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Internet Issues

Facebook Filings: Social Media and Service of Process

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Over the past decade, social media has been one of the fastest and most unpredictable areas of Internet growth. Social media companies and applications appear, explode, and disappear in the time it would once have taken a startup to get its first product to market. Many of these platforms serve tiny, niche communities or cater to particular interest groups, but a few—Facebook, Twitter, and Instagram, for example—have become household names in the United States and worldwide.

What is remarkable about these services is how quickly they have become central to everyday life for millions of people. For many people, Facebook has become the dominant means of daily electronic communication in just 10 years—far outpacing email, which evolved more moderately since its birth over 40 years ago. As one New York court recently noted, although the population of social media users includes "the 157,000,000 people in the United States who, according to Facebook's 2014 fourth quarter shareholder report, check their Facebook accounts each day … . [i]t does not, by and large, include the members of the New York State judiciary."[1] This is a situation that can cause serious problems.

The meteoric rise of social media is tailed by a host of complex legal issues relating to intellectual property rights, privacy rights, evidence and discovery, freedom of speech and assembly, and securities regulation (to name just a few). These issues, which can change as quickly as social media platforms change their offerings and policies, are difficult targets for the slow-moving legislative process, so they are left to the courts. But the judges who must address them are among those least likely to have daily familiarity with the services themselves.

Facebook's labyrinthine "privacy" structure offers a good example. The question of whether a Facebook posting is public or private, and what exactly that means in terms of who can see it and who will get notice of it, is so complex that most users don't fully understand it. A judge who spends little or no time on Facebook is unlikely to be able to unravel the system without substantial effort, and by the time that work is done, Facebook may well have changed the rules. Yet this simple question—what exactly happens when something is posted to Facebook—is at the heart of a number of recent decisions and has real legal

consequences. Courts dealing with these issues have justifiably struggled to understand them and thus have sometimes reached inconsistent conclusions, or have avoided reaching any conclusions at all.

In a recent decision, however, Judge Matthew Cooper of the New York State Supreme Court tackled the issue of service of process through a private Facebook message, and did so in a surprisingly direct and uncompromising manner. The decision is worth examining not only because it makes some new law in an important area, but because it provides an excellent example of how a court can deal with a complex issue in a rapidly changing field.

New York Service of Process

The plaintiff in *Baidoo v. Blood-Dzraku*[2] faced a dilemma that often confronts civil litigants in personal disputes: She wanted to initiate a court proceeding against someone she couldn't find. In her case, it was a divorce action against her husband. Without knowing where he was, the plaintiff-wife could not personally deliver a summons to him, which is the standard method of service required by New York's Domestic Relations Law (DRL).[3] Luckily, in New York (as in most states) the legislature had anticipated this problem and provided the courts with tools to address it.

Recognizing that one spouse won't always be able to personally deliver a divorce summons to the other (especially when the other is estranged), the DRL allows courts to prescribe "one of the alternative methods allowed under the Civil Practice Law and Rules (CPLR) that does not require 'in-hand' delivery."[4]

These alternative methods are well-known. They include (1) delivery of a summons 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" accompanied by mailing it to the person's last known address (known as "substitute service"); (2) "affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode" of the person and then mailing the summons (known as "nail and mail" service);[5] and (3) publishing the summons, typically in newspaper (or several) as designated by the court.[6]

Should these methods fail, the CPLR provides a final option. A court may direct some other manner of alternative service—a method not specifically prescribed by the CPLR—if a plaintiff shows, in an ex parte application, that the CPLR's methods are "impracticable" under the circumstances.[7] This allows the court (and the plaintiff) to craft a method of service with the best chance of providing the defendant with notice of the suit when the other methods are unlikely to do so. The legal requirement for any such customized alternative method is that it satisfy principles of due process, as must all methods of service, by being "reasonably calculated, under all the circumstances, to apprise [the defendant] of the pendency of the action."[8]

In recent years, some courts have used this CPLR clause (and others like it) to permit service by email and even, in a few cases, service by social media but only if accompanied by some other type of service, such as regular mail. Other courts have rejected service by social media, and according to the court in *Baidoo*, no court has ever permitted social media

to be the *sole* method of service.[9] Noting this lack of clear precedent and the particular care it required, the court in *Baidoo* went a step further.

The Court's Analysis

The wife in *Baidoo* applied to serve divorce papers on her estranged husband through an alternative method—one often associated with casual banter and family photos but not likely to conjure the image of a process-server. She wanted to serve him by sending a private message to his Facebook account.

The court conducted a three-step analysis to determine whether to grant the application.

First, the court asked whether the wife had demonstrated that she was unable to personally serve her husband. It found that she "easily met the requirement" for numerous reasons: He refused to make himself available to be served; the last address that she had for him was many years old; and he had no fixed address or place of employment. In addition, multiple investigative firms could not locate him, the post office had no forwarding address for him, and he had no DMV record. Based on these facts, as attested to in affidavits and affirmations, the wife adequately proved that she could not effect personal service.

Second, the wife had to prove that it would be "impracticable" to serve her husband by the other type of alternative service prescribed by the CPLR. That was no high hurdle, since each of those required *some* knowledge of the person's location, specifically, a place of business or residence. And as the court recognized, the wife sought that information to no avail, thus satisfying her burden of proving impracticability.

Third, the court considered whether "sending the summons through Facebook—without any other ancillary form of service—can reasonably be expected to give him actual notice that he is being sued for divorce."[10] This last prong of the analysis engendered a discussion of whether serving a person on a social media platform, at least under the circumstances, could satisfy the legal standards required of all methods of service.

Service Through Social Media

As the court in *Baidoo* noted, the fundamental question in determining whether to permit service by social media is a practical one: Is the method of service "reasonably calculated to apprise the defendant that he is being sued"?[11] Before addressing that question, the court noted that there was a nearly even split between the courts, some of which had approved of service through social media while others had not, and that even the courts that *had* permitted service did so "only on the condition that the papers … be served on the defendant by another method as well."[12]

The court dismissed the assertion that service by social media is "novel" or "unorthodox," and belittled the idea that those were reasons for disallowing an otherwise available method of service. "In this age of technological enlightenment," the court wrote, "what is for the moment unorthodox and unusual stands a good chance of sooner or later being accepted and standard, or even outdated and passé."[13]

It instead focused its analysis on whether, in constitutional terms, the service "comports with the fundamentals of due process." Or in plain language: "If the summons for divorce is sent to what plaintiff represents to be defendant's Facebook account, is there a good chance he will receive it?"[14]

For three reasons, the court found that service on the husband through his Facebook account satisfied the legal requirements of due process.

First, the wife provided evidence to verify that the account was actually her husband's and not someone else's—an obvious necessity for service to be effective. This analysis is tricky and the court demonstrated a commendable understanding of the ins and outs of "spoofed" accounts.

Second, the court found that the wife provided evidence that the husband regularly checked his account—a necessity for service to be timely, affording her husband the opportunity to respond to the summons.

Third, the court found that a supplementary means of service, in addition to service through Facebook, was not necessary, because—quite simply—there was no way to effect it. Absent some mailing or other address, any additional form of service was unlikely likely to accomplish anything.

Rejecting Newspaper Publication

Almost as an aside, the court considered whether it should authorize service by publication, a common and authorized method under the CPLR. Even though the court acknowledged that service by publication "is probably the method of service most often permitted in divorce actions when the defendant cannot be served by other means," it still found that service via Facebook, by itself, was more appropriate.

As was recognized by even the official comments to the CPLR, publication by service is "not a method of service calculated to give actual notice."[15] To the contrary, it is a vestige of a pre-Internet era in which service through a newspaper was the most technologically advanced and effective way of providing alternative service when traditional, more direct methods were unavailable. Publication in large circulation, general interest newspapers is generally prohibitively expensive, so "plaintiffs are often granted permission to publish the summons in such newspapers as the New York Law Journal or the Irish Echo." As the court in *Baidoo* noted, "[i]f that were to be done here, the chances of defendant, who is neither a lawyer nor Irish, ever seeing the summons in print … are slim to none."[16]

Thus, although newspaper publication is explicitly permitted by statute and Facebook publication is not, the court held that the latter was more likely actually to accomplish the statute's goals. As technology moves forward, the law must do so as well. And where the legislature has recognized that necessity and has created tools like the alternative service provision, courts should not be shy about using them.

Careful Conclusions

It is tempting to read *Baidoo* as a blanket acceptance of Facebook as a new frontier for service of process, and some commentators have done so. But that would be a mistake. *Baidoo* is a nuanced review of a particular situation in which, on an extensive factual record, the court determined that a Facebook private message was the best way to get the summons and complaint into the hands of the defendant. The fact that other courts had been shy about doing so, or that the technology was novel or unfamiliar, was irrelevant: What mattered to the court was the particular situation before it.

The court was able to consider the particular factual situation before it, and craft an appropriate remedy, because of the flexibility provided by the legislature in the DRL's service provisions. And that may be the most important take-away from *Baidoo*. In the context of a fast-moving, fluid technology that touches millions of lives, legislators cannot be expected to address every change as it occurs. Sometimes the best answer is to provide the courts with flexible tools and hope they use them with appropriate care, as the court did here.

Endnotes:

1. *Baidoo v. Blood-Dzraku*, 5 N.Y.S.3d 709, 711 n.2 (N.Y. Sup. Ct. 2015).

2. Id.

3. Id. at *2 (characterizing DRL §232(a) as prescribing personal delivery of the summons as "[t]he standard method" or "the method of first resort" in a divorce action).

4. Id. at *2. See DRL §232(a)(2)(b).

5. CPLR §308(2)-(4).

6. CPLR §315.

7. CPLR §308(5).

8. *Hollow v. Hollow*, 194 Misc.2d 691, 696 (Sup Ct. Oswego Cnty. 2002), quoted in *Baidoo*, 5 N.Y.S. 3d at 712. See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

9. *Baidoo*, 5 N.Y.S.3d at 713.

10. Id. at 712.

11. Id. at 713.

12. Id.

13. Id.

14. Id. at 714.

15. CPLR §315 cmt. (McKinney) (quoting N.Y. Adv. Comm. on Prac. & Proc., Second Prelim. Rep., Legis. Doc. No. 13, p.167 (1958)).

16. *Baidoo*, 5 N.Y.S.3d at 715.

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