

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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DASHOD REED,

Plaintiff,

v.

PERRY RUSSELL, et al.,

Defendants.

Case No. 2:22-cv-00537-RFB-BNW

ORDER

Before the Court is Plaintiff's Ex Parte Motion for Service by Publication. ECF No. 54. The Court finds that Plaintiff meets the requirements for service by publication and that good cause exists for extension of the service deadline. The Court therefore grants the Motion.

I. BACKGROUND

Plaintiff initiated a case against multiple defendants, including Defendant Jeanie Kyle-Ellender, asserting (among others) a First Amendment Retaliation claim. *See generally* ECF No. 16. The Court screened the operative complaint and found that Plaintiff had plausibly alleged a First Amendment Retaliation claim against Defendant Kyle-Ellender. ECF No. 15 at 11.

The Nevada Attorney General's Office did not accept service for Defendant Kyle-Ellender but provided her last-known address under seal. *See* ECF Nos. 29, 30. Plaintiff issued a proposed summons for Defendant Kyle-Ellender, and the Court instructed him to fill out a USM-285 form and return it to the U.S. Marshals Service. ECF Nos. 31, 35, 44. Though Plaintiff returned the form and indicated that Defendant Kyle-Ellender's address was filed under seal, the USMS was unable to effect service. *See* ECF Nos. 50, 51. The summons returned unexecuted because the USMS had three unsuccessful attempts at Defendant Kyle-Ellender's last-known address. *See id.*

The Court directed Plaintiff that given the unsuccessful service attempts, he must file a motion indicating whether some other manner of service should be attempted. ECF No. 52. Plaintiff filed the underlying motion, with an attached affidavit, requesting that the Court allow him to serve Defendant Kyle-Ellender by publication. ECF No. 54.

II. ANALYSIS

A. Service by Publication

The Constitution does not require any particular means of service of process. *Rio Props., Inc. v. Rio Intern. Interlink*, 284 F.3d 1007, 1017 (9th Cir. 2002) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). Instead, it requires only that service “be reasonably calculated to provide notice and an opportunity to respond.” *Id.* To that end, service of process is governed by Rule 4 of the Federal Rules of Civil Procedure.

Rule 4(e) governs service of individuals located within a judicial district of the United States. FED. R. CIV. P. 4(e). It provides that service is proper by serving an individual in accordance with law of the state where the district court is located. FED. R. CIV. P. 4(e)(1). This Court is located in the District of Nevada. The Nevada Rules of Civil Procedure (“NRCP”), in turn, allow for service by publication. NEV. R. CIV. P. 4.4(c).

A litigant who desires to effect service by publication must meet eight requirements. NEV. R. CIV. P. 4.4(c). The litigant must (1) establish that “the service methods provided in [NRCP] 4.2, 4.3, and 4.4(a) and (b) are impracticable”;¹ (2) demonstrate that the defendant cannot, after due diligence, be found, or that the defendant seeks to avoid service of process through concealment; (3) establish through pleadings or other evidence that a cause of action exists against the defendant; (4) demonstrate that the defendant is a necessary or proper party to the action; (5) set forth specific facts demonstrating the efforts plaintiff made to locate and serve the defendant; (6) provide the proposed language of the summons to be used in the publication, briefly summarizing the claims asserted and the relief sought; (7) suggest one or more newspapers in which the summons should be published that are reasonably calculated to give the defendant actual notice; and (8) provide the defendant’s last-known address, the dates during

¹NRCP 4.2 tracks federal Rule 4(e)(2) and permits service of an individual by either delivering a copy of the summons and complaint to the individual personally, leaving the copies at the individual’s dwelling with a person of suitable age and discretion, or delivering the copies to an agent authorized by appointment or by law to receive service of process. NEV. R. CIV. P. 4.2(a); FED. R. CIV. P. 4(e)(2). NRCP 4.3 governs service of individuals located outside Nevada or outside the United States. NRCP 4.4(a) governs service in a manner prescribed by statute. And NRCP 4.4(b) governs service “through any alternative service method.”

1 which defendant lived at that address, and confirmation that plaintiff is unaware of any other
2 address at which defendant has resided since that time or at which defendant can be found. NEV.
3 R. CIV. P.4.4(c).

4 In his Motion and accompanying affidavit, Plaintiff explains that because he is pro se and
5 proceeding *in forma pauperis*, he attempted to serve Defendant Kyle-Ellender through the USMS.
6 ECF No. 54 at 2, 6. He details that after the Attorney General's Office provided Defendant Kyle-
7 Ellender's address under seal, he filled out and returned the required USM-285 form to the
8 USMS, which unsuccessfully attempted service three times her last-known address. *Id.* He further
9 notes that because her address is under seal, his efforts to locate alternative addresses for
10 Defendant Kyle-Ellender have been limited. *Id.* at 2. Thus, he submits that despite public records
11 searches, he has been unable to determine other addresses for Defendant Kyle-Ellender. *Id.* at 2,
12 6. Instead, Plaintiff states that he has only been able to determine Defendant Kyle-Ellender's
13 employer through his search. *Id.* at 2 n.1. Given his inability to determine the city or county of
14 Defendant Kyle-Ellender's last-known address, or potential current address, Plaintiff asks that he
15 be able to publish a copy of the summons and complaint "in any major newspaper or periodical in
16 the respective county which was provided under seal." *Id.* at 4.

17 Based on Plaintiff's submissions, the Court will grant his Motion because it satisfies the
18 eight requirements imposed by NRCP 4.4(c). As to the first requirement, Plaintiff has established
19 that the service methods in NRCP 4.2, 4.3, 4.4(a), and 4.4(b) are impracticable. Beginning with
20 NRCP 4.2, it is evident that personal or substitute service upon Defendant Kyle-Ellender is
21 impracticable at this juncture because Plaintiff diligently attempted to locate Defendant Kyle-
22 Ellender and her current dwelling to no avail. Service under NRCP 4.3 is likewise impracticable
23 because that provision governs service of persons located outside Nevada or the United States,
24 but Defendant Kyle-Ellender's last-known address indicates that she is located in Nevada.
25 Further, service under NRCP 4.4(a) is inapplicable and therefore impracticable because there
26 exists no statute that requires service upon Defendant Kyle-Ellender in a particular manner.
27 Finally, service under NRCP 4.4(b) is also impracticable. Although NRCP 4.4(b) allows for
28 service by email, Plaintiff has been unable to discern an email for Defendant Kyle-Ellender

1 through his public records searches. Therefore, Plaintiff satisfies the first requirement because he
2 has shown that the service methods under NRCP 4.2, 4.3, 4.4(a), and 4.4(b) are impracticable.

3 Additionally, the Court finds that Plaintiff has satisfied the second, fifth, and eighth
4 requirements. Plaintiff's Motion and its supporting affidavit demonstrates that Plaintiff complied
5 with the Court's prior orders and returned the USM-285 form to the USMS. The USMS was
6 unable to serve Defendant Kyle-Ellender at her last-known address, which was provided under
7 seal by the Attorney General's Office, despite three attempts. Plaintiff, who is pro se and
8 proceeding *in forma pauperis*, searched public records in an attempt to locate a new address for
9 Defendant Kyle-Ellender, but was unsuccessful. Plaintiff's Motion, therefore, establishes NRCP
10 4.4(c)'s second, fifth, and eighth requirements because it: (1) shows that Plaintiff exercised due
11 diligence but could not locate Defendant Kyle-Ellender, (2) sets forth specific facts demonstrating
12 his efforts to locate Defendant Kyle-Ellender, (3) references Defendant Kyle-Ellender's last-
13 known address filed under seal, and (4) establishes that Plaintiff is unaware of any other address
14 where Defendant Kyle-Ellender resides at this time.

15 Regarding the third requirement, a cause of action is "[a] group of operative facts giving
16 rise to one or more bases for suing" or a "legal theory of a lawsuit." *Cause of Action*, BLACK'S
17 LAW DICTIONARY (11th ed. 2019). In screening the operative complaint, the Court previously
18 found that Plaintiff stated a plausible First Amendment Retaliation claim against Defendant Kyle-
19 Ellender. Thus, Plaintiff meets the third requirement, too.

20 Further, the Court finds that, based on the operative complaint, Defendant Kyle-Ellender
21 is a necessary and proper party to this matter because she supposedly played a central role in the
22 alleged First Amendment Retaliation. Thus, Plaintiff meets the fourth requirement as well.

23 Plaintiff likewise meets the sixth requirement. NRCP 4.4 provides that a litigant who
24 desires to serve his adversary by publication must "provide the proposed language of the
25 summons to be used in the publication, briefly summarizing the claims asserted and the relief
26 sought[.]" NEV. R. CIV. P. 4.4(c)(2)(C). Thus, NRCP 4.4 speaks to the content of the summons.
27 However, the required content of summonses issued by the federal court is governed by Federal
28 Rule of Civil Procedure 4. *See* FED. R. CIV. P. 4(a). Rule 4 is consonant with the Rules Enabling

1 Act and the U.S. Constitution because it does not “abridge, enlarge, or modify any substantive
2 right.” *See* 28 U.S.C. § 2072; *Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003).
3 Therefore, Rule 4 “applies regardless of contrary state law.” *Gasperini v. Ctr. for Humanities*,
4 518 U.S. 415, 427 n.7 (1996). Accordingly, Rule 4 will govern the content of the summons issued
5 in this case and the Court will not ask Plaintiff to modify the summons already issued for
6 Defendant Kyle-Ellender at ECF No. 45.

7 Finally, Plaintiff meets NRCP 4.4(c)’s seventh requirement because he suggested that the
8 complaint and summons be published in any major newspaper or periodical in the respective
9 county which was provided under seal. Because Defendant Kyle-Ellender’s last-known address
10 was provided under seal, Plaintiff is unable to discern the particular city or county of her last-
11 known address and therefore unable to provide specific suggestions for newspapers. The Court
12 therefore deems that Plaintiff’s submission regarding “the respective county which was provided
13 under seal” is sufficient.

14 In sum, the Court will grant Plaintiff’s Motion to serve Defendant Kyle-Ellender by
15 publication in accordance with NRCP 4.4(c) and FRCP 4(e)(1). Additionally, however, Nevada
16 law enables the Court to order Plaintiff “to make reasonable efforts to provide additional notice . .
17 . to a defendant using other methods of notice, including certified mail, telephone, voice message,
18 email, social media, or any other method of communication..” NEV. R. CIV. P. 4.4(d)(1). Thus,
19 this Court will also order that Plaintiff send the summons and complaint to the Defendant Kyle-
20 Ellender’s workplace, as identified by his public records search, by certified mail.

21 **B. Extension of Service Deadline**

22 Rule 4 provides that a plaintiff must serve a defendant “within 90 days after the complaint
23 is filed.” FED. R. CIV. P. 4(m). Rule 4(m) requires a two-step analysis to determine whether to
24 extend the time for service. *In re Sheehan*, 253 F.3d 507, 512 (9th Cir. 2001). At the first step, the
25 Court “must” extend the time for service “upon a showing of good cause.” *Lemoge v. United*
26 *States*, 587 F.3d 1188, 1198 (9th Cir. 2009). At the second step, the Court “may” extend the time
27 for service “upon a showing of excusable neglect.” *In re Sheehan*, 253 F.3d at 512.
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1 Courts must determine on a case-by-case basis whether the serving party has shown good
2 cause. *Id.* Generally, good cause is equated with diligence, and it requires more than the mere
3 inadvertence of counsel. *Townsel v. Contra Costa Cnty., Cal.*, 820 F.2d 319, 320 (9th Cir. 1987).
4 To determine whether there exists good cause, the Court can analyze whether: (1) the party to be
5 served personally received actual notice of the lawsuit, (2) defendant would suffer no prejudice
6 by the extension, and (3) plaintiff would be severely prejudiced if his complaint were dismissed.
7 *In re Sheehan*, 253 F.3d at 512.

8 Here, the Court finds that Plaintiff has shown good cause for his requested extension.
9 After the Court found that Plaintiff's First Amendment Retaliation claim survived screening, the
10 Attorney General's Office filed Defendant Kyle-Ellender's last-known address under seal.
11 Plaintiff complied with the Court's order to fill out and return a USM-285 form to the USMS.
12 The USMS attempted to serve Defendant Kyle-Ellender at her last-known address but could not
13 accomplish service despite three attempts. Plaintiff then complied with the Court's instructions to
14 file an appropriate motion for alternative service. And he has indicated in his Motion that despite
15 efforts to find an address for Defendant Kyle-Ellender through public records searches, he has
16 been unable to do so. Thus, Plaintiff has been diligent, and the Court now turns to the three
17 *Sheehan* factors.

18 The first *Sheehan* factor weighs against good cause because the record does not evince
19 that Defendant Kyle-Ellender received actual notice of the lawsuit. However, this lawsuit is still
20 in its infancy and has not advanced beyond the pleading stage. *See* ECF No. 49. Thus, the Court
21 finds that the second factor weighs in favor of good cause because Defendant Kyle-Ellender will
22 not be prejudiced by the extension. Plaintiff's Motion does not speak to the prejudice it would
23 suffer if the Court declined to enlarge the time for service, so the Court will construe this factor
24 against him. Still, the Court in its discretion finds that Plaintiff's diligence, coupled with the lack
25 of prejudice that Defendant Kyle-Ellender would suffer, constitutes good cause for the requested
26 extension.

27 Because the Court finds that there is good cause at the first step, the Court need not
28 advance to the second step.

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