

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 HOTEL EMPLOYEES AND RESTAURANT )
4 EMPLOYEES INTERNATIONAL UNION )
5 WELFARE FUND, by and through its Fiduciary Tom )
6 Zumtobel; SOUTHERN NEVADA CULINARY )
7 AND BARTENDERS PENSION TRUST FUND, by )
8 and through its Fiduciary Angie Ambrose, )

Case No.: 2:09-cv-02043-GMN-PAL

ORDER

Plaintiffs,

vs.

9 KEPHART & CORTI PRODUCTIONS, INC. dba )
10 THE COMEDY STOP, a Nevada corporation; )
11 TROPICANA LAS VEGAS, INC., a Nevada )
12 corporation; ROBERT KEPHART, individually; )
13 JOHN DOES 1-5; ROE ENTITIES 1-5, )

Defendants.

15 Pending before the Court is Defendant Robert Kephart's ("Kephart") Motion to Set Aside
16 Default Judgment (ECF No. 41) filed on August 8, 2011. Plaintiffs Hotel Employees and
17 Restaurant Employees International Union Welfare Fund ("HEREIU") and the Southern Nevada
18 Culinary and Bartenders Pension Trust Fund ("SNCB") (collectively, "the Trust Funds"), filed
19 an untimely Opposition<sup>1</sup> (ECF No. 43) on August 29, 2011, and Kephart filed an untimely Reply
20 on October 12, 2011 (ECF No. 46).

21 Also before the Court is the Trust Funds' Motion to Strike Kephart's Reply (ECF No.
22 49), filed on October 12, 2011. Kephart filed an Opposition (ECF No. 50) on October 31, 2011,
23 and the Trust Funds filed a Reply (ECF No. 54) on November 8, 2011.

25 <sup>1</sup> With the Opposition, Plaintiffs requested an extension of time to file the Opposition. Plaintiffs claim that counsel contacted Kephart's Counsel on August 26, 2011 to ask for an extension of time, but was unable to get Kephart's Counsel to agree.

1 **I. BACKGROUND**

2 Plaintiffs commenced the instant action on October 21, 2009, alleging claims for relief in  
3 Breach of Contract, Breach of Fiduciary Duty, and seeking Injunctive Relief. (*See* Compl., ECF  
4 No. 1.) The summons for Kephart issued on October 22, 2009. (Summons Issued, ECF No. 3.)  
5 On February 11, 2010, Plaintiffs filed a return of the Summons. (Affidavit of Service, ECF No.  
6 11.)

7 Plaintiffs first attempted service on January 4, 2010 at 3 Sunset Boulevard, Longport, NJ  
8 08403. (Opposition 4:3–6, ECF No. 43.) The process server discovered the home to be vacant  
9 with a “for sale” sign affixed to the property. The neighbors reported to the process server that  
10 the home had been foreclosed upon and that Kephart had not resided there for months. (*See*  
11 Affidavit of Attempts of Service, Ex. 1 attached to Opposition, ECF No. 43–1.)

12 The process server then attempted to obtain a forwarding address for Kephart from the  
13 United States Postal Service. The process server reported the following:

14 2010-01-05 10:30:00 ATTEMPTED BUT UNABLE TO SERVE[.] I went to  
15 Longport PO and submitted forward request form. They reported that the 3 Sunset  
16 mail was now forwarded to PO Box 519. I requested the street address info for  
17 boxholder of #519 and they reported that it was 3 Sunset Blvd. I advised her of  
18 that obvious problem. The clerk put me on the phone with the PO Regional  
19 Manager and I explained. He said that they would request a valid street address  
20 from the boxholder and that I should check back at the PO. I checked back the  
21 next day (1/6/10) and the clerk reported that she had called Kephart on the phone  
22 number he had listed on their records and that **he had told her he was living at**  
23 **2801 Pacific Ave, Ste 306, Atlantic City, NJ 08401**. I advised her that this was  
24 his business address, not his residence, which is required on all boxholders. She  
25 advised that I speak with the Postmaster about this. I spoke with the Postmaster  
(‘Nancy’) in the Atlantic City office, however she advised that I should deal with  
the regional manager again on this. His phone is 609-822-2404. I called his office  
and he was out for the day. I left a message. He called on 1/8/10 and stated that he  
had called Kephart and asked him about the Pacific Ave address. He reported that  
**Kephart stated to him that he was currently LIVING at this business (The**  
**Comedy Stop at the Tropicana casino)**. .....SO... this was the 2nd US Postal  
Service employee whom he had told he was residing at the Pacific Ave address.  
(*Emphasis added, all caps in original.*)

1 (See Affidavit of Attempts of Service, Ex. 2 attached to Opposition, ECF No. 43–2.)

2 Relying on this information, the process server left a copy with John Does, maître d' and  
3 bartender, a person of suitable age and discretion at the Comedy Stop, what plaintiffs deem as  
4 Kephart's usual place of abode based on the statements of the postal service. The process server  
5 reported the following:

6 I went to the Comedy Stop and stated to a front-door employee that I had a  
7 delivery for Mr. Kephart. She asked me to wait, went in back, then returned,  
8 stating that he was not there. I told her it was a delivery of urgent paperwork and  
9 asked if I could speak with whoever was in charge. She showed me back to the  
10 apparent maître d' (standing at a seating-chart type podium). I told him I had an  
11 important delivery for Kephart. He (and a bartender who was with him) said that  
12 he was not there but is there 'sometimes' over the weekends (being evasive). They  
13 asked what it was and I told them it was documents of some kind. I said that I  
14 could leave it but that I needed a name as to who I left it with. Both refused to give  
15 their names. At that point, I told them they were Federal Court papers and that  
16 Kephart had stated that he lived at the club, so I was going to leave them. I placed  
17 them on the podium. They said that they might 'accidentally fall into the trash'. I  
18 held up my cell and started taking a photo. They tried to scatter, but I got the  
19 maître d on film (attached). I would say he was 5'10, 175, 35yo, light brown hair.

15 (See Affidavit of Service, Ex. 3 attached to Opposition, ECF No. 43–3.)

16 Plaintiffs filed their Proof of Service on February 11, 2010. (ECF No. 11) On February  
17 17, 2010 a Clerk's Default was entered against Kephart. (ECF No. 14). A Notice of Default was  
18 mailed to Kephart at the address of the Comedy Stop on the same day. (See Certificate of  
19 Service, Ex. 4 attached to Opposition, ECF No. 43–4.)

20 On February 24, 2011, the Plaintiffs filed their application for default judgment against  
21 Kephart. (ECF No. 32.) On this same day, notice of the application was mailed to Kephart at the  
22 Comedy Stop address. Also on the same day, notice was mailed to Kephart's counsel, who at  
23 that time had not formally appeared for Kephart in the case. On or around March 2011, upon  
24 receipt of the application for default, Kephart's counsel phoned Plaintiffs' counsel to discuss  
25 resolution of the case and the application for default judgment. On April 11, 2011, the Court  
awarded Default Judgment in favor of the Plaintiffs and against Kephart. (ECF No. 34.)

1 In June 2011, Plaintiffs' counsel contacted Kephart's counsel to discuss post-judgment  
2 discovery. In response, Kephart's counsel continued to negotiate on Kephart's behalf, even  
3 though he still had not made a formal appearance for Kephart. (*See* Correspondence, Ex. 5  
4 attached to Opposition, ECF No. 43–5.) Kephart filed the instant motion to set aside default on  
5 August 8, 2011, four months after default judgment was entered. (ECF No. 41.)

## 6 **II. LEGAL STANDARD**

7 Federal Rule of Civil Procedure 55(c) provides that “[t]he court may set aside an entry of  
8 default for good cause, and it may set aside a default judgment under Rule 60(b).” The Ninth  
9 Circuit has held that there are three factors to be considered when weighing whether or not there  
10 is good cause: (1) whether the defendant's culpable conduct led to the default; (2) whether the  
11 defendant has a meritorious defense; and (3) whether reopening the default judgment would  
12 prejudice the plaintiff. *Franchise Holding II, LLC. v. Huntington Restaurants Group, Inc.*, 375  
13 F.3d 922, 925 (9th Cir. 2004). “[T]he party seeking to vacate a default judgment bears the  
14 burden of demonstrating that these factors favor vacating the judgment.” *TCI Group Life Ins.*  
15 *Plan v. Knoebber*, 244 F.3d 691, 697 (9th Cir. 2001). “Judgment by default is a drastic step  
16 appropriate only in extreme circumstances; a case should, whenever possible, be decided on the  
17 merits.” *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984).

## 18 **III. DISCUSSION**

19 Kephart contends that the default judgment is void because he was not properly served  
20 with the summons and complaint. “A person is not bound by a judgment in a litigation to which  
21 he or she has not been made a party by service of process.” *Mason v. Genisco Technology*  
22 *Corp.*, 960 F.2d 849, 851 (9th Cir. 1992) (citing *Yniguez v. Arizona*, 939 F.2d 727, 735 (9th  
23 Cir.1991) (quoting *Hansberry v. Lee*, 311 U.S. 32 (1940))). Where a default judgment is based  
24 on flawed service, such default judgment is void. *Mason*, 960 F.2d at 849.

1 “Unless service is waived, proof of service must be made to the court,” and “[e]xcept for  
2 service by a United States marshal or deputy marshal, proof must be by the server’s affidavit.”  
3 Fed. R. Civ. P. 4(l)(1). “A signed return of service constitutes prima facie evidence of valid  
4 service which can be overcome by strong and convincing evidence.” *S.E.C. v. Internet Solutions*  
5 *for Business Inc.*, 509 F.3d 1161, 1163 (9th Cir. 2007). Moreover, a defendant moving to vacate  
6 a default judgment based on improper service of process, who had actual notice of the original  
7 proceeding but delayed in bringing the motion until after entry of default judgment, bears the  
8 burden of proving that service did not occur. *Id.* at 1165.

9 Kephart argues that service was not proper because leaving a copy of the Summons and  
10 Complaint on a podium at his place of business does not satisfy Rule 4. Pursuant to Fed. R. Civ.  
11 P. 4 to properly serve an individual a plaintiff must (A) deliver a copy of the summons and of  
12 the complaint to the individual personally; (B) leave a copy of each at the individual’s dwelling  
13 or usual place of abode with someone of suitable age and discretion who resides there; or (C)  
14 delivering a copy of each to an agent authorized by appointment or by law to receive service of  
15 process. Fed. R. Civ. P. 4(e)(2) A plaintiff may also effect service by following state law for  
16 serving a summon in an action in the state where the district court is located or where service is  
17 made. Fed. R. Civ. P. 4(e)(1).

18 Service of process at the Comedy Stop was not proper in the manner stated in the  
19 affidavit. Even if the Court accepts as true that the Comedy Stop was Kephart’s usual place of  
20 abode the person with whom the summons and complaint was left was not a person who resides  
21 there.<sup>2</sup> Plaintiffs never allege or provide proof that the maître d’ and bartender also resided at  
22 the Comedy Stop. This is essential to Fed. R. Civ. P. 4(e). *See e.g., Franklin America, Inc. v.*  
23 *Franklin Cast Products, Inc.*, 94 F.R.D. 645, 647 (E.D. Mich. 1982) (delivery to part-time  
24 housekeeper who did not reside in defendant’s home not valid service on defendant).

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<sup>2</sup> Under New Jersey Rules of Civil Procedure a copy can be left at the individual’s dwelling place or usual place of abode with competent member of the household . . . residing therein. New Jersey Rules of Civil Procedure 4:4–4.

