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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BOARD OF TRUSTEES OF THE SAN
MATEO HOTEL EMPLOYEES AND
RESTAURANT EMPLOYEES WELFARE
FUND, *et al.*,

No. C-08-2619 EMC

Plaintiffs,

**ORDER RE SUPPLEMENTAL
BRIEFING AND/OR EVIDENCE**

v.

H. YOUNG ENTERPRISES, INC., *et al.*,

Defendants.

Plaintiffs are the Board of Trustees of the San Mateo Hotel Employees and Restaurant Employees Welfare Fund and Pension Fund and Sherri Chiesa. The Welfare and Pension Funds (collectively, “Trust Funds”) are employee benefit plans and multiemployer plans. Plaintiffs filed suit on the behalf of the Trust Funds, for which they are trustees, against Defendants H. Young Enterprises, Inc. (“Enterprises”) and Howard Young (individually and doing business as Just Desserts), asserting claims pursuant to the Employee Retirement Income Security Act (“ERISA”), *see* 29 U.S.C. 1132, and the Labor Management Relations Act (“LMRA”). *See id.* § 185. After Defendants failed to respond to Plaintiffs’ complaint, default was entered against Mr. Young on August 29, 2008, and against Enterprises on October 27, 2008. *See* Docket Nos. 12, 17. Plaintiffs thereafter moved for default judgment. Having considered Plaintiffs’ brief and accompanying submissions, as well as all other evidence of record, the Court hereby orders that supplemental briefing and/or evidence be provided as follows.

1 I. DISCUSSION

2 A. Service of Process

3 1. Mr. Young

4 In the instant case, the proof of service for the summons and complaint indicates that the
5 documents were served on Mr. Young by (1) leaving a copy of the summons and complaint at his
6 place of business with Beverly Lee, the receptionist and person apparently in charge; and (2)
7 thereafter mailing a copy of the summons and complaint to Ms. Lee -- not Mr. Young -- at the place
8 where the documents were left. *See* Docket No. 4. This service did not strictly comply with
9 California Code of Civil Procedure § 415.20(a). More specifically, for strict compliance with the
10 statute, a copy of the documents should have been mailed to Mr. Young, and not Ms. Rogers. The
11 question for the Court is whether Plaintiff’s failure to strictly comply with § 415.20(a) renders
12 service of process inadequate.

13 In *Dill v. Berquist Construction Co.*, 24 Cal. App. 4th 1426 (1994), a California appellate
14 court addressed a similar issue. In *Dill*, the specific issue for the court was whether the plaintiff had
15 adequately served the defendant-corporation pursuant to California Code of Civil Procedure §
16 415.40, which allows a summons to be served on a person outside California by sending a copy of
17 the summons and complaint to the person to be served by first-class mail, postage prepaid, requiring
18 a return receipt. The court explained that, “in order to serve a corporate defendant by mail at an
19 address outside the state pursuant to section 415.40, a plaintiff must mail the summons to a person to
20 be served on behalf of the corporation, *i.e.*, to one of the individuals specified in section 416.10.” *Id.*
21 at 1436. The court found that, in that case, the plaintiff did not strictly comply with § 415.40
22 because he “did not mail the summons to any individual at all, but rather to the corporate defendants
23 themselves.” *Id.* While the plaintiff could have substantially complied with the statute “if, despite
24 his failure to address the mail to one of the persons to be served on behalf of the defendants, the
25 summons was actually received by one of the persons to be served,” *id.* at 1437, there was
26 insufficient evidence that the person who received the summons was one of the individuals specified
27 in § 416.10. *See id.* at 1437-39. “[T]he mere fact that some employee of the corporation received
28 the summons does not necessarily establish substantial compliance. Rather, there must be evidence

1 ‘establishing actual delivery to the person to be served’” *Id.* at 1438-39. The *Dill* court
2 therefore concluded that the plaintiff failed to prove that he had effected valid service.

3 In the instant case, there is no doubt that Plaintiffs failed to strictly comply and, while, per
4 *Dill*, substantial compliance can render service adequate, here, there is no evidence of substantial
5 compliance -- *e.g.*, that Mr. Young actually received service of process. The Court acknowledges
6 that Plaintiffs did leave a copy of the summons and complaint in Mr. Young’s office, but there is no
7 authority of which the Court is aware that holds that this, by itself, is sufficient to establish
8 substantial compliance with § 415.20(a). Indeed, if that could be sufficient, then the mailing
9 component of substitute service would, in essence, be rendered meaningless.

10 The Court therefore orders that Plaintiffs provide supplemental briefing explaining why
11 service of process as to Mr. Young was proper.

12 2. Enterprises

13 In the instant case, the proof of service for the summons and complaint indicates that the
14 documents were served on Enterprises by (1) leaving a copy of the summons and complaint at its
15 place of business with Beverley Lee, the office assistant and person apparently in charge; and (2)
16 thereafter mailing a copy of the summons and complaint -- to whom it is not clear -- at the place
17 where the documents were left. *See* Docket No. 13.

18 For reasons similar to above, based on *Dill*, the Court has concerns about the adequacy of
19 service with respect to Enterprises. The Court therefore orders that Plaintiffs provide supplemental
20 briefing explaining why service of process as to Enterprises was proper.

21 B. Agreements at Issue

22 In their complaint, Plaintiffs allege that Defendants “were bound by a written collective
23 bargaining agreement with Hotel Employees & Restaurant Employees Local No. 340.” Compl. ¶ 5.
24 In support of their motion for default judgment, Plaintiffs note that “Defendants have not denied
25 being bound by this agreement.” Barrett Decl. ¶ 2. The Court hereby orders that Plaintiffs provide
26 any and all evidence establishing that *each* of the defendants (*i.e.*, both Mr. Young and Enterprises)
27 agreed to be bound by the collective bargaining agreement (*i.e.*, the SFO Airport Interim
28 Agreement).

1 In addition, the Court orders that Plaintiffs provide a signed copy of the collective bargaining
2 agreement. The copy attached to the Barrett Declaration does not appear to have been signed.

3 Finally, the Court notes that, pursuant to the SFO Airport Interim Agreement, it appears that
4 an employer agrees to be bound by the Trust Agreement for the Welfare Fund. *See* Interim
5 Agreement § 39(j). It is not clear where, in the Interim Agreement, an employer agrees to be bound
6 by the Pension Fund Trust Agreement. Plaintiffs should provide any and all evidence establishing
7 that an employer made such an agreement to be bound by Pension Fund Trust Agreement.

8 C. Damages

9 1. Interest

10 Plaintiffs claim that the proper rate of interest for unpaid contributions is 5%. *See* Barrett
11 Decl. ¶ 9 (“[I]nterest at the rate of 5% is due pursuant to the trust agreements and 29 U.S.C. §
12 1132(g), inasmuch as it is the rate charged by the Internal Revenue Service at this time.”). Based on
13 the Court’s review, it does not appear that any particular interest rate is specified in the relevant
14 agreements; therefore, under 29 U.S.C. § 1132(g), “the rate prescribed under section 6621 of the
15 Internal Revenue Code of 1986” is applicable. Plaintiffs should explain how, pursuant to § 6621,
16 they arrived at a rate of 5%.

17 2. Damages Calculations (Interest and Unpaid Contributions)

18 Based on the Court’s review, it is not clear that the damages calculations for the months of
19 November 2007, June 2008, and September 2008 are correct. The reports submitted for these
20 months reflect calculations made in three different columns: (1) Welfare; (2) Pension; and (3) Paid
21 Vacation, Sick Leave, Absences, and Holidays. It is not clear that Plaintiffs are entitled to
22 contributions for the third column since they appear to be trustees for only the Welfare and Pension
23 Trust Funds. The Court orders Plaintiffs to explain why they are entitled to contributions for the
24 third column (*i.e.*, Paid Vacation, Sick Leave, Absences, and Holidays).

25 **II. CONCLUSION**

26 The supplemental briefing and/or evidence required by the Court shall be filed within two
27 weeks of the date of this order.

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All parties are hereby given notice that any opposition to the motion for default judgment shall be filed by January 7, 2009. Absent further order of the Court, the Court shall prepare a report and recommendation on Plaintiffs' motion based on the papers submitted, *i.e.*, no hearing shall be held.

Immediately upon receipt of this order, Plaintiffs shall serve a copy of this order on each Defendant. Thereafter, Plaintiffs shall file a proof of service with the Court.

IT IS SO ORDERED.

Dated: December 16, 2008



EDWARD M. CHEN
United States Magistrate Judge