UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ALBERT DYTCH,

Plaintiff,

v.

IGNACIO BERMUDEZ, et al.,

Defendants.

Case No. 17-cv-02714-EMC

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

Docket No. 34

United States District Court
Northern District of California

I. FACTUAL AND PROCEDURAL BACKGROUND

The Court assumes familiarity with Plaintiff's factual allegations, which were recounted in detail in the Court's second order denying Plaintiff's motion for default judgment. *See* Docket No. 31. In short, Plaintiff Albert Dytch attempted to visit El Campesino, a Latino eatery in Richmond allegedly owned by Defendants as sole proprietors. He thereafter alleged violations of the Americans With Disabilities Act (ADA). While there, he encountered numerous obstacles in the parking lot, on the route from the public street to the entrance, and within the facility, especially in the restrooms. The Court denied Plaintiff's first motion for default judgment because the affidavit of service stating that substituted service was made upon a "John Doe" at El Campesino failed to identify whether "John Doe" was "apparently in charge" as required by California Code of Civil Procedure Section 415.20(b). *See* Docket No. 19. Plaintiff was given the option of re-attempting service or filing an adequate affidavit; rather than re-attempt service, Plaintiff filed a new affidavit and moved a second time for default judgment. On review, the Court determined the amended affidavit was not credible because it merely "recites, in a formulaic and conclusory fashion, that John Doe [upon whom service was made] was 'apparently in charge,'" but that it "lack[ed] factual detail," "d[id] not identify the particular person served," and

was made "a year after the fact" without any "corroborat[ion] by contemporaneous notes or documentation." *See* Docket No. 19 at 4-5. Accordingly, the Court found that substituted service was inadequate and, as a result, the Court lacked personal jurisdiction over the Defendants and could not enter default judgment against them. *Id.* at 5.

The Court also determined that, even if service had been adequate, default judgment would not have been warranted. In particular, Plaintiff's complaint was "not sufficiently detailed to establish key elements of his claim," including whether the modifications requested were "readily achievable," even assuming that the building was an "existing" facility when the ADA was passed. *Id.* The Court held that "whether a modification is 'readily achievable' is not an affirmative defense, but rather an element of the case-in-chief for which the plaintiff bears the burden." *Id.* Without allegations about "how feasible the changes are, how much it would cost to make El Campesino accessible, the impact of any required changes on the facility, or other factors," Plaintiff's complaint was insufficient to warrant a grant of default judgment. *Id.* at 6.

The Court also concluded that Plaintiff's alternative claim under the more stringent requirements for new constructions, built 30 months after July 26, 1990 (*i.e.*, in 1993), did not apply. Though Plaintiff conclusory alleged that the El Campesino building was designed and constructed after January 26, 1993, the Court cited published county records indicating construction in 1961. *Id.* at 6.

Finally, the Court noted that "Plaintiff's concession that he does not know whether El Campesino continues to operate raises questions about whether he faces any threat of future harm to support his request for injunctive relief." *Id.* at 6-7. The Court granted Plaintiff 60 days to file and serve an amended complaint.

II. LEGAL STANDARD

The Court **GRANTS** Plaintiff's motion for leave to file a motion for re-consideration in light of the fact that Plaintiff did not have an opportunity to address the grounds for the Court's prior decision, which was decided on the papers, and in light of additional authorities cited by Plaintiff that were not previously before the Court. *See* Civil L. R. 7-9(a). However, for the reasons explained below, the Court **DENIES** Plaintiff's motion for re-consideration. This motion

is appropriate for resolution without oral argument. *See* Local Civ. R. 7-1(b).

Plaintiff advances three arguments in support of reconsideration. First, Plaintiff argues that service of process was effective. Second, Plaintiff argues that the Court improperly took judicial notice of a disputed fact when it discredited the allegation that El Campesino was built after 1993. Third, Plaintiff argues that, even with respect to buildings existing before that time, the Court erred in treating the question whether the removal of a barrier was "readily achievable" as an element of the plaintiff's case-in-chief rather than the defendant's affirmative defense. The Court addresses each issue below.

A. Adequacy of Service

Although Plaintiff correctly argues that a proof of service creates a presumption of proper service, *see Floyevor Int'l, Ltd. v. Super. Ct.*, 59 Cal.App.4th 789, 795 (1997), such proofs of service are most often executed contemporaneously or amended very shortly thereafter. As the Court previously noted, here, the amendment was made nearly a year after the purported service. The amendment to the affidavit was conclusory: it merely identified John Doe as "a coworker and person apparently in charge." The lack of detail, particularly where the amendment was made a year later, detracts from the declaration's credibility. *Cf. Duran v. U.S. Bank Nat'l Assn.*, 59 Cal.4th 1, 56 (2014) (noting that "the credibility of declarations as to how much time an employee spent on outside sales activity may depend on whether the employer or employee kept contemporaneous records of his or her time"). It is difficult to believe that a professional process server would, one year after the fact, recall specific details about John Doe's status at the May 23, 2017 encounter at El Campesino. The evidence is insufficient to support a credible presumption that John Doe was in fact "apparently in charge," or had a "relationship with [Defendants which] makes it more likely than not that [he] deliver[ed] process to [Defendants]," *Bein v. Brechtel-Jochim Grp., Inc.*, 6 Cal.App.4th 1387, 1393 (1992) (quotation and citation omitted). Because that showing was inadequate, it is irrelevant that Plaintiff also attempted to mail a copy. *See* Cal. Code Civ. Proc. § 415.20(b) (substitute service requires service on "a person apparently in charge of his or her . . . place of business" and "*thereafter* mailing a copy of the summons and of the complaint by first-class mail" (emphasis added)).

For these reasons, the Court declines to re-consider its prior holding as to the inadequacy of service. The Court notes that Plaintiff was not left without any other option. The Court granted Plaintiff leave to re-attempt service of the complaint, but Plaintiff opted not to do so.

B. Judicial Notice of Pre-1993 Construction Date

Plaintiff also argues that he has stated a prima facie claim and thus it was erroneous for the Court to decline default judgment. One of the factors the Court may consider in evaluating whether default judgment is warranted is the "sufficiency of the complaint." *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). The Court "must take the well-pleaded factual allegations of [a complaint] as true," but "necessary facts not contained in the pleadings, and claims which are legally insufficient, are not established by default." *Cripps v. Life Ins. Co. of N. Am.*, 980 F.2d 1261, 1267 (9th Cir. 1992). Although failure to meet the Rule 12(b)(6) standard precludes entry of default judgment under this *Eitel* factor, *see Cripps*, 980 F.2d at 1267, the inverse is not necessarily true. A complaint may satisfy Rule 12(b)(6) standards and thus be "sufficient," but default judgment nevertheless may not be warranted. Indeed, *Eitel* contemplates that the Court may take into consideration other factors; the complaint's sufficiency is not dispositive. *See Eitel*, 782 F.2d at 1471 (other factors include, *inter alia*, "the merits of plaintiff's substantive claim" and "the possibility of a dispute concerning material facts").

Here, the Court credited Plaintiff's allegations that he was disabled and was denied equal access to El Campesino, a public accommodation. However, with respect to Plaintiff's alternative theories of liability under the ADA, the Court did not credit Plaintiff's allegation that El Campesino was built after 1993—such buildings are required to be "readily accessible to and usable by individuals with disabilities" unless "an entity can demonstrate that it is structurally impracticable to meet the requirements." 42 U.S.C. §§ 12183(a)(1). Instead, the Court took judicial notice of online City of Richmond county records indicating the building was constructed in 1961. Plaintiff argues that judicial notice was improper because the building date is "disputed" insofar as Plaintiff had alleged it was built after 1993, and the website includes a disclaimer that although the City of Richmond "makes every effort to produce and publish the most current and accurate information possible," it makes "[n]o warranties" about the data. Yet Plaintiff

acknowledges that "it may be true that the building was first constructed in 1961, [but] that is not a fact that can be judicially noticed." Mot. at 15. Whether or not judicial notice was proper, Plaintiff's argument highlights why default judgment on that claim was not warranted. Even on this motion, Plaintiff does not deny the building was constructed in 1961. His allegation to the contrary was merely a recitation of the elements of a claim under the ADA for newly constructed buildings; he did not allege a specific construction date but merely said it was beyond the cut-off. That kind of formulaic recitation, even if sufficient to survive review as an alternative theory on a Rule 12(b)(6) motion, raises serious questions about "the merits of plaintiff's substantive claim" and "the possibility of a dispute concerning material facts," both factors weighing against a grant of default judgment for the aforementioned reasons. *Eitel*, 782 F.2d at 1741.

Thus, even if the Court does not take judicial notice of the 1961 construction date, Plaintiff's conclusory, alternative allegation that El Campesino was built after 1993 is not enough to persuade the Court on the merits of Plaintiff's claim or to eliminate the likelihood of a material dispute—indeed, such a dispute is very likely where Plaintiff's allegation contradicts county records. The Court therefore declines to reconsider its holding with respect to this issue.

C. "Readily Achievable"

Finally, Plaintiff argues that the Court improperly held him to a summary judgment or trial standard of producing evidence that the removal of the barriers was "readily achievable," rather than the motion to dismiss standard. Plaintiff also argues that the Court improperly placed the burden on Plaintiff to state a case, whereas the Defendant should bear the burden as to whether an alteration is "readily achievable."

As above, whether viewed as an issue going to the complaint's sufficiency or the merits of Plaintiff's claim, Plaintiff's complaint conclusorily alleges that the modifications are "readily achievable" without any supporting factual allegations whatsoever. It is impossible for the Court to evaluate the merits of that assertion. Although the Ninth Circuit has yet to decide whether the plaintiff or the defendant bears the burden of proof with regards to whether the removal of a barrier is "readily achievable," most federal courts do characterize the "readily achievable" issue as an affirmative defense, but they follow a burden-shifting framework established in *Colo. Cross*

Disability Coal. v. Hermanson Family Ltd. P'ship, 264 F.3d 999, 1002 (10th Cir. 2001), whereby the plaintiff bears the initial burden of production but the defendant bears the ultimate burden of persuasion. *See, e.g.*, *Ridola v. Chao*, No. 16-CV-02246-BLF, 2018 WL 2287668 at *10 (N.D. Cal. May 18, 2018) ("[A]lthough [plaintiff] has not identified a case where the Ninth Circuit explicitly decided who has the burden of proving that removal of an architectural barrier is readily achievable, the Court follows the district courts applying the *Colorado Cross* framework."). The Ninth Circuit has rejected the burden-shifting framework in the discrete context of historical buildings. *See Molski v. Foley Estates Vineyard & Winery, LLC*, 531 F.3d 1043, 1048 (9th Cir. 2008) (declining to follow *Colorado Cross* in this context of whether removal of a barrier is achievable in historic facilities because "[b]y placing the burden of production on the defendant, we place the burden on the party with the best access to information regarding the historical significance of the building"). Judge Seeborg has extrapolated the principle in *Molski* to hold that the defendant always bears both the initial burden of production and ultimate burden of persuasion with respect to the "readily achievable" defense. *See Rodriguez v. Barrita, Inc.*, No. C 09-04057 RS, 2012 WL 3538014, at *11 (N.D. Cal. Mar. 1, 2012) ("While it is true that [*Molski*] is, by its terms, limited to cases where the historical exception is asserted, its concerns regarding the availability of evidence have equal weight when defendant claims that remediation would be too costly or impractical. Defendants will usually be better positioned to assess both the special logistical difficulties posed by construction and, given their knowledge of their own financial circumstances, the relative expense associated with it."). But several other courts in this circuit continue to follow *Colorado Cross*. *See, e.g.*, *Ridola*, *supra*; *Hernandez v. Polanco Enterprises, Inc.*, 19 F.Supp.3d 918, 931 (N.D. Cal. 2013); *Rodgers v. Chevys Restaurants, LLC*, No. C13-03923 HRL, 2015 WL 909763 (N.D. Cal. Feb. 24, 2015) (listing cases in the eastern, central, and southern districts which also follow the burden-shifting approach).

Ultimately, whether the plaintiff or defendant bears the initial burden of production makes no difference to whether default judgment is appropriate in this case. Even those courts placing the burden on the defendant recognize that '[w]hether a specific change is readily achievable 'is a fact-intensive inquiry that will rarely be decided on summary judgment.'" *Rodriguez*, 2012 WL

3538014, at *8 (citation omitted). That highlights why default judgment is inappropriate here. Even if Plaintiff's claim is sufficient for Rule 12(b)(6) purposes, the allegations are so bare that the Court is not persuaded about "the merits of plaintiff's substantive claim." *Eitel*, 782 F.2d at 1741. The question whether removal of a barrier is "readily achievable" requires consideration of information like the nature of the costs, the financial resources of the facilities, the size of the business, and so on, *see* 42 U.S.C. § 12181(9), and no such information has been alleged in the complaint. The fact that "readily achievable" can rarely be decided on summary judgment increases "the possibility of a dispute concerning material facts" here, particularly where no facts related to the readily achievable defense are alleged. *Id.* Especially where Plaintiff seeks injunctive relief, the lack of information—let alone recent information—raises serious concerns.[1]

Accordingly, the Court **DENIES** Plaintiff's motion for reconsideration on this issue.

III. CONCLUSION

The Court recognizes that certain information about the "readily achievable" defense may be in Defendants' exclusive possession. A plaintiff should not be precluded from obtaining relief where a defendant has defaulted and thereby prevented the plaintiff from taking discovery to establish the merits of his or her claim. However, as explained above, it is not clear that Defendants have defaulted here; questions surrounding the adequacy of service merely reinforce the Court's concern about entering judgment on a factually-complex issue. Furthermore, not *all* information about the readily achievable defense is unavailable to Plaintiff. Plaintiff need not allege specific engineering plans and details, but surely Plaintiff can obtain general information about the type of modifications that could be pursued with a ball-park estimate of their costs in analogous contexts. It is not uncommon for plaintiffs in ADA access cases to have an access specialist. *See* General Order 56(3-5).

For the reasons stated above, Plaintiff's motion for reconsideration is **DENIED**. Plaintiff may file an amended complaint in line with the guidance above within 30 days. Within 60 days of

[1] The Clerk entered default in July 2017, Docket No. 9, but Plaintiff waited 5 months until December 2017 before moving for default judgment, Docket No. 10. A full year has passed since default was entered, and over a year since Plaintiff's complaint was filed. As the Court previously noted, Plaintiff is unsure whether El Campesino continues to operate. *See* Docket No. 31 at 6-7.

filing, Plaintiff must serve the amended complaint on Defendants in compliance with Federal Rule of Civil Procedure 4, with a service package that includes a Spanish-language cover letter and the Spanish edition of the Court's Pro Se Litigation Handbook, in addition to other materials required by the local rules. Plaintiff is encouraged to attempt service on Defendants' residential address if it can be located through due diligence. If Defendants default, then Plaintiff may file a new motion for default judgment.

This order disposes of Docket No. 34. The motion hearing scheduled for August 9, 2018 is **VACATED**.

IT IS SO ORDERED.

Dated: August 1, 2018

EDWARD M. CHEN
United States District Judge

United States District Court
Northern District of California