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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

KATHLEEN SEIFERT,

Plaintiff,

No. CIV S-08-998 GEB KJM PS

vs.

RICHARD WERNER,

Defendant.

ORDER

_____ /

Defendant’s motion to dismiss and a status conference came on regularly for hearing December 10, 2008. Kenneth Pratt appeared for plaintiff. Defendant Werner appeared telephonically in propria persona. Upon review of the documents in support and opposition, upon hearing the arguments of counsel, upon review of the court’s file, and good cause appearing therefor, THE COURT FINDS AND ORDERS AS FOLLOWS:

1. The motion to dismiss is denied. Although defendant has not yet been properly served,¹ the court finds plaintiff has made good faith efforts to timely effect service on defendant.

¹ Plaintiff attempted service on defendant both by personal service and substituted service under California Code of Civil Procedure § 415.40, which allows for service on a person outside of the state by sending a copy of the summons and complaint by first-class mail, postage prepaid, requiring return receipt. Defendant contends there is no evidence that postage was prepaid; however, the copy of the envelope plaintiff’s counsel has provided shows postage paid. Even though service is deemed complete on the tenth day after mailing under section 415.40,

1 The court therefore declines to recommend dismissal for failure to serve summons within the 120
2 days allowed under Federal Rule of Civil Procedure 4(m).

3 2. Plaintiff has exhausted all means to serve defendant by the methods allowed
4 under Federal Rule of Civil Procedure 4 and the state methods incorporated therein. The
5 California Code of Civil Procedure allows for service by publication “if upon affidavit it appears
6 to the satisfaction of the court in which the action is pending that the party to be served cannot
7 with reasonable diligence be served in another manner specified in this article and that ... a cause
8 of action exists against the party upon whom service is to be made....” The record here
9 establishes that requirement. Within fifteen days, plaintiff shall submit a proposed order for
10 service by publication.

11 3. The parties at the hearing agreed that this action is subject to arbitration and
12 also agreed to referral to the court’s Voluntary Dispute Resolution Program (VDRP) prior to
13 referral to arbitration. Accordingly, this matter is referred to VDRP. The VDRP process shall be
14 completed no later than March 31, 2009. The Clerk of Court shall serve a copy of this order on
15 the court’s VDRP coordinator.

16 4. In the event the VDRP process does not resolve the matter, this action is
17 ordered to arbitration. The parties shall select a neutral arbitrator and proceed to arbitration in
18 accordance with the attorney/client fee agreement. The parties shall advise the court when
19 arbitration is completed.

20 /////

21 _____
22 California Code of Civil Procedure § 417.20 requires evidence satisfactory to the court
23 establishing actual delivery to the person to be served. Because the receipt is marked “refused,”
24 there is no evidence the summons and complaint actually have been delivered to defendant. See
25 generally Neadeau v. Foster, 129 Cal.App.3d 234 (1982) (receipt signed by person authorized to
26 accept mail on behalf of defendant constitutes actual delivery); see also Bolkiah v. Superior
Court, 74 Cal.App.4th 984, 1000-01 (1999) (while service by mail on defendant outside of state
does not require executed acknowledgment of receipt, proof of service by mail on out-of-state
defendant must strictly comply with section 417.20 requirement of evidence establishing actual
delivery to the person to be served).

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5. Except for service by publication and submission to VDRP, this action is stayed. No responsive pleadings need be filed in the federal court action; rather, they will be filed in the arbitration. Because this matter is subject to arbitration, any further pleadings filed in federal court will be stricken.

DATED: January 22, 2009.



U.S. MAGISTRATE JUDGE

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