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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LARRY DOWNING,

Plaintiff,

No. CIV S-07-1599 JAM EFB

vs.

ROBERT WANCHEK, CORNING
TRUCK WASH,

Defendants.

FINDINGS AND RECOMMENDATIONS

On January 21, 2009, this court heard plaintiff's motion for default judgment and defendants' motion to set aside default. Attorney Nathaniel Potratz appeared on behalf of plaintiff. Brigitte Mayo appeared on behalf of the defendants. For the reasons set forth below, this court recommends that default be set aside and that this case proceed on the merits.

I. BACKGROUND

A. PROCEDURAL HISTORY

Plaintiff filed his initial complaint on August 4, 2007. He asserts causes of action for negligence, products liability, and "premises liability," based on injuries he sustained while using defendants' products to wash trucks at the defendants' place of business. On September 28, 2007, defendant Blue Beacon was voluntarily dismissed from the action, leaving Corning Truck Wash and Robert Wanchek the only remaining defendants. Dckt. No. 7.

1 On May 29, 2008, plaintiff requested the Clerk's entry of default which was entered as to
2 both defendants on June 5, 2008. Dckt. No. 13. Plaintiff moved for default judgment on June 5,
3 2008, and set the matter for hearing on July 9, 2008. At the hearing, the court expressed concern
4 with the failure of the complaint to adequately allege diversity of citizenship. The deficiency
5 called into question this court's subject matter jurisdiction. Accordingly, the court directed
6 plaintiff to file an amended complaint by July 18, 2008. Dckt. No. 15. Prior to the written
7 findings and recommendations on the matter being issued on August 13, 2008, Dckt. No. 20,
8 plaintiff filed an amended complaint, and again requested entry of default and moved for default
9 judgment. Dckt. Nos. 16, 17 (which are duplicative), 18, 19. The Clerk, acting on that new
10 request, again entered defendants' default on August 13, 2008. Dckt. No. 21. Coincidentally,
11 that default was entered on the same day that the court filed its findings and recommendations
12 concerning the original complaint.

13 On September 19, 2008, the court filed an Order and Findings and Recommendations on
14 the new motion for default judgment, finding that the amended complaint adequately established
15 this court's diversity jurisdiction, and recommending that plaintiff's motion for default judgment
16 again be denied for failure adequately to demonstrate service of process. Dckt. No. 24. Both
17 findings and recommendations were adopted on October 9, 2008. Dckt. Nos. 25, 26. On that
18 same day, again coincidentally, plaintiff once more moved for default judgment and noticed the
19 motion for hearing on November 12, 2008. Dckt. No. 27.

20 Prior to the hearing the court issued an order, filed November 5, 2008, directing plaintiff
21 to be prepared at hearing to discuss the court's concerns regarding service of process, and to
22 present all evidence supporting plaintiff's damages claim. Dckt. No. 29. The next day,
23 November 6, 2008, the plaintiff requested that the hearing on his motion be postponed to January

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1 7, 2009, because he was engaged in settlement negotiations with defendants.¹ Dckt. No. 30.
2 Thereafter, on November 19, 2008, defendants filed a motion to set aside default, and set the
3 matter for hearing on January 14, 2009. Dckt. Nos. 31, 32. The court set both matters for
4 hearing on January 21, 2009. Dckt. No. 34.

5 **B. SERVICE OF PROCESS**

6 Service of process is procedural and therefore governed by federal law, even in a federal
7 diversity action. *Hanna v. Plumer*, 380 U.S. 460 (1965). Fed. R. Civ. P. 4 (e)(2) provides that
8 process may be accomplished by delivering a copy of the summons and complaint personally
9 upon the defendant, by leaving the documents at defendant’s dwelling or usual place of abode
10 with someone of suitable age and discretion who resides there, or by personal delivery upon an
11 authorized agent. Fed. R. Civ. P. 4(e)(1) provides, alternatively, that process may be completed
12 by following state law. California law provides for personal service of process, Cal. Civ. Proc.
13 Code § 416.90(b), or, after reasonable diligence, substituted service by “leaving a copy of the
14 summons and complaint at the person’s dwelling house, usual place of abode, usual place of
15 business, or usual mailing address . . . in the presence of a competent member of the household
16 or a person apparently in charge of his or her office, place of business, or usual mailing address
17 . . . at least years of age, who shall be informed of the contents thereof, and by thereafter mailing
18 a copy of the summons and of the complaint by first-class mail, postage prepaid to the person to
19 be served at the place where a copy of the summons and complaint were left.” Cal. Civ. Proc.
20 Code § 415.20 (b). “Service of a summons in this manner is deemed complete on the 10th day
21 after the mailing.” *Id.*

22 Defendant Robert Wanchek is sued both in his individual capacity and “doing business
23 as” defendant Corning Truck Wash, a sole proprietorship. Robert Wanchek is therefore the
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25 ¹ In her declaration, defendants’ counsel, Ms. Mayo, states that she was retained by
26 defendants’ insurer, Travelers, on November 4, 2008, and spoke with plaintiff’s counsel for the
first time on the same date. Dckt. No. 31, Exh. A, Mayo Decl..

1 appropriate representative of Corning Truck Wash for service of process. *See, e.g., California*
2 *Shellfish Inc. v. United Shellfish, Co.*, 56 Cal.App.4th 16, 24 (1st Dist. 1997) (“[d]etermining the
3 agent for service of process upon a business entity is a simple process . . . if the business is a sole
4 proprietorship, obtaining the address of the owner”). The importance of this requirement is
5 underscored by defendant Wanchek’s representation that he sold Corning Truck Wash in May
6 2007. *See* Decl. of Robert Wanchek, Dckt. No. 31, at p. 7; *see also* Decl. of James Hilton
7 (manager of Corning Truck Wash until May 2007, then manger to date of the location’s new
8 business entity, Royal Truck Wash Tire and Lube), Dckt. No. 36, at p. 10.

9 Despite the briefing on this matter and plaintiff’s repeated attempts to obtain a default
10 judgment, plaintiff has yet to demonstrate service of process of the summons and complaint in
11 accordance with the requirements of Fed. R. Civ. P. 4(e), pursuant either to federal or California
12 law.

13 The First Amended Complaint includes a Proof of Service demonstrating service *by mail*
14 on defendant Robert Wanchek, at 5286 Filbert Court, Paradise CA 95969, on *July 9, 2008*,
15 identified as Wanchek’s home address in the amended complaint. Am. Compl., at 2:16-17.
16 Once *in personsum* jurisdiction has been acquired by service of process in the manner prescribed
17 by Rule 4, service of subsequent pleadings by mailing or electronic filing is appropriate.
18 However, mailing a copy of an amended complaint is no substitute for completion of service of
19 process to the summons and complaint. Plaintiff has been given multiple opportunities to
20 demonstrate the latter and has not done so. No return of service of the initial summons and
21 complaint was filed. The only relevant document of record is a copy of a Return of Service that
22 is attached to plaintiff’s initial request for entry of default filed May 29, 2008. *See* Docket Entry
23 No. 12, p. 7. It states that service of the summons and complaint was made “personally” upon
24 “defendant” at “5286 Filbert Court, Paradise CA 95969,” on *March 26, 2008*. In addition to
25 plaintiff’s failure to ever separately file the Return of Service as required by E. D. Cal. L. R.
26 (“Local Rule”) 4-210(b) (“proof of service of process shall be made by acknowledgment of the

1 party served or by affidavit of the person serving such process. . . . [and] shall be filed and
2 served”) this purported copy of the unfiled Return of Service is facially in conflict with another
3 document filed by the plaintiff. Plaintiff’s Status Report filed three months earlier, on January
4 10, 2008, states without supporting documentation, that “service of process was completed on
5 Corning Truck Wash on September 25, 2007. It is believed service of process was completed on
6 Robert Wanchek on *September 21, 2007*, however the man who was served at Corning Truck
7 Wash refused to provide his name.” *See* Dckt. No. 17, at pp. 1-2 (emphasis added). These
8 representations do not satisfy the requirements for service of process of the initial summons and
9 complaint on either defendant, and the dates (Sept. 21 and 25, 2007) are so inconsistent with the
10 above-noted unfiled Return of Service (asserting personal service of process on Mar. 26, 2008)
11 as to cast doubt on all. This court is therefore unable to conclude that service of process of the
12 initial summons and complaint was made upon defendants or, therefore, that plaintiff’s service
13 by mail of the First Amended Complaint was adequate.

14 Further undermining plaintiff’s own conflicting statements regarding the details of
15 service is defendant Robert Wanchek’s declaration filed November 19, 2008. He states under
16 penalty of perjury that he was never served with the Complaint or First Amended Complaint, and
17 that he first became aware of this action only upon the October 10, 2008 receipt of plaintiff’s
18 August 12, 2008 request for entry of default and motion for default judgment. He recieved those
19 documents by certified mail accepted by defendant’s brother at defendant’s home. Dckt. No. 31,
20 at p. 7.

21 II. ANALYSIS

22 Federal Rule of Civil Procedure, 55(c) provides that a default may be set aside for “good
23 cause.” “Good cause” may be demonstrated by: (1) a sufficient excuse for not meeting the
24 filing deadline; (2) a meritorious defense; or (3) lack of undue prejudice to the other party.
25 *Madsen v. Bumb*, 419 F.2d 4, 6 (9th Cir. 1969); *Mendoza v. Wight Vineyard Management*, 783
26 F.2d 941, 945 (9th Cir. 1986); *see also*, *Tri-Continental Leasing Corp. v. Zimmerman*, 485 F.

1 Supp. 495, 497 (N. D. Cal. 1980). “[T]hese factors are disjunctive,” and the court may vacate
2 entry of default “if any of the three factors is true.” *Franchise Holding II, LLC. v. Huntington*
3 *Restaurants Group, Inc.*, 375 F.3d 922, 926 (9th Cir. 2004), quoting *American Ass’n of*
4 *Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104, 1108 (9th Cir. 2000) (internal quotations
5 omitted).

6 Plaintiff’s failure to meet his burden of demonstrating legally sufficient service of
7 process in accordance with the requirements of Fed. R. Civ. P. 4(e), satisfies the “good cause”
8 requirement for setting aside a default pursuant to Fed. R. Civ. P. 55(c). Obviously, absent
9 proper service of process defendants had a compelling reason for failing to meet the deadline for
10 filing a responsive pleading. It is fundamental that “[b]efore a federal court may exercise
11 personal jurisdiction over a defendant, the procedural requirement of service of summons must
12 be satisfied. ‘[S]ervice of summons is the procedure by which a court having venue and
13 jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party
14 served.’ *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444-445 [] (1946).” *Omni*
15 *Capital Intern., Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 104 (1987). Absent a showing that
16 a defendant has adequately been informed of an action, it is inappropriate to conclude that the
17 defendant “has failed to plead or otherwise defend.” Fed. R. Civ. P. 55(a). Understandably,
18 plaintiff is frustrated with the several unsuccessful attempts to obtain a default judgment. But
19 there is no small irony to the plaintiff’s predicament. It is not asking too much of a litigant to
20 comply with the procedural requirements of Rule 4 for completion of service of process and the
21 requirements for filing the Return of Service, as a precondition to a motion seeking to secure a
22 judgment through default by a strict and mechanical application of the rules regarding the filing
23 of an answer. Indeed, “[t]he law does not favor defaults, and any doubts as to whether a party is
24 in default should be decided in favor of the defaulting party.” 10 Charles A. Wright, Arthur R.
25 Miller & Mary K. Kane, *Federal Practice and Procedure* § 2681 at 402-03 (2d ed. 1983).”
26 *Marschauser v. Travelers Indem. Co.*, 145 F.R.D. 605, 610 (S.D. Fla. 1992).

1 Accordingly, it is hereby recommended that the Clerk's entry of default as to each
2 defendant be set aside, and that plaintiff's motion for default judgment be denied.

3 **III. CONCLUSION**

4 For the foregoing reasons, IT IS HEREBY RECOMMENDED that:

- 5 1. Defendants' motion to set aside default, Dckt. No. 31, be granted;
6 2. Plaintiff's motion for default judgment, Dckt. No. 27, be denied; and,
7 3. Defendants be given twenty (20) days to file and serve a responsive pleading to the
8 amended complaint.²

9 These findings and recommendations are submitted to the United States District Judge
10 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within ten days after
11 being served with these findings and recommendations, any party may file written objections
12 with the court and serve a copy on all parties. Such a document should be captioned "Objections
13 to Magistrate Judge's Findings and Recommendations." Failure to file objections within the
14 specified time may waive the right to appeal the District Court's order. *Turner v. Duncan*, 158
15 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

16 DATED: January 29, 2009.

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19 EDMUND F. BRENNAN
20 UNITED STATES MAGISTRATE JUDGE
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25 ² The court indicated to counsel at the hearing its intent to move the case forward and, to
26 that end, inquired of defense counsel regarding her willingness to accept service so that the case
could be scheduled. On January 28, 2009, counsel cordially filed a Notice and Acknowledgment
of Receipt.