

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BRIDGEPORT MUSIC, INC., et al.,)
)
Plaintiffs,)
)
v.) NO. 3:01-0700
) Jury Demand
ROAD RUNNER RECORDS,) Judge Campbell/Brown
)
Defendants.)

O R D E R

Presently pending in this case are two (2) motions by the plaintiffs. The motion for extension of time to effect service (Docket Entry No. 4) is **GRANTED IN PART**. The plaintiffs may have until **October 15, 2001**, to complete service in all cases, provided that the plaintiffs use personal service so that the time for response will be twenty (20) days after service. If the plaintiffs were to wait until the deadline to serve an amended complaint and use service by mail, responses would not be due in sufficient time to allow the scheduling order set by the District Judge to be maintained.

Of course, there is nothing to prevent the plaintiffs from filing and serving their amended complaint on the defendants in this case before the September 28, 2001 deadline. Plaintiffs

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have had since May to be working on service of process, and so a longer extension is not justified.

For the reasons stated below, plaintiffs' motion for service by publication is **DENIED** (Docket Entry No. 3).

As an initial matter, the Magistrate Judge notes that plaintiffs' motion for service by publication is not supported by memorandum, and thus is in violation of Local Rule 8(b)(2). It is further noted that the affidavit of Mr. Armen Boladian, submitted in support of the motion for the purpose of verifying plaintiffs' belief that certain purported defendants do not reside in the state of Tennessee and that the residence of these parties is unknown, does not bear Mr. Boladian's original signature, nor does it appear to be properly notarized. Specifically, the affidavit lacks the notary's signature. Furthermore, the affidavit is entirely conclusory, giving neither the basis for the affiant's belief that these purported defendants do not reside in the state of Tennessee, nor any details as to what measures plaintiffs employed in attempting to discover the addresses where these parties might be found. Mr. Boladian merely concludes that ". . . the residence of each stated defendant is unknown and cannot be ascertained upon diligent inquiry."¹ It is also disturbing that the list of

¹ The Magistrate Judge cannot help but wonder why so fundamental a matter has not already been addressed in the nearly four months since the original complaint was filed.

defendants to be served by publication contains a number of defendants who are listed as having not returned a request for waiver or having not picked up certified mail. Clearly plaintiffs have good addresses for these defendants and have not shown they attempted personal service despite being warned early in the case of the need to obtain service promptly in the matter.

Notwithstanding these defects, the Magistrate Judge has reviewed the motion, affidavit, and accompanying exhibit. The motion cites Rule 4(e) of the Federal Rules of Civil Procedure and §§ 21-1-203 and 21-1-204 of the Tennessee Code as permitting service by publication in this matter. Rule 4(e) provides, in pertinent part, as follows:

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 . . .

In reviewing a motion brought pursuant to this subsection, the district court in Thomas v. Morgan, 1 F.Supp.2d 1424 (M.D. Ala. 1998), defined the analysis called for as follows:

Thus, when a suit is filed in federal district court in the Middle District of Alabama, a plaintiff may serve on a defendant a copy of the complaint and a summons by any means authorized by Alabama law. The question for the court is whether the facts of this case present an occasion where Alabama law would authorize service by publication.

Plaintiffs cite two statutory sections from Title 21 of the Tennessee Code, dealing with proceedings in chancery, as the source of state law authorizing service by publication. While T.C.A. §§ 21-1-203 and 21-1-204 do dispense with the requirement of personal service in chancery proceedings when the defendant is a nonresident or of unknown residence, and further designate the procedure by which service by publication may be had, it does not appear that these or any other provisions of the Tennessee Code authorize such service in a copyright infringement action.²

In Scroggins v. Goss, 1999 WL 820742 (Tenn.Ct.App.), the Tennessee Court of Appeals considered an argument for service by publication in an action at law, by analogy to the above cited provisions applicable to chancery proceedings. The court

² Such an action, in which monetary relief is sought, is of course an action at law, not a proceeding in equity properly pursued in chancery court. Video Views, Inc. v. Studio 21, Ltd., 925 F.2d 1010, 1016 (7th Cir. 1991), overruled on other grounds, 510 U.S. 517 (1994).

acknowledged that three Tennessee statutes authorize service by publication in circuit court proceedings, specifically in the instance of forcible entry and detainer, in cases of eminent domain, and in any equity proceedings conducted in circuit court. Id. at *3. The court went on to state its belief that these three statutes, "which provide that service by publication may be proper in certain instances, are further evidence that service by publication is not allowed in the absence of such authorization." Id.

The Scroggins court proceeded to quote the opinion by the Tennessee Court of Appeals in Continental Ins. Co. v. Masters, 1993 WL 4856 (Tenn.Ct.App. 1993), wherein the court held that T.C.A. § 21-1-203 does not apply to the circuit court, further stating that this statute effectively "provides a means of giving notice to interested parties when the court is acting in rem." The Scroggins court concluded by holding as follows:

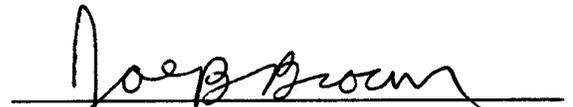
The Tennessee General Assembly has chosen to authorize the utilization of service by publication in certain specific instances. Such instances have ben codified as statutes in the Tennessee Code. Nowhere in the Tennessee Code does the General Assembly authorize service by publication for civil negligence actions filed in circuit court. In the absence of such a statute, service by publication is not a valid method of achieving service upon a defendant.

Scroggins, 1999 WL 820742 at *4. Likewise, the Magistrate Judge concludes that Tennessee law does not allow service by publication in intellectual property actions or other actions at law (except as previously identified) which would be properly filed in circuit court. Service of process in this manner, if permitted, would raise serious constitutional due process issues if plaintiffs tried to enforce any judgment they obtained by default on these defendants.

Accordingly, the motion for service by publication is **DENIED**.

The Clerk will post this order on the Court's webpage, www.tnmd.uscourts.gov, under Bridgeport General Orders, with the title "Deadline for Service of Process".

It is so ORDERED.



JOE B. BROWN
United States Magistrate Judge