

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WILLIAM J. KEEFE and
RANDY J. KEEFE,

Plaintiffs,

v.

RONALD A. ARTHUR,
State Bar Number 01009-482,
and KATHLEEM M. ARTHUR,
State Bar Number 01017413,

Defendants.

ORDER

00-0016-C

Plaintiffs William J. Keefe and Randy J. Keefe began this lawsuit against defendants Ronald A. Arthur and Kathleen M. Arthur and the Wisconsin Supreme Court's Board of Professional Responsibility and certain individual members of the board in January 2000. In an order entered March 2, 2000, I dismissed the suit against the board and its members on the grounds of sovereign immunity and failure to state a claim on which relief could be granted. At the time, I advised plaintiffs that they had to serve defendants Ronald Arthur and Kathleen Arthur by May 3, 2000, or the case would be dismissed as to these defendants as well. In April 2000, plaintiffs asked for an extension of time in which to serve defendants

because defendants were trying to avoid service and had filed bankruptcy proceedings. In an order entered April 25, 2000, I dismissed the case without prejudice to plaintiffs' reopening it if the bankruptcy proceeding did not dispose of their claims against defendants. In an order entered May 15, 2003, I granted plaintiffs' motion to reopen the suit on plaintiffs' representation that the bankruptcy proceeding had not resolved the issues in this case and that they had located defendants so as to be able to serve them with the complaint. I asked plaintiffs to act diligently and effectuate service within sixty days so as to speed the proceedings along. However, according to Fed. R. Civ. P. 4(m), plaintiffs have 120 days from the date the suit was reopened in which to serve defendants. The September 12, 2003 deadline will be extended upon a showing of good cause, such as proof of defendants' continued evasion of service. Fed. R. Civ. P. 4(m); see Coleman v. Milwaukee Bd. of School Directors, 290 F.3d 932, 933-34 (7th Cir. 2002).

Now, plaintiffs have filed a letter and attachments that I construe as a motion for an extension of time to serve defendants by publication and mailing pursuant to Wis. Stat. § 801.11(1)(c). Because I find that plaintiffs' attempt at service fails to constitute reasonable diligence as required by Wis. Stat. § 801.11(1)(c), plaintiffs' motion to serve defendants by publication will be denied.

In support of their motion, plaintiffs have submitted documents showing that plaintiffs hired a process server who went to defendants' home on July 11, 2003. The server

saw people inside the home but no one would answer the door. When the server called Ronald Arthur's cell phone and identified himself and the reason why he was at his door, the person who answered the phone hung up on him. Subsequently, security escorted the server off the Arthurs' property. The server returned to defendants' home accompanied by a police officer. The server alleges that "Mr. Arthur was there, walking around but would not answer."

Fed. R. Civ. P. 4(e)(1) permits service pursuant to the law of the state in which the district court hearing the matter is located. Wis. Stat. § 801.11(1)(c) provides that a plaintiff may serve a defendant by publication and mailing only after the plaintiff has exercised reasonable diligence to serve the defendant by two preferred methods. See Welty v. Heggy, 124 Wis. 2d 318, 323, 369 N.W.2d 763, 766-67 (Ct. App. 1985). First, the plaintiff must attempt to serve the defendant personally. Wis. Stat. § 801.11(1)(a). Second, if the plaintiff's attempts at personal service are unsuccessful despite reasonable diligence, the plaintiff may leave the summons and complaint with a competent family member at least fourteen years old or with an adult residing at the defendant's home. Wis. Stat. § 801.11(1)(b). Only after these two methods of service have been attempted with reasonable diligence can a plaintiff pursue service by publication.

Plaintiffs have not made a showing that they exercised the requisite reasonable diligence. Reasonable diligence requires a plaintiff to "exhaust with due diligence any leads

or information reasonably calculated to make personal service possible.” West v. West, 82 Wis. 2d 158, 166, 262 N.W.2d 87, 90 (1978). The exact parameters of reasonable diligence are not defined; however, Wisconsin case law provides some guidance. In Welty, 124 Wis. 2d at 325, 369 N.W.2d at 767, the court upheld service by publication after deputy sheriffs had made nineteen attempts to serve the defendant personally. Similarly, the Wisconsin Supreme Court has permitted service by publication after the plaintiff attempted to personally serve a defendant at an address where she reasonably believed the defendant would be, and the defendant admitted that he was continuously traveling and refused to give the plaintiff (his wife) his current address. In re Marriage of Emery v. Emery, 124 Wis. 2d 613, 624-25, 369 N.W.2d 728, 733-34 (1985).

In contrast to the cases in which service was upheld, Wisconsin courts have held that singular, unsuccessful attempts at service do not make substitute service proper. See, e.g., West, 82 Wis. 2d at 167, 262 N.W.2d at 91 (holding that plaintiff failed to exercise reasonable diligence by giving process server defendant’s last known address when other means of finding defendant were available). In Haselow v. Gauthier, 212 Wis. 2d 580, 589, 569 N.W.2d 97, 101 (Ct. App. 1997), the court held that reasonable diligence required at least one follow up attempt at service.

In this case, unlike most cases addressing the reasonable diligence inquiry, plaintiffs do not contend that they cannot find defendants. Plaintiffs contend that defendants are

evading service. Nonetheless, plaintiffs must adhere to the federal rules and the concomitant Wisconsin Statutes concerning proper service. Plaintiffs' attempt to serve defendants on July 11, 2003 does not fall within the parameters of reasonable diligence because they made no follow up attempt at service. Thus, plaintiffs have not "exhaust[ed] with due diligence any leads or information calculated to make personal service possible." West, 82 Wis. 2d at 166, 262 N.W.2d at 90. Plaintiffs may not seek service by publication until such reasonably diligent efforts have been made.

One final point is in order. Plaintiffs are not required to force defendants to accept service in order to exercise reasonable diligence. When a process recipient evades service by refusing to accept a copy of the summons and complaint, Wisconsin law permits the plaintiff to announce the nature of the documents to the recipient and place the documents in the general vicinity, that is, the physical proximity of the recipient. Currier v. Baldrige, 914 F.2d 993, 995 (7th Cir. 1990); Borden v. Borden, 63 Wis. 374, 377, 23 N.W. 573, 574 (1885).

ORDER

IT IS ORDERED that the motion of plaintiffs William J. Keefe and Randy J. Keefe for an extension of time to serve defendants by publication is DENIED without prejudice.

Entered this 20th day of August, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge