

SUMMARY OF ARGUMENT

This Court should not entertain Defendant D's motion to quash the service of summons because the service of summons was properly affected in accordance with the statutory requirements of Section 415.20 of the California Code of Civil Procedure. The proof of service filed with this Court and the surrounding evidence clearly show that the summons and complaint were properly served at the Defendant's "usual place of business" with Ms. G, a co-worker of the Defendant who had represented at the time of the service that she was the managing agent of Defendant's office. Furthermore, the Court must deny Defendant D's motion to set aside the default judgment because the Defendant had adequate notice of the service of process and failed to timely file a responsive pleading.

ARGUMENT

I. SERVICE OF SUMMONS WAS VALID UNDER CAL. C.C.P. § 415.20(b) BECAUSE THE SUMMONS WAS SERVED AT DEFENDANT'S USUAL PLACE OF BUSINESS IN THE PRESENCE OF A PERSON CLAIMING TO BE A MANAGING AGENT OF THE BUSINESS.

Cal. C.C.P. § 415.20(b) authorizes substitute service upon an individual in lieu of personal service. Statutes governing substitute service are to be liberally construed to effectuate service. *Bein v. Brechtel-Jochim Group Inc.*, 6 Cal.App.4th 1387, 1391-1393 (1992). The Supreme Court's admonition to construe the process statutes liberally extends to substituted service. *Id.* To be constitutionally adequate, the form of the substituted service must be "reasonably calculated to give an interested party actual notice of the proceedings and an opportunity to be heard." *Zibres v. Stratton*, 187 Cal.App.3d 1407, 1417 (1986).

Section 415.20(b), which governs substitute service on individuals, provides in pertinent part:

If a copy of the summons and of the complaint cannot with reasonable diligence be personally delivered to the person to be served ...a summons may be served by leaving a copy of the summons and of the complaint at such person's dwelling house, usual place of abode, usual place of business, or usual mailing address...in the presence of a competent member of the household or a person apparently in charge of his or her office...at least 18 years of age, who shall be informed of the contents thereof, and by thereafter mailing a copy of the summons and of the complaint by first-class mail, postage prepaid to the person to be served at the place where a copy of the summons and complaint were left. Service of a summons in this manner is deemed complete on the 10th day after the mailing.

Cal C.C.P. § 415.20(b) (emphasis added). Thus, for example, the court in *Bein* held that a service of summons to a gate guard was proper and within the purview of the statute governing substituted service. *Bein*, 6 Cal.App.4th at 1393.

In the instant case, Plaintiff's process server, Mr. J, made reasonable and diligent efforts to personally serve Defendant D at his last known residence at 000 BBBB Avenue, TTTTT, New York 11000. (See Affidavit of Attempted Service of Mr. J, attached as Exhibit A.) After Plaintiff's reasonable efforts to serve the Defendant in person failed, substitute service was made at Defendant's "usual place of business," at DFL, Inc., 00 ZZZZ Drive, TTTT, New York 11000. *Id.* The service of summons was made to Ms. G, who was at least 18 years of age and who claimed to be a co-worker of the Defendant and a managing agent of DFL, Inc. (See Proof of Service, attached as Exhibit B, and Affidavit of Attempted Service of Ms. VV, attached as Exhibit C.) As such, Ms. G was "apparently in charge of [the Defendant's] office" and competent to receive such service under § 415.20(b). Thereafter, a copy of summons and complaint was mailed first class to the Defendant D at 00 SSSSS Drive, TTTTT, New York 11735. Based on these facts, the service of summons was clearly compliant with Section 415.20(b), and the Defendant's motion to quash service of summons should be denied.

II. THE COURT SHOULD DENY DEFENDANT’S MOTION TO SET ASIDE THE DEFAULT JUDGMENT BECAUSE THE DEFENDANT FAILED TO TIMELY FILE A RESPONSIVE PLEADING DESPITE HAVING ACTUAL NOTICE OF THE SUMMONS AND COMPLAINT.

California Code of Civil Procedure § 473(b) authorizes a court to set aside a default judgment taken against “him or her through his or her mistake, inadvertence, surprise or excusable neglect.” *Khourie, Crew & Jaeger v. Sabek, Inc.*, 220 Cal.App.3d 1009, 1013 (1990). Defendant D argues that the default judgment against him should be set aside because of surprise and excusable neglect. Specifically, the Defendant argues that since he did not have actual notice of proof of service, he was “surprised that a proof of service materialized for the purposes of default.” (*See* Defendant’s Motion to Quash, p. 10.) The court should, however, reject this argument because the Defendant clearly had sufficient notice of proof of service, which, as established above, was effectively served and which clearly negates any inference of surprise to the Defendant. *See Khourie*, 220 Cal.App.3d at 1014 (while denying the motion to set aside a default judgment, the court held that a process server provided actual notice of the documents to the person apparently in charge of defendant’s office where on being prevented by that person from leaving them inside the office, the process server left them on the other side of the office door); *see also Ludka v. Memory Magnetics Int’l*, 25 Cal.App.3d 316, 323 (1972) (default judgment upheld against the argument that it should have been set aside because the service of process was faulty).

The court must also deny Defendant’s excusable neglect argument. The Defendant argues that it was excusable neglect on his part not to file responsive pleading in light that his counsel made multiple requests for proof of service to the Plaintiff in the two months preceding the entrance of a default judgment. (*See* Defendant’s Motion to Quash, p. 10.) This argument should fail because the evidence shows to the contrary that the Defendant’s negligence in filing a

responsive pleading was not excusable, but was because of Defendant's carelessness. *Ludka*, 25 Cal.App.3d at 321-22 ("Diligence is an essential ingredient of a motion for relief under section 473. Courts do not relieve litigants from the effects of mere carelessness.") (internal citations omitted). As is evident from a communication between Defendant's counsel, E, and the Plaintiff's counsel, B, on January 15, 2004, Mr. E was made aware of effective proof of service on the Defendant and the February 7, 2004 deadline to file a responsive pleading. (*See* Defendant's Motion to Quash, p. 3; *see also* January 15, 2004 letter from Mr. E to Mr. B, attached as Exhibit D.) A proof of service was in fact faxed by Mr. B to Mr. E in the first week of February 2004, and a unilateral extension for filing a responsive pleading until February 13, 2004 was granted to the Defendant. (*See* February 18, 2004 letter from Mr. B to Mr. E, attached as Exhibit E.) Far from filing a responsive pleading and despite being granted a unilateral extension to file a responsive pleading until February 13, 2004, Mr. E denied receipt of proof of service that was faxed by Mr. B to him. (*See* February 18, 2004 letter from Mr. E to Mr. B, attached as Exhibit F.)

Even assuming that Mr. E did not receive the proof of service as of February 18, 2004, as alleged by Defendant's counsel, the fact that he waited for over two weeks, until February 18, 2004, to contact Mr. B for a copy of proof of service, in light of the fact that Mr. E was aware of the February 13 deadline to file proof of service, further leads to only one inference – that the Defendant's counsel acted carelessly. Frustrated by Mr. E's carelessness, the Plaintiff's counsel filed for a default judgment on February 19, 2004. These facts suggest that Defendant's reluctance to file a responsive pleading was not due to excusable neglect, but was due to his and/or his counsel's carelessness. *See Khourie*, 220 Cal.App.3d at 1015 (court declined to find excusable neglect where the defendant requested for an extension to file responsive pleading on

the eve of the due date and still failed to file a responsive pleading after an extension was granted). Thus, this Court should deny Defendant's motion to set aside the default judgment.

III. THIS COURT HAS PERSONAL JURISDICTION OVER THE DEFENDANT BECAUSE THE DEFENDANT WAS EFFECTIVELY SERVED UNDER CAL. C.C.P. § 415.20.

The Defendant argues that California does not have personal jurisdiction over him because the substitute service asserted over him was defective. (*See* Defendant's Motion to Quash, pp. 10-11.) This argument is without merit because, as established above, the Plaintiff's substitute service of summons and complaint upon the Defendant was proper and effective. *See* Section I, *supra*.

CONCLUSION

Pursuant to the express provisions of Cal. C.C.P. § 415.20, the Plaintiff served Defendant G at the Defendant's "usual place of business." Furthermore, the process was served upon a person who claimed to be Defendant's co-worker and manager of the office and who could reasonably be believed to inform the Defendant about the process. Not only were the statutory requirements complied with, the Defendant even had actual notice of the process. As such, Defendant's motion to quash service of summons must be denied. Similarly, since the Defendant was properly served and the Defendant failed to timely file a responsive pleading, Defendant's motion to set aside the default must also be denied.

Dated: May _____, 2004.

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