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Is service of process via social media expanding?

Elisa Reiter and Daniel Pollack | April 5, 2023

When faced with an elusive litigant, service of process can be quite complicated. Times are changing, as reflected by the U.S. Bankruptcy Court for the Southern District of New York's recent decision, *In Re Three Arrows Ltd.* The focus is on Rule 45 of the Federal Rules of Civil Procedure. Absent from Rule 45 is specific direction regarding service of

individuals outside the United States who are not U.S. nationals or residents.

Three Arrows involves a debtor investment firm, incorporated in the British Virgin Islands. The decision "focused on trading cryptocurrency and other digital assets. The debtor was reported to have over $3 billion of assets under management as of April 2022." The company's directors included Su Zhu (Zhu), Mark James Dubois (Dubois) and Kyle Livingstone Davies (Davies).

Davies was American by birth, but held Italian and Singaporean passports. Davies and Zhu created Three Arrows Capital, LLC in Delaware, and registered that company to allow for operations in the state of California under the name Three Arrows Capital Management, LLC. Davies and Zhu formed Three Arrows Capital, Ltd. in the British Virgin Islands. Davies, Zhu and Dubois sought and obtained credit from financial institutions in the United States, including J.P. Morgan Chase, Citibank, and Bank of America.

Do factual circumstances preclude standard service where an individual holds themselves out to be a United States citizen, but the individual is a globe-trotting citizen of the world? The court presumed that Davies (who was born in the United States) was a U.S. national. The court found that F.R.C.P. 45(b)(3) applied, which provides in pertinent part: "28 U.S.C. *17 §1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country."

Three Arrows is not a criminal case, thus the Bankruptcy Court focused its analysis on whether the documents that Davies was being asked to

present were: "(1) necessary in the interests of justice; and (2) not possible to obtain in any other manner."

The court concluded that the documents subpoenaed from Davies were necessary and sought in the interests of justice. It further found that Davies played an integral role in Three Arrows' formation. As a result, it added that Davies held knowledge integral to the Foreign Representatives' case.

As to the second prong, the court concluded that sheer impossibility is not a prerequisite to allowing for alternative service. It held that "the Foreign Representatives have shown that Rule 45 and Section 1783 allow for service on Davies outside the United States."

Having determined that Davies may be served under F.R.C.P. 45 and 28 U.S.C. §1783, the court explored whether the circumstances merit alternative service, even though F.R.C.P. 45 only contemplates personal service. The court noted that there is substantial precedent in New York authorizing service by other than personal service via private process. Three issues were addressed:

(1) when alternative service is allowed;

(2) what types of alternative service can be used per F.R.C.P. 45; and

(3) if there is precedent, the extent to which there is a basis for applying such precedents in circumstances involving F.R.C.P. 45.

In its analysis, the court questioned whether there had been due diligence in attempting to serve Davies. However, the court acknowledged that New York precedent does not always mandate due

diligence in attempting to effectuate process before alternative means of serving a debtor have been explored.

The court concluded that it must consider the circumstances of each case, and what might justify alternative service in a given case. In the instant case, the foreign representatives could not have exercised due diligence, as Davies and Zhu traveled freely between countries, and there was no guarantee that they could have been served through traditional means.

While service by certified mail may evidence due diligence, there was simply no reason to believe that Davies and Zhu would have signed off on a certified mail receipt for a letter containing a subpoena duces tecum.

The court noted that it found only one other case in the jurisdiction that allowed for service via email. In that case, service via email was condoned as a second step to personal service, paired with overnight mail. See *Petrobras*, 2016 WL 908644, at *1-2. However, the court also acknowledged that the foreign representatives provided a continuum of cases where alternative service has been allowed, apart from F.R.C.P. 45.

The court held that "[w]here all other statutory prerequisites are met, and all that remains is the due process standard, the Court finds no principled reason for denying the applicability of the Rule 4 alternative service cases to the Rule 45 context." It acknowledged that while the lack of precedent is curious, it "does not seem to be an indication that doing so is incorrect."

The bottom line: It remains to be seen whether this case is deemed to be fact specific. Will *Three Arrows* point courts in a new direction, and stand as authority to condone service of discovery requests via alternative service of a Rule 45 subpoena outside the United States, via email and social media? Stand by.

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