UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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THOR HALVORSSEN,

Plaintiff,

-against-

GLENN R. SIMPSON, PETER FRITSCH, FRANCISCO D'AGOSTINO-CASADO, LEOPOLDO A. BETANCOURT-LOPEZ, PEDRO TREBBAU-LOPEZ, and FRANCISCO CONVIT-GURUCEAGA,

Defendants.
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MEMORANDUM & ORDER
CV 18-2683 (JMA)(AYS)

SHIELDS, Magistrate Judge:

This is an action commenced by Plaintiff Thor Halvorssen ("Plaintiff" or "Halvorssen") pursuant to the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO"). Halvorssen describes himself as a human rights advocate, and an outspoken critic of the government of his native Venezuela. He is the president of an organization known as the Human Rights Foundation (the "Foundation"). Halvorssen's claims here arise out of his criticism of a Venezuelan electric power company known as Derwick Associates ("Derwick"), and its owners. Essentially, Plaintiff alleges that he has publicly described Derwick as a corrupt business with no real expertise in the construction of power plants. Derwick's owners are alleged to have committed numerous federal crimes in Venezuela arising from the company's scheme of obtaining illegal kickbacks from the Venezuelan government, and its gross overbilling of Venezuelan citizens for the costs of electric power.

Halvorssen claims that in retaliation for his criticism of Derwick, its owners acted against him through an American company known as "Fusion GPS". Fusion GPS is alleged, through its

United States principals, Defendants Glenn R. Simpson ("Simpson") and Peter Fritsch ("Fritsch"), to have produced a "false dossier and media campaign" against Halvorssen, depicting him as a pedophile, heroin addict and embezzler of his foundation's money. DE 1 3. Simpson and Fritsch are alleged to have disseminated this false dossier via optimization of social media and journalists who they knew would spread the false information. The campaign against Halvorssen is alleged to have cost Plaintiff his reputation, and to have deprived him and the Foundation of millions of dollars.

Based upon these allegations, which are factually amplified in the complaint herein, Plaintiff alleges a RICO conspiracy engaged in by the Venezuelan owners of Derwick and the American owners of Fusion GPS. The Venezuelan owners of Derwick are Defendants Francisco D'Agostino-Casado ("D'Agostino"), Leopoldo A. Betancourt-Lopez ("Betancourt"), Pedro Jose Trebbau-Lopez ("Trebbau") and Francisco Convit-Guruceaga ("Convit").

Presently before this Court is Plaintiff's motion, pursuant to Rule 4(f)(3) of the Federal Rules of Civil Procedure ("Rule 4(f)(3)") to allow substitute service of process as to three of the above-referenced Venezuelan owners of Derwick. Specifically, Plaintiff seeks an order allowing him to serve Defendants Betancourt, Trebbau and Convit (collectively the "Venezuelan Defendants") by service on their attorneys – who are located within the United States. The Venezuelan Defendants oppose the motion, principally on the ground that Plaintiff should be required to first attempt to serve them via the terms of an international treaty, to which both the United States and Venezuela are parties, which provides for international service of process. That treaty is more commonly known (and referred to herein) as the Hague Convention. Plaintiff counters that that any attempt at Hague Convention service would be futile given the Venezuelan Defendants' positions in Venezuela, and that, in any event, the law requires no such first attempt

at Hague Convention service. For the reasons set forth below, the Court denies, without prejudice, the motion for substitute service.

BACKGROUND

I. The Motion

As noted, the motion presently before the Court seeks an order pursuant to Rule 4(f)(3) allowing for substitute service on Defendants Betancourt, Trebbau and Convit. Plaintiff has made no attempt at service pursuant to the Hague Convention. Instead, he seeks an order allowing him to serve the Venezuelan Defendants by service on their United States based attorneys. Defendants oppose the motion relying principally on the legal argument that Plaintiff must attempt to serve Defendants pursuant to the Hague Convention prior to seeking alternative relief from the Court.

II. The Parties' Submissions

In support of the motion, Plaintiff submits his personal declaration in which he states that despite his diligent effort to obtain the home addresses of the Venezuelan Defendants, he has not been able to establish that information with any certainty. Plt's Mot., Declaration of Thor Halvorssen ("Halvorsseb Decl."), DE 58-2 at ¶ 1. Instead, he has only obtained the address of their place of business, i.e., Derwick's office, which he states is insufficient for proper service of process under the Hague Convention. Id. at ¶ 2. In any event, Plaintiff describes the Derwick office as "guarded by heavily-armed men who work for Venezuela's secret police." Id. at ¶ 3. He further explains that private gun ownership in Venezuela is limited to the police, army and other approved entities. Id. at ¶ 4. Plaintiff attaches to his declaration photographs obtained from the social media account of Kelvin Vivas ("Vivas"), an individual who Plaintiff claims is Defendant Betancourt's "lead bodyguard". Those photographs depict armed persons (including an

individual Plaintiff identifies as Vivas) next to a helicopter, in a garage and on a motorcycle. The final photograph shows a group of men in front of a Derwick sign. Those men are described by Plaintiff as wearing "the traditional red shirts and armbands of Venezuela's feared 'Bolivarian circles" militia". Id. at ¶ 5.

In addition to his personal declaration, Plaintiff attaches to his motion the declaration of Daniel Sierra ("Sierra"). Plt's Mot., Declaration of Daniel Sierra ("Sierra Decl."), DE 58-2, Exh. B. Sierra states that he is the International Representative from the "Venezuelan National Assembly of the Permanent Commission of Controllership" – an entity that Sierra describes as "the only internationally recognized entity considered democratically legitimate" by, inter alia, the United States. Sierra Decl. ¶¶ 2-3. Sierra alleges familiarity with the activities of the Venezuelan Defendants, including their wealth and power within Venezuela and their relationship with the son of the late Venezuelan President, Hugo Chavez. Id. at ¶ 5. He states that their influence will allow them to ensure than any individual attempting service via the Hague Convention would be thwarted. Id. at ¶ 6. In particular, Sierra states that the Venezuelan Defendants "would stymie and block any attempt at the highest levels" and that a process server would "meet with intimidation and even arrest by Venezuela's secret service". Id. at ¶ 7.

In response, the Venezuelan Defendants submit a declaration signed by Vivas, Betancourt's alleged bodyguard. Frank H. Wohl Opposition Declaration ("Wohl Decl"), Declaration of Kevin Vivas ("Vivas Decl."), DE 60-1; Exh. A. In his declaration, Vivas acknowledges that he worked as a private bodyguard for Betancourt and Derwick from June of 2009 through February of 2017. Vivas Decl. at ¶ 1. He denies that he, or anyone working on security detail for Betancourt or Derwick, has ever worked for the Venezuela's state police or for any agency of its government. Id. at ¶ 2. He further explains that he carried machine guns

lawfully and only during training classes in Venezuela or Argentina. Id. at ¶ 3. Finally, Vivas states that he does not know of anyone who worked for either Betancourt or Derwick who used automatic weapons unlawfully. Id.

The Venezuelan Defendants also respond to Plaintiff's allegation that he has been unable to secure their home addresses. Specifically, their counsel has submitted a declaration stating that she has provided Plaintiff with an address for Convit that can be used for Hague Convention service. Erika Levin Opposition Declaration ("Levin Aff."), DE 61. Counsel states further that Plaintiff has been provided with a copy of Convit's Venezuelan National Identity Card and his driver's license.

Plaintiff's reply memorandum of law notes that the Venezuelan Defendants have not provided the home addresses of either Betancourt or Trebbau. It is further argued that providing Convit's address was not done in good faith inasmuch as he was recently indicted for money laundering in the Southern District of Florida. DE 62 at 4. It is noted that Convit failed to appear for his initial appearance in that matter, and he has since been transferred to "fugitive status" by the District Court in Florida. DE 64. It is therefore argued that Convit is unlikely to be present for service at his home address. Further, Plaintiff describes the danger of even approaching Convit's home, stating that anyone nearing that residence might be "on a suicide mission". In support of this scenario, Plaintiff refers to the money laundering criminal complaint charging Convit, which describes the air of intimidation during a business meeting held by Convit. In particular, the criminal complaint states, inter alia, that during that meeting Convit sat with a handgun on the table holding a remote control device attached to the shock collar of a German Shepard who, according to Convit, was not always under control. DE 62 at 4.

Plaintiff also submits his own supplemental declaration. Reply Memo., Supplemental Declaration of Thor Halvorssen ("Halvorssen Supp. Decl"), DE 62-1, Exh. C. That document states that there are no public listings or databases of home addresses in Venezuela. Halvorssen Supp. Decl. at ¶ 1. He states that prior to filing this lawsuit he hired a private investigator to locate the home addresses of the Betancourt and Trebbau. That investigator was unable to locate those addresses. Id. at ¶ 2. Plaintiff also states that he searched for these Defendants' addresses in the Venezuelan government-owned online telephone directory database. That effort also failed to reveal the sought after addresses. Id. at ¶ 3. Plaintiff's final attempt to obtain home addresses came in the form of reaching out in March of 2018 to his own network of individuals who include "former ambassadors, human rights defenders and civil society activists". None of these individuals were able to provide the addresses. Id. at ¶ 4.

In final response to the allegations made by Plaintiff with respect to Convit, defense counsel submits a letter dated October 22, 2018, in which she acknowledges that Convit has been charged in the Southern District of Florida, but states that he "has not fled from the jurisdiction of the United States or from any restraint placed upon him". DE 65. She further argues that the criminal proceeding does not obviate Plaintiff's need to meet his burden with respect to this motion, and that Convit continues to reside at the address provided and he is therefore amendable to service pursuant to the Hague Convention.

ANALYSIS

I. Standard for Rule 4(f)(3) Alternative Service

Rule 4(f) of the Federal Rules of Civil Procedure provides, in pertinent part, that an individual may be served "at a place not within any judicial district of the United States: (1) by any internationally agreed means of service that is reasonably calculated to give notice, such as

those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents . . . or (3) by other means not prohibited by international agreement, as the court orders. Fed. R. Civ. P. 4(f).

The decision as to whether to allow alternative service "by other means" lies within the discretion of the court. AMTO, LLC v. Bedford Asset Mgmt., LLC, 2015 WL 3457452, *4 (S.D.N.Y. June 1, 2015). When exercising that discretion, courts may require plaintiff to make a threshold showing before moving for alternative service. In particular, a court "may require the parties 'to show that they have reasonably attempted to effectuate service on the defendant(s) and that the circumstances are such that the district court's intervention is necessary'". Securities and Exchange Comm. v. Cluff, 2018 WL 896027, *1 (S.D.N.Y. January 10, 2018) (quoting, Madu Edosie & Madu, P.C. v. Socketworks Ltd., Nigeria,. 265 F.R.D. 106, 115-16 (S.D.N.Y. 2010); In re GLG Life Tech Corp. Sec. Litig.,. 287 F.R.D. 262, 265 (S.D.N.Y. 2012). This requirement has be engrafted on to Rule 4(b)(3) to ensure that parties do not avoid the requirements of the Hague Convention and instead, "whimsically" seek an order of alternative service. In re GLG, 287 F.R.D. at 267.

However, there is no legal requirement that service be attempted under the Hague Convention prior to seeking an order of alternative service under Rule 4(f)(3). See AMTO, 2015 2015 WL 3457452, at *4 ("[s]ervice of process under Rule 4(f)(3) is neither a last resort nor extraordinary relief. It is merely one means among several which enables service of process on an international defendant.") (quoting Madu, 265 F.R.D. at 115 (S.D.N.Y.2010) (internal quotation marks omitted); accord Bazarian Internat'l. Fin. Assocs., LLC v. Desarrolos Aerohotelco, C.A., 168 F. Supp.3d 1, 13 (D.D.C. 2016). Indeed, the plain language of Rule 4(f), framing methods of service in the alternative, makes clear that service can be made under the

terms of an international agreement like the Hague Convention (in accord with Rule 4(f)(1)), "*or* by any other means . . . ." Fed. R. Civ. P. 4(f)(3) (emphasis added). The only requirement imposed by Rule 4(f)(3) is that the means of service be directed by the court and not prohibited by international agreement. AMTO, 2015 WL 3457452, at *4 (citation omitted).

Of course, any service ordered must also comport with Constitutional requirements of due process. It is worth noting that the method of service sought here, i.e., service on the Venezuelan Defendants' United States counsel has been held, under appropriate circumstances, to be "reasonably calculated, under all the circumstances" to provide notice and an opportunity to be heard to the party served. See In re GLG, 287 F.R.D. at 267 (quoting, Volkswagenwerk Aktiengesellschaft, 486 U.S. 694, 705, (1988); see also Western Supreme Buddha Ass'n., Inc. v. Oasis World Peace and Health Found., 2011 WL 856378, *2 (W.D.N.Y. Mar. 9, 2011). More specifically, to pass Constitutional muster, service on counsel (which may include service via electronic means), must be supported by a showing of "adequate communication" between the person to be served and counsel. AMTO, 2015 WL 3457452, at *5. Such communication has been found to exist in cases where the counsel sought to be served has filed a notice of appearance and knows how to contact his clients. Id. (collecting cases).

Ultimately, each case must be decided on its particular facts to determine whether the court should exercise the discretion granted by the Federal Rules. With these principles in mind, and upon consideration of the facts herein, the Court turns to the merits of the motion.

II. Disposition of the Motion

Plaintiff has certainly demonstrated the possible difficulty of serving the Venezuelan Defendants pursuant to the terms of the Hague Convention. However, there is no question but that, other than referring to efforts to obtain Defendants' home addresses, he has attempted no

such service. While the law does not require that Hague Convention service be attempted prior to seeking an order of alternative service, and this Court does not find the request for alternative to be "whimsical," the Venezuelan Defendants have properly countered Plaintiff's showing with their representation that they are all amenable to Hague Convention service in Venezuela. The home address of Convit has been provided. Additionally, based upon their submissions herein, Betancourt and Trebbau state that they are amenable to such service at the offices of Derwick, and that any documents delivered to that office would be accepted. Their representations in this matter would likely estop these Defendants from later objecting to service on the ground that the office is not their "address" for purposes of the Hague Convention. See A.T.N. Indust., Inc. v. Gross, 2016 WL 362309, at *4 (S.D. Tex. Jan. 29, 2016) (noting that documents served in Venezuela "may always to be delivered to an addressee who accepts it voluntarily").

While Hague Convention service may be costly and time consuming, the Court holds that under the facts here, Plaintiff must attempt such service at the addresses provided by the Venezuelan Defendants. The Court therefore denies, at this time, Plaintiff's motion for alternative service. However, to minimize delay and, in view of the showing already made, the Court's decision herein is made without prejudice to renewal of Plaintiff's request. In the event that Plaintiff is unable to effectuate Hague Convention service within six months of the date of this order he may renew his motion for alternative service under Rule 4(f)(3). Any renewed application shall include evidentiary material detailing Plaintiff's efforts at service in Venezuela.

CONCLUSION

For the foregoing reasons, this Court denies the motion for alternative service. This denial is without prejudice to renewal after the passage of six months under the terms referred to above.

Dated: Central Islip, New York
November 5, 2018

/s/ Anne Y. Shields
Anne Y. Shields
United States Magistrate Judge