



# COPYRIGHT CLAIMS BOARD

Docket number: 22-CCB-0149

Kerry Bern

CLAIMANT

v.

Luxury Home Remodeling DFW

RESPONDENT

## ORDER DISMISSING CLAIM WITHOUT PREJUDICE

On September 10, 2022, the claimant filed claim 22-CCB-0149 with the Copyright Claims Board (Board). On October 17, 2022, the Board found this claim compliant and filed a Notice of Compliance and Direction to Serve.

A claimant has 90 days after receiving the Notice of Compliance to file a proof of service or waiver of service form with the Board. 17 U.S.C. § 1506(g); 37 C.F.R. § 222.5(b)(3)(i); 37 C.F.R. § 222.5(c)(5).

The claimant filed a proof of service form on January 12, 2023. The proof of service recited that, on January 12, 2023, the process server “attempted to deliver document at Isaac Banai place of abode. . .and delivered document to lady who identified herself as his wife.” A separate document filed by the claimant on January 12, 2023 appears to be an email from the office of the Texas Secretary of State confirming that the respondent, Luxury Home Remodeling DFW, designated Isaac Banai as its registered agent. The email also confirms the respondent’s entity type is a Domestic Limited Liability Company (LLC).

On February 14, 2023, the Board filed an Order to Show Cause giving the claimant the opportunity to explain why the proceeding should not be dismissed for failure to complete service on the respondent.

A limited liability company (LLC) is not a person capable of accepting process on its own behalf and must be served through an agent. . . . Agents authorized by statute to accept service on behalf of an LLC include its registered agent and, depending on whether the LLC is manager-or member-managed, any manager or member of the LLC. . . . A proper service return must show both the name of the person who accepted service on behalf of the LLC and that the person was authorized to do so.

*Pearson v. Duncanville Senior Care, LLC*, No. 05-21-00900-CV, 2022 WL 4480562, \*2 (Tex. App.-Dallas Sept. 27, 2022) (citations omitted).

Serving the wife of a designated agent of a limited liability company does not constitute valid service on the company. See *World Environmental, L.L.C. v. Wolfpack Environmental, L.L.C.*, 2009 WL 618697, Tex. App. LEXIS 1742, \*7 (Tex App. 2009)(service upon a manager or registered agent’s personal assistant does not constitute service of process on an LLC); accord, *Jolie Design & Decor, Inc. v. CeCe Caldwell’s Paints, LLC*, 2013 Westlaw 4431342, 2013 U.S. Dist. LEXIS 116345, \*7 (E.D. La. 2013)(applying Texas law and finding that service on babysitter of authorized agent of defendant LLC “did not effect service.”). “[W]hen serving an agent for a corporation or other entity, the citation must affirmatively show that the individual served is in fact the agent for service.” *Pharmakinetix Labs, Inc. v. Katz*, 717 S.W.2d 704, 706 (Tex. App.-San Antonio 1986). Texas law “requires . . . that process be served on someone who holds a particular position” with the entity. *Fuller v. CIG Fin., LLC*, No. 3:22-cv-1289-D, 2022 WL 4227518, \*2 (N.D. Tex. Sept. 13, 2022).

The Board received claimant's response to the Order to Show Cause on February 23, 2023. In the response, the claimant states that respondent was properly served according to the Texas Rules of Civil Procedure, Rule 106, from which claimant quotes the following service option: "leaving a copy of the citation and of the petition with anyone older than sixteen at the location specified in the statement; or in any other manner, including electronically by social media, email, or other technology, that the statement or other evidence shows will be reasonably effective to give the defendant notice of the suit." Tex. R. Civ. P. 106(b)(1-2). Such service is known as "substituted service." *State Farm Fire & Cas. Co. v. Costley*, 868 S.W.2d 298, 298 (Tex. 1993). However, by the terms of Rule 106(b), a party may not make substituted service without the authorization of a court. Section 106(b) describes the mechanism for obtaining such authorization: "Upon motion supported by a statement—sworn to before a notary or made under penalty of perjury—listing any location where the defendant can probably be found and stating specifically the facts showing that service has been attempted under (a)(1) or (a)(2) at the location named in the statement but has not been successful, the court may authorize service" under Rule 106(b)(1) or (2). Claimant did not seek authorization from the Board to make substituted service, but if claimant had sought authorization the Board would not be able to grant it. The Board has no authority under Texas law to authorize substituted service.

Texas law requires strict adherence to the rules regarding service of process. *Diggs v. Ditech Fin., LLC*, No. A-16-CV-828 LY, 2016 WL 6082049, at \*4 (W.D. Tex. Oct. 17, 2016), report and recommendation adopted, No. 1:16-CV-828-LY, 2016 WL 10957316 (W.D. Tex. Dec. 9, 2016) (holding claimant failed to effectuate service, even if it gave actual notice to defendant, because "Texas law requires strict compliance with the rules"); *Scott's Big Truck Sales v. Garcia*, No. 02-17-00402-CV, 2018 WL 1865861, at \*2 (Tex. App. Apr. 19, 2018) (deciding that service was invalid because the return did not show service that was in "strict compliance with the rules of civil procedure"); *Lewis v. Ramirez*, 49 S.W.3d 561, 564 (Tex. App. 2001) ("strict compliance with the rules of civil procedure...must be shown...or the attempted service of process will be rendered invalid").

Because claimant did not validly serve respondent, the Board dismisses this case without prejudice and closes it. 17 U.S.C. § 1506(v)(1). Dismissal without prejudice means the claimant may raise the allegations again by filing a new claim.

If claimant does file a new claim, they may attempt to serve the Service Packet according to Texas Rules of Civil Procedure, Rule 106(a)(2) governing service of process, by "mailing to the defendant by registered or certified mail, return receipt requested, a copy of the citation and of the petition." If attempting service by mail, Texas Rules of Civil Procedure, Rule 107(c), must be followed and the "return of service" (which is called the "proof of service" document before the Board) must include, not only the elements outlined in Rule 107(a-b), but also a return receipt with the designated agent's signature. Tex. R. Civ. P. 107(c); see *Master Cap. Sols. Corp. v. Araujo*, 456 S.W.3d 636, 639 (Tex. App. 2015); *Hollister v. Palmer Indep. Sch. Dist.*, 958 S.W.2d 956, 959 (Tex. App. 1998).

If claimant is unable to complete service by mail and is unable to personally serve respondent's designated agent, Banai, because he cannot with reasonable diligence be found at the address provided as respondent's registered office, claimant may serve the Texas Secretary of State, which is designated by statute as an agent of an entity (including a limited liability company) for service of process if "the registered agent of the entity cannot with reasonable diligence be found at the registered office of the entity." Tex. Bus. Orgs. Code Ann. § 5.251(1); see *Acadian Properties Austin, LLC v. KJMonte Invs., LLC*, 650 S.W.3d 98, 109 (Tex. App. 2021).

Date: April 5, 2023  
Copyright Claims Board