

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

TONY O. LaVINE and GAYLE M.
LaVINE,

Plaintiffs,

v.

CITY of HAYWARD, a fourth class
Wisconsin municipality, THOMAS J.
DUFFY, JR., individually and in his
official capacity as Mayor of the City
of Hayward, JOHN METCALF,
individually and in his official capacity
as Director of Public Works for the
City of Hayward, MICHAEL A.
KELSEY, individually and in his
official capacity as City Attorney for
the City of Hayward, LUCY
GUNTHER, individually and in her
capacity as City Clerk for the City of
Hayward, and CHESTER A.
BONCLER, JR.,

Defendants.

ORDER

04-C-0201-C

Defendant Chester A. Boncler, Jr. has moved the court to dismiss this case for insufficiency of service of process. The parties have briefed the issue and have submitted evidence on the matter. Subject matter jurisdiction is present under 28 U.S.C. §§ 1331 and

1332. I conclude from the parties' affidavits and documentary evidence that plaintiffs were reasonably diligent in attempting to serve process on defendant Boncler, Jr. Accordingly, defendant's motion to dismiss for insufficiency of service of process will be denied.

FACTS

Plaintiffs filed their action in this court on March 30, 2004. On April 1, 6, 9 and 14 of 2004, a private process server, Paul Shober, of Duluth, Minnesota, attempted to serve defendant with an authenticated copy of the summons and complaint both at defendant's home and at defendant's office.

According to Shober, on two occasions, he was told that defendant would be in the office, but when he arrived at defendant's office, an employee told Shober that defendant was out for the day and could not be contacted, even by cell phone.

Sawyer County Deputy Sheriff David Aubart attempted to serve personally defendant at defendant's place of business twice on April 29, 2004, and three times on April 30, 2004. On each occasion, Deputy Sheriff Aubart spoke to defendant's secretary, Kelly Rauch. Ms. Rauch suggested various ways that Deputy Sheriff Aubart "could probably catch" defendant. These suggestions ranged from going to defendant's home, going to defendant's mother's home in Radisson, WI, approximately 30 miles from the City of Hayward where defendant Boncler, Jr. lives and works, and going to the hospital.

On Deputy Sheriff Aubart's fifth try to serve defendant personally, he made substitute service on Ms. Rauch.

On May 3, 2004, Laurie Pinnow, a legal assistant with the law firm representing plaintiffs, mailed a copy of the summons and complaint in this action to defendant at his home address. Also on May 3, 2004, Pinnow faxed a copy of the summons to the Sawyer County Record, the newspaper of record in Sawyer County, Wisconsin, for publication as a Class III legal notice. The summons was published in The Sawyer County Register once a week for three consecutive weeks commencing May 5, 2004, and ending May 19, 2004.

On May 18, 2004, defendant Boncler, Jr. filed an "Answer and Affirmative Defenses," alleging insufficient service of process as one of his affirmative defenses.

OPINION

The Court of Appeals for the Seventh Circuit has held that "valid service of process is a prerequisite to a district court's assertion of personal jurisdiction." Swaim v. Moltan Co., 73 F.3d 711, 719-20 (7th Cir. 1996) (citing Omni Capital Int'l v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 103 (1987)). "Valid service of process comprises more than actual notice; it requires a legal basis for holding the defendant susceptible to service of the summons and complaint." Id. Fed. R. Civ. P. 4(e) sets out the rules governing service of process on an individual. It reads:

Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in any judicial district of the United States:

- (1) pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or
- (2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

Plaintiffs did not accomplish service of the summons and complaint on defendant Boncler, Jr. pursuant to the methods described in Rule 4(e)(2). There is no indication in the court's record that plaintiffs left a copy of the summons and complaint at Boncler, Jr.'s home with a person of suitable age and discretion then residing therein or that Kelly Rauch is an "agent authorized by appointment or by law to receive service of process" on defendant Boncler, Jr.'s behalf. Therefore, service of process will be sufficient only if plaintiffs accomplished service in accordance with Wisconsin law.

The Wisconsin Supreme Court has held that "when a statute prescribes how service is to be made, compliance with the statute is required for personal jurisdiction even where

the defendant has actual notice of the summons and complaint." Horrigan v. State Farm Insurance Co., 106 Wis. 2d 675, 681, 317 N.W.2d 474, 477 (1982); see also 519 Corp. v. Dept. of Transportation, 92 Wis. 2d 276, 287, 284 N. W.2d 643 (1979). Wis. Stat. § 801.10 states that "an authenticated copy of the summons may be served by an adult resident of the state where service is made who is not a party to the action. Service shall be made with reasonable diligence." Wis. Stat. § 801.11(1)(c) states that

(c) If with reasonable diligence the defendant cannot be served under par. (a) or (b), service may be made by publication of the summons as a class 3 notice, under ch. 985, and by mailing. If the defendant's post-office address is known or can with reasonable diligence be ascertained, there shall be mailed to the defendant, at or immediately prior to the first publication, a copy of the summons and a copy of the complaint. The mailing may be omitted if the post-office address cannot be ascertained with 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, but Wisconsin case law provides some guidance. In Welty v. Heggy, 124 Wis. 2d 318, 325, 369 N.W.2d 763, 761 (Ct. App. 1985), the court of appeals 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 serve a defendant personally 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 by publication was upheld, Wisconsin courts have held that singular, unsuccessful attempts at service do not make substitute service proper. 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.

Plaintiffs' attempts to serve defendant Boncler, Jr. fall within the bounds of reasonable diligence. A private process server made eight attempts on four separate dates to serve defendant at defendant's home and at his office. Defendant contends that plaintiffs' use of a private out-of-state process server would not have satisfied Wisconsin law requiring service to be accomplished by "an adult resident of the state where service is made." Although this is true, see Neidermire v. General Casualty Co. of Wisconsin, 222 Wis. 2d 356, 358, 588 N.W.2d 55, 56 (Ct. App. 1998), the fact that Shober was a non-resident does not change the fact that those eight attempts at service were made. Plaintiffs next used a Sawyer County deputy sheriff to attempt to serve defendant a total of five times at defendant's office. Only after a total of thirteen attempts at personal service did plaintiffs

serve defendant by publication pursuant to Wis. Stat. §801.11 (1)(c), by mailing the summons and complaint to defendant and publishing the summons for three consecutive weeks in the newspaper of record in Sawyer County, Wisconsin.

I conclude that plaintiffs exercised reasonable diligence in attempting to serve defendant Boncler, Jr. and that service by publication pursuant to Wis. Stat. §801.11 (1)(c) is sufficient in this case.

ORDER

IT IS ORDERED that defendant's motion to dismiss plaintiff's case for insufficiency of service of process is DENIED.

Entered this 20th day of September, 2004.

BY THE COURT:
BARBARA B. CRABB
District Judge