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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

E.S., a minor, et al.,
Plaintiffs,
v.
CITY OF VISALIA; TIM HAENER,
and DOES 2-10, inclusive,
Defendants.

CASE NO.: 1:13-cv-01697-LJO-BAM
ORDER DENYING DEFENDANTS' *EX PARTE* APPLICATION FOR ORDER TO SHOW CAUSE WHY A CONTEMPT CITATION SHOULD NOT ISSUE
(Doc. 66)

On June 17, 2015, Defendants City of Visalia and Tim Haener (“Defendants”) filed an application for an order to show cause why third-party witness Danny Ceballos (“Mr. Ceballos”) should not be held in civil contempt for failure to appear at his June 8, 2015 deposition pursuant to subpoena. (Doc. 66.) On June 26, 2015, the Court directed Plaintiffs to file a response to the *ex parte* application. (Doc. 67.) On June 30, 2015, Plaintiffs filed the declaration of Mr. Ceballos. (Doc. 68.)

For the reasons that follow, Defendants’ *ex parte* application shall be denied.

I. Background

Plaintiffs initiated this civil rights action, arising from the fatal police shooting of Armando Santibanez, on October 21, 2013. (Doc. 1.) This action proceeds on Plaintiff’s third amended complaint. (Doc. 46.)

On June 30, 2014, the Court issued a Scheduling Conference Order, which provided that all non-expert discovery, including motions to compel, must be completed no later than

1 June 16, 2015. The order also cautioned the parties that their “failure to have a discovery
2 dispute heard sufficiently in advance of the discovery cutoff may result in denial of the
3 motion as untimely.” (Doc. 41, p. 3.)

4 On June 12, 2015, the Court held an informal telephonic conference regarding
5 Defendants’ request to modify the Scheduling Conference Order to complete additional
6 depositions, which presumptively included Mr. Ceballos’ deposition. Finding that
7 Defendants failed to establish good cause for modifying the Scheduling Conference Order,
8 the Court denied Defendants’ request to extend the discovery deadline to complete
9 additional depositions. (Doc. 26.)

10 On June 17, 2015, after expiration of the discovery deadline, Defendants filed the
11 instant *ex parte* application for an order to show cause why a contempt citation should not
12 issue against Mr. Ceballos for his reported failure to comply with a subpoena to attend his
13 deposition. Mr. Ceballos’ deposition was noticed for June 8, 2015. (Doc. 66.)

14 On June 26, 2015, the Court directed Plaintiffs to file a response to the application.
15 (Doc. 67.)

16 On June 30, 2015, Plaintiffs submitted the declaration of Mr. Ceballos in opposition
17 to the *ex parte* application. Mr. Ceballos declares under penalty of perjury that he has not
18 been served with any documents for this lawsuit. (Doc. 68 at ¶ 11.)

19 **II. Discussion**

20 **A. Defendants’ Position**

21 Defendants report that a deposition subpoena was issued on May 27, 2015, and sent
22 out for service on Mr. Ceballos for a deposition to take place on June 8, 2015. (Doc. 66-2,
23 Ex. A.) On May 30, 2015, a claims investigator arrived at 926 S. Indiana Street, in
24 Porterville, California, to serve the subpoena on Mr. Ceballos. The investigator reportedly
25 saw Mr. Ceballos standing between four vehicles parked in the driveway. Mr. Ceballos was
26 identified by comparing his face to photographs from his Facebook page. When Mr.
27 Ceballos saw the investigator, he immediately took off running into the house. The
28 investigator went to the front door and knocked. Although he could hear people talking and

1 moving around, the investigator could not get anyone to open the door. All of the windows
2 had black shades blocking the view inside and there appeared to be a surveillance camera
3 above the front porch. (Doc. 66-3, Decl. of Russell Hilyard at ¶¶ 2-5.)

4 The investigator then called a cellular phone number associated with Mr. Ceballos,
5 (559) 719-5029, and could hear a phone ringing inside of the home. The call went to an
6 automated response and no message could be left. The investigator called the number two
7 more times. The next attempt was heard ringing from inside the residence and went to the
8 automated message. The last attempt went directly to the automated message. (Id. at ¶ 6.)

9 On June 5, 2015, the investigator returned to 926 S. Indiana Street. When he drove
10 by, the investigator saw Mr. Ceballos standing outside talking to other males his age. The
11 investigator parked a distance from the home and walked to where he could see Mr.
12 Ceballos and his companions. After some time, a couple of the males left in a silver truck.
13 (Id. at ¶ 7.)

14 At 6:35 p.m., the investigator walked into the yard and said “Danny.” When Mr.
15 Ceballos turned, the investigator told him he had a subpoena for him and held it out. Mr.
16 Ceballos yelled at the investigator to get off his property and appeared angry. Mr. Ceballos
17 began to walk towards the investigator, who set the subpoena down and let Mr. Ceballos
18 know that he had been served. Mr. Ceballos said that the paper meant nothing to him. The
19 investigator then left the area. Approximately 15 minutes later, the investigator drove by the
20 home and saw small pieces of paper where he had set the subpoena down. (Id. at ¶¶ 8-9.)

21 Mr. Ceballos failed to appear for his deposition on June 8, 2015. (Doc. 66-2, Decl.
22 of Leonard C. Herr at ¶ 5.)

23 **B. Mr. Ceballos’ Position**

24 In response, Mr. Ceballos declares under penalty of perjury that he never fled from
25 any process server on May 30, 2015, or on any date. (Doc. 68, Decl. of Danny Ceballos at ¶
26 3.) The phone number that the investigator called has not been Mr. Ceballos’ phone number
27 since at least January 2015, and Mr. Ceballos has no surveillance cameras at his residence.
28 (Id. at ¶¶ 12, 13.) The investigator’s statement regarding the interaction on June 5, 2015,

1 never happened with Mr. Ceballos. (Id. at ¶ 7.) Instead, Mr. Ceballos reports that he
2 worked at Vallarta, a supermarket, until about 4:30 p.m. that day. He stopped by his
3 residence to pick up his children and then went directly to Bridget Flores’ apartment on E
4 Street. Mr. Ceballos was at her apartment by 5:00 p.m. Mr. Ceballos then drove from
5 Bridget Flores’ apartment to Tulare, with Ms. Flores and his children. He left the city of
6 Porterville around 6:15 p.m. so that he could be in Tulare by 7:00 p.m. Mr. Ceballos was
7 meeting his father and others at Puerto Vallarta, a restaurant in Tulare, to celebrate his
8 father’s birthday. It takes approximately 45 minutes to drive from Porterville to Tulare. (Id.
9 at ¶¶ 8-10.) Mr. Ceballos reports that as of June 30, 2015, he has not been served with any
10 documents for this lawsuit. (Id. at ¶ 11.)

11 **C. Analysis**

12 As a preliminary matter, Defendants’ *ex parte* application is untimely. As noted
13 above, the non-expert discovery deadline expired on June 16, 2015. In contravention of the
14 Scheduling Order, Defendants filed the instant application after the expiration of the
15 relevant deadline. Defendants provide no explanation for the delay. More importantly,
16 Defendants provide no explanation as to why they elected to file this application following
17 the informal discovery conference. During that conference, the Court expressly determined
18 that the non-expert discovery deadline would not be extended for the purpose of taking
19 additional depositions.

20 Furthermore, even if Defendants’ application was timely, Defendants have failed to
21 establish that they complied with Federal Rule of Civil Procedure 45(b)(1) regarding the
22 tendering of witness fees and service of the subpoena. Pursuant to Rule 45(b), serving a
23 subpoena “requires delivering a copy to the named person and, if the subpoena requires that
24 person’s attendance, tendering the fees for 1 day’s attendance and the mileage allowed by
25 law.” Fed. R. Civ. P. 45(b)(1).

26 Here, the proof of service of the subpoena to testify at the deposition indicates that
27 no witness fees or mileage were tendered to Mr. Ceballos. (Doc. 66-2, Ex. C.)

28 Additionally, Defendants have not established that they properly served the

1 deposition subpoena on Mr. Ceballos. As noted above, serving a subpoena requires
2 “delivering a copy to the named person,” which is interpreted to mean personal service. Fed.
3 R. Civ. P. 45(b)(1); see Morgutia-Johnson v. City of Fresno, No. 1:14-cv-00127-LJO-SKO,
4 2015 WL 1021123, at *2-3 (E.D. Cal. Mar. 9, 2015) (serving subpoena requires personal
5 service); Prescott v. Cnty. of Stanislaus, No. 1:10-cv-00592 JLT, 2012 WL 10617, at *3
6 (E.D. Cal. Jan. 3, 2012) (noting that a majority of courts interpreting “delivering” to require
7 personal service).

8 In this instance, Mr. Ceballos has refuted Defendants’ claim that they served him
9 with a deposition subpoena on June 5, 2015. According to Mr. Ceballos’ sworn declaration,
10 he was not at his home at 6:35 p.m. on June 5, 2015, the date he was reportedly served, and
11 he has not been served with any documents for this lawsuit. (Doc. 68, Decl. of Danny
12 Ceballos at ¶¶ 9, 11.) Mr. Ceballos also has denied fleeing from the investigator or
13 possessing the phone number reportedly called by the investigator. (Id. at ¶¶ 3, 12.) As
14 there is no indication that Defendants in fact personally served Mr. Ceballos with a
15 deposition subpoena, they are not entitled to a contempt order. Fed. R. Civ. P. 45(g); see,
16 e.g., Morgutia-Johnson, 2015 WL 1021123, at *2-3 (citing FTC v. Enforma Natural
17 Products, Inc., 362 F.3d 1204, 1211 (9th Cir. 2004), (proper subpoenas are treated as orders
18 of the court; to establish civil contempt, moving party must show by clear and convincing
19 evidence that non-moving party violated a specific order of the court). Therefore, an order
20 to show cause is unnecessary.

21 **III. Conclusion and Order**

22 Based on the foregoing, Defendants’ *ex parte* application for order to show cause
23 why a contempt citation should not issue, filed on June 17, 2015, is HEREBY DENIED.
24 IT IS SO ORDERED.

25
26 Dated: July 2, 2015

/s/ Barbara A. McAuliffe
UNITED STATES MAGISTRATE JUDGE