UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BRANDON BLUM and DANIEL SHKOLNIK,

Plaintiffs,

v.

AMIT RAIZADA, MOHAMMED ALI RASHID, and DOES 1 through 10,

Defendants.

Case No. 18-cv-2513 DMS (BLM)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO QUASH AND DISMISS

This case comes before the Court on Defendants Mohammed Ali Rashid and Amit Raizada's motion to quash service and dismiss the complaint for insufficient service of process. Plaintiffs Brandom Blum and Daniel Shkolnik filed an opposition to the motion, and Defendants filed a reply. For the reasons discussed below, Defendants' motion is granted in part and denied in part.

I.

BACKGROUND

On November 1, 2018, Plaintiffs Blum and Shkolnik filed a complaint against Defendants Rashid and Raizada. (ECF No. 1.) Summons was issued for Defendants on November 2, 2018. (ECF No. 2.) The summons issued for Mr. Rashid was for a residence at 5875 Collins Avenue, PH2, Miami Beach, Florida. (Declaration of

Dominique Scalise ("Scalise Decl.") ¶ 9.) The summons issued for Mr. Raizada was for a residence at 800 Pointe Dr., Apt. 1401, Miami Beach, Florida 33139. (*Id.*) On November 8, 2018, a process server went to deliver the summons and complaint for both Mr. Rashid and Mr. Raizada at 5875 Collins Avenue, PH2, Miami Beach, Florida. (ECF Nos. 4, 5; Declaration of Aaron Gott in Opp'n to Mot. ("Gott Decl.") ¶ 5, Ex. 2.) The process server's Affidavit of Service indicates the copies of the summons and complaint were executed for Mr. Raizada and Mr. Rashid, and left with "Stephanie Scolise," a "[c]o-[o]ccupant" and "[c]ompetent [m]ember of the [h]ousehold." (ECF Nos. 4, 5.) The person who received the copies was Dominique Scalise, a guest of Mr. Rashid. (Scalise Decl. ¶ 4.)

II.
LEGAL STANDARD

A federal court lacks jurisdiction over a defendant who has not been properly served. *SEC v. Ross*, 504 F.3d 1130, 1138–39 (9th Cir. 2007). Rule 12(b)(5) of the Federal Rules of Civil Procedure authorizes a defendant to move for dismissal due to insufficient service of process. *See* Fed. R. Civ. P. 12(b)(5). "When the validity of service is contested, the burden is on the plaintiff to prove that service was valid under Rule 4." *Ponomarenko v. Shapiro*, No. 16-02763, 2017 WL 1709335, at *2 (N.D. Cal. May 3, 2017) (citing *Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir. 2004)). "If the plaintiff is unable to satisfy this burden, the Court has the discretion to either dismiss the action or retain the action and quash the service of process." *Id.* (citing *Lowenthal v. Quicklegal, Inc.*, No. 16-3237, 2016 WL 5462499, at *5 (N.D. Cal. Sept. 28, 2016)).

III.
DISCUSSION

Defendants Raizada and Rashid move to quash the service of process and dismiss Plaintiff's complaint based on insufficient service of process. Plaintiffs argue Defendants' motion should be denied because (1) service was valid as to both

Defendants; (2) Mr. Raizada was properly served a second time; (3) service on Defendants' counsel was valid service; and (4) Defendants waived service by making a general appearance.

A. Service on Mohammed Ali Rashid

Federal Rule of Civil Procedure 4(e) sets out the requirements for serving an individual in a judicial district of the United States. *See* Fed. R. Civ. P. 4(e). Here, Plaintiffs contend they effected proper service on Defendants pursuant to Rule 4(e)(2)(B). Rule 4(e)(2)(B) provides for service of process by leaving a copy of the summons and complaint "at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there[.]" Fed. R. Civ. P. 4(e)(2)(B).

Because Defendants contest the validity of service, Plaintiffs bear the burden of proving the service was valid. *See Brockmeyer v. May*, 383 F.3d at 801. In order to demonstrate valid service, Plaintiffs rely on the process server's Affidavit of Service and Affidavit of Reasonable Diligence. The latter states:

> A woman answered the door and I asked for Amit or Mohammed. She stated that they were both in California but due back in about a week. I asked if she resided at the residence with them and she said she did. I advised that I was leaving legal documents for Mr. Rashid with her.

(Gott Decl. ¶5, Ex. 2 at 1–2.) This affidavit is inconsistent with the declaration of Dominique Scalise, who answered the door. According to Ms. Scalise, she resides in Chicago, Illinois and stayed at Mr. Rashid's residence during her trip to Miami. (Scalise Decl. ¶¶ 2, 4.) She declares that she informed the process server that she "was staying at Mr. Rashid's home for a few days as his guest while [h]e was away," and that she was never informed of the contents of the documents. (*Id.* ¶¶ 7, 8.)

There are several flaws with Plaintiffs' reliance on the process server's affidavits. First, Plaintiffs have not presented any evidence to rebut Ms. Scalise's declaration that she resides in Chicago and was only a guest of Mr. Rashid. Second, Plaintiffs do not dispute that the process server's Affidavit of Service incorrectly

states he left the documents with "Stephanie Scolise," instead of Dominique Scalise, evidencing a mistake in identification. Third, the process server declares that he properly served both Mr. Rashid and Mr. Raizada. (ECF Nos. 4, 5.) However, his Affidavit of Reasonable Diligence indicates that though he informed Ms. Scalise he "was leaving legal documents for Mr. Rashid," he makes no mention of leaving the documents for Mr. Raizada—demonstrating, at a minimum, some issues with service. (*See* Gott Decl. ¶ 5, Ex. 2 at 1–2.) Based on the evidence, Plaintiffs have failed to demonstrate proper service on Mr. Rashid pursuant to Rule 4(e)(2)(B).

B. Service on Amit Raizada

For the same reasons, Plaintiffs have failed to establish valid service on Mr. Raizada under Rule 4(e)(2)(B). Moreover, there is a genuine dispute as to Mr. Raizada's "dwelling or usual place of abode." *See* Fed. R. Civ. P. 4(e)(2)(B). Despite Defendants' allegation that Mr. Raizada resides with Mr. Rashid, Defendants do not dispute that the packet for Mr. Raizada was addressed to a different residence, at 800 S. Pointe Dr., Apt. 1401, Miami Beach, Florida 33139.[1] Yet, the process server's Affidavit of Service indicates Mr. Raizada was served at 5875 Collins Avenue, PH2, Miami Beach, Florida. (ECF No. 4.)

Plaintiffs also argue Defendants' motion is moot as to Mr. Raizada because they "re-served" him at his purported California residence pursuant to California law on January 29, 2019, after this motion was filed. (Pls.' Mem. of P. & A. in Opp'n to Mot. ("Pls.' Opp'n") at 9–10.) However, Defendants dispute the validity of the January 29, 2019 service on grounds that "the summons and complaint were not left with a person in charge of the office" and the person who received the documents was "not informed of the contents." (Defs.' Reply Mem. of P. & A. in Supp. of Mot. at 4.) Besides the assertion that this "re-service" constituted proper service under California law, Plaintiffs have not presented any support to show the "re-service"

[1] However, Mr. Raizada claims he also did not reside at this address on November 8, 2018. (Declaration of Amit Raizada in Supp. of Mot. ¶¶ 4–5.)

was valid. In addition, Defendants' motion to quash service challenges only the first attempted service, not the subsequent "re-service." Accordingly, the Court declines Plaintiffs' request to deny as moot Defendants' motion to quash the first attempted service. That motion is pending and must be addressed.[2]

C. Service on Defendants' Counsel

Next, Plaintiffs contend their service on Defendants' counsel was valid service on Defendants under California law, which authorizes service on an individual "by delivering a copy of the summons and of the complaint … to a person authorized by him to receive service of process." Cal. Code Civ. Proc. § 416.90. *See also* Fed. R. Civ. P. 4(e)(1) (stating an individual may be served "following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made"); Fed. R. Civ. P. 4(e)(2)(C) (providing, like California law, individual may be served by delivering summons and complaint "to an agent authorized by appointment or by law to receive service of process"). Under these rules, service may be effectuated where a person has "ostensible authority to accept service" on behalf of the party. *Warner Bros. Records, Inc. v. Golden West Music Sales, et al.*, 36 Cal. App. 3d 1012, 1018 (1974). Whether a person has ostensible authority to accept service on behalf of the party is predicated on the relationship between the two—is it "sufficiently close and enduring to make it reasonably certain that they [the party] would be apprised of the service … upon their behalf." *Id.* The federal rule is similar. *See Direct Mail Specialists, Inc. v. Eclat Computerized Techs., Inc.,* 840 F.2d 685, 688 (9th Cir. 1988) (stating service is generally "sufficient when made upon an individual who stands in such a position as to render it fair, reasonable and just to imply the authority on his part to receive service.")

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[2] Whether the "re-service" on Defendant Raizada is valid is not presently before the Court, and thus, is not further addressed in this Order.

Plaintiffs argue the relationship between counsel and Defendants is such that it is reasonable to imply authority on behalf of counsel to accept service for his clients. Plaintiffs rely principally on *Estate of Moss*, 204 Cal. App. 4th 521 (2012), in support of their argument. Plaintiffs' characterization of *Estate of Moss*, however, sweeps too broadly.

In *Estate of Moss*, the court analyzed section 416.90 and found service on the party's attorney was valid service on her client but emphasized the "narrowness of [its] holding[.]" 204 Cal. App. 4th at 534. There, the executor of an estate filed a petition to probate a will against the decedent's son and grandson. The executor was represented by counsel in the probate case. During the probate proceedings, the grandson filed a "postprobate contest to the will" in the same case and served it on the executor through the executor's attorney of record. The court emphasized the "unusual procedural context" of the case—specifically, that the executor herself (through her attorney) had filed the action and submitted to the jurisdiction of the court. *Id.* In that context, the court noted that the grandson's service on the executor's attorney was valid service on the executor: "It is only in circumstances such as exist in this case, in which a party and her attorney have already appeared in the action, and as to whom new process against that party related to that same action is issued, that our holding has any applicability." *Id.*

Here, Plaintiffs argue that service on Defendants' counsel is sufficient because counsel entered an appearance on behalf of Defendants in the present case and litigated for Defendants in related cases. (Pls.' Opp'n at 6.) As discussed below, however, counsel did not make a general appearance on behalf of Defendants in this case. Rather, counsel's appearance here has been limited to challenging the entry of default against Defendants and purported service of process. Defendants have neither acceded to the jurisdiction of the Court nor defended the action on the merits.

Further, "the attorney-client relationship by itself is insufficient to convey authority to accept service[.]" *See Lasswell Foundation for Learning and Laughter,*

Inc. v. Schwartz, No. 16-497, 2016 WL 8715724, at *2 (S.D. Cal. Nov. 4, 2016). Plaintiffs have not shown that Defendants and their counsel have "a relationship that extends beyond a typical attorney-client relationship" or that counsel "was authorized to accept service of process" on behalf of Defendants. *Id.* In fact, in response to Plaintiffs' question whether Defendants' counsel would accept service on Defendants' behalf, counsel responded that he was not authorized to do so. (Declaration of Harrison J. Dossick in Supp. of Mot. ¶¶ 12, 14, Ex. 4.)

Finally, Plaintiffs argue that Defendants' counsel "actively litigated" another case "involving the exact same dispute" in Los Angeles County Superior Court, therefore service on Defendants' counsel is effective service on Defendants as a matter of law. (Pls.' Opp'n at 6, 14.) Plaintiffs have failed to cite any authority for that narrow proposition, and the Court declines to apply the rules of service so loosely. The case in Los Angeles is in a different court, in a different action and in a different jurisdiction. In addition, Defendants have not submitted to jurisdiction in the present case, and their counsel has yet to make a general appearance in this proceeding. Under these circumstances, the Court finds counsel's relationship with Defendants is not sufficient to imply he has ostensible authority to receive service of summons on behalf of Defendants. Plaintiffs' service on Defendants' counsel is therefore not valid service on Defendants.

D. Waiver of Service

Plaintiffs also rely on *Benny v. Pipes*, 799 F.2d 489 (9th Cir. 1986), to argue Defendants have waived any claims relating to service of process because they made "a general appearance showing a 'clear purpose to defend the suit.'" (Pls.' Opp'n at 13.) "An appearance ordinarily is an overt act by which the party comes into court and submits to the jurisdiction of the court. This is an affirmative act involving knowledge of the suit and an intention to appear." *Benny*, 799 F.2d at 492 (citations omitted). However, "'[n]ot every act by a party that is addressed to the court or relates to the litigation will be deemed an appearance.'" *Blankenship v. Account*

Recovery Service, Inc., No. 15-2551, 2017 WL 1653159, at *2 (S.D. Cal. May 2, 2017) (citing *Taylor v. Boston & Taunton Transp. Co.*, 720 F.2d 731, 733 (1st Cir. 1983)).

In *Benny*, the Ninth Circuit held that three pre-answer motions for extension of time to respond did not constitute a general appearance. 799 F.2d at 493. While the third motion "specifically reserved the option of asserting an affirmative defense based on insufficiency of service," the first two motions "made no discernible objection to service of process." *Id.* at 492–93. Although the defendants "would have been well advised to include statements" in the first two motions that they were "not waiving any affirmative defenses," the court explained that it would be "harsh indeed to label these pre-answer omissions as a general appearance." *Id.* at 493.

Here, Defendants have participated in this litigation by filing a joint motion to set aside default, an objection to Plaintiff's request for entry of default, and the present motion to quash and dismiss for insufficient service of process. Like the third motion in *Benny*, Defendants' joint motion to set aside default and Mr. Raizada's objection to Plaintiffs' request for entry of default unequivocally dispute the validity of service and specifically reserve the defense of insufficient service. Plaintiffs also argue that Defendants' counsel "entered an unqualified general appearance" on behalf of Defendants, citing the Notice of Appearance. (*See* ECF No. 8.) However, Plaintiffs have not demonstrated that counsel's appearance in this case constitutes a general appearance as opposed to a special appearance to contest service of process. *See, e.g.*, *Fourte International Limited BVI v. Pin Shine Industrial Co., Ltd.*, No. 18-297, 2018 WL 1757776, at *2 (S.D. Cal. Apr. 11, 2018) ("Defendants have not waived any arguments relating to insufficient service; instead, each appearance counsel has made is to solely dispute the methods of service."); *Blankenship*, 2017 WL 1653159, at *3 (counsel's participation in discovery conference did not constitute a general appearance because there was no responsive pleading and counsel intended to "preserve his client's discovery rights

while investigating whether his client had been served"). Therefore, Plaintiffs have failed to show that Defendants (through their counsel) have submitted to the jurisdiction of the Court and intend to defend the suit on the merits.

Because Plaintiffs have not satisfied their burden of proving valid service or waiver of service, the court has discretion to either dismiss or retain the action. "Dismissal of a complaint is inappropriate when there exists a reasonable prospect that service may yet be obtained." *Arasan Chip Sys., Inc. v. Sonix Tech. Co. Ltd.*, No. 09-02172, 2010 WL 890424, at *1 (N.D. Cal. Mar. 8, 2010) (internal quotation omitted). Accordingly, the Court elects to quash service rather than dismiss the complaint.

IV.

CONCLUSION

For the foregoing reasons, Defendants' motion to quash and dismiss for lack of sufficient process is granted in part and denied in part. Specifically, the Court DENIES Defendants' motion to dismiss the complaint and GRANTS Defendants' request to quash service. Plaintiffs are to effect proper service on both Defendants Raizada and Rashid within thirty (30) days from the date of this Order.

IT IS SO ORDERED.

Dated: April 23, 2019

Hon. Dana M. Sabraw
United States District Judge