UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

BRIANA DEANE SALYERS and
BRITTANY DEANE SALYERS,

Plaintiffs,

v. Case No.: 2:19-

SCOTT ,

Defendant.
_______________________________________/

ORDER

Pending before the Court is Defendant's Motion to Quash Service of Process, filed on July 24, 2020. (Doc. 58). Plaintiffs' Response in Opposition to Defendant's Motion to Quash Service of Process was filed on August 6, 2020. (Doc. 59). This matter is ripe for review. For the reasons that follow, the Court finds that Defendant's Motion to Quash Service of Process (Doc. 58) must be **GRANTED**.

BACKGROUND

The service of process at issue in this Motion was effectuated on February 3, 2020. (Doc. 20 at 1). The process server, Joseph Cabrejos, identified on the second page of his sworn declaration that he went to the last known address of Defendant and spoke to the receptionist for the management office at his apartment complex.[1] (*Id.* at 2). The receptionist verified the

[1] Defendant argues that, since Cabrejos' narrative description is on the second page of the proof of service, it is "questionable" if it can be considered to be under oath. (Doc. 58 at 1). Defendant states that this Court should conduct an evidentiary hearing to weigh the testimony of Cabrejos and Defendant in this matter. (*Id.* at 2). The narrative is, however, referenced on the signed page of Cabrejos' affidavit, which Defendant admits. (*Id.* at 1). The Court finds, therefore, that conducting an evidentiary hearing is not necessary and the Court has evaluated

address, that Defendant's lease was current, and confirmed from a photograph Defendant's identity as the Scott [redacted] renting that apartment. (*Id.*). Cabrejos knocked on the door of Defendant's apartment and said, "Hey Scott, this is Joe," to which a person inside responded, "Joe who?" (*Id.*). When Cabrejos stated he was a process server, the person refused to open the door and denied he was Defendant. (*Id.*). Ultimately, Cabrejos read out the summons, left a copy of the Summons and Complaint at the door, and mailed a copy to the address. (*Id.*).

In his Motion and in an affidavit, Defendant claims that he was neither served with the initial complaint personally, nor was service effectuated on a person authorized to accept service of process for Defendant. (Doc. 58 at 1). Defendant claims that he was at a friend's house on February 3, 2020, when the process server was at his apartment and that there was a friend at his apartment at that time.[2] (Docs. 35-1 at 1, 58 at 1). Defendant claims that he left the country from February 4, 2020 until March 12, 2020. (Doc. 35-1 at 1).

In response, Plaintiffs claim that service of process was properly effectuated through "drop service" because Defendant was avoiding service by refusing to identify himself. (Doc. 59 at 3–4). They argue that since Defendant did not initially denying being "Scott" when asked by the process server, only refusing after Defendant realized it was a process server at the door, this is enough to prove that the Defendant was, in fact, home and heard the process server read the summons. (*Id.*).

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this Motion as if Defendant's assertion that he was not home when Cabrejos served process is true.

[2] It is not clear from the affidavit (Doc. 35-1) who either of Defendant's friends are, or if they are indeed two separate people. Defendant attests that the friend at Defendant's house on February 3, 2020, took a video of the papers left by the process server, but makes no mention when Defendant was allegedly made aware of this video. (Doc. 35-1 at 1).

LEGAL STANDARDS

Fed. R. Civ. P. 4(e)(1) allows for proper service by following the law of the state where the district court is located. Fla. Stat. § 48.031(1)(a) provides:

> Service of original process is made by delivering a copy of it to the person to be served with a copy of the complaint, petition, or other initial pleading or paper or by leaving the copies at his or her usual place of abode with any person residing therein who is 15 years of age or older and informing the person of their contents. Minors who are or have been married shall be served as provided in this section.

Under Florida law, ordinarily, "[s]trict construction of compliance with statutes governing service of process is required." *Scotlynn USA Div., Inc. v. Valdez*, No. 2:15-cv-151-FtM-29MRM, 2015 WL 13734078, at *3 (M.D. Fla. Sep. 2, 2015) (quoting *Bennett v. Christiana Bank & Tr.*, 50 So. 3d 43, 45 (Fla. 3d DCA 2010). "However, case law in Florida provides for some exceptions to strict compliance with the statute. Under Florida law, the real purpose of the service of summons is to give proper notice to the defendant in the case that he is answerable to the claim of plaintiff." *Id.* (quoting *Haney v. Olin Corp.*, 245 So. 2d 671, 673 (Fla. 4th DCA 1971)). "The major purpose of the constitutional provision which guarantees 'due process' is to make certain that when a person is sued he has notice of the suit and an opportunity to defend." *Id.*

"Generally, service of process is improper when a summons and complaint are left at a defendant's door." *Scotlynn*, 2015 WL 13734078, at *3 (citation omitted). "Where, however, the person to be served flees from the presence of the process server in a deliberate attempt to avoid service of process" Fla. Stat. § 48.031 "may be satisfied if the process server leaves the papers at a place from which such person can easily retrieve them and takes reasonable steps to call such delivery to the attention of the person to be served." *Olin Corp. v. Haney*, 245 So. 2d

669, 670-71 (Fla. 4th DCA). Ultimately, "the specific facts of each case must be considered." *Scotlynn*, 2015 WL 13734078, at *3.

For example, in *Olin Corp. v. Haney*, a deputy approached Mrs. Haney as she left her house, with Mr. Haney standing in the doorway, in attempt to serve her and identified himself. *Haney*, 245 So. 2d at 672. Mrs. Haney fled the deputy, running back into her home, and closed the door in the deputy's face. *Id.* The deputy knocked on the door and rang the bell, but Mrs. Haney would not answer. *Id.* So, the deputy read the summons out loud and announced that he would leave a copy of the summons and complaint on the doorstep. *Id.* There, the court determined that "[a]n officer's reasonable attempt to effect personal service of process upon a person in his own home, when the person reasonably should know the officer's identity and purpose, cannot be frustrated by the simple expedient of the person closing the front door in the officer's face and willfully refusing to accept service of process." *Id.* at 673. The court concluded that service was proper based on the factors that defendants were physically present on the premises, knew of the officer's presence and purpose, and could have received the papers if they had opened the door. *Id.*

ANALYSIS

The Court finds that there are significant factual distinctions between the cases cited by Plaintiffs in support of proper service and the scenario at issue here. At most, the process server established that he left the papers at Defendant's apartment, and that there was an unidentified person inside. (Doc. 20 at 2). The affidavit does not state that the process server, Cabrejos, ever visually made contact with Defendant to verify the person he was talking to inside the house was Defendant. And, that person never identified themself by name initially, merely asking who the process server was, before later denying he was the Defendant. (*Id.*).

Plaintiffs argue that service was effective because Defendant was actively evading service by being inside the apartment but refusing to open the door. (Doc. 59 at 3). They claim the person inside was Defendant since "the natural and normal response to the process server's statement of 'Hey Scott, this is Joe' would be to say, 'I'm not Scott.' [sic] or 'Scott's not here.'" (Doc. 59 at 4). However, the Court is not inclined to decide what a person's normal response should be to an unexpected, unknown person who knocks on their door. Further, Cabrejos could have returned a different day or attempted to wait and make visual contact with Defendant before reading out the Summons and leaving copies of the Summons and Complaint at Defendant's door. *See Scotlynn*, 2015 WL 13734078, at *4. His affidavit lists none of that. (Doc. 20). The Court does not agree that this, by itself, shows Defendant was actively evading service to the extent it makes "drop service" proper in this instance. *See, e.g.*, *Sportcrete Ltd. v. Sternberg*, No. 611CV175ORL18GJK, 2011 WL 13298767, at *4-5 (M.D. Fla. Oct. 6, 2011).

Defendant relies on *Cullimore v. Barnett Bank of Jacksonville*, 386 So. 2d 894 (Fla. 1st DCA 1980), in support of his contention that a process server must actually make contact with the person to be served, not merely hear that a person is inside of the home while attempting service. (Doc. 58 at 2). Plaintiffs attempt to distinguish *Cullimore*, stating that, in that case, "there was no identification of the defendant and nothing to indicate that the defendant was inside the home but evading service." (Doc. 59 at 5). In *Cullimore*, there was actually more evidence that the defendant was inside his house than in this case, however. The process server in *Cullimore*, a sheriff's deputy, verified with neighbors that Cullimore lived in the house and asked a dispatcher to run the license tag of the car in the driveway to verify it was registered to Cullimore. 386 So. 2d at 895. The deputy heard noises inside the house that stopped when she knocked on the door, so she radioed the dispatcher to call Cullimore's home telephone number.

Id. The dispatcher responded back that she made contact with Cullimore, who admitted she was home but refused to answer the door. *Id.* The court in *Cullimore* determined that since the dispatcher's statements to the deputy were hearsay and the deputy had never seen or verified personally that Cullimore was inside the house, service was ineffective. *Id.* at 896.

In this case, Cabrejos was able to verify that there was someone in Defendant's house, but at no time did this person ever identify themselves as Defendant and Cabrejos does not mention that he was able to see the person he was speaking to was, in fact, Defendant. (Doc. 20 at 2). Further, none of the cases Plaintiffs cite in support deal with a scenario where the process server was not able to personally observe or verify the identity of the person avoiding service. *See Kennedy v. Grova*, No. 11-61354-CIV, 2012 WL 1368139, at *2 (S.D. Fla. Apr. 19, 2012) (defendant identified himself by name when process server knocked on the door); *Sportcrete Ltd.*, 2011 WL 13298767, at *2 (process server observed defendant inside his house but defendant refused to open the door); *Palamara v. World Class Yachts, Inc.*, 824 So. 2d 194, 194-95 (Fla. 4th DCA 2002) (defendant walked out of his office building and ran back inside when he saw process server); *Haney*, 245 So. 2d at 672 (defendants ran back inside the house when they saw process server approaching them).

Plaintiffs further argue that under Fed. R. Civ. P. 5(b)(2)(C), mailing Defendant a copy of the Summons and Complaint was sufficient for service. (Doc. 59 at 8). Defendant admits that he received the Summons and Complaint in the mail, allegedly after returning from vacation on March 12, 2020, but "understood that this was insufficient service of process" upon him, and, presumably, did nothing at that time. (Doc. 35-1 at 1). The Court does not agree with Plaintiffs that Fed. R. Civ. P. 5(b)(2)(C) is applicable to initially serving Defendant with a Complaint. The title itself, "Serving and Filing Pleadings and Other Papers," plus the description of the "papers"

applicable to this section, make no mention of being applicable to serving the original complaint. Fed. R. Civ. P. 5(a)(1). And, Plaintiffs cite no case law to support their position.[3]

Moreover, a defendant's actual notice is not sufficient to cure defectively executed service. *Albra v. Advan, Inc.*, 490 F.3d 826, 829 (11th Cir. 2007). "[A] defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding." *Baragona v. Kuwait Gulf Link Transp. Co.*, 594 F.3d 852, 854 (11th Cir. 2010) (citing *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982)). The Court finds that Plaintiffs have not shown that service of process was made either by "delivering a copy" to Defendant or by leaving copies at his "usual place of abode with any person residing therein." Fla. Stat. § 48.031. At most, the process server showed that he left the Summons and Complaint with someone who was in Defendant's apartment but denied being the Defendant. (Doc. 20 at 2).

Under Fed. R. Civ. P. 4(m), if a defendant is not served within ninety days after the Complaint is filed, the court must dismiss the action without prejudice or order service be made within a specified time. Notwithstanding this requirement, the Court may extend the time period for service for "good cause." *Id*. The Eleventh Circuit has noted, however, that good cause exists to extend the time for service "only when some outside factor[,] such as reliance on faulty advice, rather than inadvertence or negligence, prevented service." *Lepone-Dempsey*, 476 F.3d

[3] Moreover, while Florida Statute § 48.161 does allow service by mail to nonresident defendants or those concealing their identity, "due process values strict compliance with the statutory requirements" because it is substituted service of process. *Wise v. Warner*, 932 So. 2d 591, 592–93 (Fla. 5th DCA 2006) (citing cases). The plaintiff must mail a copy of the summons and complaint to the defendant by registered or certified mail, file the defendant's return receipt, and file an affidavit of compliance. *Linn v. Kidd*, 714 So. 2d 1185, 1187 (Fla. 1st DCA 1998). There is no indication on the record that Plaintiffs have attempted to follow the procedures of Florida Statute § 48.161 or filed a return receipt or affidavit.

at 1281 (citing *Prisco v. Frank*, 929 F.2d 603, 604 (11th Cir. 1991)). Even absent a showing of good cause, however, the Court still retains the power, in its discretion, to extend the time for service of process. *Id.* at 1282 (*Horenkamp v. Van Winkle And Co.*, 402 F.3d 1129, 1132-33 (11th Cir. 2005)). Furthermore, "the district court must still consider whether any other circumstances warrant an extension of time based on the facts of the case." *Id.*

In this case, Plaintiffs contend that they properly served Defendant. (Doc. 59). Defendant was aware that service of process was attempted, received copies of the Summons and Complaint, and yet did not respond for at least over a month, waiting until after the Clerk's Entry of Default to respond to this case. (*See* Docs. 27, 28, 35-1). This case has been pending over a year at this point, and Defendant has actual notice of this case. (*See* Docs. 1, 35-1). For these reasons, the Court finds that dismissal is not warranted and giving Plaintiffs time to properly serve Defendant will suffice.

CONCLUSION

For these reasons, the Court **ORDERS** as follows:

1. Defendant's Motion to Quash Service of Process (Doc. 58) is **GRANTED**.
2. **Within thirty (30) days** of the Court's Order, Plaintiffs must either serve Defendant Guttenberger with the operative complaint under the applicable law or, if applicable, renew their Motion with information sufficiently demonstrating that Defendant was the individual at the apartment where Plaintiffs' process server left a copy of the Summons and Complaint.

SO ORDERED in Chambers in Fort Myers, Florida on October 2, 2020.

MAC R. MCCOY
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Parties