

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA  
CENTRAL DIVISION

CHAD A. CURTIS,

Plaintiff,

vs.

NID PTY, LTD., et al.,

Defendant.

**No. 4:02-cv-40362**

**ORDER ON DEFENDANT'S  
MOTION TO DISMISS**

This matter comes before the Court on Defendant NID PTY's Motion to Dismiss for failure to obtain personal jurisdiction. A hearing on the motion was held on September 27, 2002. Plaintiff Curtis was represented by Harley Erbe; Defendant NID PTY was represented by Henry Harmon. For the following reasons, Defendant's Motion to Dismiss for lack of personal jurisdiction is granted, and Plaintiff's Motions to Strike, Conduct Jurisdictional Discovery, and to Submit a Surreply Brief are denied.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

On November 16, 1999, Plaintiff Chad Curtis ("Curtis") was injured when his boot became entangled in the conveyor system of a "Mogul 5" candy processing machine at the Trolli Candy Factory in Creston, Iowa. On August 27, 2001, twenty-one months after the accident, Curtis filed a product liability suit in Iowa District Court for Union County against NID PTY, the manufacturer of the Mogul 5. Curtis

alleges his injuries were caused by Defendant's negligence, failure to warn, and defectively designed product.

NID PTY is an Australian corporation. Effecting service of process upon an Australian defendant is complicated by the fact that Australia is not a signatory to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, or any other international agreement governing service of process.

Acting upon the advice of another attorney, Plaintiff's counsel contacted APS International ("APS") in Minneapolis to effect service on NID PTY. Following instructions from APS, Plaintiff filed a motion in the Iowa District Court to have APS appointed Special Process Service. The court granted the motion and also issued a Letter Rogatory requesting judicial assistance from the appropriate judicial authority of Australia.

On September 11, 2001, Plaintiff sent APS the requested documents and fee. In a letter dated October 11, 2001, APS acknowledged receipt of the documents and warned Plaintiff it could take up to one year to serve the Defendant. APS also requested information about the deadline for service and any informal channels through which the Defendant could be served.

On November 19, 2001, APS sent Plaintiff a letter informing him that the documents had been forwarded to the United States Embassy in Australia. APS

stated it could not guarantee the foreign authorities would carry out Plaintiff's request. On November 26, 2001, Plaintiff filed an extension to serve the Defendant. On November 30, 2001, Iowa District Court Judge Brown granted Plaintiff until November 26, 2002, to serve the Defendant.

On June 28, 2002, NID PTY received copies of the Original Notice, Petition at Law, and Jury Demand; neither the Defendant nor the Plaintiff knows how these copies were obtained. On July 25, 2002, Defendant, through local counsel, filed a Notice of Removal and on July 30, 2002, filed this Motion to Dismiss, asserting Plaintiff has failed to obtain personal jurisdiction over the Defendant.

In an Order dated October 18, 2002, this Court ruled the Motion to Dismiss would not be ripe for review until the extension to effect service of process granted by the Iowa District Court expired on November 26, 2002. At that time, the parties were directed to supplement their pleadings on the issue of whether Defendant had been properly served. Defendant filed a supplemental brief renewing its Motion to Dismiss and stating no further attempts to serve the Defendant have been made. Plaintiff did not supplement his pleadings. The extension granted by the Iowa District Court has expired; therefore, the Court finds the Motion to Dismiss is ripe for review.

## **II. STANDARD FOR DISMISSAL**

“To defeat a motion to dismiss for lack of personal jurisdiction, [the] non-moving party need only make a prima facie showing of jurisdiction . . . .” Dakota

Indus., Inc. v. Dakota Sportswear, Inc., 946 F.2d 1384, 1387 (8th Cir. 1991). The ultimate burden is on the plaintiff to establish jurisdiction by a preponderance of the evidence. CutCo Indus., Inc. v. Naughton, 806 F.2d 351, 365 (2d Cir. 1986); May Dep't Stores Co. v. Wilansky, 900 F. Supp. 1154, 1159 (E.D. Mo. 1995) (“The party seeking to invoke the jurisdiction of a federal court bears the burden to establish that jurisdiction exists.”); see also Frederick v. Hydro-Aluminum S.A., 153 F.R.D. 120, 123 (E.D. Mich. 1994) (“When the validity of the service of process is contested, the plaintiff bears the burden of proving that proper service was effected.”). “A federal court in a diversity action may assume jurisdiction over nonresident defendants only to the extent permitted by the long-arm statute of the forum state and by the Due Process Clause.” Bell Paper Box, Inc. v. U.S. Kids, Inc., 22 F.3d 816, 818 (8th Cir. 1994) (quoting Morris v. Barkbuster, Inc., 923 F.2d 1277, 1280 (8th Cir. 1991)).

### **III. DISCUSSION**

Defendant bases the Motion to Dismiss on Plaintiff’s failure to meet his burden of showing personal jurisdiction exists because he has not properly served the Defendant. The personal jurisdiction inquiry begins with whether the Defendant has been properly served. See Dodco v. Am. Bonding Co., 7 F.3d 1387, 1388 (8th Cir. 1993) (“If a defendant is improperly served, the court lacks jurisdiction over the defendant.”). “[J]urisdiction is a threshold issue for the court, the district court has ‘broader power to decide its own right to hear the case than it has when the merits of

the case are reached.” Bellecourt v. United States, 994 F.2d 427, 430 (8th Cir. 1993) (quoting Osborn v. United States, 918 F.2d 724, 729 (8th Cir. 1990)).

This case was removed to federal court based on diversity of citizenship *after* Plaintiff attempted to serve the Defendant; therefore, Iowa law regarding service of process applies. See Allen v. Ferguson, 791 F.2d 611, 616 n.8 (7th Cir. 1986) (“In determining the validity of service prior to removal, a federal court must apply the law of the state under which the service was made, and the question of amenability to suit in diversity actions continues to be governed by state law even after removal.”) (citing 4 C. Wright & A. Miller, Federal Practice and Procedure § 1082 at 329-31 (1969)). Under Iowa law, it is Plaintiff’s burden to demonstrate Defendant has been properly served. Mokhtarian v. GTE Midwest Inc., 578 N.W.2d 666, 669 (Iowa 1998) (“Once a plaintiff files a petition, we believe it only appropriate that the plaintiff should bear the burden of ensuring that service of the original notice and petition on defendant is both proper and timely.”).

**A. § 617.3**

In his Petition at Law filed in state court, Plaintiff asserts jurisdiction over the Defendant is proper pursuant to Iowa Code § 617.3 (“§ 617.3”), Iowa’s Long Arm Statute. Iowa Code § 617.3 sets out the procedures for commencement of action upon foreign corporations. Iowa Code § 617.3 (2001). Defendant argues Plaintiff has not satisfied § 617.3. Specifically, Plaintiff has failed to (1) file duplicate copies of

the original notice with the Secretary of State; (2) mail notification of the filing with the Secretary of State within the required time; (3) pay the required fee; and (4) file proof of service. Defendant further argues the Iowa Supreme Court has “consistently held that statutes, such as section 617.3, setting up an extraordinary method of securing jurisdiction over nonresidents of this state must be construed strictly”.

Buena Vista Manor v. Century Mfg. Co., 221 N.W.2d 286, 288 (Iowa 1974).

However, in Buena Vista, the Iowa court found § 617.3 was satisfied because plaintiff had demonstrated “sufficient compliance”. The plaintiff in Buena Vista properly prepared the original notice and filed with the Secretary of State but did not properly serve the defendant until 24 days later. Id. at 287-88. The court reasoned proper service of the original notice upon the Secretary of State and timely mailing of the notification to defendant was sufficient compliance even though the defendant had not received the original notice within ten days of filing with the Secretary of State. Id. Similarly, the Eighth Circuit found sufficient compliance of Iowa’s nonresident motorist’s statute in a case in which the Commissioner of Public Safety was properly served within the statutory period even though the defendant did not receive notification within ten days as required by the statute. Heeney v. Miner, 421 F.2d 434, 436 (8th Cir. 1970).

In the present case, Plaintiff has not sufficiently complied with § 617.3. He has failed to file a copy of the original notice with the Secretary of State and offers no

proof an authorized agent or representative of NID PTY has been served. Rather than argue he has complied with § 617.3, Plaintiff proffers Iowa Rules of Civil Procedure provide an alternative method of effecting service upon a foreign corporation. Iowa R. Civ. P. 1.306 (“Rule” 1.306 ) (West Supp. 2002) (formerly cited as Iowa R. Civ. P. 56.2 (amended Nov. 9, 2001)).<sup>1</sup>

**B. Rule 1.306**

Plaintiff correctly asserts Rule 1.306 provides an alternative method of service upon a foreign corporation. Iowa R. Civ. P. 1.306 (West Supp. 2002). Iowa Rule of Civil Procedure 1.306 allows jurisdiction over corporations having the necessary minimum contacts with the state of Iowa in every case not contrary to the provisions of the Constitution and allows service upon the Defendant according to Rule 1.305 or “in any manner consistent with due process of law prescribed by order of the court in which the action is brought”. Iowa R. Civ. P. 1.306 (West Supp. 2002). Compliance with Rule 1.306 can be accomplished either by satisfying the provisions of service set forth in Rule 1.305 or by order of the court. Iowa R. Civ. P. Ann. § 1.305 (West Supp. 2002) (formerly cited as Iowa R. Civ. P. 56.1 (amended Nov. 9, 2001)); see also Life v. Best Refrigerated Exp., Inc., 443 N.W.2d 334, 336 (Iowa Ct. App. 1989)

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<sup>1</sup> The Iowa Rules of Civil Procedure were amended and renumbered on November 9, 2001 and went into effect February 15, 2002; Rule 56.2 is now Rule 1.306 and Rule 56.1 is now Rule 1.305. See Iowa R. Civ. P. Ann. §§ 1.305 & 1.306 (West Supp. 2002).

("[W]hen service is made pursuant to rule 56.2 *and in accordance with rule 56.1*, Iowa courts may have jurisdiction.") (emphasis added).

**1. Satisfaction of the Service Requirement of Rule 1.306 via Rule 1.305**

Rule 1.305 states in pertinent part that a corporate defendant is considered "served" if a copy thereof is delivered upon "any present or acting or last-known officer thereof, or any general or managing agent, or any agent or person now authorized by appointment or by law to receive service of original notice, . . .". Iowa R. Civ. P. Ann. § 1.305 (West Supp. 2002).

Although Plaintiff correctly asserts Rule 1.306 provides an alternative method to serve the Defendant, he never explains how he has complied with Rule 1.306. In Resistance to Defendant's Motion to Dismiss, Plaintiff states:

Plaintiff finds himself in a strange position in attempting to resist NID's Motion to Dismiss because he *does not yet know exactly who at NID received service* of Plaintiff's Petition and Original Notice or what that person's position with NID is. . . . *APS has apparently effected service* upon NID through diplomatic channels in conjunction with the United States Department of State. . . . Thus, *Plaintiff does not know this information and can only assume* that the State Department served the correct person at NID. . . . *The court ought to assume this as well* because NID has not claimed that the wrong individual was served.

Plaintiff's Resistance to Defendant's Motion to Dismiss at 2 (hereinafter Pl.'s Resist.) (emphasis added).

Plaintiff relies on Mahaska Bottling Co. v. Southdown Sugars, Inc. for the proposition a defendant can be served in compliance with Rule 1.306 rather than §

617.3. Mahaska Bottling Co. v. Southdown Sugars, Inc., 79 F.R.D. 704, 705 (S.D. Iowa 1978). In Mahaska Bottling, the court found although plaintiff had not complied with § 617.3 in serving the foreign defendant, it had complied with Rules 56.1 and 56.2 (now Rules 1.305 and 1.306). Id. However, that case is distinguishable from the present case. In Mahaska Bottling, the plaintiff *served a registered agent* for the defendant. Id. Nothing in this record allows the Court to conclude Curtis has served a registered agent for NID PTY.

## **2. Satisfaction of the Service Requirement of Rule 1.306 by Order of the Court**

Rule 1.306 also allows service “in any manner consistent with due process of law prescribed by order of the court in which the action is brought”. Iowa R. Civ. P. 1.306 (West Supp. 2002). The Iowa District Court for Union County filed a Letter Rogatory on August 31, 2001, in which the court requested the Original Notice, Petition, and Jury Demand be served “by personal service into the hands of a director, managing agent, or other person authorized to accept service, or in any manner of service consistent with the law of Australia” (Def.’s Ex. G, attach. Pl.’s Ex. F). In the absence of any record that an authorized agent ever received the Original Notice, the Court cannot find Plaintiff has complied with the terms of the court order.<sup>2</sup>

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<sup>2</sup> Plaintiff relied solely on APS to effect service upon NID PTY; Australia prohibits foreign service officers from serving process on behalf of private litigants. See Judicial Assistance - Australia, available at [http://law.gov.au/aghomes/legalpol/cld/int\\_judicial\\_asst/Welcome.html](http://law.gov.au/aghomes/legalpol/cld/int_judicial_asst/Welcome.html). Australia does allow service by international registered mail, return receipt requested, and by *Australian* private process services. Id.

Plaintiff has not met his burden of showing compliance with Rule 1.306. Plaintiff has not shown proof of service, nor does he know who, if anyone, accepted service; instead, he asks the Court to *assume* the proper person was served. Plaintiff defends the attempted service by relying on the fact he selected and complied with the requests of APS. Plaintiff's Exhibits C-K lay out the attempts made to effect service of process. Unfortunately, Plaintiff did not heed the warning in APS's letter dated November 19, 2001, which stated "APS cannot influence or guarantee the performance of those foreign authorities who carry out your request" (Pl.'s Ex. K). Ultimately, the request was not carried out.

The argument that NID PTY has been aware of the lawsuit since June 28, 2002, is equally unconvincing. Iowa law does not recognize actual notice as a substitute for *service* of the original notice. Henry v. Shober, 566 N.W.2d 190, 191-92 (Iowa 1997) (finding service of the original notice and petition is required even though the party had actual notice of plaintiff's intention to sue).

Whether a plaintiff relies on § 617.3 or Rule 1.306 to establish personal jurisdiction, the initial step is to have the defendant properly served. Dodco v. Am. Bonding Co., 7 F.3d at 1388 ("If a defendant is improperly served, the court lacks jurisdiction over the defendant."); Printed Media Servs., Inc., v. Solna Web, Inc., 11 F.3d 838, 843 (8th Cir. 1993); Roebuck v. United States, 1997 WL 875661, at \*4 (S.D. Iowa Dec. 23, 1997).

### C. Minimum Contacts<sup>3</sup>

In resistance to the motion to dismiss and in multiple motions filed with the Court,<sup>4</sup> Plaintiff departs from the issue of proper service and raises the issue of minimum contacts. He argues Defendant should not be allowed to raise the argument that Plaintiff failed to show NID PTY had the necessary minimum contacts to establish personal jurisdiction. Plaintiff avers this issue was not raised until Defendant's reply and, as such, constitutes a new argument and cannot be considered in the pending Motion to Dismiss.

In his Petition at Law, Plaintiff claimed jurisdiction over NID PTY was proper pursuant to § 617.3. Accordingly, Defendant based its Motion to Dismiss on Plaintiff's failure to comply with § 617.3. Plaintiff resists by asserting he does not have to

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<sup>3</sup> Minimum contacts refers to the second step of the two-step personal jurisdiction analysis. The first step determines whether the state has a statute or rule which confers jurisdiction to the fullest extent of the constitution. Hodges v. Hodges, 572 N.W.2d 549, 551-52 (Iowa 1997). The next step determines whether the "Defendant has 'certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'". Id. at 551 (quoting Heslinga v. Bollman, 482 N.W.2d 921, 922 (Iowa 1992) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945))). In Iowa, Rule 1.306 allows jurisdiction to the outer limits of due process; therefore, the two steps collapse into one. Id. at 552.

<sup>4</sup> On August 21, 2002, Plaintiff filed a Motion to Strike, Alternative Motion for Leave to Conduct Jurisdictional Discovery, and a Motion for Leave to Submit a Surreply Brief. (Clerk's Nos. 9 & 10.) This Court initially granted plaintiff's request to submit a surreply brief on the issue of minimum contacts (Clerk's No. 11); however, following a phone hearing with the parties, Magistrate Judge Bremer entered an Order staying submission of a surreply brief until the issue of service of process was resolved. (Clerk's No. 13.)

comply with § 617.3 because Rule 1.306 provides an alternative method of service. Defendant responds arguing (1) Defendant has not been served, and (2) Plaintiff has not satisfied Rule 1.306 *because* he has not established NID PTY had the necessary minimum contacts with the state of Iowa.

Plaintiff's argument that minimum contacts constitutes a new argument and should not be considered in the pending Motion to Dismiss fails for two reasons. First, Plaintiff asserts personal jurisdiction over the Defendant under Rule 1.306 rather than § 617.3 *for the first time in resistance* to Defendant's Motion to Dismiss. Plaintiff cannot cry foul when Defendant challenges this new assertion. In essence, Plaintiff asks the Court to apply the "new argument" standard to the Defendant but not to the Plaintiff.<sup>5</sup> Furthermore, Defendant's Motion to Dismiss is based on Plaintiff's failure to establish personal jurisdiction; determining minimum contacts is part of that jurisdictional analysis.

Second, personal jurisdiction under Rule 1.306 is allowed *if* the corporation has the "necessary minimum contact with the state of Iowa". Iowa R. Civ. P. 1.306.

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<sup>5</sup> Plaintiff relies on Pike v. Caldera, 188 F.R.D. 519 (S.D. Ind. 1999), for the premise an issue raised *for the first time* in a reply brief constitutes a new argument and cannot be raised. Pike v. Caldera, 188 F.R.D. 519, 531 (S.D. Ind. 1999). Plaintiff's read of Pike is unpersuasive and inaccurate. Pike was a clarification of Southern District of Indiana *Local Rule 56.1* and, therefore, not binding on this Court. Id. at 522-23. In addition, the Pike court held arguments in a reply brief *were proper* when responding to issues raised in the other parties' resistance. Id. at 530 (finding L.R. 56.1 did not limit the length or amount of new evidence or submissions in a reply brief as long as they were responsive).

Therefore, when a plaintiff asserts the court has jurisdiction over a defendant pursuant to Rule 1.306, the plaintiff is effectively asserting and must demonstrate the defendant had the necessary minimum contacts with the state. Larsen v. Scholl, 296 N.W.2d 785, 787-88 (Iowa 1980) (finding “jurisdiction under our rule 56.2 is coextensive with the outer limitations of constitutional due process”; therefore, the court examines “whether the assertion of in personam jurisdiction over the non-resident defendant satisfies the requirement of fair play and substantial justice”) (citing Int’l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). Therefore, once Plaintiff asserted jurisdiction pursuant to Rule 1.306, the requisite minimum contacts with the state of Iowa became *the issue*, not a *new issue*.<sup>6</sup>

#### IV. CONCLUSION

Plaintiff has failed to demonstrate proper service on NID PTY in compliance with either Iowa Code § 617.3 or Iowa Rule of Civil Procedure 1.306; therefore, the Court lacks personal jurisdiction over the Defendant. For the reasons stated above, Defendant’s Motion to Dismiss for lack of personal jurisdiction is **granted**.

Accordingly, Plaintiff’s Motions to Strike, Conduct Jurisdictional Discovery, and to

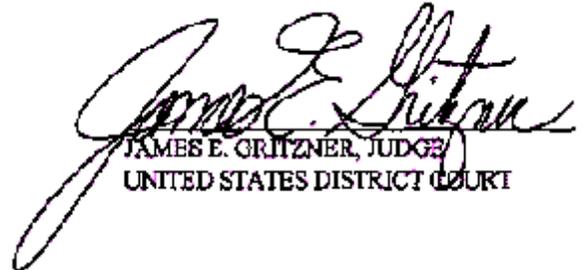
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<sup>6</sup> The Defendant’s final argument is that dismissal is warranted because the Original Notice is defective. Because the Court finds the case turns on the fact NID PTY was never properly served, it does not address the issue of a defective Original Notice.

Submit a Surreply Brief are **denied** as moot. The above-entitled action is therefore **dismissed**.

**IT IS SO ORDERED.**

Dated this 31st day of January, 2003.



JAMES E. GRITZNER, JUDGE  
UNITED STATES DISTRICT COURT