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UNITED STATES DISTRICT COURT  
Northern District of California

STEVE THIEME,

No. C 13-3827 MEJ

Plaintiff,

**ORDER RE PLAINTIFF'S  
APPLICATION FOR SERVICE BY  
PUBLICATION  
(Dkt. No. 32)**

v.

DIANE E. COBB, INDIVIDUALLY, AND  
DBA DM FINANCIAL, AKA DIANE  
WINEGARDNER; SLOANE DAVIS  
INDIVIDUALLY AKA SLOAN DAVIS,  
AND DBA DM FINANCIAL AKA  
FINANCIAL Dm; VANDYK MORTGAGE  
CORPORATION; and DOES 1-100,  
INCLUDING ROE CORPORATIONS,

Defendants.

**INTRODUCTION**

Pending before the Court is Plaintiff's Application to Serve Defendants Diane Cobb and Sloane Davis by Publication. Dkt. No. 32. On October 24, 2013, the Court ordered supplemental briefing on this issue. Dkt. No. 33. The matter is also set for hearing on Defendant's Motion to Dismiss on Thursday, October 31, 2013. Accordingly, the Court will also address Plaintiff's Application at that time. In advance of the hearing, the Court issues additional questions listed below, which Counsel should be prepared to address at Thursday's hearing in accordance with the legal standards provided herein.

**BACKGROUND**

On August 16, 2013, Defendant Van Dyk Mortgage removed this action from San Francisco Superior Court. Dkt. No. 1 ("Notice of Removal"). In its Notice of Removal, Van Dyk indicated that Defendants Diane Cobb and Sloane Davis did not join in the removal because they could not be located and had not been served with the Complaint. *Id.* at 3. On September 24, 2013, the Court

1 ordered Plaintiff Steve Thieme to file a status statement indicating whether he had effected service of  
2 process on Defendants Cobb and Davis, or if he intended to dismiss them from this lawsuit. Dkt. No.  
3 19. The next day Plaintiff filed a status statement in the form of a declaration from his counsel,  
4 Stephen A. Fraser (“Counsel”), informing the Court that Plaintiff would not be dismissing  
5 Defendants Cobb and Davis, but that he had thus far been unable locate them. Dkt. No. 22, ¶¶ 2, 4.  
6 Counsel documented his efforts up to that point to locate Diane Cobb and Sloane Davis and  
7 submitted affidavits of due diligence from attempting to locate them in another case, *Marvin Scott &*  
8 *Patricia Scott v. Diane Cobb, individually, and dba DM Financial, AKA Diane Winegardner, et al.*  
9 (Marin County Superior Court, Civ. No. 1301303). Dkt. No. 22 & Exs. 1-5. Counsel also noted that  
10 he went to Las Vegas on September 7, 2013, to locate Ms. Cobb at her last reported address, 3013  
11 Periscope Circle, Las Vegas, but was informed by the resident, Mr. Abramov, that Ms. Cobb and her  
12 husband had been tenants there for three months, from approximately March through June, and then  
13 had left the premises, leaving no forwarding address and having failed to pay rent for three months.  
14 *Id.* ¶ 6.

15 On October 21, 2013, Plaintiff filed an Application to Serve by Publication of Summons to  
16 Defendants “Diane Cobb aka DM Financial and also known as Diane Winegardner, and Sloane Davis  
17 aka ‘DM Financial’ and/or ‘Financial Dm’” (collectively “Defendants”). Dkt. No. 32 (“Appl.”).  
18 Specifically, Plaintiff requested the Court give him permission to serve Defendants by publication of  
19 the summons in the Las Vegas Sun, which Plaintiff stated “is most likely to give actual notice to  
20 Diane Cobb and Sloane Davis.” *Id.* ¶ 6; *see also id.* at \*3 (Proposed Order). Plaintiff stated that he  
21 had exercised “extraordinary diligence in seeking to serve the defendants,” resubmitting the affidavits  
22 of diligence from the *Scott* case showing Plaintiff’s earlier efforts to locate Defendants in Las Vegas,  
23 Nevada. *See Appl.*, Exs. 1-6. The Exhibits show that service was attempted in the *Scott* case on  
24 Defendant Cobb on at least six different days, from April 17, 2013 to May 5, 2013. *Id.*, Exs. 3-6.  
25 Ms. Cobb was eventually served by substituted service in the *Scott* case, which included leaving the  
26 documents with a competent member of the household at the Periscope Ct. address on April 30, 2013  
27 and mailing copies to the same address on May 7. *Id.*, Ex. 3. The *Scott* plaintiffs also attempted to  
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1 serve Defendant Davis on April 17, at two locations in Las Vegas, but were unable to locate him. *Id.*,  
2 Exs. 1-2. Plaintiff has stated that Defendants “are believed to be still residing in the Las Vegas  
3 area.” *Id.* ¶ 2.

4 On October 24, 2013, the Court ordered supplemental briefing, noting that Plaintiff’s  
5 Complaint indicated that Defendants had substantial ties to Marin County, California, but that  
6 Plaintiff’s efforts to locate Defendants focused on Las Vegas, Nevada. Dkt. No. 33. Plaintiff  
7 responded with a declaration from Mr. Fraser stating that he had gone to the County’s Registrar of  
8 Voters and found that Defendants were not shown as voters in the Registrar’s computer system. Dkt.  
9 No. 34, ¶ 3. Likewise, he found no property in Defendants’ names through a search at the Marin  
10 County Assessor-Recorder’s Office. *Id.* ¶¶ 4, 6. Counsel’s search of the National Mortgage Listing  
11 System (NMLS) only showed that Ms. Cobb abandoned her licenses in all states, while Mr. Davis  
12 was not licensed as an accountant or mortgage broker or originator, anywhere. *Id.* ¶ 11. Mr. Fraser  
13 further declared that he personally checked on the addresses of the VanDyk/Cobb/Davis offices in  
14 Marin County, but none remained in Mill Valley, Larkspur, or Novato, California. *Id.* ¶ 10. He  
15 declared he is presently unable to locate Defendants in Marin County, or in the State of California.  
16 *Id.* ¶ 12. He also queried his clients and all aver that Defendants’ last residence addresses were in Las  
17 Vegas. *Id.* ¶ 7.

18 Plaintiff and Counsel are currently pursuing a lead on Ms. Cobb in New Paris, Ohio, and have  
19 hired a private investigation firm. *Id.* ¶ 13. Counsel has also been in contact with the Federal Bureau  
20 of Investigation about the Defendants, but with no new leads at present. *Id.* ¶ 14. Plaintiff is  
21 scheduled to depose Defendant Cobb’s stepson, Anthony Richard Cobb, on November 8, 2013 in San  
22 Rafael, California, to test his earlier statements to Counsel that Defendants moved to Las Vegas, but  
23 that he has not been in contact with Defendants for the last year and does not know where Defendants  
24 are presently residing. *Id.* ¶ 5. Counsel has also compiled a list of addresses of close relatives of Ms.  
25 Cobb living throughout the United States, and he explained that he will begin calling each to locate  
26 Ms. Cobb, although he does not anticipate much cooperation. *Id.* ¶ 15.

27 Finally, Counsel acknowledged that “it may be appropriate to publish the summonses” to  
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1 Defendants “in both Las Vegas and Marin County, in which case the Independent Journal in Marin  
2 County, which is read by most readers in Marin County, and the Las Vegas Review Journal<sup>1</sup> in Las  
3 Vegas are the newspapers with the largest circulation in those areas, respectively.” *Id.* ¶ 16.

4 **LEGAL STANDARD**

5 Pursuant to Federal Rule of Civil Procedure (“Rule”) 4(e), service upon an individual may be  
6 effected in any judicial district of the United States by:

- 7 (1) following state law for serving a summons in an action brought in courts of general  
8 jurisdiction in the state where the district court is located or where service is made; or  
9 (2) doing any of the following:  
10 (A) delivering a copy of the summons and of the complaint to the individual personally;  
11 (B) leaving a copy of each at the individual’s dwelling or usual place of abode with  
12 someone of suitable age and discretion who resides there; or  
13 (C) delivering a copy of each to an agent authorized by appointment or by law to receive  
14 service of process.

14 Fed. R. Civ. P. 4(e). The goal of Rule 4 is to “to provide maximum freedom and flexibility in the  
15 procedures for giving all defendants . . . notice of commencement of the action and to eliminate  
16 unnecessary technicality in connection with service of process.” *Elec. Specialty Co. v. Road &*  
17 *Ranch Supply, Inc.*, 967 F.2d 309, 314 (9th Cir. 1992) (citation omitted). Due Process requires that  
18 any service of notice be “reasonably calculated, under all circumstances, to apprise interested parties  
19 of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v.*  
20 *Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

21 Pursuant to Rule 4(e)(1), the Court looks to California law, the state in which this Court sits,  
22 to determine the sufficiency of the proposed service. Service by publication is permissible under  
23 California law in certain circumstances:

- 24 (a) A summons may be served by publication if upon affidavit it appears to the  
25 satisfaction of the court in which the action is pending that the party to be served cannot  
26 with reasonable diligence be served in another manner specified in this article and that

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27 <sup>1</sup> Plaintiff noted that the earlier referenced Las Vegas Sun refers all queries to the Review  
28 Journal. Dkt. No. 34, ¶ 16.

1 . . . (1) A cause of action exists against the party upon whom service is to be made or he  
2 or she is a necessary or proper party to the action.

3 Cal. Code Civ. Proc. § 415.50(a). “Because of due process concerns, service by publication must be  
4 allowed only as a last resort.” *Duarte v. Freeland*, 2008 WL 683427, at \*1 (N.D. Cal. Mar. 7, 2008)  
5 (internal quotations and citations omitted).

6 In determining whether a plaintiff has exercised “reasonable diligence” for purposes of  
7 section 415.50(a), a court must examine the affidavit required by the statute to see whether the  
8 plaintiff “took those steps a reasonable person who truly desired to give notice would have taken  
9 under the circumstances.” *Donel, Inc. v. Badalian*, 87 Cal. App. 3d 327, 333 (1978). “Before  
10 allowing a plaintiff to resort to service by publication, the courts necessarily require him to show  
11 exhaustive attempts to locate the defendant, for it is generally recognized that service by publication  
12 rarely results in actual notice.” *Watts v. Crawford*, 10 Cal. 4th 743, 749 (1995). Some courts,  
13 including this one, have ordered both service by email and by publication “out of an abundance of  
14 caution.” *Aevoe Corp. v. Pace*, 2011 WL 3904133, at \*2 (N.D. Cal. Sept. 6, 2011). The fact that a  
15 plaintiff has taken one or a few reasonable steps does not necessarily mean that “all myriad . . .  
16 avenues” have been properly exhausted to warrant service by publication. *Donel*, 87 Cal. App. 3d at  
17 333.

18 Furthermore, in considering motions to allow service by publication, “California law is clear  
19 that an affidavit is required, not merely a declaration.” *Bell-Sparrow v. Wiltz*, 2013 WL 2146574, at  
20 \*2 (N.D. Cal. May 15, 2013) (finding that while plaintiff made reasonable efforts, such as purchasing  
21 a “find person” report, attempting personal service on a last known address, and attempting service  
22 by mail, these efforts fell short of diligent search required by § 415.50(a) to warrant the last-resort  
23 measure of summons by publication). An affidavit is a “voluntary declaration of facts written down  
24 and sworn to by the declarant before an officer authorized to administer oaths.” *Id.* (citing Black’s  
25 Law Dict., Ninth Ed.). “Given the serious due process concerns raised by permitting service through  
26 publication,” failure to submit an affidavit sworn and attested to by a notary public demonstrating  
27 that Plaintiff exercised “reasonable diligence” for purposes of section 415.50(a) is not quickly  
28 excused. *Bell-Sparrow*, 2013 WL 2146574, at \*2. Finally, “attempts at personal service, search,

1 affidavits, and the court's order for publication must [ ] follow in reasonably quick succession so that  
2 they would relate to the conditions at the time of publication." Judicial Council Comment to Cal.  
3 Code Civ. Proc. § 415.50(a) (citing *Forbes v. Hyde*, 31 Cal. 342, 350 (1866)).

4 **QUESTIONS**

5 Based on the foregoing, the Court issues the following questions for Counsel to address at the  
6 hearing:

- 7
- 8 1. Has Plaintiff taken any efforts to *serve* Defendant Cobb or Davis *in this case*, as  
9 opposed to attempting service in other cases? If so, when and by what manner  
10 were those efforts effected?
  - 11 2. Has Plaintiff hired a professional process server to locate Defendant Cobb or Davis  
12 in California?
  - 13 3. Has Plaintiff attempted to locate Defendant Cobb through her former attorney, Mr.  
14 Parviz Heshmati? *See* Compl., at \*10-11.
  - 15 4. Is Plaintiff aware of any email addresses presently or formerly used by either  
16 Defendant Cobb or Defendant Davis?
  - 17 5. Much of Plaintiff's efforts are focused on locating Defendant Cobb, including  
18 compiling contact information for her close relatives. Have any such efforts been  
19 taken to locate Defendant Davis?
  - 20 6. Through an informal Google search, the Court has found an entry on  
21 ChamberOfCommerce.com with an address for DM Financial at 45 Camino Alto  
22 in Mill Valley, California 94941, listing Sloane Davis as the Manager. What  
23 efforts have been used to locate Defendants through DM Financial? Has Plaintiff  
24 attempted to locate or serve Defendants at this address?

25 **IT IS SO ORDERED.**

26 Dated: October 30, 2013

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Maria Elena James  
United States Magistrate Judge