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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SCOTT EMERSON FELIX, et al.,
Plaintiffs,
v.
KARIN L ANDERSON,
Defendant.

Case No. [14-cv-03809-JCS](#)

**ORDER GRANTING LEAVE TO
SERVE SUMMONS UPON
DEFENDANT BY PUBLICATION AND
DENYING AWARD OF COSTS FOR
REFUSAL TO WAIVE SERVICE**

Re: Dkt. No. 16

I. INTRODUCTION

Plaintiffs Scott Felix and Patricia Shuey filed a Motion for Leave to Serve the Summons upon Defendant by Publication and Award of Costs for Refusal to Waive Service (“Motion”). In the Motion, Plaintiffs ask the Court to allow service upon Defendant Karin Anderson by publication, pointing to evidence that due to Defendant’s intentional evasion of service, they have been unable to serve Defendant despite extensive efforts. Plaintiffs further request that the Court award costs incurred as a result of Defendant’s refusal to waive service. A hearing on the Motion was held on February 6, 2015. For the reasons stated below, the Motion is GRANTED in part and DENIED in part.

II. BACKGROUND

On August 21, 2014, Plaintiffs filed the Complaint in this matter bringing claims including fraud, constructive fraud, and conversion. The Complaint alleges that Defendant—Patricia’s sister—agreed to manage Patricia’s real property, finances, and family trust for Plaintiffs’ benefit, but later sold Patricia’s house in California \$200,000 under market value and used the trust’s funds to buy a house in Maryland, near where Defendant lived—without discussing any of these

1 decisions with Patricia first. *See* Complaint at 3-4.

2 Plaintiffs’ counsel declares that on September 19, 2014, “after investigation into the
3 whereabouts of defendant,” the summons and complaint were provided to One Legal Online Court
4 Services (“One Legal”) for personal service upon Defendant. *See* Decl. of Richard Sax in Supp. of
5 Motion for Leave to Serve the Summons upon Defendant by Publication and Award of Costs for
6 Refusal to Waive Service ¶ 3 (“Sax Decl.”).

7 In a Declaration of Diligence, One Legal’s Sarah Decker enumerates ten separate attempts
8 to serve Defendant at 7007 Woodland Avenue in Tahoma, Maryland—the address listed as
9 Defendant’s “Home” in the Declaration of Diligence. *See* Sax Decl., Ex. 1. In particular, Decker
10 states that on September 28, 2014, she “spoke with a woman who states her name is ‘Patty’ [and
11 that Defendant] was not home,” but “server believes the lady is lying and this was defendant,” and
12 the lady refused to accept the papers. *See id.* Decker states that later, on October 27, 2014, she
13 “received [a] call from Karin Anderson [who] confirmed that she resides at address” and that
14 “someone tried to serve her papers from CA one time and she told them it wasn’t her.” *See id.*
15 According to Decker, in that same conversation, “Ms. Anderson also informed server that she goes
16 to the ‘Senior Funhouse’ on Mon/Wed/Fri and that she will call to set up meeting.” *See id.*
17 Decker’s declaration, signed November 4, 2014, does not refer to any other phone calls with
18 Defendant. *See id.*

19 Plaintiffs’ counsel states that on November 18, 2014, he received a phone call from an
20 attorney with a Maryland office address who said that he represented Karin Anderson and
21 requested that Mr. Sax provide him with the summons and complaint in this action. *See* Sax Decl.
22 ¶ 6. On November 19, 2014, Plaintiffs’ counsel emailed the attorney the summons and complaint
23 in this action as well as a state court action and asked how Defendant wanted to proceed. *See* Sax
24 Decl., Ex. 2 (November 19, 2014, Email to Sean R. Day). The Court’s record contains no response
25 to the email.

26 According to Plaintiffs’ counsel, on December 9, 2014, he received a letter from an
27 attorney with a San Francisco office address stating that her office represents Defendant. *See* Sax
28 Decl. ¶ 8. On December 12, 2014, Plaintiffs’ counsel mailed the San Francisco attorney—Jean L.

1 Bertrand—the pleadings for this action as well as a state court action, a notice and
2 acknowledgment of receipt under Cal. Code Civ. Proc. § 415.30, and a request to waive service.
3 *See* Sax Decl., Ex. 3 (December 12, 2014, Letter to Jean L. Bertrand). On December 19, 2014,
4 Jean L. Bertrand faxed Plaintiffs’ counsel a letter confirming receipt of the mailed items and
5 stating, “We are not authorized to accept service on behalf of Karin Anderson.” *See* Sax Decl., Ex.
6 4 (December 19, 2014, Bertrand’s Faxed Letter to Mr. Sax). The letter from Bertrand carried the
7 notation “cc via email: ...Karin Anderson.” *See id.*

8 **III. REQUEST FOR SERVICE BY PUBLICATION**

9 **A. Legal Standard**

10 Service upon an individual defendant in a judicial district of the United States may be
11 effected pursuant to the state law where the district court is located or where service is made. *See*

12 Fed. R. Civ. P. 4(e)(1). Under California law, service by publication is permissible when:

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

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

19 Cal. Code Civ. Proc. § 415.50. The key inquiry for the Court is whether Defendant cannot with
20 “reasonable diligence” be served by another available method. *Id.*

21 To determine whether a plaintiff has exercised “reasonable diligence,” a court must
22 examine the affidavit required by the statute to see whether the plaintiff took steps that “a
23 reasonable person who truly desired to give notice would have taken.” *Donel, Inc. v. Badalian*, 87
24 Cal. App. 3d 327, 333 (1978). Reasonable diligence denotes a “thorough systematic investigation
25 and inquiry conducted in good faith by the party or his agent or attorney.” *Watts v. Crawford*, 10
26 Cal. 4th 743, 749 n.5 (1995). In *Aevoe Corp. v. Pace*, No. C 11-3215 MEJ, 2011 WL 3904133, at
27 *1 (N.D. Cal. Sept. 6, 2011), the court found that service by publication was appropriate where
28 plaintiff (1) hired a private investigator to track down defendant, (2) attempted personal service
and service by mail to defendant’s two addresses, (3) emailed and called defendant, which did not
lead to a response.

1 Because of due process concerns, service by publication must be allowed “only as a last
2 resort.” *Donel*, 87 Cal. App. 3d at 332. That a plaintiff has taken one or a few reasonable steps
3 does not necessarily mean that “all myriad of other avenues” have been properly exhausted to
4 warrant service by publication. *Id.* at 333. Before allowing a plaintiff to resort to service by
5 publication, the courts must require her to show “exhaustive” attempts to locate the defendant.
6 *Watts*, 10 Cal. 4th at 749 (internal citations omitted). In *Castillo-Antonio v. Azurdia*, No. C-13-
7 05709 DMR, 2014 WL 7206609, at *3 (N.D. Cal. Dec. 18, 2014), plaintiff attempted personal
8 service at defendant’s believed address four times, attempted service by mail, hired a private
9 investigator who made “indirect contact” with defendant confirming the address, and retained a
10 process server who made four more attempts at service, but the court denied service by publication
11 in part because the term “indirect contact” was too vague and plaintiff did not investigate
12 defendant’s known business address, email defendant, or contact his friends, family, or co-
13 defendant.

14 However, when there is evidence that a defendant is evading service, courts are more
15 willing to allow alternative methods such as service by publication. *See Miller v. Superior Court*
16 *In & For Los Angeles Cnty.*, 195 Cal. App. 2d 779, 786 (1961) (“A person who deliberately
17 conceals himself to evade service of process is scarcely in a position to complain over much of
18 unfairness in substitutive methods of notification [namely service by publication] enacted by the
19 Legislature to cope with such situations”). In *Steve McCurry Studios, LLC v. Web2Web Mktg.,*
20 *Inc.*, No. C 13-80246 WHA, 2014 WL 1877547, at *1 (N.D. Cal. May 9, 2014), the court allowed
21 service of defendant by email as well as publication if needed, where defendant demonstrated a
22 pattern of evading service: despite process server’s eight attempts to serve defendant at his last-
23 known address, plaintiff counsel’s email to defendant asking to set up a meeting, and defendant’s
24 informal agreements to meet with plaintiff’s counsel, defendant never showed up and stopped
25 responding to emails.

26 **B. Discussion**

27 Here, Plaintiffs have, with reasonable diligence, tried to serve Defendant by other means.
28 Their efforts include: (1) an investigation into Defendant’s address; (2) ten attempts by a process

1 server to personally serve Defendant at her home under Cal. Code Civ. Proc. § 415.10; (3) an
2 attempt by the process server to set up a meeting with Defendant; and (4) an attempt to mail and
3 email copies of the pleadings to Defendant via both of Defendant’s purported attorneys. *See Sax*
4 *Decl.* ¶¶ 3–10, Exs. 1–4. Mr. Sax’s declaration and the attached exhibits suggest that Plaintiffs
5 have made exhaustive efforts to locate Defendant. They have attempted in good faith practically
6 every available avenue of serving Defendant.

7 Moreover, the declaration and exhibits support the conclusion that Defendant has actual
8 notice of the lawsuit; therefore, the typical due process concern in allowing service by publication
9 is less applicable in this scenario. *See Donel*, 87 Cal. App. 3d at 332. Here, Defendant apparently
10 retained two attorneys who were not only aware of the lawsuit but also reached out to Mr. Sax
11 regarding the lawsuit. *See Sax Decl.* ¶ 6 (“Mr. Day...requested that I provide him with the
12 summons and complaint in this action”) & Ex. 4 (December 19, 2014, Bertrand’s Faxed Letter to
13 Mr. Sax) (“Please call me if you are interested in discussing possible resolution of our clients’
14 dispute”). Further, Defendant has been “cc[’d] via email” by her lawyer specifically about
15 Plaintiffs’ attempts to serve her. *See Sax Decl.*, Ex. 4 (December 19, 2014, Bertrand’s Faxed
16 Letter to Mr. Sax). Finally, Defendant actually had a phone conversation with the process server.
17 *See Sax Decl.*, Ex. 2 (Declaration of Diligence). The evidence suggests that Defendant is aware of
18 the pending litigation against her and is evading service. *See Miller*, 195 Cal. App. 2d at 786.

19 In light of Plaintiffs’ exhaustive efforts to serve Defendant by other means and the
20 likelihood that Defendant has actual knowledge of the lawsuit and is evading service, Plaintiffs’
21 Plaintiffs’ request for leave to serve Defendant by publication is GRANTED in part. Before
22 effecting service by publication, Plaintiffs shall make a final attempt to provide copies of
23 pleadings to Defendant by mail and following the procedures outlined in Cal. Code Civ. Proc. §§
24 415.30 and 415.40. Plaintiffs shall mail the papers to 7007 Woodland Avenue in Tahoma Park,
25 Maryland as well as any newly discovered addresses of Defendant. Then, if Plaintiffs do not
26 receive acknowledgment of receipt of summons (*see* § 415.30) or satisfactory proof of service (*see*
27 §§ 415.30, 417.20) within 35 days of mailing the papers, they shall effect service by publication in
28 The Gazette—a newspaper of general circulation in Maryland including Tahoma Park. *See*

1 Memorandum of Points and Authorities in Support of Plaintiffs’ Motion for Leave to Serve the
2 Summons upon Defendant by Publication and Award of Costs for Refusal to Waive Service.
3 Publication shall occur once a week for four successive weeks pursuant to California Government
4 Code § 6064.

5 **IV. REQUEST FOR AWARD OF COSTS**

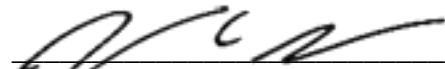
6 Plaintiffs’ request for costs of service is DENIED without prejudice. Once Defendant is
7 served, Plaintiffs may renew this request. However, the Court cannot impose on Defendant any
8 costs “incurred in making service,” where Defendant has not been served. Fed R. Civ. P. 4(d)(2).

9 **V. CONCLUSION**

10 For the foregoing reasons, Plaintiffs’ Motion is GRANTED in part as to Plaintiffs’ request
11 for leave to serve by publication, with the additional requirement to attempt proper service by mail
12 upon Defendant, and DENIED without prejudice as to Plaintiffs’ request for an award of costs
13 under Rule 4(d)(1). Plaintiffs shall have 90 days from the date of this order in which to effect
14 service.

15 **IT IS SO ORDERED.**

16 Dated: February 9, 2015

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19 JOSEPH C. SPERO
20 Chief Magistrate Judge
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