

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT BLUEFIELD

MARKEL INSURANCE CO.,

Plaintiff,

v.

CIVIL ACTION NO. 1:08-1445

MIKE DANIELEY d/b/a
MIKE'S TOWING & WRECKING, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

Pending before the court is plaintiff's motion for authorization for the United States Marshal to serve defendant Kenny Williams, or, in the alternative, motion for authorization for service by publication (doc. #27). For reasons expressed more fully below, the court **GRANTS** the motion for authorization for service by publication.

According to Federal Rule of Civil Procedure 4(e)(1):

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: (1) 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;

West Virginia Rule of Civil Procedure 4(e)(1) allows for service by publication if the plaintiff files with the court an affidavit stating "[t]hat the plaintiff has used due diligence to ascertain the residence or whereabouts of the defendant, without effect; or [t]hat process, delivered to the sheriff of the county in which the defendant resides or is, has twice been delivered to such

officer and has been returned without being executed. . . ." W. V. R. Civ. P. 4(e)(1)(C) and (D). "'Due diligence' means the exercise of a reasonable effort to locate a person's residence so that notice . . . may be provided." Cook v. Duncan, 301 S.E. 2d 837, 841 (W. Va. 1983) (citing State ex rel. Knapp v. Sloper, 256 Or. 299 (1970)).

Plaintiff has submitted an affidavit, pursuant to W. V. R. Civ. P. 4(e), that persuades the court that it has used due diligence to ascertain the whereabouts of Kenny Williams and such attempts have been unsuccessful. Plaintiff's affidavit further establishes that the Mercer County Sheriff's Department has twice attempted to serve Kenny Williams without success. Accordingly, pursuant to W. V. R. Civ. P. 4(e)(1)(C) and (D) and Fed. R. Civ. P. 4(e)(1), plaintiff's motion to serve Williams by publication is GRANTED.

The Clerk is directed to send a copy of this Memorandum Opinion and Order to counsel of record, all unrepresented parties.

IT IS SO ORDERED this 11th day of September, 2009.

ENTER:



David A. Faber
Senior United States District Judge