

1                                    IN THE UNITED STATES DISTRICT COURT  
2                                    FOR THE NORTHERN DISTRICT OF CALIFORNIA

3  
4 CHARLES A. BONNER,

No. C 11-1350 CW

5                                    Plaintiff,

ORDER GRANTING  
DEFENDANTS' MOTION  
TO SET ASIDE ENTRY  
OF DEFAULT, Docket  
No. 14, AND MOTION  
TO SUBMIT FURTHER  
EVIDENCE, Docket  
No. 30, AND  
DENYING AS MOOT  
PLAINTIFF'S MOTION  
FOR DEFAULT  
JUDGMENT, Docket  
No. 16, AND  
ADMINISTRATIVE  
MOTION TO ADMIT  
ADDITIONAL  
DOCUMENTS, Docket  
No. 35

6                                    v.

7 AKRAM ARASTEHJOO; NEDA VOJDANI;  
8 and DOES 1-100,

9                                    Defendants.  
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United States District Court  
For the Northern District of California

15                    Plaintiff Charles A. Bonner filed the present action against  
16 Defendants Akram Arastehjoo and her daughter Neda Vojdani,  
17 alleging sixteen causes of action under federal and state law.  
18 After Defendants failed to answer the complaint or otherwise  
19 respond, the Clerk entered default as to both Defendants.  
20 Defendants have appeared specially to move the Court to set aside  
21 the entry of default. Docket No. 14. Having considered all of  
22 the parties' submissions, the Court GRANTS the motion.

24                                    BACKGROUND

25                    According to the allegations in the Complaint and other  
26 submissions filed with the Court, Plaintiff Bonner and Defendant  
27 Arastehjoo had a personal relationship for several years. During  
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1 that time Bonner and Arastehjoo allegedly engaged in real estate  
2 transactions together and Bonner provided legal services to  
3 Arastehjoo, Vojdani and other family members. In addition,  
4 Arastehjoo loaned Bonner sums of money, and Bonner provided  
5 certain real property as security. On November 23, 2010,  
6 Arastehjoo filed suit against Bonner in Marin County Superior  
7 Court, alleging fraud and other violations of law related to the  
8 loans, and legal malpractice, and sought judicial foreclosure.  
9 Arastehjoo has also instituted a non-judicial foreclosure of  
10 Bonner's real property located at 105 Buchanan Drive, Sausalito,  
11 California. On December 27, 2011, Bonner served a cross-complaint  
12 in the state action against Arastehjoo and Doe defendants.  
13 Arastehjoo demurred to the cross-complaint.  
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15 On March 21, 2011, Bonner filed the above-entitled federal  
16 action against Arastehjoo and Vojdani. The complaint arises from  
17 the loans that are also at issue in the state action and seeks  
18 payment for legal services Bonner allegedly provided. Bonner  
19 attempted to serve Defendants on the same day by sending his  
20 assistant Ilse Wolff to the law office of Robert Diskint, counsel  
21 for Arastehjoo in the state action.  
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23 The day after Bonner filed the federal action, he moved for a  
24 temporary restraining order to stop the foreclosure sale of his  
25 Buchanan Drive property. Again, Wolff went to Diskint's law  
26 office. She personally gave Diskint the motion and other related  
27 papers, including a copy of the complaint. The parties dispute  
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1 whether a copy of summons was included with the copy of complaint  
2 that was enclosed with the motion for a temporary restraining  
3 order. The motion was denied.

4 DISCUSSION

5 Federal Rule of Civil Procedure 55(a) provides, "When a party  
6 against whom a judgment for affirmative relief is sought has  
7 failed to plead or otherwise defend as provided by these rules and  
8 that fact is made to appear by affidavit or otherwise, the clerk  
9 shall enter the party's default." However, a "person is not bound  
10 by a judgment in litigation to which he or she has not been made a  
11 party by service of process." Mason v. Genisco Tech. Corp., 960  
12 F.2d 849, 851 (9th Cir. 1992). If a party was not properly  
13 served, the entry of default against it must be set aside. See  
14 id. (stating that the default judgment is void if plaintiff failed  
15 to serve defendant properly). Furthermore, a court may set aside  
16 entry of default for good cause. Fed. R. Civ. P. 55(c). Default  
17 is disfavored. See In re Hammer, 940 F.2d 524, 525 (9th Cir.  
18 1991). Public policy supports deciding cases on the merits; any  
19 doubts as to the propriety of the default are resolved against the  
20 party seeking the default. See id.

21 In the present case, the parties dispute whether the summons  
22 and complaint were properly served. Federal Rule of Civil  
23 Procedure 4 establishes the required form and method of service.  
24 Among other methods, Rule 4 provides that service may be  
25 accomplished by following state law for serving a summons or  
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1 delivering a copy of the summons and complaint to an agent  
2 authorized by appointment or law to receive service of process.  
3 Fed. R. Civ. P. 4(e)(1), (2)(C). Defendants concede that an  
4 agent's authority to accept service may be implied. United States  
5 v. Ziegler Bolt and Parts Co., 111 F.3d 878, 881 (Fed. Cir. 1997).

6 Bonner argues that he properly served Defendants because  
7 (1) Diskint accepted service of his cross-complaint in the state  
8 action, (2) Diskint instructed Bonner to direct all communications  
9 intended for Arastehjoo to him, (3) Diskint's assistant told  
10 Plaintiff's process server that she would accept service and  
11 (4) Diskint failed to inform the process server that he was not  
12 authorized to accept service on behalf of Defendants.  
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14 The first argument fails because Bonner does not dispute case  
15 law indicating that the "mere relationship between a defendant and  
16 his attorney does not, in itself, convey authority to accept  
17 service." Ziegler, 111 F.3d at 881. Furthermore, California Code  
18 of Civil Procedure section 428.60(2) states that if a party has  
19 appeared in the action, the cross-complaint shall be served upon  
20 the party's attorney, or upon the party if the appearance has been  
21 made without an attorney. Accordingly, the fact that Diskint  
22 accepted service of the cross-complaint in the state action does  
23 not establish that Arastehjoo authorized him to receive service of  
24 the complaint and summons in this action. Furthermore, this  
25 argument does not apply to service on Vojdani who was not a party  
26 to the state action.  
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1 Bonner's second argument is unpersuasive because Diskint's  
2 instructions to Bonner that Bonner communicate with him regarding  
3 the dispute does not amount to evidence that Defendants authorized  
4 Diskint to accept service of the federal complaint. Cal. Civil  
5 Code § 2322(b) ("An authority expressed in general terms, however  
6 broad, does not authorize an agent to . . . [d]efine the scope of  
7 the agency); Imperial-Yuma Prod. Credit Ass'n v. Shields, 99 Cal.  
8 App. 546, 551 (1950) (a declaration by a purported agent that he  
9 was the agent, "made out of the presence and without the knowledge  
10 of the principal, was incompetent to establish either the fact of  
11 agency or the extent of the agent's authority"). Moreover, the  
12 March 11, 2011 email from Diskint to Bonner, in which he stated,  
13 "akram sent me your email to her. please deal with me regarding  
14 negotiations. as we discussed please try to come up with a  
15 serious proposal," does not even expressly refer to the federal  
16 action or service of process.<sup>1</sup>

19 Bonner's third argument is defeated for the same reasons that  
20 his second argument fails. Even if Diskint's secretary, Cornell,  
21 told Wolff or otherwise agreed with Wolff that she would accept  
22 service on behalf of Defendants, such facts do not demonstrate  
23 that Defendants authorized Cornell or Diskint to accept service of  
24 the summons and complaint in the federal action.

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27 <sup>1</sup> Defendants' unopposed request to file additional evidence  
28 is GRANTED. See Docket Nos. 30, 32 and 34.

1 Finally, Bonner points to no authority for the proposition  
2 that Diskint's failure to inform Wolff that he was not authorized  
3 to accept service on behalf of Defendants renders Bonner's manner  
4 of service proper under Rule 4.

5 Even if Bonner's service of the federal complaint were  
6 effective, there is good cause under Rule 55(c) to set aside the  
7 entry of default. Benton v. Kearney, 2009 WL 2711943, at \*2 (C.D.  
8 Cal.). There is no evidence that culpable conduct by Defendants  
9 led to the entry of default. Defendants indicate that they intend  
10 to litigate the case. Indeed, Arastehjoo demurred to the cross-  
11 complaint in the state action. Bonner has not demonstrated that  
12 the requirement that he litigate the case would prejudice him.

14 CONCLUSION

15 Because Bonner failed to serve the complaint and summons on  
16 Defendants properly, and other factors, demonstrate good cause to  
17 set aside the entry of default, Defendants' motion is GRANTED.  
18 Docket No. 14. Bonner's motion for default judgment is DENIED as  
19 moot. Docket No. 16. Bonner's motion for admission of filed  
20 documents in support of his motion for default judgment is DENIED  
21 as moot. Docket No. 35. Plaintiff shall serve Arastehjoo within  
22 thirty days and Vojdani within 120 days.

24 IT IS SO ORDERED.

26 Dated: 10/31/2011

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CLAUDIA WILKEN  
United States District Judge