UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:15-cv-00393-SVW-PJW	Date	April 8, 2015
Title	*Federal Insurance Co. v. Caldera Medical, Inc., et al.*		

Present: The Honorable	STEPHEN V. WILSON, U.S. DISTRICT JUDGE

Paul M. Cruz	N/A
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
N/A	N/A

Proceedings: IN CHAMBERS ORDER DENYING FEDERAL INSURANCE COMPANY'S MOTION FOR AN ORDER AUTHORIZING SUBSTITUTED SERVICE [20]

Federal Insurance Company named, among others, twenty-four individuals in this interpleader action. These individuals are named plaintiffs in putative class actions pending against Federal's insured. Federal located twelve of these individuals and personally served eight of them. The remaining sixteen elude it. Federal asked the individuals' attorneys to accept service, but they received no response. Since Federal's search efforts and overtures to opposing counsel were unfruitful, Federal now turns to the Court: Federal asks for an order permitting it to serve the summons and complaint on the remaining sixteen individuals through the lawyers representing them in the underlying class actions.

LEGAL STANDARD

Federal Rule of Civil Procedure 4 governs service of summons. *See* Fed. R. Civ. P. 4. Under Rule 4(e)(2)(C), a party may serve another by "delivering a copy of each to an agent authorized by appointment or by law to receive service of process." Fed. R. Civ. P. 4(e)(2)(C). Under Rule 4(e)(1), a party may serve another by "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)(1).

DISCUSSION

I. Federal Rule of Civil Procedure 4(e)(2)(C)

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The first issue is whether the Court has the power under Federal Rule of Civil Procedure 4(e)(2)(C) to grant the relief Federal seeks. The answer is no. This Rule simply does not vest the Court with authority to fashion a prophylactic order appointing a third party as an agent for service of process.

Federal applies to the Court for an order authorizing particular attorneys as agents for service of process. An agent, however, can only be authorized "by appointment or by law." Fed. R. Civ. P. 4(e)(2)(C). The Rule contemplates appointment by the unserved party, not a court. *In re Focus Media*, 387 F.3d at 1083-84; *see also Nelson v. Swift*, 271 F.2d 504, 505 (D.C. Cir. 1959) (per curiam); *Olympus Corp. v. Dealer Sales & Serv., Inc.*, 107 F.R.D. 300, 305 (E.D.N.Y. 1985). And authorization by law flows from legislation, not court order. *Nelson*, 271 F.2d at 505; *see also* 4A Wright & Miller, Federal Practice & Procedure § 1098 (3d ed.). Thus, there is no authority permitting the Court to declare a particular person an authorized agent for service before the issue is presented by a motion to quash service.

Federal's request also fails to the extent it seeks an alternative means of service rather than appointment of agents for service. Rule 4(e)(2)(C) has no provision for fashioning alternative means of service, and, as a general practice, a court should not read non-existent words into a rule. *See United States v. Watkins*, 278 F.3d 961, 965 (9th Cir. 2002) ("[A] court should not read words into a statute that are not there."). Moreover, Rule 4(f), unlike Rule 4(e), permits courts to order service by "other means" — the Court ought not to presume that Rule 4(e), in the absence of such language, grants similar power for service on those living within the United States. *See Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (finding the inclusion of particular language in one section implies that the omission from another is intentional, indicating a disparate meaning).

Federal offers a single case where a court issued such an order, *Tuttle v. Sky Bell Asset Mgmt., LLC*, No. C 10-03588 WHA, 2011 WL 767741 (N.D. Cal. Feb. 28, 2011). *Tuttle*, however, did so without any discussion of its power to do so. And the case *Tuttle* relied on — *In re Focus Media, Inc.* — was a post-hoc evaluation of whether the agent actually served had sufficient authority, not a review of an order authorizing a mode of service yet performed. *See* 387 F.3d 1077, 1081-82 (9th Cir. 2004).[1]

[1] All of Federal's other proffered authority also arose in the context of evaluating service already performed. *E.g., United States v. Ziegler Bolt & Parts Co.*, 111 F.3d 878, 880 (Fed. Cir. 1997); *Semler v. Klang*, 603 F. Supp. 2d 1211, 1226 (D. Minn. 2009); *Thelen v. City of Elba*, No. 08-CV-1150 JNE/JJG, 2009 WL 212940, at *3-6 (D. Minn. Jan. 28, 2009) *Semler v. Klang*, 603 F. Supp. 2d 1211, 1226 (D. Minn. 2009). This makes sense: usually, a party attempts service, and the served party may move to quash if it finds

The Court therefore does not find *Tuttle* sufficiently persuasive to depart from Rule 4(e)(2)(C)'s unambiguous mandate.

Although Rule 4's procedures were "designed to provide maximum freedom and flexibility," *Elec. Specialty Co. v. Rd. & Ranch Supply, Inc.*, 967 F.2d 309, 314 (9th Cir. 1992) (quoting 4C Wright & Miller, Federal Practice and Procedure § 1061 (2d ed. 1987)), Rule 4(e)(2) does not vest the Court with power to modify the Rules' prescriptions in favor of its own view of adequate service and notice. In short, Federal Rule of Civil Procedure 4(e)(2)(C) does not empower the Court to enter the kind of order Federal seeks.

II. Federal Rule of Civil Procedure 4(e)(1)

Federal also moved for the same order under Federal Rule of Civil Procedure 4(e)(1), which permits service in accord with state law. Fed. R. Civ. P. 4(e)(1). Like Federal Rule of Civil Procedure 4(e)(2)(C), Section 416.90 of California's Code of Civil Procedure permits service on a person "authorized by [the party] to receive service of process." Cal. Code Civ. P. § 416.90.

Again, there is no authority indicating that a court may rule that a unserved party's attorney has sufficient authority to accept service before the plaintiff attempts service. To be sure, a court may determine — indeed, courts are often required to determine — whether an attorney possessed sufficient authorization to accept service on behalf of a client. *See, e.g.*, *In re Estate of Moss*, 204 Cal. App. 4th 521, 524, 533-34 (Cal. Ct. App. 2012); *Summers v. McClanahan*, 140 Cal. App. 4th 403, 406-15 (Cal. Ct. App. 2006);*Warner Bros. Records, Inc. v. Golden West Music Sales*, 36 Cal. App. 3d 1012, 1018 (Cal. Ct. App. 1974). But as Federal concedes, the issues of whether a served attorney has been expressly or impliedly authorized and whether the Court may authorize service on an otherwise unauthorized attorney are distinct. Dkt. 35, Reply, 7:14-23. The Court finds nothing enabling it to appoint the unserved defendants' attorneys as agents authorized to accept service.

Federal's resort to California Civil Code Section 413.30 fails to salvage its argument. That provision permits a court to direct service "in a manner which is reasonably calculated to give actual notice to the party to be served" so long as "no provision is made in this chapter or other law for the service of summons." Cal. Code Civ. P. 413.30. The problem is that the Court just discussed the provisions providing for service of summons upon authorized agents. *See* Cal. Code Civ. P. § 416.90. Thus, the Court cannot invoke Section 413.30 to circumvent Section 416.90.

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service improper. *See* Fed. R. Civ. P. 12(b).

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III. Service by Publication

In a footnote of its reply brief, Federal mentioned the possibility of service by publication. A court may approve of such notice under appropriate circumstances. Cal. Civ. Code P. 415.50; *see also* Fed. R. Civ. P. 4(e)(1). The Court would consider the propriety of such service if properly presented in a motion.

CONCLUSION

For the foregoing reasons, the Court denies Federal's motion. Nothing in this order prevents Federal from attempting service through the unserved parties' attorneys and then litigating the authorization issue upon a motion to dismiss under Federal Rule of Civil Procedure 12(b)(5). The Court only determines that it lacks the authority to fashion an alternative method of service by appointing agents for the unserved defendants.

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