie, ("Swiss Life"), were mailed by the Clerk of the Court to third-party defendants Moses Kraus and Caruso AG ("Caruso"). Service by international registered mail on both third-party defendants in the United Kingdom was made pursuant to Fed.R.Civ.P. 4(f)(2)(c)(ii) and Article 10(a) of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents. Convention, Nov. 15, 1965, [1969] 20 U.S.T. 361, T.I.A.S. No. 6638. Kraus appeared in the action by counsel and filed a motion to dismiss the third-party complaint on or about July 30, 2008. Said

motion to dismiss was denied by this Court on March 30, 2012. The parties then stipulated to extend the date for Kraus to answer the third-party complaint to April 27, 2012. Kraus has not answered the third-party complaint and the time for him to answer has long since expired. By Memorandum Decision and Order dated June 12, 2012, the motion by counsel for Kraus to withdraw as his attorney in this case was granted. Kraus was given thirty days to retain new counsel. No new counsel has appeared on behalf of Kraus to date.

On November 16, 2012, the Clerk of the Court entered a Certificate of Default against Kraus pursuant to Fed.R.Civ.P. 55(a) and Local Civil Rule 55.1. The Clerk had previously entered a Certificate of Default against Caruso on June 30, 2010. Caruso has never appeared in this action. On December 20, 2012, Swiss Life filed a motion for default judgment against both Kraus and Caruso.

II. Discussion

Swiss Life sent via Federal Express copies of the default judgment papers filed in this matter to third-party defendant Kraus at his home address of: 34 Fountayne Road, London, N167DT. Said papers were not were not actually received by Kraus and were subsequently returned to the sender, Swiss Life. See Declaration of Jesse T. Conan Concerning Service of Default Judgment Papers dated January 8, 2013. (Docket # 174). Swiss Life contends that Kraus evaded service of the papers based on it appearing that he refused to accept service on or about January 2, 2013. Id. at ¶ 3. However, the undersigned concludes that, on this record, one unsuccessful attempt by Federal Express to serve the papers on Kraus cannot be deemed to be sufficient service and does not comport with due process. Moreover, the Court received by facsimile a letter

dated January 22, 2013 from Kraus alleging that he was out of the country when Federal Express attempted service of the default judgment papers. Kraus also states that he received by regular mail a copy of a January 8, 2013 letter from counsel herein for Swiss Life stating that he was avoiding receipt of the papers. The January 8th letter did not include any enclosures. Kraus denies that he was avoiding receipt of the papers, demands a copy of the papers and desires to respond once received. It does not appear that Kraus sent a copy of the January 22, 2013 letter to Swiss Life. The Court will docket said letters with this Report.

As to third-party defendant Caruso, copies of the default judgment papers were sent via Federal Express to its offices in the United Kingdom at 2 Stamford Hill; London, N166XZ; and to its registered agent in Liechtenstein-c/o Kranz Truehand & Verwaltungs; Caruso A.G.; Austrasse 49; Vaduz 9490. Conan Affidavit at ¶¶ 5-6. The Conan affidavit further states on January 3, 2013 Federal Express attempted delivery of the default judgment papers on Caruso and were advised that the address was incorrect; and Caruso had moved. *Id.* at ¶¶ 7. The Conan affidavit also sets forth that Federal Express attempted service on Caruso's registered agent in Liechenstein on or about January 7, 2013; the agent refused to accept delivery of the papers; and that the papers would be returned by Federal Express to Swiss Life. *Id.* at ¶¶ 8-9. The undersigned concludes that the attempted service on Caruso, who has never appeared in this action, at an address that is not current; and that the one unsuccessful attempt on serving the registered agent would not constitute sufficient service of the papers or comport with due process.

III. Conclusion

For all of the foregoing reasons, the undersigned respectfully recommends that the

motions for default judgment as to both Kraus and Caruso should be denied with leave to renew after proof of sufficient service, or substituted service approved by the Court, of the default judgment papers.

IV. NOTICE

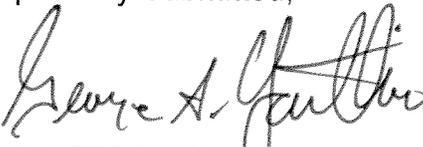
Pursuant to 28 U.S.C. § 636(b)(1), as amended, the parties shall have fourteen (14) days from receipt of this Report to serve and file written objections to this Report and Recommendation. If copies of this Report are served upon the parties by mail, the parties shall have seventeen (17) days from receipt of this Report to file and serve written objections. See Fed.R.Civ.P. 6(d). Such objections, if any, shall be filed with the Clerk of the Court, with extra copies delivered to the chambers of The Honorable Loretta A. Preska, United States District Court, Southern District of New York, 500 Pearl Street, New York, New York 10007, and to the chambers of the undersigned at the U.S. Courthouse, 300 Quarropas Street, White Plains, New York 10601.

Failure to file timely objections to this Report and Recommendation will preclude later appellate review of any order of judgment that will be entered. See Caldor v. Onondaga County, 517 F.3d 601, 604 (2d Cir. 2008).

Request for extensions of time to file objections must be made to the Honorable Loretta A. Preska and not to the undersigned.

Respectfully Submitted,

Dated: October 11, 2013
White Plains, New York



GEORGE A. YANTIS, U.S.M.J.