New York Law Journal
Technology Today
WWW.NYLJ.COM
An ALM Publication
VOLUME 253—NO. 85
TUESDAY, MAY 5, 2015

STATE E-DISCOVERY

Courts Address Service, Facebook Data and Documentary Evidence

By **Mark A. Berman**

BIGSTOCK

A trio of recent trial court decisions has had to grabble with service of process via Facebook or by email on individuals who do not want to be located, and the tension created by seeking to ensure that such a putative defendant has been given notice of a litigation that comports with "due process." It has long been clear to courts, lawyers and parties that statutory service by publication generally is an ineffectual means of service and the decisions discussed below demonstrate that electronic service of process, albeit not specifically permitted by statute, will be permitted in lieu of publication, if the appropriate predicate is established that the defendant will receive notice, "reasonably calculated" under the circumstances, to inform her of the action.

Significantly, the First Department in *Kolchins v. Evolution Mkts.*,[1] has now made it clear that emails may in the appropriate case constitute documentary evidence under CPLR 3211(a)(1), and a recent civil court decision found that emails exchanged between counsel can be sufficient to establish a stipulation that resolves a matter.

Finally, on a Facebook discovery motion, a trial court in *Melissa "G" v. North Babylon Union Free School District*[2] required counsel for plaintiff, in the first instance, to review his client's social media postings for relevance, and rejected movant's request for the court to review such postings in camera. Then, in order to protect plaintiff's "reasonable expectation of privacy," the court denied, absent evidence that routine communications with family and friends contained information material and necessary to the defense, the production of communications sent through the "one-on-one messaging option" that is available through Facebook accounts regarding "private messages sent by or received by plaintiff."

Defamation: Social Media Service

In *MLO v. "Younglawyer"*,[3] plaintiff law firm sought an order seeking leave to authorize alternative service of process on unknown defendants who allegedly made defamatory statements about plaintiff on websites that exist for the purpose of posting anonymous comments. Plaintiff alleged that such defendants used fictitious names and non-trace-

MARK A. BERMAN, *a partner at commercial litigation firm Ganfer & Shore, cochairs the social media committee of the Commercial and Federal Litigation Section of the New York State Bar Association.*

able IP addresses. Plaintiff requested that it be permitted to serve defendants by posting the summons and complaint on the website as "rebuttals" to defendants' allegedly defamatory posts. Plaintiff asserted that it expected the website would "provide notification of the submission of a rebuttal to the author of the original report." The motion court rejected such proposed method of service, as movant relied upon inapposite precedent permitting service by email. The motion court noted that, while service of process by email has been permitted, in those cases the parties had a prior history of communications with each other by email and the email address at issue was shown to be valid. The court noted that there "is very little assurance that the pleadings posted on these anonymous websites would be services on the defendants 'reasonable calculated to give them notice of the action.'" In sum, the court noted that, while it is sympathetic to the lack of viable methods to serve process, and thereby challenge the alleged defamation, "due to the specific nature of the websites at issue here, posting pleadings as a rebuttal does not conform to New York law."

Divorce: Service via Facebook

In *Baidoo v. Baidoo*,[4] the issue before a matrimonial court was whether a wife may serve her husband with a divorce summons by solely sending it "through Facebook by private message to his account." The court characterized the wife's request as asking the court "already beyond the safe harbor of statutory prescription, to venture into unchartered waters without the guiding light of clear judicial precedent." The court noted that the Domestic Relations Law permits a spouse to utilize one of the alternative methods of service provided under the CPLR and CPLR §308.5, in turn, permits a court to order service and devise a method that "fits the particular circumstances of the case." However, such service must be "reasonably calculated, under all the circumstances, to apprise [the defendant] of the pendency of the action."

Significantly, the First Department in 'Kolchins' has now made it clear that emails may in the appropriate case constitute documentary evidence under CPLR Rule 3211(a)(1).

The wife submitted copies of exchanges that took place between her and her husband when she contacted him through his Facebook page and she identified him as the subject of the photographs that appear on the Facebook page. The court noted that while it is "conceivable that if plaintiff herself or someone at her behest created defendant's page, she could fabricate exchanges and post photographs—plaintiff has nevertheless persuaded the court that the account in question does indeed belong to defendant." The court found that plaintiff established that defendant regularly logs into his Facebook account so that he would be able to see the summons. The court then noted that, since plaintiff had the husband's cell phone number, she or her attorney could speak to him or leave him a message or text him that a divorce action had been commenced against him and to check his Facebook account.

The court characterized service by publication as expensive and "essentially statutorily authorized non-service" because it is "almost guaranteed *not* to provide a defendant with notice of the action for divorce" (emphasis in original). As such, the court concluded that under the circumstances, "service by Facebook, albeit novel and non-traditional, is the form of service that most comports with the constitutional standards of due process." To effectuate the requested service, the court ordered that, because litigants cannot serve each other, plaintiff's counsel shall log into plaintiff's Facebook account and message the husband by first identifying himself, and then including a Web address identifying where the summons could be viewed or attaching an image of the summons. The court said that such transmittal must be performed once a week for three consecutive weeks, and that plaintiff and her attorney are to call and text the husband informing him that the summons had been sent to him via Facebook.

Estate Proceedings: Email Service

In *Estate of Sucich*,[5] the proposed executor sought an order authorizing service of a citation by electronic mail, pursuant to SCPA §307(3), upon a distributee of the decedent, who is alleged to have been a fugitive from justice and believed to reside in Mexico, under an assumed alias. The sister of the distributee stated that her brother periodically contacted her by email and provided proof that her brother has responded to two email addresses. SCPA §307(2) provides that, when a distributee resides outside of New York, "service may be effectuated upon non-domiciliaries by certified mail, return receipt, registered mail, return receipt or by special mail carrier." The proposed executor alleged that he had exhausted his ability to locate the brother's whereabouts other than to note that he is purportedly living somewhere in Mexico under an alias and may be receiving mail at a phantom address in that country.

First, the court held that service by publication, pursuant to SCPA §307(3)(a), "is entirely imprudent financially and practically based upon the record." The court noted that SCPA §307(3)(b) allows for service of the citation "*by any manner of special mail service, as the court*

may direct" and that SCPA §307(3)(c) authorizes "substituted service such as is provided by CPLR 308(2) and (4), within or without the state subject to 308 and 309, *and to such variations of CPLR 308 as the court may provide*." The court then took judicial notice that the United States and Mexico are signatories to the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters. The court further stated:

> [w]hile service of process by email is not directly authorized by either the CPLR or the Hague Convention, it is not prohibited under either state or federal law, or the Hague Convention, given appropriate circumstances … [B]oth New York courts and federal courts have, upon application by plaintiffs [in civil suits], authorized email service of process as an appropriate alternative method when the statutory methods have been proven ineffective.[6]

The court then held that "electronic service is an acceptable method … 'once the impracticability standard is satisfied' that reasonable efforts to accomplish service according to the methods specified in CPLR §§308(1), (2) and (4) are not feasible." Then "[o]nce that standard is met, the method of service reasonably calculated, under all of the circumstances, to inform the subject party of the action or proceeding can be fashioned."

Facebook Discovery

In *Melissa "G"*, defendants, in a personal injury action predicated upon alleged sexual contact by a teacher, sought "unedited account data for all Facebook accounts maintained only by plaintiff Melissa, including all postings, status reports, emails, photographs and videos posted on her Web page to date." In support of their application, defendants submitted printed pages from plaintiff's Facebook account, depicting postings that were accessible to the general public on May 20, 2014, including photographs of Melissa engaged in a variety of recreational activities and "activities with her boyfriend …; at work in a veterinary hospital; rock climbing; and out drinking with friends." Toward the top of each page is a notation, "To see what she shares with friends, send her a friend request." Defendants also submitted printed pages from an account that appears to be jointly held by Melissa and her boyfriend.

In deciding how to address the actual review and production of the requested social media content, the motion court noted that, while "it has been suggested that an in camera review is appropriate to determine whether certain material on plaintiff's Facebook account is discoverable, an in camera inspection in disclosure matters is the exception rather than the rule, and there is no basis to believe that plaintiff's counsel cannot honestly and accurately perform the review function in this case." As such, the motion court directed plaintiff to "print out and to retain all photographs and videos, whether posted by others or by plaintiff herself, as well as status postings and comments posted on plaintiffs Facebook accounts, including all deleted materials." However, the court held that

> not all of plaintiff's personal communications to others are subject to scrutiny in connection with her claims. Since there is a reasonable expectation of privacy attached to the one-on-one messaging option that is available through Facebook accounts, private messages sent by or received by plaintiff need not be reviewed, absent any evidence that such routine communications with family and friends contain information that is material and necessary to the defense.

Emails as Documentary Evidence

In *Kolchins*, the First Department rejected the motion court's holding that emails do not constitute "documentary evidence" for purposes of CPLR 3211(a)(1), and held that there is no "blanket rule by which email is to be excluded from consideration as documentary evidence under the statute."

Settlement Stipulation By Email

In *Maria McBride Prods v. Badger*,[7] defendants moved for an order enforcing the parties' stipulation to settle an action that consisted of multiple email ex-changes. CPLR 2104 provides that an "agreement between the parties or attorneys relating to any matter in an action … is not binding upon a party unless it is in a writing subscribed by him or his attorney." The court held that the emails "exchanged between counsel, which contained their printed names at the end, constitute signed writings (CPLR 2104) within the meaning of the statute of frauds and entitled [that party] to judgment."

•••••••••••••●●•••••••••••••

1. 2015 NY Slip Op. 02863, 2015 N.Y. App. Div. LEXIS 2841 (1st Dep't April 2, 2015).
2. Index No. 36209/2006 (Sup. Ct. Suffolk Co. March 18, 2015).
3. 2015 NY Slip Op. 30498(U), 2015 N.Y. Misc. LEXIS 1008 (Sup. Ct. Kings Co. March 9, 2015).
4. Index No. 310947 (Sup. Ct. N.Y. Co. March 27, 2015).
5. 2014-262, NYLJ 1202723667432, at *1 (Surr. Ct. Dutchess Co. April 13, 2015).
6. Id. (quoting *Alfred E. Mann Living Trust v. ETIRC Aviation S.A.R.L.*, 78 A.D.3d 137, 141, ___N.Y.S.2d __ (1st Dep't 2010)).
7. 46 Misc.3d 1221(A), 2015 N.Y. Misc. LEXIS 464 (Civ. Ct. N.Y. Co. Feb. 26, 2015).

Reprinted with permission from the May 5, 2015 edition of the NEW YORK LAW JOURNAL © 2015 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382 or reprints@alm.com. # 070-05-15-03

GANFER & SHORE, LLP
ATTORNEYS AT LAW
360 Lexington Avenue
New York, New York 10017
212.922.9250
mberman@ganfershore.com