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CLOSED

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAMES H. DONELL, Receiver)	Case No. CV 12-00519 DDP (JEMx)
for NewPoint Financial)	
Services, Inc., and NewPoint)	
Mortgage Bankers, Inc.,)	
)	ORDER DENYING DEFENDANT'S MOTION
Plaintiffs,)	TO SET ASIDE AND VACATE DEFAULT
)	AND DEFAULT JUDGMENT PURSUANT TO
v.)	FED. R. CIV. P. 60(b)(1)
)	
MAJID MANDI GHOMI)	[Dkt. No. 20]
)	
Defendant.)	
_____)	

Presently before the Court is Defendant's Motion ("Motion") to set aside and vacate the default and default judgment pursuant to Fed. R. Civ. P. 60(b)(1) . Having considered the parties' submissions and heard oral argument,¹ the Court denies the Motion and adopts the following Order.

I. BACKGROUND

The Defendant Majid Mandi Ghomi ("Defendant") invested \$40,000.00 (the "Principle Investment") with NewPoint Financial Services Inc. ("NewPoint"), a defendant in a separate enforcement action with the SEC, entitled Securities and Exchange Commission v.

¹ No appearance was made on behalf of Defendant at the hearing.

1 NewPoint Financial Services, Inc., et al., Case No. 10-CV-0124-DPP-
2 (JEMx) ("SEC Action"). (Complaint ¶ 12.) In the SEC Action, the SEC
3 alleged that NewPoint was operating a Ponzi Scheme and returned
4 money to certain favored investors at the expense of other
5 investors who were not repaid. (Id. at ¶¶ 55-57.) As a result of
6 the SEC Action, the Court appointed Plaintiff, James H. Donell
7 ("Plaintiff" or "Receiver") as acting permanent receiver of
8 NewPoint and specifically authorized the Receiver to bring an
9 action against the Defendant. (Id. at ¶¶ 22-23.) The Receiver
10 alleges that the Defendant invested \$40,000.00 in NewPoint
11 ("Principle Investment"), but received payments from NewPoint
12 amounting to \$74,183.00. (Id. at ¶¶ 61-63.) As a result of the
13 payments made to him, the Defendant received \$34,183.00 more than
14 his Principal Investment such that the Receiver is therefore
15 entitled to recover from the Defendant damages in a sum of
16 \$34,183.00 with interest. (Id. at ¶ 69.)

17 Between February and April 2012, the Receiver's process server
18 made twenty service attempts at the Defendant's last known
19 residential address in Woodland Hills, California ("Residence") at
20 various hours of the day and evening to no avail. (Decl. re
21 Diligence by Miguel Leyva.) Following the failed service attempts,
22 the Receiver's counsel contacted attorney David Willingham who had
23 previously indicated he represent the Defendant in this matter.
24 (Id. at 6.) Receiver's counsel asked Willingham whether he would
25 accept service of summons and complaint on behalf of the Defendant,
26 which Willingham agreed to do. (Davidson Decl. in Opposition to
27 Motion to Set Aside/Vacate Default ¶ 2.) Receiver's counsel
28 prepared a Notice of Acknowledgment of Receipt of Summons and

1 Complaint, and sent it by Fedex to Willingham, along with copies of
2 Summons and Complaint. (Id.) On August 1, 2012, Receiver's counsel
3 contacted Willingham about returning the Acknowledgment of Receipt
4 of Summons and Complaint. (Id. ¶ 3.) Willingham responded that the
5 firm did not represent the Defendant in the present matter and that
6 he would "get them to sign it and send it to [Willingham] for
7 return to [Receiver's counsel]." (Id.) Willingham did not return
8 any documents to Receiver's counsel. (Id. ¶ 4.)

9 Receiver's counsel conducted further proprietary database
10 searches in an attempt to locate additional information as to the
11 whereabouts of the Defendant. (Eandi Decl. in support of Motion for
12 Service ¶ 5.) On December 27 and 28, 2012, three additional
13 unsuccessful service attempts were made at the Residence.
14 (Affidavit of Process Server, Dkt. No. 11-3.) On February 11,
15 2013, the Receiver filed a motion to allow him to serve the
16 Defendant by publication. (Dkt. No. 11.) While the Court
17 subsequently granted that motion on February 20, 2013, (Dkt. No.
18 13) the Receiver did not serve the Defendant by publication. (Proof
19 of Service, Dkt. No. 12.) The Defendant was sub served, by service
20 on his wife, Nazanian Ghomi, at their home on February 14, 2013,
21 and then by US mail. (Dkt. No. 12.) The Defendant later confirmed
22 receipt of the documents. (Ghomi Declaration ¶ 7.)

23 April 1, 2013, filed and served on the Defendant a request for
24 entry of default. (Dkt. No. 14.) The clerk entered default on
25 April 2, 2013. The Receiver filed a motion for default judgment on
26 April 10, 2013. The Defendant took no action until April 25, 2013,
27 when the Defendant called counsel for the Receiver and told him
28 that the Defendant did not believe he owed anything because, he

1 contended, he had loaned \$40,000 to his brother, using NewPoint as
2 an intermediary. On May 13, 2013, counsel for the Receiver received
3 a telephone call from David Scott Kadin ("Kadin") in which Kadin
4 stated that his firm might represent the Defendant and requested
5 that the Receiver set aside the Defendant's default. (Kadin
6 Declaration ¶ 2.) Counsel for the Receiver denied this request. Id.

7 No appearance was made on behalf of the Defendant at the May
8 20, 2013, hearing on the Receiver's Motion for Default Judgment.
9 (Minutes, Application for Default Judgment, Dkt. No. 16.) On May
10 20, 2013, the Court granted the Receiver's Motion for Default
11 Judgment and judgment was entered. (Dkt. No. 19.) On June 25, 2013,
12 the Defendant filed the present Motion to set aside the default
13 judgment. (Dkt. No. 20.)

14 Defendant moves to set aside the default and default judgment
15 on the basis that he was not personally served with the Complaint
16 and he was not aware that he was responsible for responding to the
17 court documents delivered to his previous attorney. (Mot. at 4-5.)
18 The Defendant also contends that he has a meritorious defense to
19 the action in that he never invested in NewPoint but rather loaned
20 money to his brother and used NewPoint as the intermediary. (Id. at
21 5.)

22 **II. LEGAL STANDARD**

23 A Court has the power to set aside a default for "mistake,
24 inadvertence, surprise or excusable neglect." Fed. R. Civ. P.
25 60(b)(1); Lemoque v. U.S., 587 F.3d 1188, 1192 (9th Cir. 2009). In
26 the Ninth Circuit, a motion to set aside a default judgment can be
27 denied when "(1) the plaintiff would be prejudiced if the judgment
28 is set aside, (2) defendant has no meritorious defense, or (3) the

1 defendant's culpable conduct led to the default." In re Hammer,
2 940 F.2d 524, 525-26 (9th Cir. 1991). The test is disjunctive, and
3 "[o]nly one of those factors need be present to justify denial of a
4 motion to set aside a default judgment." McManus v. American
5 States Co., 201 F.R.D. 493, 500 (C.D. Cal. 2000)(citing In re
6 Hammer, 940 F.2d at 526.). The burden is on the party seeking to
7 vacate the default judgment to demonstrate that the factors are
8 present and favor vacating the judgment. TCI Grp. Life Ins. Plan v.
9 Knoebber, 244 F.3d 691, 696 (9th Cir. 2001).

10 **III. DISCUSSION**

11 The Defendant contends that the default and default judgment
12 were entered against him due to his mistake, surprise and/or
13 excusable neglect and therefore, the default and default judgment
14 should be set aside and vacated.

15 **A. Service**

16 As a threshold matter, the Defendant argues that he was not
17 personally served with the Complaint and Summons. Under the
18 Federal Rules of Civil Procedure, an individual has been properly
19 served where service is made by leaving copies of the summons and
20 complaint at defendant's "dwelling or usual place of abode with
21 someone of suitable age and discretion who resides there." Fed. R.
22 Civ. P. 4(e)(2)(B). Here, the Receiver effected service to
23 Defendant's wife Nazanian Ghomi at Defendant's home at 20857 Martha
24 Street, Woodland Hills, CA, as well as by U.S. mail. (Proof of
25 Service, Dkt. No. 12.) The court finds that service was proper.

26 **B. Culpable Conduct**

27 "A defendant's conduct is culpable if he has received actual
28 or constructive notice of the filing of the action and failed to

1 answer." Meadows v. Dominican Republic, 817 F.2d 517, 521 (9th
2 Cir. 1987). Defendant argues that he did not respond to the
3 Summons and Complaint because of his mistaken assumption that these
4 documents related to the SEC Action and that since he was no longer
5 part of that action, he was not required to respond. If the
6 default judgment is obtained because of a mistaken understanding of
7 the facts concerning the duty to respond, relief may be granted.
8 See 999 v. Cox & Co., 574 F.Supp. 1026, 1029 (E.D.M.O
9 1983)(granting relief where a defendant's answer was late because
10 defendant's counsel acted in good faith reliance on the client's
11 mistaken statement as to the date the summons was received). The
12 mistake must be excusable under the circumstances, and relief will
13 not be granted where a party should know the consequence of
14 ignoring service of process. Direct Mail Specialists, Inc. v.
15 Eclat Computerized Technologies, Inc., 840 F.2d 685, 690 (9th Cir.
16 1988).

17 The Defendant's asserted reason for not answering the
18 Complaint was that he was previously represented by an attorney
19 relating to a grand jury subpoena in the SEC action, and that he
20 mistakenly assumed that the Summons related to that action. The
21 Summons in this case states, "A lawsuit has been filed against you"
22 and named him in capital letters as a defendant.

23 Even if the court gives Defendant, a non-lawyer, the benefit
24 of the doubt and finds that he made a mistake as to the Summons,
25 subsequent conduct indicates that he was not innocent in the entry
26 of default judgment. Even if Defendant has an excuse of mistake
27 for not answering the Complaint, based on his phone calls he
28 appears to have understood the need to respond to the Receiver's

1 application for default judgment. On April 25, 2013, after the
2 Receiver had filed an application for default judgment on April 1,
3 Defendant called the Receiver and stated his defense. (Davidson
4 Decl. ¶ 7.) On May 13, 2013, Receiver's counsel received a phone
5 call from David Scott Kadin, who informed the Receiver that Kadin's
6 firm might represent Defendant and asked the Receiver to set aside
7 the default, which the Receiver declined to do. (Id. ¶ 9.)
8 Neither Defendant nor counsel for the Defendant appeared at the
9 hearing on the application for default judgment on May 20, 2013.
10 (Id. ¶ 10.)

11 Because both Defendant and his representative phoned the
12 Receiver regarding the application for default judgment, Defendant
13 appears to have been aware of the application and concerned about
14 it. Excusable neglect "encompasses situations where the failure to
15 comply with a filing deadline is attributable to negligence" and
16 "includes omissions caused by carelessness". Lemoge, 587 F.3d at
17 1192 (quoting Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd.,
18 507 U.S. 380, 394 (1993)). Defendant's failure to defend the
19 default judgment does not fall within excusable neglect. Defendant
20 has given no explanation for why he should be excused for not
21 opposing the default judgment application.

22 **C. Meritorious Defense**

23 A motion to set aside a default judgment will not be granted
24 when the Defendant does not have a "meritorious defense." In re
25 Hammer, 940 F.2d at 525. Defendant claims as a defense that he did
26 not invest in Newpoint but rather made a loan to his brother and
27 used Newpoint as the intermediary. The court finds that the
28 evidence Defendant offers to support this claim is unconvincing.

1 The evidence consists of the accounting prepared by Receiver's
2 accountants with handwriting of an unknown origin indicating "home
3 repair" next to certain checks. This does not in any way support
4 Defendant's claim that he loaned money to his brother through
5 Newpoint, or that six of the checks to him were given to him by
6 Farahi so that he could cash them. The court finds that Defendant
7 has not presented a meritorious defense.

8 **D. Prejudice to Plaintiff**

9 The court finds that Plaintiff would be prejudiced if the
10 default judgment were set aside. The Receiver has expended
11 attorney's fees in seeking the default and default judgment against
12 Defendant, and the estate and innocent investors will be prejudiced
13 if the judgment is set aside and the Receiver is obligated to
14 expend more estate resources in prosecuting the action,
15 particularly when Defendant has no meritorious defense.

16 **IV. CONCLUSION**

17 For the above reasons, Defendant's motion to set aside and
18 vacate the default and default judgment is DENIED.

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21 IT IS SO ORDERED.

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23 Dated: July 30, 2013

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DEAN D. PREGERSON
United States District Judge