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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RICKEY HENRY, *et al.*,
Plaintiffs,
v.
CENTRAL FREIGHT LINES, Inc.,
Defendant.

Case No. 2:16-cv-00280-DAD-JDP

ORDER
DENYING PLAINTIFFS’ MOTION FOR
DEFAULT JUDGMENT WITHOUT
PREJUDICE
ECF No. 156

In this class action lawsuit brought by truck drivers who worked for defendant Central Freight Lines, Inc., plaintiffs Rickey Henry, Kawaski Corley, Fernando Garcia, Jose de Jesus Moreno, and Michael Waldman allege that defendant committed numerous violations of the California Labor Code by intentionally misclassifying them as independent contractors to withhold wages and other benefits. ECF No. 153. After defense counsel withdrew and defendant failed to obtain replacement counsel, the Clerk of Court entered default. ECF Nos. 132, 143, & 152. Plaintiffs subsequently filed a second amended complaint and then moved for entry of default judgment. ECF Nos. 153 & 156.

Plaintiffs’ motion was before the court for hearing on December 1, 2022. Defendant did not appear. I instructed plaintiffs to file further briefing addressing, among other things, whether the second amended complaint had been properly served on defendant. ECF No. 159. Plaintiffs

1 submitted a brief, ECF No. 160, but it fails to establish adequacy of service. I will deny
2 plaintiffs' motion without prejudice.

3 **Relevant Procedural History**

4 In October 2015, plaintiff Henry commenced this lawsuit by filing a class action
5 complaint in state court alleging claims of unfair competition and labor code violations. ECF No.
6 1-5. Defendant removed the case to federal court and later filed an answer to plaintiff's first
7 amended complaint. ECF Nos. 1 & 46.

8 On January 31, 2022, after years of litigation, defense counsel moved to withdraw as
9 defendant's attorney, arguing that the attorney-client relationship had broken down as defendant
10 was closing its business and was no longer providing counsel with necessary information or
11 paying its legal fees. ECF No. 130; ECF No. 130-1 at 2. In accordance with Local Rule 182(d),
12 counsel identified defendant's general counsel, James Mahoney, as the "primary contact" for
13 defendant, and provided defendant's current or last known mailing address: 5601 West Waco
14 Drive, Waco, TX 76710.¹ ECF No. 130-2 at 3. Counsel also provided Mr. Mahoney's current or
15 last known email address and phone number. *Id.*

16 On February 22, 2022, the district judge granted defense counsel's motion and ordered
17 defendant to obtain replacement counsel within forty-five days, noting that defendant, a
18 corporation, was barred from appearing without an attorney.² ECF No. 132. Defense counsel
19 sent Mr. Mahoney a copy of the district judge's ruling by email and regular mail. ECF No. 133.

20 After defendant failed to retain substitute counsel within the allotted time, plaintiff Henry
21 moved to strike defendant's answer and enter default. ECF No. 140. The district judge granted
22 the motion, finding that defendant had failed to secure representation and was prohibited from
23 appearing in court, and instructed the clerk's office to enter default. ECF No. 143. On September

24
25 ¹ Under Local Rule 182(d), an attorney must obtain leave of court pursuant to a noticed
26 motion when seeking to withdraw if the client would be left without representation. Additionally,
the attorney "shall provide an affidavit stating the current or last known address or addresses of
the client." E.D. Cal. L.R. 182(d).

27 ² "It is a longstanding rule that '[c]orporations and other unincorporated associations
28 must appear in court through an attorney.'" *D-Beam Ltd. P'ship v. Roller Derby Skates, Inc.*, 366
F.3d 972, 973-74 (9th Cir. 2004) (citation omitted); *see also* E.D. Cal. L.R. 183(a) ("A
corporation or other entity may appear only by an attorney.").

1 9, 2022, the Clerk of Court entered default. ECF No. 152.

2 On September 13, 2022, plaintiffs filed a second amended complaint, which added Mr.
3 Corley, Mr. Garcia, Mr. Moreno, and Mr. Waldman as named plaintiffs. ECF No. 153. The
4 certificate of service states that the amended pleading was mailed on September 13, 2022, to the
5 following address: Cogency Global Inc., 1325 J Street Ste 1550, Sacramento, CA 95814. *Id.* at
6 47.

7 On October 18, 2022, plaintiffs moved for entry of default judgment under Federal Rule
8 of Civil Procedure 55(b), seeking “relief in the form requested in the [second amended
9 complaint], namely entry of judgment for unpaid wages and associated penalties” for each named
10 plaintiff. ECF No. 156-1 at 10; *see also* ECF No. 156 at 4. The certificate of service shows that
11 plaintiffs mailed a copy of the motion to Cogency Global. ECF No. 156-1 at 21. Defendant did
12 not file an opposition and did not appear at the December 1, 2022 hearing on the motion. On
13 January 17, 2023, plaintiffs filed a supplemental brief addressing, among other issues, the
14 adequacy of service of the second amended complaint. ECF No. 160.

15 **Service of Process**

16 As a preliminary matter, the court must consider whether plaintiffs properly served the
17 amended pleading on defendant.

18 Rule 5 of the Federal Rules of Civil Procedure governs service of pleadings filed after the
19 original complaint. Fed. R. Civ. P. 5(a)(1)(B). Rule 5(b)(2) lists the various ways service can be
20 made, including by “mailing it to the person’s last known address—in which event service is
21 complete upon mailing.” Fed. R. Civ. P. 5(b)(2)(C). Service is not required, however, if the
22 party to be served “is in default for failing to appear” and the pleading does not assert a new claim
23 for relief against the defaulting party. Fed. R. Civ. P. 5(a)(2). But when the default is for failure
24 to appear and the pleading *does* raise a new claim, service must be made pursuant to Rule 4,
25 which governs service of process when an action is commenced. *Id.*; *see* Fed. R. Civ. P. 4.

26 Plaintiffs’ argument that the second amended complaint was properly served is two-fold.
27 First, plaintiffs assert that they completed service by mailing a copy to defendant’s registered
28 agent for service of process, Cogency Global, and by filing the amended pleading via the court’s

1 electronic filing system. Second, plaintiffs contend that their attempts at service went well
2 beyond what was required, as under Rule 5(a)(2) they “need not have served the amended
3 pleading on the party in default.” *See* ECF No. 160 at 5-6.

4 The undersigned rejects plaintiffs’ contention that Rule 5(a)(2) eliminated the need to
5 effect service of process. As discussed above, the function of Rule 5(a)(2) is to excuse service
6 when a party is in default *for failing to appear*. Here, the district judge found that defendant
7 defaulted not for failing to appear, but for failing to secure new counsel following defense
8 counsel’s withdrawal. ECF No. 143. The docket further undermines plaintiffs’ position, as
9 defendant not only filed an answer to the first amended complaint and but also actively
10 participated in this litigation by attending mediations, conducting discovery, and moving for
11 summary judgment. *See* ECF Nos. 46 & 72. Accordingly, plaintiffs’ assertion that Rule 5(a)(2)
12 applies is inapposite. Having appeared, defendant was entitled to receive service of the amended
13 pleading in accordance with Rule 5(b)(2). *See Phillip M. Adams & Assocs., LLC v. Winbond*
14 *Elects. Corp.*, 2010 WL 3489400, at *5 (D. Utah Sept. 1, 2010) (noting Rule 5(a)(2)’s service
15 exception not applicable when party appeared before defaulting) (citations omitted); *O’Halloren*
16 *v. Quarzite Carrara*, 129 F.R.D. 24, 24-25 (D. Mass. 1990) (denying motion to amend complaint
17 for failure to serve because defaulted defendant had appeared and was “entitled to service of
18 pleadings to the same extent as a party not in default”); *see also* 1 James Wm. Moore et al.,
19 Moore’s Federal Practice—Civil § 5.03 [3] (2023) (“A party who appears and subsequently
20 defaults continues to be entitled to the service of all pleadings and papers under Rule 5. An
21 appearance at any time during the action requires service on that party of all subsequent pleadings
22 and papers regardless of the defaulting party’s absence at any or all later stages of the action.”)
23 (footnotes omitted).³

24
25 ³ Rule 5 creates “a dichotomy . . . between parties in default for failure to appear and
26 parties in all other type defaults (such as parties who appeared but subsequently defaulted).” 1
27 James Wm. Moore et al., Moore’s Federal Practice—Civil § 5.03 [2] (2023) (footnote omitted).
28 Parties in the former group “are not entitled to be notified of any progress regarding the
proceedings concerning them because they have never submitted themselves to the jurisdiction of
the court,” while parties who appeared and then defaulted “must be informed of such progress
because they have submitted themselves to the court’s jurisdiction.” *Id.* (footnotes omitted).

1 The court next considers whether plaintiffs' service attempts satisfied Rule 5. Plaintiffs
2 are correct that under Rule 5(b)(2)(C), service of an amended pleading is complete at the time it is
3 mailed to a party's last known address. When plaintiffs mailed the second amended complaint on
4 September 13, 2022, however, they did not use defendant's last known address—in Waco,
5 Texas—which defense counsel provided in the motion seeking leave to withdraw. Instead, the
6 certificate of service states that plaintiffs mailed the amended pleading to Cogency Global at an
7 address in Sacramento. ECF No. 153 at 47.

8 A review of defendant's business entity profile and related documentation retrieved from
9 the California Secretary of State's website indicates that Cogency Global was no longer
10 defendant's designated agent for service of process in California at the time the second amended
11 complaint was mailed. Defendant's status is listed as "Terminated" with an "Inactive Date" of
12 June 24, 2022.⁴ See California Secretary of State website,
13 <https://bizfileonline.sos.ca.gov/search/business> (last visited October 17, 2023). A Certificate of
14 Surrender, signed by a corporate officer for defendant and filed on June 24, 2022, with the
15 California Secretary of State, states that defendant "surrender[ed] its rights and authority to
16 transact intrastate business in the State of California" and "revok[ed] its designation of agent for
17 service of process in California." See California Secretary of State Certificate of Surrender, filed
18 June 24, 2022, <https://bizfileonline.sos.ca.gov/search/business>. The Certificate also states that
19 defendant consented to have the California Secretary of State accept service of process of any
20 legal documents intended for defendant, and references a P.O. Box address in Waco, Texas, as
21 the mailing address where such documents could be forwarded to defendant. *Id.* The foregoing
22 information reflects that Cogency Global's authorization to accept service for defendant ceased
23 when defendant's business in California terminated on June 24, 2022.

24 On this record, plaintiffs have failed to demonstrate that defendant was properly served
25 when the second amended complaint was mailed to Cogency Global in September 2022. Neither

26 ⁴ The court takes judicial notice of defendant's entity profile from the California Secretary
27 of State's website. Fed. R. Evid. 201; see *Gerritsen v. Warner Bros. Entm't, Inc.*, 112 F. Supp.
28 3d 1011, 1033-34 (C.D. Cal. 2015) (taking judicial notice of business entity profile from the
California Secretary of State's website).

1 have plaintiffs shown that they satisfied the service requirement by electronically filing the
2 second amended complaint with the court. The court’s notice of electronic filing reflects only
3 that plaintiffs’ attorneys were notified by email that the amended pleading was filed. There is no
4 indication that any notification was sent to defendant; indeed, the court’s notice instructs that the
5 second amended complaint “must be served conventionally by the filer to: Central Freight Lines,
6 Inc., c/o James Mahoney, General Counsel, 5601 West Waco Drive, Waco, TX 76710.” Nothing
7 in the record suggests that plaintiffs followed this directive to effect proper service.

8 Based on the above, it is hereby ORDERED that plaintiffs’ motion for default judgment,
9 ECF No. 156, is denied without prejudice.

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11 IT IS SO ORDERED.

12 Dated: December 15, 2023



JEREMY D. PETERSON
UNITED STATES MAGISTRATE JUDGE

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