IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

STEPHEN M. SAXON, et al.,	:	
	:	
Plaintiff,	:	
	:	**Case No. 300573-V**
v.	:	
	:	
ROBERT W. EMMETT, III, et al.	:	
	:	
Defendants.	:	

MEMORANDUM OPINION

On September 12, 2008, plaintiff Stephen M. Saxon ("Saxon"), a Maryland resident, and four other individuals (who are not Maryland residents), sued defendant Robert W. Emmett, III ("Emmett") and defendant Sanctuary, LLC ("Sanctuary"), asserting several causes of action arising out of an alleged "Ponzi-scheme" perpetrated by the defendants. (DE # 1) The defendants moved to dismiss the complaint on a variety of grounds (DE # 13), and for a protective order (DE # 27), precluding discovery pending a ruling on the dismissal motion. The court held a hearing on March 4, 2009.

At the conclusion of the hearing, the court permitted discovery to proceed on the issues of personal jurisdiction and service of process. All other discovery was stayed. The reasons for the court's rulings are set forth below.

I.

According to the complaint, the plaintiffs made various investments with Emmett and entities either formed or controlled by Emmett. The initial investments were made between 1992 and 1999. None of these investment vehicles were located in the State of Maryland. (Complaint, ¶¶ 18-34). In 2000, Emmett proposed that the plaintiffs invest in

Sanctuary, a limited liability company he formed under the laws of the Commonwealth of Virginia. (Complaint, ¶¶ 35-36). In July 2002, Emmett allegedly advised the plaintiffs that he had contributed all of their previous initial investments and investment returns as additional ownership interests in Sanctuary. (Complaint, ¶ 38). Sanctuary, in turn, had purchased ownership interests in private residence clubs ("PRCs"), in St. John, U.S. Virgin Islands. (Complaint, ¶ 39).[1]

The plaintiffs alleged that in August 2007, Emmett advised them that further distributions would be delayed due to ongoing litigation regarding the PRCs. (Complaint, ¶ 43). When Emmett thereafter refused to provide the plaintiffs with information regarding the PRC litigation or the status of their investments (Complaint, ¶ 45), this lawsuit ensued. The complaint alleges five causes of action: Count I, breach of fiduciary duty; Count II, breach of the Sanctuary operating agreement; Count III unjust enrichment; Count IV, access to records under a Virginia statute; and Count V, constructive fraud.

II.

Emmett was served with process by a professional process server, who left the summons and complaint with Emmett's wife at the parties' residence in Williamsburg, Virginia. (DE # 7). Emmett challenges service of process claiming that he was not served at his usual place of abode. *See* Maryland Rule 2-121(a)(2).

Sanctuary was alleged to have been served by delivering the summons and complaint to the entity's office manager, at the company's headquarters in Williamsburg,

[1] On December 15, 2004, Sanctuary amended its Articles of Organization to effectuate a name change to FOLIO Collections, LLC. Because it is the same entity, for convenience the court will refer to it as Sanctuary.

Virginia. (DE # 8). No contention is made that Sanctuary was not properly served. *See Academy of IRM v. LVI Environmental Services, Inc*., 344 Md. 434, 446-49 (1997).

Before 1999, service by leaving a copy of the summons and complaint at a defendant's usual place of abode was considered a form of substituted service, available only after a defendant was shown to have evaded personal service. *Mooring v. Kaufman*, 297 Md. 342 (1983). As Judge Rodowsky explained, former Rules 107 a 3 and 104 h 1, adopted in 1966, were patterned after Section 308 of the New York Civil Practice Law and designed to give practical application to Maryland's then new long arm statute. *Id*. at 349-52. As a form of substituted service, the Rules were strictly construed. *Id*. at 354-55.

In 1999, the General Assembly enacted Chapter 434, Maryland Laws 1999 (House Bill 603), which was codified in section 6-312 of the Courts & Judicial Proceedings Article. Under this new statute, effective on October 1, 1999, the form of service discussed in *Mooring* was no longer a form of substituted service. Instead, the delivery of the summons and complaint to the defendant's dwelling or usual place of abode with a person of suitable age and discretion was no longer disfavored and became "as effective as actual personal service." MD. CODE ANN., CTS. & JUD. PROC. § 6-312(c)(2) (2006).

The new Maryland statute on service of original process was modeled after Rule 4(e)(2) of the Federal Rules of Civil Procedure. In light of the enactment of Chapter 434, on September 10, 1999, the Rules Committee of the Court of Appeals proposed an amendment to Maryland Rule 2-121 to conform the Maryland Rules to the new statute. Albert D. Brault, Esquire, explained that the Rules Committee debated this method of

service during the 1984 Rules revision but decided not to adopt it. However, in light of Chapter 434, an amendment to Rule 2-121 was proposed because: "The new statute requires it." Rule Committee Mins. at 64. As Mr. Brault noted, chapter 434 "supersedes the requirement of personal service on original process by allowing service to be effected by leaving copies of the summons and complaint at the defendant's home with a person of suitable age who resides at the home." *Id*. at 64.

On July 29, 1999, Delegate Dana Dembrow sent a letter to Assistant Attorney General Robert A. Zarnoch, Counsel to the General Assembly and now Judge Zarnoch of the Court of Special Appeals, requesting that Mr. Zarnoch's opinion on the scope and effect of House Bill 603 "for the purpose of clarifying the meaning of the new statute, thereby creating a legislative history." *Id*. at 64. By letter dated August 20, 1999, Mr. Zarnoch responded and explained that House Bill 603 would apply to all civil cases, and that the Rules Committee would propose an amendment to Rule 2-121 and "support the broader application of the changes brought about by HB 603." App. F to the Rule Committee Mins. New Maryland Rule 2-121(a) became effective on October 5, 1999.

As Judge Niemeyer has noted: "Adoption of this method in 1999 by a rule change and by legislation, *see* Code, Courts Article Section 6-312(c), for use as a matter of course marks a break with Maryland's tradition of generally requiring personal delivery to the defendant." P. NIEMEYER & L. SCHUETT, MARYLAND RULES COMMENTARY 106 (3d ed. 2003). The appellate courts of Maryland apparently have not had occasion to construe Maryland Rule 2-121(a) and Section 6-312(c) of the Courts Article in light of the 1999 changes. This case presents such an occasion.

Under Federal Rule 4(e)(2), if the procedure outlined in the Rule is followed properly, "the service will be effective even though the defendant did not actually receive the papers." 4A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, §1096 (3d ed. 2006). *See Rovinski v. Rowe*, 131 F.2d 687, 689 (6th Cir. 1942)(applying former Federal Rule 4(d)(1)). Appellate courts in States that have adopted nearly identical service provisions have held that actual receipt by the defendant of the summons and complaint is not necessary. *See, e.g.*, *Guthrie v. Ray*, 235 S.E.2d 146, 148-49 (N.C. 1977); *Fassett v. Evans*, 610 S.E.2d 841, 844-45 (S.C. App. 2005). *See also Karlsson v. Rabinowitz*, 318 F.2d 666, 668 (4th Cir. 1963)(holding that actual receipt of the summons and complaint was unnecessary, but that the defendant's actual notice of the suit was an important factor). Emmett concedes that he received actual notice of the lawsuit but contends, nonetheless, that service was improper.

As Judge Wilner stated in connection with construing an Act of the General Assembly: "The cardinal rule of statutory construction is to discern and implement the intent of the legislature, gleaned first from the language of the statute." *Harleysville Mut. Ins. Co. v. Zelinski*, 393 Md. 83, 94 (2006). The same legal principles apply when construing a Maryland Rule. *In re Victor B.*, 336 Md. 85, 94 (1994).

The language of section 6-312(c) is not ambiguous and the Legislature's intention in enacting Chapter 434 is plain. The amended language of Rule 2-121(a) is also plain and unambiguous. Consequently, there is no need to look beyond the language of the statute and the rule. *Bryant v. State*, 393 Md. 196, 202 (2006). Under both the statute and the rule, service of process is effective if a copy of the summons and complaint is delivered to the defendant's dwelling or usual place of abode and left with a person of

suitable age and discretion. Actual notice of the lawsuit or receipt of the court papers by the defendant is not required. Although unnecessary, resort to the legislative history of the statute and the minutes of the Rules Committee regarding the Rule amendment confirms this conclusion. *Georgia Pacific v. Benjamin*, 394 Md. 59, 80-81 (2006).

Improper service of process is a basis to vacate an enrolled judgment because, if shown, the court would not have acquired personal jurisdiction over the defendant. *Miles v. Hamilton*, 269 Md. 708, 712-14 (1973); *Sheehy v. Sheehy*, 250 Md. 181, 184-85 (1968); *J. Whitson Rogers, Inc. v. Hanley*, 21 Md. App. 383, 392-94 (1974). Consequently, improper service is a basis for dismissing a suit before the entry of a final judgment. Maryland Rule 2-322(a).

A return of service properly made under Maryland Rule 2-126 is presumed to be correct. The person attacking the propriety of service generally cannot overcome this burden by mere denials. *Ashe v. Spears*, 263 Md. 622, 627-29 (1971); *Little v. Miller*, 220 Md. 309, 315-16 (1959); *Parker v. Berryman*, 174 Md. 356, 359-60 (1938). This proposition was questioned in *dicta* but not decided in *Roddy-Duncan v. Duncan*, 157 Md. App. 197, 205 (2004). In that case, process was purportedly served by a party's girlfriend, not a processional process server. In this case, the affidavit of service was filed by a professional process server who would have no motive to misrepresent. *See Ashe*, 263 Md. at 628. The Supreme Court of Alabama has given the same presumption of correctness to the affidavit of a professional process server as would be afforded that of a Sheriff. *Powell v. Central Bank of the South*, 510 S.2d 171, 172-73 (Ala. 1987).

After a judgment is enrolled, the person attacking service of process must show by clear and convincing evidence that proper service was not made. *Harvey v. Slacum*,

181 Md. 206, 209 (1942); *J. Whitson Rogers, Inc.*, 21 Md. App. at 393. At this stage of the proceeding, however, the court need not decide the quantum of proof by which Emmett must show that service was improper. *Compare Ashe*, 263 Md. at 629 (stating that the test is clear and convincing evidence) *with Guen v. Guen*, 38 Md. App. 578, 583-85 (1978)(assuming, but not deciding, that the burden is clear and convincing on a motion raising preliminary objection). A defect in service of process is jurisdictional, and the court cannot proceed to a valid final judgment absent proper service of process. *Miles*, 269 Md. at 713; *Guen*, 38 Md. App. at 585.

Emmett filed an affidavit with his motion to dismiss stating that in June 2007, he changed his residence from Williamsburg, Virginia to St. John, U.S. Virgin Islands. Emmett's wife, Pauline Emmett, continues to reside at the parties' home in Williamsburg and was the person with whom the process server left the summons and complaint. Although he concedes that his wife is a person of suitable age and discretion, Emmett contends that service of process was defective because the Williamsburg residence was not his usual place of abode at the time process was delivered. Notably, Emmett did not aver in his affidavit: (1) that he no longer owns or has an interest in the residence where his wife received the summons and complaint; (2) that he is in any way estranged from his wife; (3) that he has permanently relocated from Virginia to St. John; (4) the reason for the alleged "relocation;" (5) that he is no longer registered to vote in Virginia; (6) that he no longer holds a Virginia driver's license; or (7) that he informed the Supreme Court of Virginia where he currently resides for purposes of maintaining his law license. *See Rosa v. Cantrell*, 705 F.2d 1208, 1216 (10th Cir. 1982), *cert. denied*, 464 U.S. 821 (1983)(the defendant bore the burden of proving that he established a new dwelling place,

a mere assertion was not enough, and evidence that his family still resided at the former marital residence indicated that it was his usual place of abode).

Ordinarily, the court would likely conclude that Emmett failed to carry his burden of proof, even if it were simply by a preponderance of the evidence, to rebut the presumption that service was proper. *See Ashe*, 263 Md. at 628-29. However, because there will be a need to conduct discovery regarding personal jurisdiction, as discussed below, prudence dictates that the parties ventilate this issue factually so that it can be decided on a more fulsome record.

The court declines Emmett's request to limit discovery to interrogatories and requests for production of documents. All experienced litigators know that oral examination is a superior method of truth seeking rather than simply relying on an opponent's written answers to interrogatories, which can be artfully crafted by counsel. *See Mill-Run Tours, Inc. v. Khashoggi*, 124 F.R.D. 547, 549-50 (S.D.N.Y. 1989); *Greenberg v. Safe Lighting Inc*., 24 F.R.D. 410, 411 (S.D.N.Y. 1959). Moreover, even if a putative deponent has submitted a declaration on a subject, a party still is entitled to test these assertions by oral examination. *See Nakash v. U.S. Department of Justice*, 128 F.R.D. 32, 35 (S.D.N.Y. 1989).

III.

Emmett and Sanctuary contend that the court may not lawfully exercise personal jurisdiction over either of them because neither has or had sufficient contacts with Maryland. The only nexus with Maryland, they contend, is that one of the plaintiffs, Saxon, happens to live in Maryland. The defendants contend that this suit is essentially a

dispute with a Virginia LLC, and that the case should have been brought, if at all, in Virginia.

Paragraph 16 of the complaint alleges:

> At all times relevant to this Complaint, Emmett purposefully and regularly solicited Saxon in Maryland to persuade Saxon to make investments with and through him. Emmett purposefully and regularly initiated telephone calls to Saxon in Maryland and mailed documents to Saxon soliciting investment in Emmett's investment opportunities. Emmett realized substantial revenue because of his initiation of and regular solicitation of Saxon in Maryland. Emmett knowingly engaged in conduct, as further described herein, that resulted in substantial injury in Maryland.

On a motion to dismiss for lack of personal jurisdiction, the court may receive evidence without converting the motion to one for summary judgment under Rule 2-501. *Bond v. Messerman*, 391 Md. 706, 718 (2006). "If facts are necessary in deciding the motion, the court may consider affidavits or other evidence adduced during an evidentiary hearing." *Beyond Systems, Inc. v. Realtime Gaming Holding Co*., 388 Md. 1, 12 (2005)(footnote omitted).

The plaintiffs contend that the averments recited in paragraph 16 of the complaint are sufficient, without more, for the court to exercise personal jurisdiction over both Emmett and Sanctuary under Maryland's long-arm statute, which is codified in section 6-103 of the Courts & Judicial Proceedings Article. The defendants contend that the complaint's rather boilerplate allegations satisfy neither the long-arm statute nor the minimum contacts requirements of the Due Process Clause. Moreover, Emmett filed an affidavit controverting the complaint's fairly sparse allegations and stating, affirmatively, that his only contacts with Saxon occurred in the District of Columbia.

The court engages in a now familiar two part analysis when a defendant moves to dismiss for lack of personal jurisdiction. First, the court must determine whether the allegations of the compliant fairly invoke any of the provisions of the long-arm statute. Second, the court must determine, even so, whether the exercise of personal jurisdiction in the forum state would comport with Due Process. *See Republic Properties Corp. v. Mission West Properties, LP*, 391 Md. 732, 760-61 (2006); *Taylor v. CSR Limited*, 181 Md. App. 363, 374-76 (2008). Once challenged, the burden of demonstrating the existence of sufficient facts so that the court may lawfully exercise personal jurisdiction over any of the defendants rests with the plaintiffs. *Craig v. General Finance Corp. of Illinois*, 504 F. Supp. 1033, 1034 (D. Md. 1980).

Although basically boilerplate, taken as true, the allegations of section 16 of the complaint do not lack a minimal level of plausibility sufficient to implicate at least the transacting business prong of the Maryland long-arm statute, and possibly, other provisions. *See Snyder v. Hampton Industries, Inc.*, 521 F. Supp. 130, 141 (D. Md. 1981), *aff'd*, 758 F.2d 649 (4th Cir. 1985);[2] *Craig*, 504 F. Supp. at 1038; *Bahn v. Chicago Motor Club*, 98 Md. App. 559, 570 (1993); *Jason Pharmaceuticals, Inc. v. Jianas Brothers Packaging Co., Inc.*, 94 Md. App. 425, 430-34 (1993). The plaintiffs correctly note that, as a matter of pleading, a complaint must contain "only such statements of fact

[2] The Court of Special Appeals has declined to follow *Snyder* with respect to whether the contacts of an in-state agent may be attributed to an out-of-state principal for purposes of determining personal jurisdiction. *Zavian v. Foudy*, 130 Md. App. 689, 699 (2000). This case presents no occasion to attempt to reconcile these seemingly disparate views as the plaintiffs do not allege that the defendants conducted business in Maryland via an agent. *See* J. Utermohle, Maryland's Diminished Long-Arm Jurisdiction in the Wake of Zavian v. Foudy, 31 U. Balt. L. Rev. 1 (2001). In any event, the Court of Special Appeals has accepted *Snyder's* view that a non-resident may transact business in Maryland even if he never entered the state, either personally or through an agent. *Sleph v. Radke*, 76 Md. App. 418, 427, *cert. denied*, 314 Md. 193 (1986); *see also Capital Source Finance, LLC v. Delco Oil Co*., 520 F. Supp.2d 684, 691 (D. Md. 2007).

as may be necessary to show the pleader's entitlement to relief." Maryland Rule 2-303(b). The plaintiffs also correctly note that it is the defendants who must raise questions of personal jurisdiction before filing an answer to the complaint. Maryland Rule 2- 322(a).

The defendants have raised questions of personal jurisdiction. Read as a whole, the complaint is far too bereft of specifics, especially when the court considers Emmett's affidavit, *see Taylor*, 181 Md. App. at 373-74, to determine at this juncture whether it can properly exercise personal jurisdiction under any subsection of section 6-103(b) of the long-arm statute, or whether such exercise of personal jurisdiction over either of the defendants would not offend due process. *See Bond v. Messerman*, 391 Md. 706, 722 -31 (2006).[3]

However, in contrast with the complaint in *Beyond Systems*, 388 Md. at 28-29, the complaint in this case sets forth enough detail, albeit barely, to allow the plaintiffs to conduct discovery. The complaint, in regard to personal jurisdiction, is not clearly frivolous, and the court can't help but notice the corresponding thinness of Emmett's affidavit in support of his motion to dismiss on jurisdictional grounds. As a consequence, the court will exercise its discretion and permit all parties to conduct discovery on the issue of whether this court may exercise personal jurisdiction over either, or both, of the defendants. *See Androutsos v. Fairfax Hospital*, 323 Md. 613, 639-40 (1991); *Hart*

[3] As to the Maryland resident with whom Emmett allegedly had contacts, it would seem relatively simple for Saxon to detail those contacts in an affidavit and attach thereto any supporting documentation to establish that the defendants transacted business in Maryland. *See Bahn*, 98 Md. App. at 570; *Jason Pharmaceuticals*, 94 Md. App. at 433-34. Of course, the plaintiff may file an amended complaint to flesh out their jurisdictional, or other, contentions. Maryland Rule 2-341. *See Prudential Securities, Inc. v. E-Net, Inc*., 140 Md. App. 194, 231-34 (2001).

Holding Co., Inc. v. Drexel Burnham Lambert, Inc., 593 A.2d 535, 539-40 (Del. Ch. 1991).

Discovery on personal jurisdiction shall be completed within sixty (60) days hereof. Any party may use any method of discovery suitable to the task. Maryland Rule 2-401(a). Supplemental briefs and accompanying evidentiary materials should be filed within ninety (90) days. Any party which requests a further hearing shall do so in accordance with Maryland Rule 2-311(f).

IV.

The defendants have raised a host of other grounds to dismiss the complaint, including that: (1) the plaintiffs' claims are barred by Maryland's three year statute of limitations;[4] (2) certain claims must be brought derivatively rather than directly;[5] (3) the complaint does not properly plead either demand-futility or demand-refused if the claims are derivative rather than direct;[6] (4) the allegations are insufficient to state a cause of action for unjust enrichment;[7] and (5) the complaint inadequately pleads constructive

[4] *See, e.g., Dashiell v. Meeks*, 396 Md. 149, 168-70 (2006); *Frederick Road Ltd. Partnership v. Brown & Sturm*, 360 Md. 76, 95-117 (2000); *O'Hara v. Kovens*, 305 Md. 250, 294-95 (1986); *Pappano v. Chevy Chase Bank, F.S.B.*, 145 Md. App. 670, 678-83 (2002).

[5] *See, e.g., Paskowitz v. Wohlstadter*, 151 Md. App. 1, 9 (2003); *see also Gentile v. Rossette*, 906 A.2d 91 (Del. 2006); *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766 (Del. 2006); *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004).

[6] *See, e.g., Mona v. Mona Electric Corp.*, 176 Md. App. 672, 695-700 (2007); *Bender v. Schwartz*, 172 Md. App. 648, 665-67 (2007); *Bennett v. Damascus Community Bank*, 2006 WL 2458718 (April 6, 2006).

[7] *See, e.g., Hill v. Cross Country Settlements, LLC.*, 402 Md. 281, 295 (2007); *Royal Investment Group, LLC v. Wang*, 183 Md. App. 406, 438-44 (2008); *Jackson v. 2109 Brandywine, LLC*, 180 Md. App. 535, 574-76 (2008).

fraud[8] or fraudulent concealment.[9] "[I]nteresting as these questions might be, they are not properly before us," *Della Rata v. Dixon*, 47 Md. App. 270, 275 (1980), and must await a determination of whether process was effected upon Emmett, and whether the exercise of personal jurisdiction is proper.

Dated: March 9, 2009

RONALD B. RUBIN, Judge

[8] See, e.g., *Walsh v. Edwards*, 233 Md. 552, 557 (1964); *Fowler v. Benton*, 229 Md. 571, 581-82 (1962); *Brager v. Friedenwald*, 128 Md. 8, 32 (1916). *See also Zirn v. VLI Corp*., 681 A.2d 1050, 1053-56 (Del. 1996); *Bocchini v. Gorn Management Co*., 69 Md. App. 1, 19-21 (1986).

[9] *See, e.g., MacBride v. Pishvaian*, 402 Md. 572, 581-86 (2007); *Doe v. Archdiocese of Washington*, 114 Md. App. 169, 187-90 (1997).