

Statute, Tex. Ins. Code § 542.057–058, against Defendant on July 6, 2022, in the County Court at Law No. 3, El Paso County, Texas, Cause No. 2022DCV197. (ECF No. 1, p. 1). On November 23, 2022, Defendant removed the case to this Court,² and Plaintiffs thereafter filed their Original Complaint. (ECF Nos. 1, 3).

Plaintiffs allege that they are intended beneficiaries of two life insurance policies that Defendant issued to Steven James (“Steven”), Plaintiffs’ father, who passed away in November 2021. (ECF No. 3, p. 2). Policy No. JA96241100 (“the Other Policy”) listed Steven’s three children, Seth, Sarah, and Naomi James, as beneficiaries at the time of Steven’s death; these designations had remained the same since 2008. (*Id.*) However, Policy No. JA96241110 (“the Policy”) underwent several changes between March 2020 and March 2021. (*Id.*) For the last of these changes, Steven purportedly attempted to add Seth as a beneficiary and make him, Sarah, and Robin E. James (“Robin”)—Steven’s ex-wife—co-equal beneficiaries. (*Id.* at 3). However, in his attempt to do so, Steven “accidentally omitted one digit . . . from the policy number when he completed the beneficiary form.” (*Id.*) As a result, Defendant interpreted Steven’s change in designation as applying to the Other Policy, and not the Policy. (*See id.* at 2). Subsequently, when Sarah requested payment of the Policy death benefits, Defendant refused to pay Plaintiffs in accordance with Steven’s last purported change. (*Id.* at 4). As a result, instead of each receiving 1/3 of the policy payments, Sarah received 15% while Seth received nothing. (*Id.*)

In its responsive pleading, Defendant asserted a third-party claim against Robin on the grounds that she and Plaintiffs are “rival claimants to the proceeds of [the Policy]” and that adding her as a third-party defendant would allow Defendant to “avoid being exposed to double or multiple liability.” (ECF No. 6, p. 11–12).

² Defendant asserts that the Court has subject matter jurisdiction over this matter under 28 U.S.C. §§ 1332, 1441, and 1446. (ECF No. 1, p. 1–2).

Subsequently, Defendant attempted to serve Robin with its Answer, Counterclaim and Third-party Complaint and Application for Temporary Restraining Order and Injunctive Relief. (ECF No. 16-2, p. 1–2).³ However, Defendant’s process server failed to make contact with Robin in five attempts to personally serve her. (*Id.*) Four of those attempts were made at 1019 Mesita Dr., El Paso, Texas 79902 (“the Mesita property” or “the Mesita address”), the address that Robin included in her claim for benefits on January 17, 2022. (*Id.* at 1).⁴

Defendant filed the instant Motion asking the Court to authorize substituted service, pursuant to Texas Rule of Civil Procedure 106(b), on Robin by “affixing a copy of the Summons, Answer, Counterclaim, and Third-party Complaint and Application for Temporary Restraining Order and Injunctive Relief, and related documents to the door of the [Mesita property], or by another means this Court deems appropriate.” (ECF No. 16, p. 4–5).

Attached to Defendant’s Motion are affidavits from its process server, Armando Juarez, and its attorney, Matthew B. Skidmore. (ECF Nos. 16-1, 16-2). In addition to describing Juarez’s attempts to personally serve Robin, Attorney Skidmore’s Affidavit also notes that during one of Juarez’s attempts to serve Robin at the Mesita property, her “ex-husband or boyfriend,” Mark Boykin, answered the door. (ECF No. 16-2, p. 3).

II. ANALYSIS

Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served in a judicial district of the United States by[] 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.

³ Citations to this and other submissions whose pages are not consecutively numbered by their authors refer to the page numbers imprinted thereon by the Court’s Case Management and Electronic Case Filing system.

⁴ The process server also states that he tried to personally serve Robin once at 6830 Gato Road, Canutillo, Texas, but the person who answered the door stated that the Lupol family lives there and, that they had purchased the house three weeks prior. (ECF No. 16–1, p. 2).

Fed. R. Civ. P. 4(e)(1). Invoking this rule, Defendant asks to serve Robin in accordance with Texas state law by “affixing a copy of the Summons, Answer, Counterclaim, and Third-party Complaint and Application for Temporary Restraining Order and Injunctive Relief, and related documents to the door of [the Mesita property].” (ECF No. 16, p. 4–5). Texas Rule of Civil Procedure 106(b), in turn, provides:

(b) Upon motion supported by a statement--sworn to before a notary or made under penalty of perjury--listing any location where the defendant can probably be found and stating specifically the facts showing that service has been attempted under (a)(1) or (a)(2) at the location named in the statement but has not been successful, the court may authorize service:

- (1) by leaving a copy of the citation and of the petition with anyone older than sixteen at the location specified in the statement; or
- (2) in any other manner, including electronically by social media, email, or other technology, that the statement or other evidence shows will be reasonably effective to give the defendant notice of the suit.

Tex. R. Civ. P. 106(b). To be granted leave to effectuate service under Rule 106(b), a movant must “strictly compl[y]” with the rule’s requirements. *Hernandez v. Erazo*, No. 22-CV-01069, 2022 WL 17490682, at *2 (W.D. Tex. Oct. 31, 2022); *see also Miller v. Short, How, Frels & Tredoux*, No. 05-93-000326, 1994 WL 67720, at *2 (Tex. App.—Dallas Mar. 4, 1994, no writ) (mem. op., not designated for publication) (“Where in personam jurisdiction is based upon substituted service, the record must affirmatively show strict compliance with the statute authorizing such service.” (citing *Wilson v. Dunn*, 800 S.W.2d 833, 836 (Tex. 1990))); *Amato v. Hernandez*, 981 S.W.2d 947, 949 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (“‘Strict compliance’ means literal compliance with the rule[.]”).

Accordingly, the Court will consider whether Defendant has strictly complied with each requirement in Rule 106(b).

A. Whether Robin James Can Probably be Found at the Mesita Property

Before a court “orders substituted service under rule 106, there must be evidence of probative value that the location stated in the affidavit is [a] place where the defendant can probably be found.” *Garrels v. Wales Transp., Inc.*, 706 S.W.2d 757, 759 (Tex. App.—Dallas 1986, no writ). A movant may make this showing by either unequivocally stating that a location complies with Rule 106(b) or proffering “other evidence of probative force . . . stating facts that led the affiant to the belief that the location” complies with the rule. *Miller*, 1994 WL 67720, at *2. The movant’s evidence must come in the form of a sworn affidavit; courts do not consider statements made in an unsworn motion. *Garrels*, 706 S.W.2d at 759; *James v. Comm’n for Law. Discipline*, 310 S.W.3d 586, 591 (Tex. App.—Dallas 2010, no pet.). “Moreover, unless authorized by statute, an affidavit is insufficient unless allegations contained therein are direct and unequivocal and perjury can be assigned upon it.” *Miller*, 1994 WL 67720, at *2 (citing *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984)).

Defendant attaches two sworn affidavits to its Motion. The first, attested to by Defendant’s process server, describes his attempts to serve Robin at the two properties where Defendant originally believed she might be found. (*See* ECF No. 16-1). It does not unequivocally state, or provide evidence supporting affiant’s belief, that the Mesita property is where Robin can probably be found. Defendant’s second affidavit, which is attested to by its attorney, also does not unequivocally state that the Mesita property is a proper location for substituted service. However, it does state that Robin identified the Mesita address as her residence “in her claim for benefits” and that her “ex-husband or boyfriend” answered the door during one of Defendant’s attempts to personally serve her. (ECF No. 16-2, p. 2–3). Thus, the affidavit contains unequivocal statements supporting Defendant’s belief that Robin “can

probably be found” at the Mesita property.⁵ *See Villanueva v. Garcia*, No. 5-19-CV-00448, 2019 WL 13193917, at *2 (W.D. Tex. Oct. 30, 2019) (finding that the defendant could “probably be found” at the address where he directed delivery of his mail).

Accordingly, Defendant has provided sufficient probative evidence to show that Robin can probably be found at the Mesita property.

B. Whether Defendant has Shown that it has Attempted Service under Tex. R. Civ. P. 106(a)

Defendant must also show that it has already unsuccessfully attempted service on Robin under Rule 106(a). The rule provides that a defendant may be served by: “(1) delivering to the defendant, in person, a copy of the citation, showing the delivery date, and of the petition; or (2) mailing to the defendant by registered or certified mail, return receipt requested, a copy of the citation and of the petition.” Tex. R. Civ. P. 106(a); *see also State Farm Fire & Cas. Co. v. Costley*, 868 S.W.2d 298, 299 n.2 (Tex. 1993) (“Under Rule 106(b), a party need only show that attempts have failed under either Rule 106(a)(1) or Rule 106(a)(2).” (citing Tex. R. Civ. P. 106)). Defendant has shown that it has attempted, without success, to personally serve Robin at the Mesita property on four occasions. (ECF No. 16-1); (ECF No. 16-2, p. 2–3 (“Counsel for John Hancock attempted to serve Robin James with its Answer, Counterclaim and Third-party Complaint and Application for Temporary Restraining Order and Injunctive Relief by personal process service on at least four occasions between February 3 and February 21, 2023[,] at 1019

⁵ Attorney Skidmore’s affidavit also states that “Ms. [Robin] James, or someone purporting to be Ms. James, accepted service of” a certified mailing of Defendant’s Application for Temporary Restraining Order and Injunctive Relief. (ECF No. 16-2, p. 3). However, the affidavit does not specify where these filings were mailed to or where Robin signed for them. (*See id.*). While Defendant’s Motion clarifies that Robin signed for the mailing at the Mesita property, (ECF No. 16, p. 3), the Court does not consider this assertion because, as stated, “an unsworn motion is not evidence of probative value that the location was [a] place where the defendant can probably be found.” *Garrels*, 706 S.W.2d at 759. For the same reason, the Court also does not consider Defendant’s unequivocal statement in its Motion that Robin “can probably be found” at the Mesita property. (ECF No. 16, p. 4).

Mesita Dr., El Paso[,] Texas, 79902.”)). Thus, Defendant has provided sufficient evidence to show that it has unsuccessfully attempted service under Rule 106(a)(1).

C. Whether Defendant’s Proposed Method of Service Will be Reasonably Effective to Give Robin Notice of this Suit

Finally, because Defendant proposes a method of service other than “leaving a copy” of its Summons and filings with “anyone older than sixteen at the location specified,” Defendant must show that its proposed method of substituted service “will be reasonably effective to give the defendant notice of the suit.” *See* Tex. R. Civ. P. 106(b).

In *State Farm Fire & Casualty Company*, the Texas Supreme Court found that the plaintiff’s substituted service gave the defendant sufficient notice where she mailed her petition to an address that the defendant had previously listed as his residence on an insurance policy. 868 S.W.2d at 299. Similarly, here, Robin listed the Mesita property as her address on her claim for benefits. (ECF No. 16-2, p. 2). Moreover, as Defendant notes, state and federal courts applying Rule 106(b) have authorized substituted service by “affixing a copy of the summons to the door of the defendant’s residence.” (ECF No. 16, p. 3 (first citing *Perez v. Old W. Cap. Co.*, 411 S.W.3d 66, 73 (Tex. App.—El Paso 2013, no pet.); then citing *Platter v. G Force Cement Works, L.L.C.*, No. H-19-2012, 2019 WL 5748763 (S.D. Tex. Nov. 5, 2019))); *see also Heras v. Rapid Tax, Inc.*, No. 5:13-CV-498, 2014 U.S. Dist. LEXIS 75612, at *6 (W.D. Tex. June 3, 2014) (allowing the plaintiff to effectuate service under Rule 106(b) by “posting” the summons and complaint to the front door of the defendant’s residence).

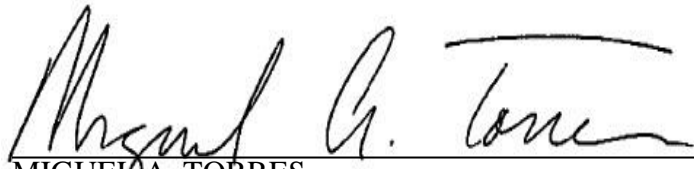
Accordingly, the Court finds that serving process on Robin by “affixing a copy of the Summons, Answer, Counterclaim, and Third-party Complaint and Application for Temporary Restraining Order and Injunctive Relief, and related documents to the door of [the Mesita

property],” (ECF No. 16, p. 4–5), will “be reasonably effective to give” her notice of this suit. Tex. R. Civ. P. 106(b)(2).

III. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendant’s Motion for Substituted Service. (ECF No. 16). Defendant is **HEREBY AUTHORIZED** to serve process on Robin E. James by affixing copies of its Summons, Answer, Counterclaim, and Third-party Complaint and Application for Temporary Restraining Order and Injunctive Relief, and related documents to the door of 1019 Mesita Dr., El Paso, Texas 79902.

SIGNED and **ENTERED** this 24th day of March, 2023.

A handwritten signature in black ink, appearing to read "Miguel A. Torres", is written over a horizontal line.

MIGUEL A. TORRES
UNITED STATES MAGISTRATE JUDGE