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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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|---|---|--------------------------------|
| JULIA M. CARLON, CHRISTINE M. CARLON, |) | Case No. 2:11-CV-00499-JAM-GGH |
| |) | |
| Plaintiffs, |) | ORDER DENYING PLAINTIFFS' EX |
| |) | PARTE APPLICATION AND |
| v. |) | DISMISSING PLAINTIFFS' CLAIMS |
| |) | AGAINST TAYLOR, BEAN & |
| |) | WHITAKER |
| TAYLOR, BEAN & WHITAKER MORTGAGE COMPANY, CENTRAL LOAN ADMINISTRATION AND REPORTING, OCWEN LOAN SERVICE, LLC, and DOES 1 through 100, |) | |
| |) | |
| Defendants. |) | |

On July 11, 2011, this Court issued an Order to Show Cause, requiring Plaintiffs Julia Carlon and Christine Carlon ("Plaintiffs") to show good cause for their failure to timely serve

1 Defendant Taylor, Bean & Whitaker Mortgage Co. ("TBWMC") in order
2 to avoid dismissal of their claims against TBWMC (Doc. #17). In
3 response, Plaintiffs filed an Ex Parte Application for an Order for
4 Publication of Summons (Doc. #18) and a Response to this Court's
5 Order to Show Cause (Docs. #19-21). For the reasons set forth
6 below, Plaintiffs' Application is DENIED and Plaintiffs' claims
7 against TBWMC are dismissed because Plaintiffs have not shown good
8 cause for their failure to effect service on TBWMC.

9
10 I. OPINION

11 A. Legal Standard

12 Pursuant to Federal Rule of Civil Procedure 4(m), the Court
13 must dismiss an action if a defendant has not been served within
14 120 days of a plaintiff's filing of his or her complaint, unless
15 the plaintiff can demonstrate good cause for his or her failure to
16 serve the defendant. FED. R. CIV. P. 4(m).

17 The Court must determine whether good cause "has been shown on
18 a case by case basis." In re Sheehan, 253 F.3d 507, 512 (9th Cir.
19 2001) (citing Cartage Pac., Inc. v. Waldner (In re Waldner), 183
20 B.R. 879, 882 (9th Cir. BAP 1995)). Good cause "applies only in
21 limited circumstances" Hamilton v. Endell, 981 F.2d 1062,
22 1065 (9th Cir. 1992) (discussing former subdivision 4(j))
23 (overruled on other grounds). "At a minimum, 'good cause' means
24 excusable neglect." Boudette v. Barnette, 923 F.2d 754, 756 (9th
25 Cir. 1991). However, in the Ninth Circuit:

26 a plaintiff may be required to show the following
27 factors in order to bring the excuse to the level of
28 good cause: "(a) the party to be served received actual
notice of the lawsuit; (b) the defendant would suffer no
prejudice; and (c) plaintiff would be severely

1 prejudiced if his complaint were dismissed.”
2 In re Sheehan, 253 F.3d at 512 (quoting Boudette v. Barnette, 923
3 F.2d 754, 756 (9th Cir. 1991)) (other citations omitted).

4 The Court also has broad “discretion under Rule 4(m), absent a
5 showing of good cause, to extend the time of service or to dismiss
6 the action without prejudice.” In re Sheehan, 253 F.3d 507, 513
7 (9th Cir. 2001) (citing Petrucelli v. Bohringer & Ratzinger, GMBH,
8 46 F.3d 1298, 1305 (3d Cir. 1995)).

9 B. Plaintiffs’ Ex Parte Application

10 Plaintiffs move this Court for an Order for Publication of
11 Summons pursuant to the California Code of Civil Procedure section
12 415.50. Doc. #18, pg. 1-2. In their motion, Plaintiffs
13 erroneously argue that because the Federal Rules of Civil Procedure
14 authorize service of process in accordance with state law,
15 Plaintiffs may move this Court for an order under the California
16 Code of Civil Procedure. See id. Plaintiffs have not provided any
17 binding authority, or any federal law for that matter, upon which
18 this Court can properly grant Plaintiffs’ application and order a
19 publication of summons. For this reason alone, Plaintiffs’
20 application is improper and is, therefore, denied.

21 C. Plaintiffs’ Response to the Order to Show Cause

22 Plaintiffs argue that their unsuccessful attempts to effect
23 service on TBWMC, coupled with their application for service by
24 publication under the California Code of Civil Procedure, provide a
25 basis for this Court to not dismiss their claims against TBWMC.
26 Doc. #19 at pg. 1-3. Plaintiffs further argue that TBWMC “is the
27 orchestrator and central culprit of the wrongdoings suffered by the
28 Plaintiffs,” and therefore, this Court should not dismiss TBWMC

1 from this case. See id. Notwithstanding the fact that Plaintiffs
2 do not cite any case law, or provide a legal standard,
3 demonstrating that these things satisfy the good cause requirement
4 under federal law, the Court will evaluate whether Plaintiffs have
5 sufficiently demonstrated good cause to avoid dismissal of their
6 claims against TBWMC.

7 Although Plaintiffs made four attempts to serve TBWMC, three
8 of these attempts were directed at CT Corp. See Docs. #19, 20, and
9 Exhibits A, B. On January 28, 2011, when Plaintiffs first
10 attempted to serve TBWMC, they were informed that CT Corp. was not
11 the agent for service and CT Corp. did not have a listing for
12 TBWMC. Id. Thus, the two subsequent attempts by Plaintiffs to
13 serve CT Corp., on February 22, 2011, and March 23, 2011, are
14 irrelevant to this Court's good cause inquiry because Plaintiffs
15 were aware that CT Corp. was not the proper agent for service, yet
16 continued to attempt service on it. See id. On March 23, 2011,
17 Plaintiffs also unsuccessfully attempted service by mail on
18 Patricia Smaldone, a registered agent for TBWMC. Doc. #19 at pg.
19 2. However, Plaintiffs have not informed the Court of any other
20 attempts to locate or serve Ms. Smaldone, or the reason why the
21 service by mail was unsuccessful. See id. This Court cannot glean
22 from the two sentences regarding Ms. Smaldone in the Plaintiffs'
23 response whether she has not been served due to the Plaintiffs'
24 "excusable neglect." Without providing any justification, this
25 Court cannot find that Plaintiffs two legitimate attempts to serve
26 TBWMC, one on January 28, 2011, through CT Corp., and one on March
27 23, 2011, through Ms. Smaldone, satisfy the good cause requirement
28 to maintain Plaintiffs case against TBWMC.

1 This Court also finds that Plaintiffs have not made any
2 showing that the elements set forth in Boudette are met in this
3 case, and therefore, Plaintiffs have failed to demonstrate good
4 cause. See In re Sheehan, 253 F.3d 507, 512 (9th Cir. 2001)
5 (quoting Boudette v. Barnette, 923 F.2d 754, 756 (9th Cir. 1991))
6 (other citations omitted). Indeed, Plaintiffs have not argued
7 that: (a) TBWMC received actual notice of the lawsuit; (b) TBWMC
8 would suffer no prejudice; and (c) Plaintiffs would be severely
9 prejudiced if their complaint were dismissed. Cf. id.

10 Finally, Plaintiffs argument that its application for an order
11 to serve by publication somehow satisfies the requisite good cause
12 showing is unpersuasive, given that Plaintiffs' motion was made
13 under the California Code of Procedure and not the Federal Rules of
14 Civil Procedure.

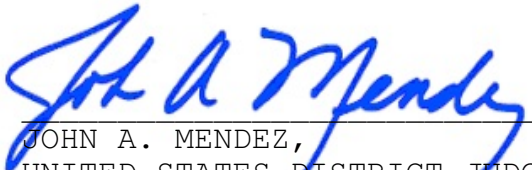
15 Accordingly, because Plaintiffs have not shown good cause for
16 their failure to serve TBWMC within the 120 day period under Rule
17 4, their claims against TBWMC are dismissed.

18
19 II. ORDER

20 For the reasons set forth above, Plaintiffs' Ex Parte
21 Application for an Order for Publication of Summons is DENIED, and
22 Plaintiffs' claims against Defendant Taylor, Bean & Whitaker
23 Mortgage Company are DISMISSED WITHOUT PREJUDICE.

24
25 IT IS SO ORDERED.

26 Dated: July 27, 2011

27 
JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE