IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MARY CUMMINS	§	
	§	
VS.	§	CIVIL ACTION NO. 4:12-CV-560-Y
	§	
AMANDA LOLLAR, et al.	§	

ORDER REGARDING MOTIONS

Before the Court are the following motions:

(1) Defendant Dorothy Hyatt's Motion to Dismiss Under Federal Rules of Civil Procedure 12(b)(4) and (5) **(doc. 70)**;

(2) Defendant Dorothy Hyatt's Motion to Dismiss Under Federal Rule of Civil Procedure 12(b)(6) **(doc. 74);**

(3) Defendant Kate Rugroden's Motion to Dismiss Under Rules 12(b)(4) and (5) **(doc. 71)**;

(4) Defendant Kate Rugroden's Motion to Dismiss Under Rule 12(b)(6) **(doc. 77)**

After review of the motions, responses, replies, and sur-replies, the motions to dismiss under Rules 12(b)(4) and (5) of both Hyatt and Rugroden are DENIED. The services attempted on Hyatt and Rugroden are hereby QUASHED. These defendants' motions under Rule 12(b)(6) are also DENIED without prejudice to their re-filing upon proper service.

I. BACKGROUND

The instant lawsuit arose out of an incident that occurred at a bat sanctuary called Bat World, which is located in Mineral Wells, Texas. Plaintiff Mary Cummins alleges that she was working at Bat World as an intern when she sustained injuries. Cummins claims that Bat World's president, Amanda Lollar,

"instructed Cummins to enter the 'wild sanctuary' building" and "put on a hair net/hat, booties[,] and a head lamp to enter the darkened building to clean guano and check for ill, injured[,] and orphaned bats." Pl.'s 2nd Am. Compl. at 1-2. Lollar allegedly instructed Cummins to "climb up a step stool to climb through a window to go out onto the roof of the building to look for bats outside." *Id.* at 2. According to Cummins, as she attempted to climb through the window, she "hit her head on a piece of wood," which caused her to fall backward. *Id.* Cummins claims that she sustained injuries to her head and back and passed out as a result of the fall.

Cummins, who is proceeding pro se, originally filed suit against Bat World and Lollar in the United States District Court for the Central District of California. She then filed an amended complaint, adding Hyatt as a defendant. The case was later transferred to this district. Following transfer, Cummins sought and was granted leave to amend her complaint a second time. Cummins filed her second amended complaint, adding Rugroden as a defendant.

Cummins asserts claims against Bat World and several of its officers and board members for (1) negligence, (2) negligent interference with prospective economic advantage, and (3) negligent infliction of emotional distress. Bat World and Lollar previously moved for dismissal of Cummins's claims under Rule

12(b)(6). This Court granted the motion in part, dismissing Cummins's claims against Bat World and Lollar for negligent interference with prospective economic advantage and negligent infliction of emotional distress. The Court construed Cummins's negligence claim as a premises-liability claim and concluded that Cummins had stated a claim for premises liability. Accordingly, the Court denied the motion to dismiss with respect to that claim.

Hyatt, Bat World's Vice President, and Rugroden, a Bat World board member, have now moved for dismissal of Cummins's claims against them. Hyatt and Rugroden both allege that they were never properly served in the instant action. Alternatively, they claim that Cummins has failed to state a claim against them.

II. Service of Process

The Court first addresses Hyatt's and Rugroden's claim that Cummins failed to properly serve them. Hyatt alleges that she was not properly served with both a summons and a copy of the complaint. She claims that a private process server named Zeke Jackson came to her home on July 5, 2013. Hyatt answered the door to Jackson, who did not identify himself at that time. According to Hyatt, Jackson said "You're Dorothy Hyatt, yes, you are." Jackson apparently looked down at what is assumed to be a picture of Hyatt. Hyatt claims that she closed the door. Jackson began ringing the doorbell. Hyatt went to the backyard

to get her husband, but when Hyatt and her husband returned to the front door, Jackson had already left. Hyatt claims that Jackson left a copy of the complaint on a porch bench, but no summons. On the complaint, Jackson had written "Served July 5, 2013 Zeke Jackson."

According to Hyatt, she later received an envelope via regular mail from "Dr. Zeke's Auto Sales," which she did not open. Cummins later filed a proof of service with this Court, signed by Jackson, which states that he personally served Hyatt. Hyatt disputes this in the affidavit attached to her motion to dismiss, stating that she has never been served in this matter, either through personal service or by certified or registered mail.

The proof of service also states that Jackson personally served Rugroden. Rugroden points out that her last name is misspelled on the proof of service ("Rugrode"). She further complains that, although the proof of service lists the date of service, it does not, as is customary, list a time. Finally, in the affidavit attached to her motion to dismiss, she denies that Jackson ever came to her home to serve her.

According to Rugroden, on July 5, 2013, the alleged date of service, she was away from her home for most of the day attending to errands. Her husband, who was at home while she was out, also submitted an affidavit stating that Jackson never came to their

home to serve Rugroden. Like Hyatt, Rugroden received an envelope by regular mail from Dr. Zeke's Auto Sales several days after the alleged date of personal service.

In response to Hyatt's and Rugroden's claims that Jackson never properly served them, Cummins submitted a declaration from Jackson. Jackson states that he served Hyatt in her home on July 5 and later mailed a copy of the amended complaint and summons to the same address.

With respect to Rugroden, Jackson states that he served her at her home and later mailed a copy of the complaint and summons to the same address. He acknowledges that he left off the "n" when he handwrote Rugroden's name on the proof of service. He points out that Rugroden's name is spelled correctly on the summons.

When service of process is challenged, the serving party bears the burden of establishing its validity. *Aetna Bus. Credit, Inc. v. Universal Decor & Interior Design, Inc.*, 635 F.2d 434, 435 (5th Cir. 1981). The general rule is that "[a] signed return of service constitutes prima facie evidence of valid service, which can be overcome only by strong and convincing evidence." *People's United Equip. Fin. Corp. v. Hartmann*, 447 Fed. App'x 522, 524 (5th Cir. 2011).

Here, Cummins filed a proof of service (doc. 65), in which the process server, Jackson, declared under penalty of perjury

that copies of the summons were personally served on Hyatt and Rugroden. Cummins has also submitted Jackson's declaration where he states that he personally served Hyatt and Rugroden.

Through their own sworn affidavits, Hyatt and Rugroden dispute Jackson's declaration. Hyatt admits that Jackson came to her home, but denies that he personally served her. According to Hyatt, Jackson simply left a copy of the complaint, without a summons, on her front porch. Rugroden claims that Jackson never came to her home to serve her.

In his declaration, Jackson states that he "mailed" a copy of the amended complaint and summons to both Hyatt and Rugroden. He does not expressly state that the service documents were mailed via certified or registered mail as required under Texas law.[1] Hyatt and Rugroden acknowledge receiving an envelope through **regular mail** from Jackson, but have never received anything by certified or registered mail.

[1] Mail service is not directly authorized under the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 4(e)(1). Rule 4(e)(1) allows service on individuals "following state law for serving a summons." The Texas Rules of Civil Procedure authorize service, by authorized persons, via certified or registered mail. Tex. R. Civ. P. 103; 106(a)(2). There appears to be some conflict in the case law with respect to who is authorized to perform service by mail under Rule 106(a)(2). *Compare Kleppinger v. Assocs. Corp. of N. America*, No. 3:99-CV-1662-L, 2003 WL 22329032, *2-3 (N.D. Tex. Oct. 6, 2003) (Lindsay, J.) (observing that under Rule 106(a)(2), only the only the clerk of the court may serve process by certified or registered mail) *with P&H Transp., Inc. v. Robinson*, 930 S.W.2d 857, 859 (Tex. App.–Houston [1st Dist.] 1996, writ denied) (holding service by authorized private process server valid because "service by mail may be made not only by the clerk but also by other authorized persons"). The Court urges Cummins, if she chooses service by certified or registered mail, to comply with the plain language of Rule 106(a)(2) and request service by the clerk of the court.

"Dismissal of a case under Rules 12(b)(4) or 12(b)(5) is not appropriate where there is a reasonable prospect that plaintiff ultimately will be able to serve defendant properly." *Cockerham v. Rose*, No. 3:11-CV-277-B, 2011 WL 1515159, *2 (N.D. Tex. Apr. 18, 2011) (Boyle, J.) (citations and internal quotation marks omitted). Dismissal is appropriate where "there is no reasonably conceivable means of acquiring jurisdiction over the person of a defendant." *Id.* (citation omitted). Where that is not the case, "a district court has discretion to quash the defective service of process and provide a plaintiff another opportunity to effect proper service of process." *Id.* (citation omitted). In determining whether to exercise its discretion, a district court should be mindful of a plaintiff's pro-se status and her good-faith attempt to effect service. *Id.*

The Court is aware that Cummins has had considerable difficulty serving these defendants. Cummins attempted to serve Hyatt and Rugroden in November 2012 via certified mail at Bat World. Cummins filed a motion with this Court asking it to approve service via certified mail even though the signature cards had been lost (doc. 59). The Court denied the motion, but it granted Cummins "one final opportunity" to file proof of adequate service on Hyatt and Rugroden (doc. 62). Cummins filed a proof of service, but the adequacy of service is disputed by Hyatt and Rugroden for the reasons set out above.

Cummins is proceeding pro se in this matter and is prosecuting her case from out of state. Although the adequacy of Cummins's latest attempt at service is disputed by both Hyatt and Rugroden, the Court cannot say that Cummins will not be able to serve these defendants properly if given another opportunity. The Court is also of the opinion that Cummins made a good-faith effort to comply with the Court's previous order in her latest attempt at service.

Accordingly, these defendants' motions to dismiss under Rules 12(b)(4) and (5) are DENIED. The Court hereby QUASHES the services attempted on Hyatt and Rugroden. The motions to dismiss under Rule 12(b)(6) are DENIED without prejudice to re-filing similar motions following proper service of process.

Cummins is DIRECTED to serve these defendants on or before **March 28, 2014**.[2] Cummins should ensure that she fully complies with the requirements for summons and service set out in Rule 4 of the Federal Rules of Civil Procedure and, if service is sought to be effected by registered or certified mail, then with the requirements of Texas Rules of Civil Procedure 103 and 106. If

[2] Federal Rule of Civil Procedure 4(m) provides that if a defendant is not served within 120 days of filing the complaint, the Court must either "dismiss the action without prejudice against that defendant or order that service be made within a specified time." More than 120 days has passed since Cummins filed her amended complaint. Consistent with the discussion above, though, the Court orders Cummins to serve Hyatt and Rugroden by a specified time rather than dismiss her claims against these defendants. *See Monroe v. Tex. Utils. Co.*, No. 3:01-CV-1012D, 2002 WL 413866, *3 (N.D. Tex. Mar. 11, 2002) (Fitzwater, C.J.) (extending deadline for service under Rule 4(m) for pro-se plaintiff).

proper service is not made by the deadline set out in this order, Hyatt and Rugroden will be dismissed from this action.

SIGNED February 28, 2014.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE