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7 **UNITED STATES DISTRICT COURT**
8 **SOUTHERN DISTRICT OF CALIFORNIA**

9 Estate of TIMOTHY GENE SMITH,
10 deceased, by his successor in interest
11 JANIE RICHELLE SANDERS;
12 JANIE RICHELLE SANDERS, as an
individual; SANDY LYNN
SIMMONS; and WYATT ALLEN
GUNNER SMITH,

CASE NO. 16cv2989-WQH-MDD
ORDER

13 Plaintiffs,

14 v.

15 CITY OF SAN DIEGO; SHELLEY
ZIMMERMAN AND SCOTT
HOLSLAG, as individuals and
employees of City of San Diego;
16 NATALIE ANN MACEY, as an
individual doing business as Macey
Bail Bonds; LEGAL SERVICE
17 BUREAU, Inc., a California domestic
corporation doing business as Global
Fugitive Recovery; DAN
18 ESCAMILLA, as an individual and on
behalf of Legal Service Bureau, Inc.;
LELAND CHAPMAN BAIL BOND
19 CO. INC., a Colorado corporation;
LBC, Inc., a Hawaii corporation;
20 KAMA AINA BAIL BONDS, INC., a
Hawaii corporation; LELAND B.
21 CHAPMAN, as an individual and on
behalf of Leland Chapman Bail Bond
Co. Inc., LBC, Inc., and Kama Aina
Bail Bonds, Inc.,

22 Defendants.

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27 HAYES, Judge:

28 The matter before the Court is the Ex Parte Motion for Alternative Service of

1 Summons filed by Plaintiffs Estate of Timothy Gene Smith, by his successor in interest
2 Janie Richelle Sanders; Janie Richelle Sanders; Sandy Lynn Simmons; and Wyatt Allen
3 Gunner Smith (“Plaintiffs”) (ECF No. 37).

4 **I. Background**

5 On December 8, 2016, Plaintiffs initiated this action by filing a complaint. (ECF
6 No. 1). On December 29, 2016, Plaintiffs filed the First Amended Complaint, which
7 is the operative complaint in this matter. (ECF No. 7). The First Amended Complaint
8 includes four causes of action against Defendant Dan Escamilla: conspiracy to violate
9 civil rights; intentional infliction of emotional distress; defamation; and false light. *Id.*
10 at 20-26. On May 4, 2017, the Court ordered that “Plaintiffs shall have ninety (90) days
11 from the date of this order to serve and file proof of service of summons of the
12 complaint on the remaining defendants to be served.” (ECF No. 36 at 7).

13 On May 4, 2017, Plaintiffs filed the Ex Parte Motion for Alternative Service of
14 Summons as to Defendant Dan Escamilla (“Defendant Escamilla”). (ECF No. 37). In
15 a Declaration by one of Plaintiffs’ Counsel Donald A. Green attached to the Motion,
16 Green states, in part,

17 “On December 12, 2016, I sent a Notice a Notice of Lawsuit and Request
18 for Waiver of Service of Summons on Dan Escamilla at 888 W. Santa Ana
Blvd., Suite 100, Santa Ana, CA 92701 by certified U.S. Mail . . . Included
19 in the package were the Notice, Waiver, copy of the summons, and copy
of the lawsuit. . . . This notice and waiver package was received by Dan
20 Escamilla on December 14, 2016. . . . On December 22, 2016, my
co-counsel and I received a letter from Dan Escamilla confirming his
receipt of this lawsuit and attacking plaintiffs’ allegations.”

21 (ECF No. 37-2 at 2; Green Decl. at ¶¶ 5-8).

22 The December 22, 2016 letter from Defendant Escamilla to Plaintiffs’ Counsel
23 states, in part,

24 This letter is intended to advise each of the plaintiff’s attorneys, and the
plaintiff, that the claims brought against the defendant are wholly without
25 merit and are not warranted under existing law. Based on the lack of legal
and factual merit of plaintiff’s claims against this defendant, the
undersigned is demanding immediate dismissal as a defendant in this
26 action.

27 Finally, this letter will place plaintiffs, and its attorneys, on notice that if
the undersigned and related entities are not immediately dismissed from

1 this action, monetary and nonmonetary sanctions, including but not limited
2 to a Rule 11 motion will be brought against the plaintiffs and its attorneys
3 seeking costs, attorney's fees and sanctions.

4 (ECF No. 37-5 at 1). The letter lists several causes of action, and states that the
5 complaint is in violation of California's Anti-SLAPP statute and "the lawsuit is in
6 potential violation of the attorneys' ethical obligations." *Id.* at 2-3. The letter bears the
7 signature of "Dan Escamilla[.]" *Id.* at 5.

8 On January 9, 2017, a letter was signed and sent by Defendant Escamilla to
9 Plaintiffs' Counsel. (ECF No. 37-6). The letter states "Thank you for withdrawing, as
10 to the undersigned defendant and Legal Service Bureau, Inc. dba Global Fugative
11 Recovery, the cause of action for negligence, the cause of action for wrongful death
12 (CCP §337.60) and the survival action (CCP §337.30)." *Id.* at 1. The letter states: "I
13 am continuing to maintain that there is a lack of legal and factual merit for any of the
14 causes of actions remaining as to the undersigned defendant and related entities." *Id.*
15 The letter discusses causes of actions alleged in the First Amended Complaint. *Id.* at
16 1-3.

17 Green states that "[i]n response to Mr. Escamilla's letter, plaintiffs agreed to
18 dismiss the cause of action for defamation." (ECF 37-2 at 3; Green Decl. at ¶ 10). On
19 January 26, 2017, Plaintiffs' Counsel sent a letter to Defendant Escamilla, stating, in
part,

20 As I told you in our conservation, I have reviewed your second letter. You
21 make a valid point regarding the defamation cause of action being barred
22 by the one year statute of limitations period of CCP § 340(c). In light of
23 that, I have filed a dismissal of that cause of action only. I do not agree
with any of your other arguments as expressed in your letter. I will
proceed with the balance of the causes of action in which you are named
as a defendant in the complaint.

24 During our telephone discussion in which I told you that we intend to go
25 forward and reiterated my request that you accept service by mail, you
said something that concerns me. You told me you would not waive
formal service. I then asked if I would be required to hire a process server.
You said something to the effect of, 'good luck in having him find me.'

26 (ECF No. 37-7 at 1.)

27 On January 31, 2017, a letter was signed and sent by Defendant Escamilla to

1 Plaintiffs' Counsel. (ECF No. 37-8). The letter states, in part,

2 With regard to service, you are attempting to construe my statements to
3 you as a breach of FRCP Section (d)(1) to avoid unnecessary expenses of
4 serving the summons. However, as with the filing of the complaint, you
have not adequately investigated the facts. So, as with my prior letters, I
will assist you in this obligation.

5 I am currently not physically located within the United States, and have
6 not been for some time. I am not currently, nor will I be in the near future,
7 in a position to meet with attorneys in Southern California for the purpose
8 of entering into a retainer agreement and assisting with the preparation of
any response to your lawsuit against me. The nature of my work requires
me to be available for international travel and my return date to the United
States is not certain at this time.

9 (ECF No. 37-8 at 1). The letters addressed to Defendant Escamilla from Plaintiffs'
10 Counsel, and the letters from Defendant Escamilla to Plaintiffs' Counsel bear the same
11 address: 888 W. Santa Ana Blvd, Suite 100, Santa Ana, California 92701. *See* ECF
12 Nos. 37-5, 37-6, 37-7, and 37-8. This is the same address that Plaintiffs assert their
13 Counsel sent a notice of lawsuit and a request for waiver of service of summons to on
14 December 12, 2016. (ECF No. 37-1 at 2).

15 Green states that on February 23, 2017, Plaintiffs hired a process server to serve
16 Defendant Escamilla, and that the process server subsequently attempted to serve him
17 at the 888 W. Santa Ana Blvd. address several times. (ECF No. 37-2 at 4; Green Decl.
18 at ¶¶ 14-17). Green states that on April 19, 2016, the process server performed a skip
19 trace on Defendant Escamilla, and the skip trace "indicated that the only address known
20 for Dan Escamilla was the address we already had: 888 W. Santa Ana Blvd." (ECF No.
21 37-2 at 4; Green Decl. at ¶ 18). Green states that following the skip trace, the process
22 server made several additional unsuccessful attempts to serve Defendant Escamilla at
23 the 888 W. Santa Ana Blvd. address. (ECF No. 37-2 at 4-5; Green Decl. at ¶¶ 19-20).

24 **II. Contentions of the Plaintiffs**

25 Plaintiffs contend that good cause exists for this Court to issue an order
26 permitting Plaintiffs to complete service on Defendant Escamilla by publication.
27 Plaintiffs assert they have acted diligently in attempting to personally serve Defendant
28 Escamilla.

1 **III. Applicable Law**

2 Federal Rule of Civil Procedure 4(e) states that an individual “may be served in
3 a judicial district of the United States by . . . following state law for serving a summons
4 in an action brought in courts of general jurisdiction in the state where the district court
5 is located or where service is made.” Fed. R. Civ. P. 4(e)(1). California Code of Civil
6 Procedure § 415.50 states,

7 (a) A summons may be served by publication if upon affidavit it appears
8 to the satisfaction of the court in which the action is pending that the party
9 to be served cannot with reasonable diligence be served in another manner
10 specified in this article and that either:

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

14 (2) The party to be served has or claims an interest in real or
15 personal property in this state that is subject to the
16 jurisdiction of the court or the relief demanded in the action
17 consists wholly or in part in excluding the party from any
18 interest in the property.

19 Cal. Civ. Proc. Code § 415.50(a). California Code of Civil Procedure § 415.50(b)
20 states,

21 The court shall order the summons to be published in a named newspaper,
22 published in this state, that is most likely to give actual notice to the party
23 to be served. If the party to be served resides or is located out of this state,
24 the court may also order the summons to be published in a named
25 newspaper outside this state that is most likely to give actual notice to that
26 party. The order shall direct that a copy of the summons, the complaint,
27 and the order for publication be forthwith mailed to the party if his or her
28 address is ascertained before expiration of the time prescribed for
29 publication of the summons. Except as otherwise provided by statute, the
30 publication shall be made as provided by Section 6064 of the Government
31 Code unless the court, in its discretion, orders publication for a longer
32 period.

33 Cal. Civ. Proc. Code § 415.50(b). California Government Code § 6064 states,

34 Publication of notice pursuant to this section shall be once a week for four
35 successive weeks. Four publications in a newspaper regularly published
36 once a week or oftener, with at least five days intervening between the
37 respective publication dates not counting such publication dates, are
38 sufficient. The period of notice commences with the first day of
39 publication and terminates at the end of the twenty-eighth day, including
40 therein the first day.

41 Cal. Gov’t Code § 6064.

42 “When substituted or constructive service is attempted, strict compliance with the
43 letter and spirit of the statutes is required.” *Olvera v. Olvera*, 283 Cal. Rptr. 271, 277

1 (Cal. Ct. App. 1991). “Before allowing a plaintiff to resort to service by publication,
2 the courts necessarily require him to show exhaustive attempts to locate the defendant,
3 for it is generally recognized that service by publication rarely results in actual notice.”
4 *Watts v. Crawford*, 896 P.2d 807, 811 n.5 (Cal. 1995) (quotation marks omitted). “The
5 term ‘reasonable diligence’ takes its meaning from the former law: it denotes a
6 thorough, systematic investigation and inquiry conducted in good faith by the party or
7 his agent or attorney[.]” *Kott v. Superior Court*, 53 Cal. Rptr.2d 215, 221 (Cal. Ct. App.
8 1996) (quotation marks omitted). California allows service by publication “as a last
9 resort[.]” *Donel, Inc. v. Badalian*, 150 Cal. Rptr. 855, 858 (Cal. Ct. App. 1978).

10 **IV. Analysis**

11 The Court applies California state law governing service by publication. The
12 Court determines that “[a] cause of action exists against the party upon whom service
13 is to be made.” Cal. Civ. Proc. Code § 415.50(a)(1). Service by publication is therefore
14 permitted if Defendant Escamilla “cannot with reasonable diligence be served in
15 another manner specified in this article[.]” Cal. Civ. Proc. Code § 415.50(a). Plaintiffs
16 have located Defendant Escamilla at 888 W. Santa Ana Blvd, Suite 100, Santa Ana,
17 California 92701. Based upon the letter exchange between Defendant Escamilla and
18 Plaintiffs’ Counsel, Defendant Escamilla appears to possess actual notice of the
19 Complaint and Summons. The letter from Defendant Escamilla states that he is not
20 within the United States and that his “return date . . . is not certain at this time.” (ECF
21 No. 37-8 at 1).

22 Plaintiffs have demonstrated exhaustive attempts to locate Defendant Escamilla.
23 Plaintiffs have demonstrated that Defendant Escamilla has actual notice of this action,
24 and that Defendant Escamilla has refused to return waiver of service. The Court
25 concludes that Plaintiffs have sufficiently demonstrated that Defendant Escamilla
26 “cannot with reasonable diligence be served in another manner specified in this
27 article[.]” Cal. Civ. Proc. Code. § 415.50(a). The Court concludes that service by
28 publication is necessary as a last resort under the facts of this case.

1 IT IS HEREBY ORDERED that Plaintiff's Ex Parte Motion for Alternative
2 Service of Summons (ECF No. 37) is GRANTED. Plaintiffs shall be permitted to
3 serve the summons on Defendant Escamilla by publication.

4 Service by publication as to Defendant Escamilla must be completed in the
5 following newspaper of general circulation in the state of California: Orange County
6 Reporter, 600 W. Santa Ana Blvd., Suite 205, Santa Ana, CA 92701; Telephone: (714)
7 481-0544. Pursuant to California Government Code § 6064, the publication "shall be
8 once a week for four successive weeks. Four publications in a newspaper regularly
9 published once a week or oftener, with at least five days intervening between the
10 respective publication dates not counting such publication dates, are sufficient. The
11 period of notice commences with the first day of publication and terminates at the end
12 of the twenty-eighth day, including therein the first day." Cal. Gov't Code § 6064.

13 DATED: July 19, 2017

14 
15 **WILLIAM Q. HAYES**
16 United States District Judge

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