FOR PUBLICATION

IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

MARISSA ANN MUÑA, **Plaintiff,** **vs.** **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, DEPARTMENT OF PUBLIC HEALTH, COMMONWEALTH HEALTH CENTER, DR. FRIEDRICH C. BIELING, and DOES 1-9,** **Defendants.**	**CIVIL ACTION NO. 07-0216C** **DECISION AND ORDER GRANTING DEFENDANTS' MOTION TO QUASH SERVICE BY PUBLICATION AND FOR RELIEF FROM ENTRY OF DEFAULT AGAINST DR. FRIEDRICH C. BIELING**

I. Introduction

THIS MATTER came before the Court on August 25, 2008 at 1:30 p.m. in Courtroom 220A for a hearing on the motion of Defendant Commonwealth of the Northern Mariana Islands ("Commonwealth") to quash service by publication on Defendant Dr. Friedrich Bieling, its former employee, and to set aside the entry of default against Dr. Bieling. The Commonwealth appeared by and through Assistant Attorney General David Lochabay, Esq. Attorney George L. Hasselback, Esq., appeared on behalf of Plaintiff Marissa Ann Muna in opposition to the motion. Due to an electrical power outage, the hearing was adjourned and counsel met in chambers to discuss the matter. At this conference, counsel agreed to submit the matter for a decision by the Court on the basis of the legal memoranda already filed. On October 21, 2008, the Court held a status conference on the record and announced its ruling granting the motion. Based upon the legal arguments presented and after

consideration of the pleadings and affidavits of counsel, and the applicable law, the Court hereby issues its written decision granting Defendant's motion to quash service of summons and to vacate the entry of default against Dr. Bieling.

II. Factual and Procedural Background

On June 11, 2007, Plaintiff filed a First Amended Complaint for personal injury damages, alleging negligent medical treatment by Defendants Commonwealth, the Department of Public Health and Environmental Services, the Commonwealth Health Center (collectively, "Commonwealth Defendants") and Dr. Friedrich Bieling. Summons and a copy of the First Amended Complaint were served by personal delivery to the CNMI Office of Attorney General ("OAG"), and by certified mail to the Commonwealth Defendants on June 25, 2007.

Seven months later, on February 8, 2008, Plaintiff moved for an order from the Court to allow service of summons on Dr. Bieling by publication pursuant to Rule 4(e) of the Commonwealth Rules of Civil Procedure and 7 CMC § 1104(b). The motion was prepared by Michael W. Dotts, Esq., of the law firm representing Plaintiff in this action and was supported by an affidavit of counsel (hereinafter "Declaration"), the body of which is reproduced here:

> DECLARATION IN SUPPORT OF PLAINTIFF'S MOTION FOR SERVICE BY PUBLICATION
>
> I, Michael W. Dotts, under penalty of perjury, hereby declare and state as follows:
>
> 1. I am the attorney for Plaintiff in the above-entitled case.
>
> 2. Upon my best knowledge and belief, Defendant Dr. Friedrich C. Bieling has left and taken up residence outside the Commonwealth, preventing service of the Summons and Complaint directly upon him.
>
> 3. Plaintiff attempted service upon Defendant Bieling. However, Plaintiff was advised by Defendant's former employer that Defendant had moved to Guam.
>
> 4. Plaintiff attempted service upon Defendant Bieling in Guam. However, Plaintiff has been unable to locate said Defendant on Guam.
>
> [sic]6. Plaintiff does not know the whereabouts of Defendant Bieling.

7. Plaintiff proposes to serve the Summons and Complaint upon the Office of the Attorney General and publish the Summons in a Commonwealth newspaper in compliance with 7 CMC §1104, and also to publish in a Guam newspaper.

8. This Declaration supports Plaintiff's Motion for Service by Publication.

I, Michael W. Dotts, have read the foregoing declaration, and declare and state under penalty of perjury that it is true and correct to my best knowledge and belief, and if called upon to testify, I could competently testify thereto.

Executed this 8th day of February, 2008 at Saipan, Northern Mariana Islands.

_____/s/_____
Michael W. Dotts, Esq. (FO150)

Based upon the representations of counsel that reasonable efforts had failed to locate Dr. Bieling for the purpose of executing personal service, this Court granted Plaintiff's motion for service by publication on February 21, 2008. The order was amended to correct a clerical omission on March 12, 2008. Thereafter, Plaintiff proceeded to effect service based upon the March 12th amended order, publishing the summons for four consecutive weeks in both the Saipan and Guam editions of the Marianas Variety newspaper. The last such publication was made in the Guam edition on April 7, 2008.

On May 14, 2008, Plaintiff moved for entry of default against Dr. Bieling, which was entered by the Clerk of Court. The next day, the Commonwealth filed an "Opposition to Motion for Entry of Default Against Dr. Friedrich C. Bieling" contemporaneously with a motion to substitute the Commonwealth as defendant in place of Dr. Bieling pursuant to Public Law 15-22. On May 19, 2008, the Court *sua sponte* issued an order deeming Defendant's "opposition" to be a request for relief from entry of default pursuant to Com. R. Civ. P. 55(c) and setting a briefing schedule and a hearing date of June 17th on Defendant's motion to set aside the default.

On June 2, 2008, Dr. Bieling entered a general appearance to join the Commonwealth's motions for relief from entry of default and for substitution pursuant to Public Law 15-22.

At the June 17th hearing on Defendants' motion for relief from default, matters were presented to the Court that raised a question of the validity of the service on Dr. Bieling. Based on these matters, Defendants Commonwealth and Bieling jointly filed on June 24, 2008 their motion to quash the service of summons by publication on Dr. Bieling.

III. Analysis

The Defendants argue in support of both motions that Plaintiff's February 8th affidavit of counsel was legally insufficient to support an order for service by publication and that, consequently, both the service of summons and ultimate entry of default against Dr. Bieling are invalid. Defendants further contend that Plaintiff's attorneys failed to make a reasonable effort to locate Dr. Bieling for service and suggest a bad faith motive to secure a default against Dr. Bieling prior to his dismissal by substitution under Public Law 15-22.

Plaintiff argues that relief should be denied on the basis of the culpability of the Defendants, who had actual or constructive knowledge of the action since June 25, 2007. Following an unsuccessful motion to strike, the Commonwealth Defendants filed their answer on September 11, 2007, and the OAG was served notice of all subsequent matters, including Plaintiff's February 8, 2008 motion to allow service by publication. Despite this notice, the Commonwealth made no objection to the proposed service by publication and did not seek to substitute itself for Dr. Bieling prior to the entry of default. Plaintiff argues that because the OAG, who claims the implied authority under Public Law 15-22 to represent Dr. Bieling in this matter, had actual notice of the action and Dr. Bieling had at least constructive notice by virtue of the completed publication, neither may now contest the sufficiency of Plaintiff counsel's February 8th affidavit as a means to defeat service and thereby set aside the default.

Generally, the Court will set aside an entry of default if the movant can show that: (1) plaintiff will not suffer prejudice if relief is granted; (2) a meritorious defense exists; and (3) the default was not the result of the defendant's culpable conduct. *Roberto v. DeLeon Guerrero*, 4 N.M.I. 295, 297 (1995).

The notice provided by service of summons to a defendant which is effected in compliance with the civil rules for service of process, however, is a prerequisite to the Court's personal jurisdiction over the defendant. A request for relief from the entry of default based upon a claim of ineffective service of process is therefore analogous to a motion brought under Com. R. Civ. P. 60(b)(4) for relief from a judgment or order that is void. Because the Court has no discretion to give effect to a void entry of default, the relative culpability of the moving defendant's conduct in the matter is irrelevant. *See*, *Reyes v. Reyes*, 2001 MP 13, ¶ 24.

For the same reason, the validity of the service on Defendant in this case cannot rest on either the fact that Plaintiff obtained prior authorization from the Court for service by publication, or that the publication actually took place. The Court may not confer jurisdiction upon itself by improvidently allowing service by publication when the statutory and judicial prerequisites for such service have not been satisfied. Service by publication is itself "constructive service" that lies at the limit of what constitutional due process allows. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-315, 70 S.Ct. 652, 657-658, 94 L.Ed. 865 (1950). Strict compliance with the authorizing statute is mandatory; substantial compliance by accomplishing the actual publication is insufficient. *Olvera v. Olvera*, 232 Cal.App.3d 32, 41 (Cal.App. 1991), citing, *Stern v. Judson*, 127 P. 38, 42 (Cal. 1912).

At the June 17th hearing on Defendants' motion for relief from default, certain problems with the service by publication on Dr. Bieling were brought to the attention of the Court. The OAG represented that it first learned of these matters on the morning of the hearing when counsel met with Dr. Bieling for the first time. Thereafter, in support of Defendants' motion to quash service, the OAG submitted a legal memorandum citing extensive controlling and persuasive authority on the issue, which authority now convincingly demonstrates to this Court that the February 8th affidavit by Plaintiff's attorney was insufficient to support the order allowing service by publication and that Plaintiff failed to exercise reasonable diligence in attempting personal service on Dr. Bieling prior to pursuing service by

publication under the statute. (Def.'s Mem. of Law in Supp. of Mot. to Quash, filed June 24, 2008). The following discussion incorporates much of the authority and most of the points contained in the OAG's legal memorandum.

i) Insufficiency of the Declaration in Support of Service by Publication

The Commonwealth's long arm statute provides in part that any person, regardless of citizenship or residency, who causes tortious injury or damage within the Commonwealth by an act or omission done within the Commonwealth, will thereby submit themselves to the jurisdiction of the courts of the Commonwealth as to any cause of action arising from such act or omission. 7 CMC § 1102(a)(4). "The Commonwealth's long arm statute extends the court's jurisdiction to the extent permitted by the U.S. Constitution." *Bank of Saipan v. Superior Court (Attorneys' Liab. Assurance Soc'y, Inc.)*, 2001 MP 5 ¶ 37, 6 N.M.I. 242. "Jurisdiction pursuant to that section is to be coextensive with the minimum standards of due process as determined in the federal courts." *Id.*, ¶ 38. Subsection (b) of Section 1102 further provides:

> (b) Service of process upon any person who is subject to the jurisdiction of the courts of the Commonwealth, as provided in this section, may be made as provided by 7 CMC § 1104, **if the person cannot be found in the Commonwealth**, with the same force and effect as if process had been personally served within the Commonwealth.

7 CMC § 1102(b) (emphasis added).

If the person to be served can be found in the Commonwealth or in any other jurisdiction of the United States, personal or substituted personal service is appropriate. Com. R. Civ. P. 4(e)(2). If personal service cannot be made because the person cannot be found within the territory described by Rule 4(e), service may be accomplished according to the alternative means provided by Section 1104:

> § 1104. Manner of Service.
>
> (a) When service of process is provided by 7 CMC §§ 1102 and 1103, **service shall be made by leaving a certified copy with the Attorney General**, who shall keep a record of each such process and the day and hour of service; **provided, that notice of the service and a copy of the summons and of the complaint are served upon the defendant personally** by any person authorized to serve process in the place in which he

> or she may be found or appointed by the court for the purpose; **or sent by certified or registered mail, postage prepaid, with return receipt requested, by the plaintiff or the plaintiff's attorney to the defendant.** The plaintiff or his or her attorney shall file an affidavit of service with the clerk of courts showing that copies of the summons and complaint were served or sent by certified or registered mail, and in the latter case, the return receipt signed by the defendant shall be filed with the affidavit. The service shall be deemed complete upon delivery of the required papers to the defendant outside the Commonwealth, personally or by mail as provided.
>
> (b) **After service on the Attorney General, if the defendant cannot be personally served by mail the summons and the complaint, and if by affidavit or otherwise the court is satisfied that with reasonable diligence the defendant cannot be served, and that a cause of action arises against the party upon whom service is to be made, or he is a necessary and proper party to the action, the court may order that service be made by publication of the summons in at least one newspaper published and having a general circulation in the Commonwealth.** Publication shall be made once each week for four successive weeks, and the last publication shall be not less than 21 days prior to the return date stated herein.

7 CMC § 1104 (emphasis added).

Thus, service of the summons and complaint by publication is authorized only as a means of last resort, once the Attorney General has been served and service on the defendant by mail proves impossible. Moreover, the Court is authorized to order service by publication only upon *the Court's finding* that the plaintiff cannot, by the exercise of reasonable diligence, serve the defendant by any of the preferred alternative means. § 1104(b). The factual basis for this preliminary finding must appear "by affidavit or otherwise." *Id.* This Court has previously adhered to the rule that, even in the most routine matters that call for an order from the Court based upon a declaration or affidavit of counsel, the supporting affidavit must contain non-conclusory factual statements sufficient to permit the Court to exercise its discretion in the matter. *Commonwealth v. Erwin Evance and Jesse S. Peredo*, Crim. No. 07-0042 (N.M.I. Super. Ct. Nov. 28, 2007) (Order Denying Without Prejudice the Commonwealth's Motion to Dismiss Information With Prejudice, p.4). A more exacting standard applies when leave is sought pursuant to a statute which authorizes an extraordinary procedure only on conditions narrowly prescribed to ensure the defendant's constitutional right to due process of law and the resultant jurisdiction of the Court. *Fox v. Ginsburg, Feldman & Bress*, 785 A.2d 1024, 1027 (D.C.App. 2001),

citing, *Spevacek v. Wright*, 512 A.2d 1024, 1027 (D.C.App. 1986); 62B AM.JUR. 2D, *Process* § 242 (1990).

The preponderance of legal authority stretching back for over a century and a half has established that where service of process by publication is permitted upon a prior affidavit of due diligence by a party or counsel, the allegations of diligence must state the probative and evidentiary facts upon which the ultimate fact of due diligence is based, rather than simply reciting compliance with the statutory requirements. *Romig v. Gillett*, 187 U.S. 111, 115-116, 23 S.Ct. 40, 41, 47 L.Ed. 97 (1902) (affidavit attesting that summons was returned by sheriff unserved and defendants could not be found alleged diligence as a "conclusion of law" only, the omission of "facts tending to show such diligence" rendered affidavit insufficient), citing, *inter alia*, *Kahn v. Matthai,* 47 P. 698, 699-700 (Cal. 1897); *Alderson v. Marshall,* 16 P. 576, 578 (Mont. 1888); *Thompson v. Shiawassee Circuit Judge*19 N.W. 967 (Mich. 1884); *Carleton v. Carleton*, 85 N.Y. 313, 315 (N.Y. 1881); *Ricketson v. Richardson*, 26 Cal. 149, 154 (Cal. 1864), and *McDonald v. Cooper,* 32 F. 745, 748 (D.Oregon 1887). *See, also, Jordan v. Giblin*, 12 Cal. 100, 102 (Cal. 1859); 62B AM.JUR. 2D § 250; 21 A.L.R.2d 929 § 4.

The rule that evidentiary facts must be alleged in the affidavit as a predicate to the conclusion that the plaintiff has satisfied the statutory prerequisites for service of process by publication was therefore firmly established by the time of the United States Supreme Court's decision in *Romig*. The state and federal court decisions cited by the Court in *Romig* still stand on the issue, with the rule perhaps best stated by the Supreme Court of California one hundred and forty-five years OAG:

> An affidavit which merely repeats the language or substance of the statute is not sufficient. Unavoidably the statute cannot go into details, but is compelled to content itself with a statement of the ultimate facts which must be made to appear, leaving the detail to be supplied by the affidavit from the facts and circumstances of the particular case. Between the statute and the affidavit there is a relation which is analogous to that existing between a pleading and the evidence which supports it. The ultimate facts of the statute must be proved, so to speak, by the affidavit, by showing the probatory facts upon which each ultimate fact depends. These ultimate facts are conclusions drawn from the existence of other facts, to disclose which is the special office of the affidavit. To

> illustrate: It is not sufficient to state generally, that after due diligence the defendant cannot be found within the State, or that the plaintiff has a good cause of action against him, or that he is a necessary party; but the acts constituting due diligence, or the facts showing that he is a necessary party, should be stated. To hold that a bald repetition of the statute is sufficient, is to strip the Court or Judge to whom the application is made of all judicial functions and allow the party himself to determine in his own way the existence of jurisdictional facts--a practice too dangerous to the rights of defendants to admit of judicial toleration. The ultimate facts stated in the statute are to be found, so to speak, by the Court or Judge from the probatory facts, stated in the affidavit, before the order for publication can be legally entered.

Ricketson v. Richardson, 26 Cal. at 153.

The particular facts that must be alleged to show the plaintiff's exercise of due diligence in attempting to locate or serve the defendant will necessarily vary with the circumstances. "The question is simply whether [plaintiff] took those steps which a reasonable person who truly desired to give notice would have taken under the circumstances." *Donel*, *supra*, 87 Cal.App.3d at 333. The requirement of "reasonable diligence" in this context has been held to connote "a thorough, systematic investigation and inquiry conducted in good faith ...." *David B. v. Superior Court*, 21 Cal.App.4th 1010, 1016 (Cal.App. 1994) (*quoting*, California Judicial Council Com., Deering's Ann. Cal. Code Civ. Proc. § 415.50 (1991 ed.), p. 676.). "A 'due diligent effort' requires such pointed measures as an examination of telephone company records, utility company records, and records maintained by the county treasurer, county recorder, or similar record keepers." *Sprang v. Petersen Lumber, Inc.*, 798 P.2d 395, 399 (Ariz.App. 1990). Where specific averments of this nature do not appear in the affidavit, no basis is presented for finding that the jurisdictional prerequisite of reasonable diligence has been satisfied and orders for service by publication based thereon are commonly deemed to be void. *Id.*, at 400.

Revisiting the Declaration that was submitted in this matter, it is apparent in the present light that the declaration is insufficient on its face to support the Court's order for service of process on Defendant by publication. On the issue of the Plaintiff's need to execute service by publication, the most specific factual averments in the declaration are that: Plaintiff was told by Defendant's former employer that Defendant had moved to Guam (¶ 3); Plaintiff "attempted service" on Defendant in Saipan and Guam

(¶¶ 3-4), and; "Plaintiff" does not know the whereabouts of Defendant (¶ 6). The declaration is attested by Plaintiff's attorney "on information and belief" and states in the first-person that the declarant believes that Defendant "has left and taken up residence outside the Commonwealth, preventing service of the summons and Complaint directly upon him," a statement expressing two conclusions, one of which is invalid. Nowhere in the declaration is there an account of any steps that were taken by Plaintiff or her attorney to locate Dr. Bieling personally, such as at his residence, other than once speaking to his former employer. For example, there is no statement from a process-server describing the time and circumstances of any "attempted service" or how many attempts were made. In this respect alone, the declaration presents less material content than the affidavit declared insufficient in *Romig v. Gillett* and many of the decisions cited above.

Reconsidering this Court's February 21, 2008 Order Granting Plaintiff's Motion for Service by Publication, amended March 12, 2008, on the Defendant's direct challenge by motion to quash service of summons and complaint, the Court must agree with Defendant that the Declaration submitted by Plaintiff was inadequate to justify the order allowing service by publication. The declaration in support of the order failed to identify evidence that the statutory prerequisites for service by publication were satisfied and no such showing was otherwise made to the Court. 7 CMC § 1104(b). "It is established that, where orders for publication of summons are void by reason of the insufficiency of the affidavits therefor, defaults and default judgments entered and rendered on service made pursuant thereto are likewise *void on their face*, and should be set aside." *Hustace v. Kapuni*, 718 P.2d 1109, 1116 (Haw.App. 1986), quoting (with emphasis), *Batte v. Bandy*, 332 P.2d 439, 445 (Cal.App. 1958).

Despite the frequent characterization of such orders as "void," however, there is a significant split of authority regarding the effect of an insufficient affidavit of due diligence on the court's order for publication and the subsequent proceedings. 62B AM.JUR. 2D § 252. The Court has the power to decide the question of its own jurisdiction over the subject matter and the parties, so *that* decision cannot be

void even if it is irregular or erroneous. The Court acquires personal jurisdiction over a defendant when the defendant is served notice of the action according to a lawfully prescribed manner of service. Service of process by publication is a manner of service specifically provided by statute. 7 CMC §§ 1102, 1104(b). Moreover, the statute does not list the specific averments that must be included in a supporting affidavit or "otherwise" presented to the court. *Id.* These considerations have led some courts to the view that the only *jurisdictional* prerequisite to be found in such statutes is that the affidavit or other presentation must be "to the satisfaction of" the judge or officer authorized to issue the order for publication, with the consequence that such an order is not subject to collateral challenge. "When the issuing officer is satisfied by the affidavit, his decision to order service by publication is final absent fraud or collusion." *Wachovia Bank of South Carolina, N.A. v. Player*, 535 S.E.2d 128, 130 (S.C. 2000), citing, *Yarbrough v. Collins, 360 S.E.2d 300 (1987)*; *See*, *J.C. Tenorio Enterprises, Inc. v. Uddin*, 2006 MP 22, ¶¶14-15 (default judgment entered by clerk of court upon insufficient affidavit was irregular, but not void for lack of jurisdiction); *Montgomery v. Mullins*, 480 S.E.2d 467, 470 (S.C.App. 1997) ("we hold the trial court was without authority to overrule the finding of the clerk of court that the [defendants] could not, "after due diligence, be found...."))[1]; *also*, *Noonan v. Montgomery*, 209 P. 302, 320-321 (Ariz. 1922).

On Defendants' present motions before this Court, it is not necessary to endorse one or the other of these positions on the status of a legally sufficient affidavit of due diligence as a "jurisdictional prerequisite" to the Court's order for publication. In this matter, the Court is persuaded that faulty foundation supplied by Plaintiff counsel's declaration alone provides a sufficient basis to reconsider and

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[1] The South Carolina statute also requires a prior showing of due diligence by the plaintiff, but authorizes the clerk of court to issue the order permitting service by publication: "When the person on whom the service of the summons is to be made cannot, after due diligence, be found within the State and (a) that fact appears by affidavit to the satisfaction of the court or judge thereof, the clerk of the court of common pleas, the master, or the probate judge of the county in which the cause is pending... the court, judge, clerk, master, or judge of probate may grant an order that the service be made by the publication of the summons...." S.C. Code Ann. § 15-9-710 (LEXSTAT 2007).

strike its prior order granting Plaintiff's motion for service by publication and to grant Defendants' motion to quash service of the summons and complaint. If, however, the facial deficiency of the declaration represents a formal defect that is not fatal to the validity of the proceedings built upon it, this can only be because Plaintiff failed through inadvertence to describe the diligent steps that Plaintiff had actually taken by that time to locate Dr. Bieling.

ii) Lack of Diligence in Attempting Personal Service on Dr. Bieling

In addition to providing an affidavit or other evidence of the plaintiff's exercise of reasonable diligence in pursuing traditional means of service on a defendant, the plaintiff must *actually* exercise such diligence. An affidavit that is facially sufficient to support a valid order for service by publication will not immunize the subsequent service of process from direct challenge if the plaintiff has not *in fact* exercised the degree of diligence reasonably warranted by the circumstances. *Donel*, at 333; *Ogumoro v. Han-Yoon Ko*, et al, Civ. No. 99-0655 (N.M.I. Super. Ct. March 8, 2004) (Order Granting Defendant's Rule 60(b) Motion for Relief from Judgment) (determining that plaintiff's failure to exercise reasonable diligence to locate defendant before resorting to service by publication made subsequent default judgment void for lack of personal jurisdiction).

In opposition to Defendants' present motions, Plaintiff submits the declaration of her Guam-based process server to elaborate upon the specific steps taken to locate Dr. Bieling for service prior to the Court's order for publication. (Pl.'s Opp. to Mot. to Quash Service, Ex. A: Decl. of Patrick R. Sablan, July 31, 2008). Plaintiff cites no legal authority on the issue, but implicitly raises the question of whether the Court should apply a somewhat converse rule to that above; that is, whether Plaintiff's *actual* prior exercise of reasonable diligence may be subsequently proven to cure defects of omission in Plaintiff's original supporting affidavit, at least when the formalities of constructive service have otherwise been performed and the defects have caused no prejudice to Defendant. If the keystone statutory precondition to valid service by publication is interpreted to be the requirement that plaintiff

actually undertake reasonable efforts to locate a defendant for the purpose of executing the preferred means of service, rather than the affidavit offered to prove this fact, subsequent proof on the issue should be allowed. From the relevant undisputed facts presented to the Court on the matter, however, it is apparent that Plaintiff in fact failed to exercise reasonable diligence in seeking out the whereabouts of Dr, Bieling prior to seeking an order for service by publication.

Dr. Bieling was named as a defendant in Plaintiff's original complaint filed in this action on May 25, 2007, and Plaintiff moved for an order for service of summons and complaint on Dr. Bieling by publication on February 8, 2008. At the time the Declaration was made and submitted to the Court, Dr. Bieling in fact had active telephone numbers with Saipancell on Saipan and Guamcell on Guam, which he had possessed for six years and two years, respectively. His Saipancell number also functions on Guam. Dr. Bieling also had post office boxes on both Saipan and Guam that he had possessed for six years and two years, respectively. Also at that time, Dr. Bieling was maintaining an apartment at the Stanford Resort on Saipan, where he had been living for more than five years, and where he remained until December, 2007. He also had a residence on Guam, which he currently occupies and has maintained since September of 2006. Dr. Bieling was employed by the Commonwealth Health Center for approximately six years, resigning on January 14, 2007. Since September 25, 2006, Dr. Bieling became employed part-time by Guam Memorial Hospital ("GMH") and thereafter divided his time between Saipan and Guam, occasioning his need to keep two residences. Since December of 2007, Dr. Bieling has maintained a second apartment on Saipan that has been used by his wife as her primary residence for at least two years. (Defs.' Ex. 1, Declaration of Friedrich C. Bieling in Support of Motion to Quash Service by Publication, June 19, 2008).

As was known to Plaintiff and averred in her complaint, Dr. Bieling was a medical doctor and an obstetrician. He is a licensed obstetrician and has been employed full-time at Guam Memorial Hospital since March 17, 2008. There is no reason to doubt Dr. Bieling's claim that he spends long hours at

GMH delivering forty to fifty babies per month, sometimes sleeping overnight at the hospital; or that there are only nine obstetricians on Guam, all of whom are known to one another. What matters is that such circumstances might reasonably be anticipated from the knowledge already possessed by Plaintiff, and the avenues of investigation that they would suggest to one who was seriously desirous of making contact with Defendant. At a minimum, it would be reasonable to contact or to access the website of the appropriate medical licensing board, or to speak to Dr. Bieling's professional colleagues to obtain a clue as to his whereabouts. Plaintiff's Declaration submitted on February 8, 2008, however, simply stated that Plaintiff "was advised by Defendant's former employer that Defendant had moved to Guam." (¶ 4). There is no indication Plaintiff asked the former employer any obvious follow-up question that would possibly have helped to locate Dr. Bieling.

Most troubling is the fact that public court records reveal that at the time that Plaintiff moved for service by publication, Dr. Bieling was a party to a divorce action then pending before the Superior Court of Guam. *Bieling v. Bieling*, Guam Super. Ct. Domestic Case No. DM 0598-87 (Complaint filed Sep. 1. 2007). Dr. Bieling was plaintiff in the Guam action, represented by attorney Mark E. Williams, Esq. Dr. Bieling's former wife, the defendant in the action, was represented by the law firm of Berman, O'Connor and Mann, the Guam-based affiliate of the law firm representing Plaintiff in this matter, O'Connor, Berman, Dotts and Banes.

In opposition, Plaintiff submits the above-referenced declaration of Patrick Sablan. Mr. Sablan was retained in July 2007 to serve process on Defendant on Guam, and executed his declaration on July 31, 2008. Sablan states that he telephoned GMH, but that a receptionist told him there was no listing for Dr. Bieling at that time. (¶3) He made two telephone calls to the Guam Board of Medical Examiners and was advised by unidentified employees on the first occasion to check an unidentified clinic that turned out not to exist at the location given, and on the second occasion to check at the Hafadai Specialist Clinic in Tumon, where Sablan was told by someone present that Dr. Bieling did not work at

that clinic. (¶¶ 4-7). Sablan recounts that he could find no Guam bank account listings for Dr. Bieling, but that "There were only Saipan accounts for Dr. Bieling." (¶ 8). Plaintiff's counsel argues the points that Sablan had been engaged to serve process prior to the filing of the complaint in *Bieling v. Bieling*; that the Guam action involved representation of "another party adverse to Dr. Bieling in a separate and unrelated action;" and that the pleadings in that case do not reveal the personal address of Dr. Bieling. (Pl.'s Opp. to Mot. to Quash Service, pp. 1-2).

Again, however, the issue is not one of whether or not any particular information is sufficient on its own to enable the execution of personal service, or whether knowledge may be imputed between affiliated counsel, or whether the Defendant may be served through counsel previously retained on another matter. The critical question is whether or not reasonable means of locating Defendant were available to Plaintiff, but were nevertheless neglected or ignored. "Where the party conducting the investigation ignores the most likely means of finding the defendant, the service is invalid even if the affidavit of diligence is sufficient." *David B.*, *supra*, 21 Cal.App.4th at 1016. Where, for "substantial periods of time the defendant was available for personal service the facts surrounding the attempts to serve the defendant must negative that any reasonable way existed to effectuate such service." *Evartt v. Superior Ct.*, 89 Cal.App.3d 795, 800 (Cal.App. 1979). In this matter, Plaintiff wholly failed to exercise reasonable diligence to locate Defendant for personal service of process prior to attempting to effect service by publication.

VI. Conclusion

For the reasons stated above, Plaintiff's service of summons and complaint on Defendant Dr. Friedrich Bieling by publication in this case was unjustified and therefore deficient. The Court finds that Defendant could have been personally served with process at the time of Plaintiff's motion for an order for service by publication, and that Defendant's availability for personal service was reasonably

discoverable by Plaintiff. Plaintiff's declaration in support of an order authorizing service by publication failed to set forth a sufficient factual basis to support the requisite judicial finding that Plaintiff had previously exercised reasonable diligence to attempt to locate Defendant for the purpose of executing personal service or service by mail. The Court concludes that Plaintiff in fact failed to exercise such reasonable diligence. Consequently, the service by publication in this case was ineffective pursuant to statute and the resulting entry of default against Defendant must be vacated and set aside.

The motion of Defendants Commonwealth of the Northern Mariana Islands and Dr. Friedrich Bieling to quash service by publication on Defendant Dr. Friedrich Bieling is GRANTED. The motion of the same Defendants pursuant to Com. R. Civ. P. 60(b) for relief from entry of default is also GRANTED. Accordingly, the default entered against Defendant Dr. Friedrich Bieling and with the docket entry date of May 16, 2008, is VACATED.

IT IS SO ORDERED this 12th day of November, 2009.

/s/

RAMONA V. MANGLOÑA, Associate Judge