UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
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ARISTA RECORDS et al.,

Plaintiffs, 08-cv-765 (GTS)(RFT)

-against-

KIMBERLY FRAWLEY,

Defendant.

---x

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS COMPLAINT

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Defendant's attorney, Law Offices of Richard A. Altman, submits this memorandum of law in support of this motion to dismiss this action with prejudice, based upon insufficient service of process and the running of the statute of limitations.

FACTS AND PROCEDURAL HISTORY

This is one of tens of thousands of copyright infringement actions brought by the Recording Industry Association of America, seeking (and failing) to stop the downloading of music over the internet. This is not the place to recite in detail the abusive conduct engaged in by the RIAA and its members, and inasmuch as this motion is not directed to the merits, the specific facts need not be examined here. The only issues on this motion are the statute of limitations and the lack of personal jurisdiction. It will be demonstrated that the former has run, and that service of process was insufficient. The motion should therefore be granted and the action dismissed with prejudice, and, because the time to sue has run, without leave to re-serve.

Defendant supports this motion with a declaration from her, from her mother and from her counsel. Annexed to Ms. Frawley's declaration is documentary proof of her residence being other than the place of service, consisting of a lease for an apartment in Ohio covering the period when the papers were served in New York. Annexed to the Altman declaration are copies of the complaint, answer and affidavit of service as Exhibits A, B and C respectively, and emails between counsel regarding the issue of service (Exhibits D and E). Ms. Frawley's mother, Johnna Westine, describes in her declaration her encounter with the process server.

The action has a complex procedural history. It was originally commenced on July 17, 2008 against Does 1-16 (Dkt. #1). Plaintiffs were granted leave *ex parte* to conduct immediate discovery (#5), and pursuant to that order, served a subpoena upon non-party State University of New York,

seeking disclosure of the identities of Does 1-16, all of whom were students at the University. On September 15, 2008, three of the students retained counsel, and he moved on their behalf to quash the subpoena (#12). While the motion was pending, plaintiffs reached settlements with most of the other students, and they were voluntarily dismissed from the action (##31 and 36) in October 2008.

On February 18, 2009, Magistrate Judge Treece denied the motion to quash the subpoenas (# 40). The three defendants who had moved to quash took a timely appeal of the decision to District Judge Suddaby (# 41). On March 5, 2009, Judge Suddaby denied the appeal, and ordered that the University comply with the subpoena by March 11 (# 43). Thereafter, two of the three defendants settled with plaintiffs and were voluntarily dismissed (#47). The remaining defendant, Ms. Frawley, who was Doe 3, appealed to the U.S. Court of Appeals for the Second Circuit (#44) and filed a motion seeking a stay of enforcement of the subpoena on March 9.

The next day, the Second Circuit granted an interim stay, and later granted a full stay pending the determination of the appeal (#48). The appeal was briefed, argued and submitted, and on April 29, 2010, the Court affirmed the order of the District Court and vacated the stay (##51 and 52). On June 18, District Judge Suddaby ordered that the subpoena be complied with by July 2. The University complied and disclosed Ms. Frawley's identity to the plaintiffs before then.

On June 28, 2010, eight of the original thirteen plaintiffs filed an amended complaint, naming Ms. Frawley for the first time, as the sole defendant (#53). Originally (and properly) filed as a new action, under a new case number, the Court then *sua sponte*, and after *ex parte* consultation with plaintiffs' counsel, terminated the new action and instead filed it under the original case number (Docket Annotation of July 7, 2010). A summons was issued as to Ms. Frawley that same day.

On July 20, 2010, plaintiffs' process server delivered copies of the papers to an address in Oneida, New York, where defendant's mother lived. Her mother advised the process server at the time that Ms. Frawley did not live there, but the process server "nailed and mailed" the papers at that address anyway. On October 3, 2010, plaintiffs filed proof of service of the summons and amended complaint (#57). Defendant Frawley filed an answer on August 10, 2010 (#58). The answer (Altman decl., Exh. B) contains the defenses of lack of personal jurisdiction and the expiration of the statute of limitations.

The parties participated in a Rule 16 conference with Magistrate Judge Treece on September 30, 2010, during which Ms. Frawley's counsel stated his intention to file a Rule 12(c) motion to dismiss within 45 days. The Court then adjourned the conference pending the disposition of the motion (#62). Ms. Frawley now moves for dismissal in accordance with the order.

As a preliminary procedural point, a motion under F.R.Civ.P. 12(c) for judgment on the pleadings is decided under the same standards as a Rule 12(b) motion for dismissal prior to service of an answer. The Court must "accept all factual allegations in the complaint as true and draw all reasonable inferences in favor of the [plaintiff]. To survive a Rule 12(c) motion, the complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Bank of N.Y. v. First Millennium, Inc.*, 607 F.3d 905, 922 (2d Cir.2010). A Rule 12(c) motion which is based on the statute of limitations is proper so long as the defense has been stated in the answer, which is the case here, *see Kulzer v. Pittsburgh-Corning Corp.*, 942 F.2d 122, 125 (2d Cir.1991), and the motion will be granted "if the dates in a complaint show that an action is barred by a statute of limitations." *Ghartey v. St. John's Queens Hosp.*, 869 F.2d 160, 162 (2d Cir.1989).

POINT I

SERVICE OF PROCESS WAS INSUFFICIENT, AND THE COURT LACKS JURISDICTION OF THE PERSON OF THE DEFENDANT, REQUIRING DISMISSAL.

"Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied." *Dynegy Midstream Servs. v. Trammochem*, 451 F.3d 89, 94 (2d Cir. 2006)(*quoting Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 104, 108 S. Ct. 404, 98 L. Ed. 2d 415 (1987)). "[I]n considering a motion to dismiss...for insufficiency of [service of] process, a Court must look to matters outside the complaint to determine whether it has jurisdiction." *Darden v. DaimlerChrysler N. Am. Holding Corp.*, 191 F. Supp. 2d 382, 387 (S.D.N.Y. 2002). The plaintiff bears the burden of demonstrating that service was adequate. *See Dickerson v. Napolitano*, 604 F.3d 732, 752 (2d Cir.2010). Failure of a plaintiff to properly serve a defendant deprives the court of personal jurisdiction and requires dismissal of the complaint. It is irrelevant if a defendant receives actual notice; that is not a cure for improper service or failure to serve. *See Bogle-Assegai v. Connecticut*, 470 F.3d 498, 507 (2d Cir.2006).

F.R.Civ.P. 4(e) provides in pertinent part as follows:

> Unless federal law provides otherwise, an individual...may be served in a judicial district of the United States by: (1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or (2) doing any of the following: (A) delivering a copy of the summons and of the complaint to the individual personally; (B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there...

Subdivision (1) permits service in accordance with the laws of New York as an alternate method of service. New York CPLR § 308 provides in pertinent part as follows:

> Personal service upon a natural person shall be made by any of the following methods:

> 1. by delivering the summons within the state to the person to be served; or
> 2. by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by...mailing the summons to the person to be served at his or her last known residence...in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such delivery and mailing to be effected within twenty days of each other...
> 4. where service under paragraphs one and two cannot be made with due diligence, by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing the summons to such person at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such affixing and mailing to be effected within twenty days of each other...

Defendant and her mother submit declarations on personal knowledge in support of this motion. Her mother, Johnna Westin, states that she informed the process server that her daughter did not live at the address, and she refused to accept the papers on her daughter's behalf. Ms. Frawley states that at the time of service, she was living in Ohio, and that she had no other connection to her mother's home at the time. She annexes a copy of a lease she signed, which commenced on July 1, 2010, three weeks before the service. Furthermore, as she states, she had moved out of her mother's home in May 2009. Thus the place of service was not at the time Ms. Frawley's "actual place of business, dwelling place or usual place of abode," as provided by the CPLR.

The affidavit of the process server (Altman decl., Exh. C) states: "left a copy at residence at 1320 Genessee Street, Oneida, New York 13421 on door and mailed copy on 7/20/10. Left copy at 8:08 pm." It further states that "I was told by woman at residence who denied being Kimberly

Frawley but said she was her mother that Kimberly did not live at address and that she is currently attending school. She would not give me school address and would not accept summons. Postal check revealed Kimberly Frawley does continue to receive mail at 1320 Genessee Street, Oneida, New York 13421." Thus her affidavit is completely consistent with both Ms. Frawley's and Ms. Westin's declarations.

Under either the Federal rules or New York law, defendant was not properly served, because the place of service was at the time neither her actual place of business, dwelling place or usual place of abode. It may have been her "last known residence" (at least as known to the plaintiffs), but affixing the summons and complaint to the door of a defendant's last known residence is insufficient and requires for dismissal. *Allianz Ins. Co. v. Otero*, 2003 U.S. Dist. LEXIS 1284 at * 6 (S.D.N.Y. Jan. 29, 2003)[1]. *See Stillman v. City of New York*, 834 N.Y.S.2d 115, 117, 39 A.D.3d 301, 302-03 (1st Dept.2007)("While there may be some question as to whether there is a distinction between 'dwelling place' and 'usual place of abode,' there has never been any serious doubt that neither term may be equated with the 'last known residence' of the defendant.")(*quoting Feinstein ex rel. Wilensky v. Bergner,* 48 N.Y.2d 234, 239, 397 N.E.2d 1161, 1163, 422 N.Y.S.2d 356 [1979]). Nor does receipt of mail at that address, even assuming it is true, constitute evidence of it being her actual dwelling place or residence at the time of service. All that it means is that Ms. Frawley *at one time* lived there and received mail there, a fact which is not in dispute. It does not necessarily establish the determinative issue of whether she resided there in July 2010, and in fact she did not.

The papers were subsequently mailed to Ms. Frawley at her last known residence (see copy of envelope annexed to Altman decl. as Exh. D), so that portion of the requirement of CPLR subd.

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[1] Copies of all unreported cases are annexed to this memorandum as exhibits.

4 was followed. But the part which requires that the papers be affixed to the door "of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served" was not. Thus service was fatally defective and plaintiffs cannot meet their burden of proof to show that service of process was proper.

Ms. Frawley's mother, Ms. Westine, told the process server that her daughter did not live at the address. That placed the process server on notice that further investigation was required to determine defendant's actual address before attempting service. There were still more than two months left of the 120 days allowed by Rule 4(m) to effect service, and that was more than sufficient to do so. But instead of investigating further, the process server just left the papers the next day at the address which she had just been told was wrong. Presumably she did not act on her own, but was told to leave the papers by someone on behalf of the plaintiffs, who, despite being informed that Ms. Frawley did not live there, assumed that she did, *i.e.*, that her mother was lying. Thus plaintiffs did not act with due diligence after being informed of their error and they are not entitled to a good-cause extension of the 120 days within which to serve the papers under Rule 4(m).

Moreover, plaintiffs' counsel were informed shortly afterward that they had served the papers at the wrong address. Annexed to the Altman declaration as Exhibits E and F are copies of emails between counsel, in which he called their attention to the lack of proper service. Bizarrely, plaintiffs' counsel simultaneously asserted that service was proper and asked defendant's counsel to accept service. This is further ground for denying any Rule 4(m) extension.

Tokio Marine v. Canter, 2009 U.S. Dist. LEXIS 70347 at *24-30 (S.D.N.Y. Aug.11, 2009) is directly on point. The papers were served by affixing them to the door of defendant's parents' apartment in New York City. Defendant stated that at the time of service he was in medical school

in Mexico, and had moved there one month before. The Court held that plaintiff did not meet its burden and dismissed the action, holding that, since plaintiff adduced no evidence to dispute defendant's statement that he was in Mexico, there was no need for a hearing. *See also Agarwal v. Flushing Hosp. & Med. Ctr.*, 496 N.Y.S.2d 238, 239, 115 A.D.2d 577, 577 (2d Dept.1985)(service by affixing and mailing twelve days after defendant moved out of her New York residence to live in California was defective under C.P.L.R. § 308(4)). Thus, affixing and mailing, the method used here, is an invalid method of service if the place of affixing is not the actual residence or place of abode of the defendant at the time.

The action must therefore be dismissed for improper service of process and lack of personal jurisdiction.

POINT II

AN AMENDED COMPLAINT WHICH CHANGES THE NAME OF A DOE DEFENDANT TO THE TRUE NAME DOES NOT RELATE BACK TO THE ORIGINAL FILING.

The original complaint in this action was filed on July 17, 2008, in the names of Does 1 to 16. An amended complaint, solely against Ms. Frawley (who was Doe 3 in the original complaint), was filed on June 28, 2010.

As a general rule, an amended complaint relates back to the filing of the original complaint, so that a statute of limitations which runs in the interim does not bar the amendment, F.R.Civ.P. 15(c). However, this is not the rule when a complaint originally brought against a Doe defendant is subsequently amended once the plaintiff learns the defendant's true name. According to a long and uniform line of Second Circuit cases, the amendment does not relate back to the original filing, so that if the statute of limitations has run in the interim, the claim is time-barred. *Johnson v.*

Constantellis, 221 Fed. Appx. 48 (2d Cir.2007), *cert.den.*, 2008 U.S. LEXIS 388; *Hickey v. City of New York*, 173 Fed. Appx. 893 (2d Cir.2006); *Tapia-Ortiz v. Doe*, 171 F.3d 150, 152 (2d Cir.1999) ("an amended complaint adding new defendants [cannot] relate back if the newly-added defendants were not named originally because the plaintiff did not know their identities."); *Aslanidis v. United States Lines, Inc.*, 7 F.3d 1067, 1075 (2d Cir.1993)("'John Doe' pleadings cannot be used to circumvent statutes of limitations because replacing a 'John Doe' with a named party in effect constitutes a change in the party sued.")(citations omitted; emphasis added); *Barrow v. Wethersfield Police Dept.*, 66 F.3d 466, 470 (2d Cir.1995), *mod.* 74 F.3d 1366 (2d Cir.1996); *Hill v. New York Post*, 2010 U.S. Dist. LEXIS 76447 at *5 (S.D.N.Y.July 29, 2010)("'John Doe' pleadings do not allow a plaintiff to avoid the requirements of a statute of limitations.").

This is precisely the present situation. After plaintiffs' subpoena was complied with, they then filed a new action, but it was against a new defendant, and with fewer plaintiffs than had sued originally. For some reason, the Court *sua sponte* dismissed that new action and re-filed the case as an amended complaint under the prior case number. This would appear to be error. This is a completely new case, and should have been treated as such. But even if it were treated as an amendment of the original complaint changing the name of Doe 3 to Ms. Frawley, the result would be the same; the action is untimely either way.

A further reason for not permitting a relation back is that the caption is entirely different, in that the original plaintiffs in the first complaint are not identical to those in the amended complaint, and the caption is different. The plaintiffs in the first complaint were:

Arista Records LLC
Atlantic Recording Corporation
BMG Music

Capitol Records, LLC
Elektra Entertainment Group Inc.
Interscope Records
Maverick Recording Company
Motown Record Company, L.P.
Sony BMG Music Entertainment
UMG Recordings, Inc.
Virgin Records America, Inc.
Warner Bros. Records Inc.
Zomba Recording LLC

The plaintiffs in the new complaint are :

UMG Recordings, Inc.
Motown Record Company, L.P.
Interscope Records
Capitol Records, LLC
Sony Music Entertainment

Thus, eight of the original thirteen plaintiffs have withdrawn whatever claims they considered that they had originally against Ms. Frawley. Thus there is no basis whatsoever for treating this new complaint as an amendment to the original. It is obvious that it is an entirely new case, and it should have been filed as such. If it is treated as such, then the issue of relating back does not arise. So it if it is deemed a new case, it is untimely, and if the complaint be deemed an amendment, it is still untimely because the amended complaint does not relate back to the filing of the original. We demonstrate in the next point that the statute of limitations has run either way.

POINT III

THE STATUTE OF LIMITATIONS HAS RUN AND THIS ACTION IS TIME-BARRED.

The statute of limitations for copyright infringement claims is three years, and the claim must be "commenced within three years after the claim accrued." 17 U.S.C. § 507(b). The statute does not define when claims accrue, and the Second Circuit does not appear to have addressed the issue.

However, the majority of District Courts in the Second Circuit have held that the claim accrues and the three years begins to run when the infringement occurs, not when it is discovered.

The leading case is *Auscape Int'l v. Nat'l Geographic Soc.*, 409 F. Supp. 2d 235 (S.D.N.Y.2004), *aff'd on other grds*. 282 Fed.Appx. 890 (2d Cir.2008). Most of the subsequent cases have found the reasoning in *Auscape* persuasive and have followed it. *See Harris v. Simon & Schuster, Inc.*, 646 F. Supp. 2d 622 (S.D.N.Y.2009); *Broadvision v. General Electric Co.*, 2009 U.S. Dist. LEXIS 45862 at *14-16 (S.D.N.Y. May 5, 2009); *Medical Education Development Services, Inc. v. Reed Elsevier Group, PLC*, 2008 U.S. Dist. LEXIS 76899 at *36 (S.D.N.Y. Sep. 30, 2008). "Although only a district court opinion, *Auscape* is the best articulation to date of how to compute the Copyright Act's statute of limitations." 3 Nimmer on Copyright § 12.05[B][2][b] (2004).

However, in this case it makes no difference, because even if it is assumed that the claims accrued upon discovery, the action is still untimely. Construing the complaint most favorably to plaintiffs, they allege that their claims accrued at the earliest on April 12, 2007. On that date, they alleged that they "identified an individual...distributing audio files over the Internet...The Defendant was identified as the individual responsible" (Altman decl., Exh. A, ¶ 15 at 4). This action was commenced on June 28, 2010. Thus it is time-barred on its face and must be dismissed. If the Court follows *Auscape* and its subsequent cases, then the claims actually accrued before April 12, 2007, so the claim is even more untimely.

Plaintiffs will doubtless argue in opposition to this motion that the stay of enforcement of their subpoena during the pendency of the appeal to the Second Circuit should excuse them, and that the period of that stay should be excluded from the three-year statute. This argument should be rejected for two reasons. First, the stay of enforcement of the subpoena cannot be deemed an

extension of the statute of limitations, and there is no basis to construe it as such. Had the plaintiffs desired such relief, they could have sought it in the Second Circuit, even assuming that that Court had the power to extend it.

Second, the stay did not prevent plaintiffs from doing anything else they needed to do in order to discover Ms. Frawley's identity in the meantime. The stay was only of one subpoena, and only meant that SUNY did not have to disclose it during the pendency of the appeal. Plaintiffs had from March 9, 2009, when the Second Circuit first stayed its subpoena, until April 29, 2010, to take any steps that might have been necessary to identify Doe 3 (they actually had even more time, because enforcement of the subpoena was stayed by agreement during the pendency of the motion to quash in this Court). The stay did not prevent plaintiffs from attempting to discover her identity by any other means available to them, including serving other subpoenas and hiring investigators. There is plainly no shortage of resources on their side with which to do so.

Any plaintiff who commences a Doe action is obliged to investigate promptly to learn the identity of a putative defendant, because it is absolutely clear that the statute of limitations continues to run until the correct person is named. That it may have been difficult for these plaintiffs to learn Ms. Frawley's identity by means other than their subpoena is not the concern of either the Court or the defendant, and the cases do not express any sympathy for the difficulties a plaintiff may have in correctly identifying their defendant. Thus under these circumstances there is no basis for equitable tolling of the statute of limitations, since plaintiffs were at no time prevented from pursuing any efforts to identify the correct person. *Cf. Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990)("We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.") "If

the person seeking equitable tolling has not exercised reasonable diligence in attempting to file after the extraordinary circumstances began, the link of causation between the extraordinary circumstances and the failure to file is broken, and the extraordinary circumstances therefore did not prevent timely filing."*Valverde v. Stinson*, 224 F.3d 129, 134 (2d Cir.2000).

Accordingly, the statute of limitations is an absolute bar to this action, and it should be dismissed.

CONCLUSION

The Court lacks personal jurisdiction over the defendant and the statute of limitations has expired. This motion should be granted and the amended complaint dismissed with prejudice. Upon such dismissal, defendant becomes the prevailing party, and is entitled to costs, disbursements and a reasonable attorney's fee, pursuant to 17 U.S.C. § 505.

Dated: New York, New York
November 15, 2010

/S/

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