



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Lizandra Vega,

Plaintiff,

-against-

Hastens Beds, Inc., et al.,

Defendants.

1:21-cv-02732 (PGG) (SDA)

OPINION AND ORDER

STEWART D. AARON, UNITED STATES MAGISTRATE JUDGE.

Pending before the Court is a motion by Plaintiff Lizandra Vega (“Plaintiff” or “Vega”), for an Order, pursuant to Rule 4(f)(3) of the Federal Rules of Civil Procedure, approving alternative service of the Summons and Complaint on Defendant Hästens Ltd. (“Hastens Ltd.”). (Pl.’s 7/22/22 Not. of Mot., ECF No. 97.) For the reasons set forth below, Plaintiff’s motion is GRANTED.

BACKGROUND¹

The Complaint in this action, filed on March 31, 2021, alleges employment-related federal and state law claims for discrimination and retaliation against the Defendants Hastens Ltd., Hästens Sängar AB (“Hastens AB”) and Jan Ryde (“Ryde”) (collectively, the “Foreign Defendants”), as well as a U.S.-based entity, Hästens Beds, Inc. (“Hastens Beds”). (See Compl., ECF No. 1, ¶¶ 45-49, 203-57.) On April 29, 2021, Plaintiff sent a form for waiver of service (along with copies of the Complaint and the Summons issued to Hastens Ltd.) via DHL Express to Ryde

¹ Since the instant motion addresses service upon Hastens Ltd., the background section is limited to matters relevant to service upon that entity.

at an address in Sweden. (See 5/10/21 Decl. of Service, ECF No. 18; see also DHL receipt, ECF No. 18-1.) The waiver form was not returned. (See 8/6/21 Christensen Decl., ECF No. 39, ¶ 8.)

On June 22, 2021, a process server went to the offices of Hastens Beds at 500 Seventh Avenue, 8th Floor, New York, New York 10018 to attempt to serve Hastens Ltd., but there was “no one in the office,” and the building receptionist advised that (s)he “was not authorized to accept service” for Hastens Ltd. (See 8/6/21 Christensen Decl., Ex. B (ECF No. 39-2), Ex. C (ECF No. 39-3), Ex. D (ECF No. 39-4).) On June 24, 2021, two attempts were made to serve Hastens Ltd. at an office address in Malta, but the office was unattended. (See 6/25/21 Cert. of Service, ECF No. 23, ¶ 1.²) On June 25, 2021, another attempt was made, but the office was still unattended, and the process server “post[ed the Summons and Complaint] through the letterbox at [the Malta address] in [a] sealed envelope for the attention of Hastens Ltd.” (See *id.* ¶¶ 1-2.)

On July 30, 2021, the Foreign Defendants filed a motion to dismiss, arguing in part that the action should be dismissed against Hastens Ltd., pursuant to Rule 12(b)(5), for insufficient service of process. (See Foreign Defs.’ 7/30/21 Not. of Mot., ECF No. 36; Foreign Defs.’ 7/30/21 Mem., ECF No. 38, at 4-9.) By Opinion and Order, dated August 28, 2021, this Court found that Plaintiff had failed to show sufficient service of process upon Hastens Ltd. because Plaintiff did not accomplish service in Malta through its Central Authority. See *Vega v. Hastens Beds, Inc.*, 339 F.R.D. 210, 220 (S.D.N.Y. 2021). The Court further found that, “[s]ince Plaintiff ha[d] not established that she made any effort to serve Hastens Ltd. through the Malta Central Authority, leave under Rule 4(f)(3) [for alternative service was] not warranted.” *Id.* at 223. The Court thus

² Plaintiff filed the June 25 Certificate of Service twice, once at ECF No. 23 and once at ECF No. 34.

quashed the service upon Hastens Ltd., and granted Plaintiff sixty (60) days to effect service on Hastens Ltd. *See id.* at 225.

On September 10, 2021, Plaintiff submitted payment to Process Server Network for the purpose of effectuating service in Malta on Hastens Ltd. pursuant to the Hague Convention. (*See* 7/22/22 Christensen Decl., ECF No. 98, ¶ 3.) On September 14, 2021, Nelson Tucker (“Tucker”), the CEO of Process Server Network, forwarded the Complaint and Summons issued to Hastens Ltd. to the Office of the State Advocate in Malta (defined as the “Central Authority”), along with instructions to complete service pursuant to the Hague Convention. (*See* Tucker Decl., ECF No. 98-1, ¶ 3.) The request was received by the Central Authority on September 28, 2021. (*See id.*)

On November 8, 2021, Plaintiff advised the Court that due to COVID-19-related delays, Plaintiff’s process server estimated that it could take until March 2022 for the Central Authority in Malta to effect service on Hastens Ltd. (*See* Pl.’s 11/8/21 Ltr., ECF No. 68.) The same day, the Court granted Plaintiff an extension until March 31, 2022 to serve Hastens Ltd. (11/8/21 Order, ECF No. 69.) On March 24, 2022, the Court granted Plaintiff a second extension, until May 30, 2022, to effect service upon Hastens Ltd. (3/24/22 Order, ECF No. 94.) On May 25, 2022, the Court granted Plaintiff a third extension, until July 25, 2022, to effect service on Hastens Ltd. (5/25/22 Order, ECF No. 96.) On July 20, 2022, the Clerk of the Central Authority advised Tucker that service upon Hastens Ltd. should be completed within the next four to six weeks. (*See* Tucker Decl. ¶ 7.)

On July 22, 2022, Plaintiff filed the motion now before the Court seeking approval of alternative service on Hastens Ltd. or such other relief as the Court deemed just and proper.

(See Pl.'s 7/22/22 Not. of Mot.) On August 5, 2022, Hastens Ltd. filed its opposition to Plaintiff's motion. (See Hastens Ltd. 8/5/22 Opp. Mem., ECF No. 100.) On August 10, 2022, Plaintiff filed her reply papers. (See Christensen 8/10/22 Reply Decl., ECF No. 101; Pl.'s 8/10/22 Reply Mem., ECF No. 102.)

LEGAL STANDARDS

Rule 4 of the Federal Rules of Civil Procedure provides the methods by which an individual or corporation may be served with a summons "in a foreign country" or "at a place not within any judicial district of the United States." See Fed. R. Civ. P. 4(f), (h). Rule 4(f) provides that an individual not in any judicial district may be served

- (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;
- (2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:
 - (A) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;
 - (B) as the foreign authority directs in response to a letter rogatory or letter of request; or
 - (C) unless prohibited by the foreign country's law, by:
 - (i) delivering a copy of the summons and of the complaint to the individual personally; or
 - (ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or
- (3) by other means not prohibited by international agreement, as the court orders.

Fed. R. Civ. P. 4(f)(1)-(3). “Simply put, Rule 4(f) provides that an individual in a foreign country may be served: 1) pursuant to an international agreement; 2) where no agreement exists, or is not exclusive, by one of several alternatives; or 3) by other means not prohibited by international agreement, pursuant to a court order.” *Chen v. China Green Agric., Inc.*, No. 20-CV-09232 (MKV), 2021 WL 103306, at *2 (S.D.N.Y. Jan. 6, 2021).

Rule 4(h)(2) governs service of a summons on a foreign corporation and incorporates most of Rule 4(f), pertaining to service of a summons on an individual. Rule 4(h)(2) provides that a corporation “at a place not within any judicial district of the United States” may be served “in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i).” Fed. R. Civ. P. 4(h)(2).

In accordance with Rule 4(f), the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents (the “Hague Service Convention”), to which the United States and Malta are parties, is an applicable international agreement governing the service of process across national lines. See Hague Service Convention, 20 U.S.T. 361, 1969 WL 97765 (Feb. 10, 1969).³ The purpose of the Hague Service Convention “is to simplify, standardize, and generally improve the process of serving documents abroad,” and it “specifies certain approved methods of service and pre-empts inconsistent methods of service whenever it applies.” *Water Splash, Inc. v. Menon*, --- U.S. ---, 137 S. Ct. 1504, 1507 (2017) (internal quotation marks and citations omitted). Article 2 mandates that each contracting country “designate a Central Authority which [] undertake[s] to receive requests for service” from other countries party to the

³ See generally Hague Conference on Private International Law, *Service Section*, <https://www.hcch.net/en/instruments/conventions/specialised-sections/service> (last visited Aug. 27, 2021).

agreement. See Hague Service Convention, 20 U.S.T. 361, Art. 2. Once a Central Authority receives a request, it must serve the documents by a method prescribed by its internal laws or by a method designated by the requester that is compatible with those laws. *Id.*, Art. 5. After the Central Authority serves the person named in the request, it must “complete a certificate . . . that the document has been served.” *Id.*, Art. 6.

The Hague Service Convention provides alternate methods of service, in addition to the Central Authority—*e.g.*, “service through consular channels”, “service by mail if the receiving [foreign] state does not object” and “service pursuant to the internal laws of the [foreign] state.” See *Burda Media, Inc. v. Viertel*, 417 F.3d 292, 300 (2d Cir. 2005) (citing Hague Service Convention, Arts. 5, 6, 8, 9 & 10). In particular, under Article 10 of the Convention, absent objections from the state of destination, the Convention does not interfere with:

- (a) the freedom to send judicial documents by postal channels, directly to persons abroad,
- (b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,
- (c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Hague Service Convention, Art. 10. However, Malta expressly has objected to alternate methods of service under Article 10. See *Vega*, 339 F.R.D. at 220.

Rule 4(f)(3) permits litigants in the United States to serve an individual or entity outside of the United States “by other means not prohibited by international agreement.” Fed. R. Civ. P. 4(f)(3). “The decision whether to allow alternative methods of serving process under Rule 4(f)(3) is committed to the sound discretion of the district court.” *Madu, Edozie & Madu, P.C. v.*

SocketWorks Ltd. Nigeria, 265 F.R.D. 106, 115 (S.D.N.Y. 2010) (citation omitted). “In exercising its discretion, the court should look at the case-specific record before it.” *Baliga on behalf of Link Motion Inc. v. Link Motion Inc.*, No. 18-CV-11642 (VM) (DF), 2020 WL 5350271, at *9 (S.D.N.Y. Sept. 4, 2020) (citation omitted).

The law is clear . . . that before the Court will authorize alternative service pursuant to Rule 4(f)(3), the moving party must make some showing of the need for judicial intervention. The showing that must be made has frequently been described as follows: (1) a showing that the plaintiff has reasonably attempted to effectuate service on the defendant, and (2) a showing that the circumstances are such that the court’s intervention is necessary. Effectively, this rule requires the moving party first to follow—or attempt to follow—international agreements and law in recognition of principles of comity and not to whimsically seek an alternate means of service.

Vega, 339 F.R.D. at 217 (citing *Chen*, 2021 WL 103306, at *2).

DISCUSSION

Plaintiff seeks leave, pursuant to Rule 4(f), to serve Hastens Ltd. through its United States counsel.⁴ (See Pl.’s 7/22/22 Mem., ECF No. 99, at 1, 7, 9.) The Court finds that Plaintiff has made the requisite showing for alternative service. See *Vega*, 339 F.R.D. at 217.

First, Plaintiff reasonably has attempted to effectuate service on Hastens Ltd. in accordance with the Hague Service Convention. On September 14, 2021, Process Server Network, on behalf of Plaintiff, forwarded the Complaint and Summons issued to Hastens Ltd. to the Malta Central Authority, along with instructions to complete service pursuant to the Hague Service Convention, and the documents were received by the Malta Central Authority on September 28, 2021. (See Tucker Decl. ¶ 3.)

⁴ In its Opinion and Order in this case, dated August 28, 2021, this Court permitted service on a foreign corporation and foreign individual (*i.e.*, Hastens AB and Ryde) through their United States counsel. See *Vega*, 339 F.R.D. at 225-26. Hastens AB and Ryde did not file objections to the Court’s August 28, 2021 Order.

Second, the circumstances are such that Court intervention is necessary. There has been more than a 10-month delay in service since the Malta Central Authority received the Summons and Complaint, and further delay will impede the just and speedy determination of this action. *See Equipav S.A. Pavimentação, Engenharia e Comercia Ltda. v. Bertin*, No. 22-CV-04594 (PGG), 2022 WL 2758417, at *5 (S.D.N.Y. July 14, 2022) (“As to whether this Court’s intervention is necessary, courts in this District have found that lengthy delays in service under the Hague Convention are sufficient to show that alternative service under Rule 4(f)(3) is warranted.” (citing cases)).

Hastens Ltd. argues that service on its United States counsel is not permitted by the text of Rule 4(f). (*See* Hastens Ltd. 8/5/22 Opp. Mem. at 7 (“This Court . . . lacks authority to order service on Hästens Ltd. via its United States based counsel under Rule 4(f)(3) because the plain text of Rule 4(f) applies exclusively to service effectuated “at a place *not within* any judicial district of the United States[.]” (citing Fed. R. Civ. P. 4(f) (emphasis added by Hastens Ltd.)).) Judge Gardephe, the District Judge presiding over this case, has considered and rejected this very argument in a 2018 Order:

Defendants argue that service on [United States defense counsel] is not permissible under Rule 4(h)(2), because that provision addresses service “not within any judicial district of the United States.” (Def. Opp. (Dkt No. 32) at 31-32 (citing *Codiao Music. LLC v. Televisa S.A. de C.V.*, 15 Civ. 21737, 2017 WL 4346968, at *13 (S.D. Fla. Sept 29, 2017) (“[T]he plain language of Rule 4(f)(3) requires that the alternative service sought contain, at least, some component that will occur outside of the United States.”); *Freedom Watch, Inc. v. Org. of Petroleum Exporting Countries*, 107 F. Supp. 3d 134, 137 (D.D.C. 2015) (“[B]ased on a textual reading of both subsections (h) and (f)(3) of Rule 4 ... service [under Rule 4(f)(3)] cannot occur in the United States....” (emphasis in original)); *Drew Techs., Inc. v. Robert Bosch. L.L.C.*, No. 12-15622, 2013 WL 6797175, at *3 (E.D. Mich. Oct. 2, 2013) (“Court ordered service under Rule 4(f)(3) is clearly limited to methods of service made outside of the United States.”)))

Other courts have held, however, that Rule 4(h)(2) and (f)(3) do not bar the type of alternative service proposed here, because such service “require[s] transmission of service papers to a foreign defendant via a domestic conduit like a law firm or agent – ultimately, the foreign individual is served and thereby provided notice outside a United States judicial district, in accordance with Rule 4’s plain language.” *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 27 F. Supp. 3d 1002, 1010 (N.D. Cal. 2014); see *Bazarian Int’l Fin. Assocs., L.L.C. v. Desarrollos Aerohotelco, C.A.*, 168 F. Supp. 3d 1, 14 (D.D.C. 2016) (same); cf. *Freedom Watch, Inc. v. Org. of the Petroleum Exporting Countries*, 766 F.3d 74, 83 (D.C. Cir. 2014) (“A number of courts thus have sanctioned service on United States counsel as an alternative means of service under Rule 4(f)(3) without requiring any specific authorization by the defendant for the recipient to accept service on its behalf”). This Court finds these cases persuasive, and concludes that the relevant circumstance is where the defendant is, and not the location of the intermediary.

Washington State Inv. Bd. v. Odebrecht S.A., No. 17-CV-08118 (PGG), 2018 WL 6253877, at *4 (S.D.N.Y. Sept. 21, 2018). This Court agrees with Judge Gardephe and finds that permitting service on Hastens Ltd. through retained United States counsel does not contravene the language of Rule 4(f), since service will be completed outside the United States.⁵

Accordingly, the Court, in its discretion, finds that alternative service upon Hastens Ltd. through its United States counsel is appropriate in the circumstances of this case.

CONCLUSION

For the foregoing reasons, Plaintiff’s motion is GRANTED. No later than August 17, 2022, Plaintiff shall serve the Complaint and the Summons issued to Hastens Ltd. by email upon

⁵ Plaintiff also had sought leave to serve Hastens Ltd. by email. (See Pl.’s 7/22/22 Mem. at 1, 7, 9.) Judge Woods recently had occasion to consider whether service could be accomplished under Rule 4(f) by email upon entities located in China, which, like Malta, is a party to the Hague Service Convention that objects to service under Article 10 via postal channels. See *Smart Study Co. v. Acuteye-U.S.*, No. 21-CV-05860 (GHW), 2022 WL 2872297 (S.D.N.Y. July 21, 2022). Judge Woods held that “China’s objection to service via ‘postal channels’ would necessarily encompass an objection to service via email,” and that service by email under Rule 4(f) was improper. See *id.* at *9-13. Since the Court is authorizing service upon counsel for Hastens Ltd., the Court need not and does not address the issue of whether service by email upon Hastens Ltd. is permissible under the Hague Service Convention.

Hasten Ltd.'s counsel, Nixon Peabody LLP, and such service shall be deemed good and sufficient service upon Hastens Ltd.

SO ORDERED.

Dated: August 10, 2022
New York, New York

A handwritten signature in cursive script that reads "Stewart D. Aaron". The signature is written in black ink and is positioned above a horizontal line.

STEWART D. AARON
United States Magistrate Judge