



## Ellis v. United States of America et al

2021 | Cited 0 times | D. New Mexico | June 9, 2021

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO JOE ELLIS, Plaintiff, v. Civ. No. 20-971 CG/GBW UNITED STATES OF AMERICA, et al.,

Defendants.

### ORDER AUTHORIZING SERVICES OF KEYES DEFENDANTS VIA

PUBLICATION for Service by Publication. Doc. 27. Plaintiff requests an order authorizing service by publication on Defendants Asa Joshua Keyes and Ashlee Keyes . See id. Having reviewed the Motion and being fully advised in the premises, the Court GRANTS it.

#### I. BACKGROUND

Plaintiff has been unable to serve the Keyes Defendants despite making multiple, varied attempts to do so. He has hired several process servers, conducted multiple searches to locate addresses and places of employment, and made numerous attempts to serve them at their last known addresses. None of these actions has resulted in their service.

first attempt to serve the Keyes Defendants predates this case. On July 27, 2020, a process server hired by Plaintiff attempted to serve them with process from a different case, Ellis v. United States, No. 2:20-cv-00714-CG/SMV, 1

at 4720 Opal Dr. NE, Rio Rancho, New Mexico 87124. Doc. 27 at 8 ¶ 6. There, the process server served Vivian Hawn (presumed to be Defendant mother), who informed it that neither Keyes Defendant lived at this location. Id. Plaintiff then sent multiple letters to this address through first class mail, all of which were returned as undeliverable. Id.

Sometime thereafter but before November 16, 2020, Plaintiff conducted an Accurant Search, which located several possible addresses for the Keyes Defendants in New Mexico. Id. at 7 ¶ 3. He then retained the services of Garcia Process Serving to serve Defendants, which subsequently informed him that it could not locate these Id. at 7 ¶ 4. Garcia Process Serving also

on October 7, 2020, after discovering a

1 In Ellis v. United States, No. 2:20-cv-00714-CG/SM, Plaintiff raised the same claims against the



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same Defendants as he does here. Compare doc. 1 with Complaint, Ellis v. United States, No. 2:20-cv-00714- CG/SMV (D.N.M. July 17, 2020), ECF No. 1. His claims against Defendant United States therein were premature since he filed the complaint several weeks before Defendant deadline to respond to the Notice of Claim. See Stipulated Dismissal Without Prejudice Pursuant to Fed. R. Civ. P. 41, Ellis v. United States, No. 2:20-cv-00714-CG/SMV (D.N.M. Sept. 22, 2020), ECF No. 16 at 1. Accordingly, Plaintiff voluntarily dismissed his complaint in Ellis v. United States, No. 2:20-cv-00714-CG/SMV so that it could be refiled after that deadline. Id. This case is the refiling.

newspaper article indicating that he worked there. Id. at 8 ¶ 7. It was told that he no longer worked there. Id.

Sometime between October 7, 2020 and November 16, 2020, Plaintiff retained the services of Randy Gomez from Professional Process Service to serve the Keyes Defendants. Mr. Gomez and Ashlee Keyes at various times of the day and night and made extensive inquiries as to Id. at 7 8 at ¶ 5. His attempts left him with the

their Id.

On November 16, 2020, Plaintiff moved the Court for service by publication. Doc. 7. The Court denied the motion without prejudice

available under NMRA 1- Doc. 8 at 3 (quoting Soto v. Vill. o , Civil No. 10-0043 WJ/ACT, 2010 WL 11619168, at \*3 (D.N.M. Sept. 17, 2010) (unpublished)). - Plaintiff had exhausted service under NMRA 1- 004(F). Id. at 3 4 (quoting NMRA 1-004(J)).

In December 2020 and January 2021, Plaintiff thrice attempted to mail service to the Keyes Defendants at the addresses that he had on file for them. Doc. 27 at 2 ¶ 9, 8 9 ¶ 8. The first two attempts were rejected, while the third was never returned. See id.

On May 5, 2021, the Court extended the deadline for service on the Keyes Defendants to June 4, 2021. Doc. 18 at 3 4. Five days later, Plaintiff renewed his motion for service by publication, but neglected to attach the affidavit required by NMRA 1-004(J). Doc. 19. Therefore, the Court denied this motion without prejudice. Doc. 22. Two days later, Plaintiff filed a third motion for service by publication, doc. 23, which that the Keyes Defendants could not be served pursuant to NMRA 1-004(F)(2) or NMRA 1-004(F)(3). Doc. 24.

On May 26, 2021, the Court extended the deadline for service on the Keyes Defendants to July 6, 2021. Doc. 26. The Court also set June 7, 2021, as the deadline for Plaintiff to seek its leave for service by publication. Id.

Plaintiff then retained Garcia Process Serving to make a final attempt to serve the Keyes Defendants



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at their last known addresses. Doc. 27 at 9 ¶ 10. Garcia Process Serving ran skip traces on these Defendants and identified 4890 Taurus Rd. NE, Rio Rancho, New Mexico 87144 as the most current address for Defendant Ashley Keyes and 4720 Opal Dr. NE, Rio Rancho, New Mexico 87124 as the most current address for

Defendant Asa Joshua Keyes. Doc. 27 at 5 6. On June 2, 2021, Andres Garcia, a Garcia Process Serving employee, attempted to serve the Keyes Defendants at these addresses. Id. At 4890 Taurus Rd. NE, Rio Rancho, New Mexico 87144, Mr. Garcia talked with Valerie Hawn and learned that this Defendant no longer lived there. Id. at 5. Because Ms. Hawn declined to provide a current address for this Defendant, Mr. Garcia left a business card with her and asked her to have this Defendant call him. Id. As of June 6, 2021, he has not received a call from Defendant Ashlee Keyes. Id. At 4720 Opal Dr. NE, Rio Rancho, New Mexico 87124, the current occupant of that property informed him that she had lived there for four years and did not know Defendant Asa Joshua Keyes. Id. at 6. 2

Five days later, Plaintiff filed the instant motion for service via publication and an affidavit detailing his unsuccessful attempts to serve the Keyes Defendants. See generally id. In that affidavit, he clarified that neither he nor his agents have been able to locate a place of employment for Defendant Ashlee Keyes. See id. at 8 ¶ 7.

2 There is some tension between the sworn statements of Mr. Garcia and Plaintiff. The first point of tension r. Plaintiff swears that it is Vivian, see doc. 27 at 8 ¶ 6, while Mr. Garcia swears that it is Valerie, id. at 5. The second point of tension is whether the current occupant of 4720 Opal Dr. NE, Rio Rancho, New Mexico 87124 could have lived there for four years without knowing Defendant Asa Joshua Keyes, as Mr. Garcia claims, see id. at 6. Plaintiff swears that a different process server r, Ms. Hawn, at this same address on July 27, 2020 when attempting to serve the Keyes Defendants there. Id. at 8 ¶ 6. These points of tension, however, do not preclude the Court from authorizing service via publication not ma both the occupant and the mother denied that 4720 Opal Dr. NE, Rio Rancho, New Mexico 87124 was a usual place of abode for a Keyes Defendant.

## II. LEGAL STANDARD

Rule 4 of the Federal Rules of Civil Procedure authorizes service on an individual by methods permitted by state law in the state where the district court is located. Fed. R. Civ. P. 4(e)(1). Pursuant to the New Mexico Rules of Civil Procedure, service by

-004(J), (K).

give notice to the defendant in some manner more likely to bring the action to his T.H. McElvain Oil & Gas Ltd. P ship v. Grp. I: Benson-Montin-Greer Drilling Corp., 388 P.3d 240, 249 50 (N.M. 2016) (citations and internal quotation marks omitted); Clark v. LeBlanc exercise of diligence and good faith to locate a defendant are implicit prerequisites to T.H. McElvain, 388 P.3d at 250 (citations



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omitted).

Diligence may be established by showing that the plaintiff carefully followed the Hunt v. Inter-Globe Energy, Inc., 770 F.2d 145, 147 (10th Cir. 1985); Soto, 2010 WL 11619168, at \*2. procedure for personal service of process upon an individual is outlined in NMRA 1-004(F), which

permits service by delivery to the individual personally or by mail or commercial courier service. NMRA 1-004(F)(1). If either in-person service or service by mail is

and mailing by first class of the -004(F)(2) (emphasis added). If service fails under both

business or employment. NMRA 1-004(F)(3).

### III. ANALYSIS

Serving the Keyes Defendants by publication is proper since Plaintiff has not been able to serve them in a manner permitted by NMRA 1-004(F) despite making multiple reasonable attempts to do so. With respect to NMRA 1-004(F)(1), Plaintiff and his agents have not been able to serve the Keyes Defendants in person or via the post even though they have conducted several searches to identify possible addresses and places of employment for them, attempted to serve them at each address and place of employment identified, and sent certified mailings to these addresses. With respect to NMRA 1-004(F)(2), Plaintiff and his agents have not been able to locate a usual place of abode for either Keyes Defendant despite conducting multiple searches for their current address(es) and talking with the current occupants of each address located. His most

recent search yielded two addresses both of whose present occupants stated that no Keyes Defendant lived there. Finally, with respect to NMRA 1-004(F)(3), Plaintiff and his agents have not been able to identify a current place of business or employment for either Keyes Defendant. One process server did locate a possible place of employment for Defendant Asa Keyes, but subsequently learned from the employer that Defendant Asa Keyes no longer worked there.

### IV. CONCLUSION

Plaintiff repeated attempts to serve the Keyes Defendants demonstrate that service pursuant to NMRA 1-004(F) cannot reasonably be made and that service by publication is the only remaining mechanism that is likely to provide them with notice about this case. Accordingly, Plaintiff is HEREBY AUTHORIZED to serve the Keyes Defendants via publication.

New Mexico Rules of Civil Procedure requires that such service take the form of a notice of pendency of the action that contains the following:



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(a) the caption of the case, as provided in Rule 1-008.1 NMRA, including a statement which describes the action or relief requested; (b) the name of the defendant or, if there is more than one defendant, the name of each of the defendants against whom service by publication is sought; (c) the name, address and telephone number of plaintiff's attorney; and (d) a statement that a default judgment may be entered if a response is not filed.

NMRA 1-004(K)(2). Having reviewed t, see doc. 27 at 4, the Court FINDS that it complies with these requirements but improperly states the Keyes Defendants have thirty days to respond to Plaintiff Complaint (even though Federal Rule of Civil Procedure 12(a)(1)(A) only gives them twenty-one days to do so). Accordingly, IT IS HEREBY ORDERED that Plaintiff AMEND his notice of pendency of suit to state that the Keyes Defendants have twenty-

Finally, the New Mexico Rules of Civil Procedure require notice be published in a newspaper of general as well as general circulation in the county which reasonably appears [to be] most likely to give -004(K). The Court FINDS that the former is the Las Cruces Sun-News and the latter is the Albuquerque Journal. Accordingly, IT IS HEREBY ORDERED that suit must be published at least once a week for at least three weeks in both the Las Cruces Sun-News and the Albuquerque Journal and that any proof of service filed by Plaintiff contain a copy of the actual notice published in these newspapers and list the dates of its publication.

IT IS SO ORDERED.

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MAGISTRATE JUDGE

GREGORY B. WORMUTH UNITED STATES

