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LOS ANGELES SUPERIOR COURT

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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF LOS ANGELES - CENTRAL DISTRICT**

11 JANICE M. McCLANAHAN,

12 Plaintiff,

13 vs.

14 HAROLD MANSDORF, individually and as
15 Trustee of the Mansdorf Family Revocable
16 Trust also known as the Mansdorf Family
Trust; MILDRED MANSDORF; NORMAN
MANSDORF; and DOES 1 to 50 inclusive,

17 Defendants.

Case No. BC 363659

Assigned for all purposes to Judge Abraham
Khan, Dept. 51

Reply Brief on Motion to Set Aside Order
for Publication, Entry of Default and
Default Judgment

[CCP § 473(d)]

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Date: March 15, 2010
Time: 9:00 a.m.
Dept: 51

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CIT/CASE: DC383659 LEA/DEF#:
RECEIPT #: LAC539179001
DATE PAID: 03/09/10 09:19:36 AM
PAYMENT: \$10.50
RECEIVED:
CHECK:
CASH:
CHANGE:
CARD: 10.50

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1 1. JUDGMENTS VALID ON THEIR FACE ARE TREATED DIFFERENTLY FROM
2 JUDGMENTS INVALID ON THEIR FACE. WHERE A JUDGMENT IS INVALID
3 ON ITS FACE, THERE IS NO TIME LIMIT FOR FILING A MOTION TO SET
4 ASIDE THE JUDGMENT.

5 a. Judgments valid on their face.

6 The 2 year and 180 day time limits of CCP § 473.5 only apply to judgments which are
7 valid on their face. *Rogers v. Silverman* (1989) 216 Cal.App.3d 1114. In distinguishing cases
8 involving proper service but lack of actual notice and cases involving improper service but actual
9 notice, the court observed that where improper service has led to entry of void judgment,
10 defendant's diligence is irrelevant to the analysis of whether the judgment should be set aside.

11 "Such a requirement [of an affidavit that defendant's lack of actual notice was not
12 attributable to avoidance of service process or inexcusable neglect] is out of place,
13 however, in a motion for relief from a default judgment based upon improper service.
14 Whether the defendant caused his own lack of notice has no bearing on the propriety of
15 service. Even actual notice is not a substitute for proper service." *Id.* at 1124.

16 b. Judgments invalid on their face.

17 Where a default judgment is invalid on its face, a motion under CCP § 473(d) may be
18 brought at any time. *Plotitsa v. Superior Court* (1983) 140 Cal.App.3d 755 [statement of damages
19 not served]; *Lopez v. Fancelli* (1990) 221 Cal.App.3d 1305, 1310 [statement of damages not
20 served].

21 In *Plotitsa*, the defendants in a personal injury action were validly served with the
22 summons and complaint but were not served with a statement of damages. The plaintiff did set
23 forth her total damages in her request for entry of default, but failed to personally serve the request
24 for entry of default on the defendants. The trial court denied defendants' motion to set aside the
25 default and on appeal the plaintiff argued the trial court denial of the motion was properly based
26 on its finding that defendants had not been diligent in filing their motion. The court of appeal
27 rejected the timeliness argument and stated:

28 "Plaintiff argues that the motion to set aside default was denied solely on the basis

1 that the motion was not diligently made. This allegation is unverified and no exhibit is
2 offered to substantiate it. But even if the trial court had so ruled, relief must be granted
3 here. While trial courts are vested with discretion by section 473 to determine whether
4 motions thereunder are brought with adequate diligence under the factual circumstances of
5 each particular case, a default that is void on the face of the record when entered is subject
6 to challenge at any time irrespective of lack of diligence in seeking to set it aside within the
7 six-month period of section 473." *Plotitsa v. Superior Court, supra*, 140 Cal.App.3d 755,
8 761.

9 *Stevenson v. Turner* (1979) 94 Cal.App.3d 315 is another personal injury case where the
10 defendant was validly served with the summons and complaint but was not served a statement of
11 damages. The case was filed on April 12, 1976, defendant's default was entered, and sometime
12 after July 14, 1977 defendant retained counsel and filed a CCP § 473 motion. The trial court
13 denied the motion. In reversing, the court of appeal observed that there are no time limitations for
14 bringing a CCP § 473 motion where the judgment is void on the face of the record:

15 "The six-month outside time limit for granting relief is jurisdictional and the court may not
16 consider any motion made after that period has elapsed. (*Smith v. Pelton Water Wheel Co.*
17 *(1907)* 151 Cal. 394, 397 [90 P. 934] *Schwartz v. Smookler* (1962) 202 Cal.App.2d 76, 81
18 [20 Cal.Rptr. 507].) The sole exception arises where it is clear from the face of the
19 appellate record that the default should not have been entered. In such case, the subsequent
20 judgment is void and relief from the default on which it rests may be sought at any time. (*Nagel v. P & M Distributors, Inc.* (1969) 273 Cal.App.2d 176, 179, 180 [78 Cal.Rptr. 65]
21 *Batte v. Bandy* (1958) 165 Cal.App.2d 527, 537 [332 P.2d 439].)" *Id.* at 318.

22 The foregoing is well established law that comports with due process in providing proper
23 notice to defendants. In *Morgan v. Clapp* (1929) 207 Cal. 221 a defendant brought a motion to set
24 aside a judgment based on a summons that had been served by publication. Defendant's motion
25 was filed 27 months after entry of judgment and CCP § 473 fixed a one year time limit for relief.
26 Noting that "a judgment or order void on its face may be vacated on motion made at any time" (*Id.*
27 at 224), the court examined the sufficiency of the affidavit in support of the application for
28

1 publication and observed:

2 "It follows, therefore, that if the affidavit upon which the order directing
3 publication of summons was had in this action fails, as urged by the appellant, to comply
4 with the provisions of section 412 of the Code of Civil Procedure, the default judgment
5 thereafter entered on such defective service would be void on its face, and the trial court at
6 any time could have properly set it aside.

7 Should it be determined, however, that the affidavit fully satisfies the requirements
8 of the code section, the judgment would not be void on its face, and the attempt of the
9 court below to vacate it upon motion made more than a year after entry would be beyond
10 the jurisdiction of the court, and the order purporting to vacate the judgment would occupy
11 no better position than a judgment that is void upon its face, and, like such a judgment,
12 would be assailable wherever and whenever it might be produced." *Id.* at 225-226.

13 2. **THE JUDGMENT IS VOID BECAUSE PLAINTIFF'S APPLICATION FOR**
14 **PUBLICATION FAILED TO STATE THAT SHE ATTEMPTED TO MAIL SERVE**
15 **THE STATEMENT OF DAMAGES PURSUANT TO CCP § 415.30.**

16 Plaintiff argues that *Transamerica Title Insurance Company v. Hendrix* (1995) 34
17 Cal.App.4th 740, is limited to cases where a plaintiff has been found to have intentionally or
18 unintentionally falsified its application for publication. The holding does not, however, rely upon
19 any such considerations. Service by mail under CCP § 415.30 is one of the ways plaintiff could
20 have attempted on Mansdorf and CCP § 415.50 requires that a plaintiff attempt to serve a
21 defendant by other available methods before resorting to publication.

22 "Code of Civil Procedure section 415.50(a) provides a 'summons may be served by
23 publication if upon affidavit it appears to the satisfaction of the court ... the party to be
24 served cannot with reasonable diligence be served in another manner specified in this
25 article....' Service by mail, pursuant to Code of Civil Procedure 415.30, is "another manner
26 specified in this article." *Id.* at 742-743.

27 Since the CCP § 415.50 application for publication failed to state that the plaintiff had
28 attempted to serve the defendant by mail, it was defective as a matter of law and process was

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1 never validly served on the defendant. The court held:

2 "Thus, based on respondent's failure to attempt service by mail pursuant to Code of Civil
3 Procedure section 415.30 prior to filing its application for order for publication of
4 summons, we find the 415.50 motion was defective as a matter of law. . . Thus, based on
5 respondent's failure to attempt service by mail pursuant to Code of Civil Procedure
6 section 415.30 prior to filing its application for order for publication of summons, we find
7 the 415.50 motion was defective as a matter of law. . . Because we find the 415.50
8 motion was defective as a matter of law, we need not address appellant's arguments
9 concerning whether respondent mailed, or should have mailed, appellant a copy of the
10 summons pursuant to section 415.50(b). We hold, based on the respondent's failure to
11 comply with Code of Civil Procedure section 415.30, the 415.50 motion was incorrectly
12 granted as a matter of law and therefore service by publication was invalid in this
13 instance. Accordingly, appellant's failure to file an answer to the improperly served
14 complaint did not represent a default. It was error to enter default and beyond the power
15 of the court to do so. The trial court had a legal duty, not merely discretionary power, to
16 vacate the default it had erroneously entered." *Id.* at 746.

17 Here, as in the *Transamerica* case, the order for publication was void because the
18 application for publication failed to state that plaintiff had attempted to serve the defendant by
19 mail under CCP § 415.30. In addition, the July 20, 2007 declaration of process server of
20 Gregory J. Garrett in support of the application failed to state that he was unable to sub-serve
21 Harry under CCP § 415.20. (See Application attached as Exhibit 6 to Request for Judicial Notice)

22 **3. THE JUDGMENT IS VOID BECAUSE PLAINTIFF KNEW WHERE HARRY**
23 **LIVED.**

24 The declaration of Gregory J. Garrett in support of the application of publication clearly
25 shows that plaintiff knew where Mansdorf lived. It states:

26 "On June 7, 2007, at 3:21 P.M., I arrived at the home address for Harold
27 Mansdorf and Mildred Mansdorf of 811 North Alta Drive Beverly Hills, CA 90210. . .

28 On June 9, 2007, at 9:37 A.M., I arrived at the subject's previously noted home . . ."

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1 Mansdorf's Request for Judicial Notice, Exhibit 6, p. 12, lines 17-24.

2 Acknowledging that service by publication seldom provides actual notice, the court in
3 *Donel v. Badalian* (1978) 87 Cal.App.3d 327, 332 dubbed notice by publication to be "fictional
4 notice." And, such fictional notice never satisfies due process requirements when a defendant's
5 address is known.

6 "If a defendant's address is ascertainable, a method of service superior to publication
7 must be employed, because constitutional principles of due process of law, as well as the
8 authorizing statute, require that service by publication be utilized only as a last resort. (
9 *Mullane v. Central Hanover Tr. Co.* (1950) 339 U.S. 306, 314 [94 L.Ed. 865, 873, 70
10 S.Ct. 652]; Comment, *In Personam Jurisdiction in California* (1970) 1 Pacific L.J. 671,
11 692; 3 Witkin, Cal. Procedure (3d ed. 1985) Actions, § 795, p. 786.) The means of
12 service described in sections 415.10 through 415.40 "make service by publication
13 unnecessary except where a defendant's whereabouts and his dwelling house or usual
14 place of abode, etc. cannot be ascertained with reasonable diligence." *Watts v. Crawford*
15 (1995) 10 Cal.4th 743, 749, fn. 5.

16 4. CONCLUSION.

17 The judgment is void on its face because plaintiff's application for publication failed to
18 state that she attempted to serve the statement of damages by mail. The judgment is also void on
19 its face because plaintiff's application shows that she knew where Harry lived and service by
20 publication is never proper when the defendant's address is known.

21
22 Dated: March 8, 2010


Bob Mullen, Attorney for Defendant Harry Mansdorf,
individually and as trustee of the Mansdorf Family
Revocable Trust

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PROOF OF SERVICE

I, the undersigned, declare:

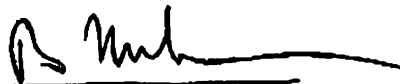
I am over the age of 18 years and am not a party to the within action. My business address is 23151 Moulton Parkway, Suite 112, Laguna Hills, CA 92653 which is located in the county where the mailing described below took place.

On March 8, 2010, I served the attached Reply Brief on Motion to Set Aside Order for Publication, Entry of Default and Default Judgment by placing a copy of it in a sealed envelope and depositing it with Federal Express for overnight delivery with delivery fees prepaid to the following addresses:

Thomas P. Cacciatore, Esq.
Law Office of Thomas P. Cacciatore
99 South Lake Avenue, Suite 502
Pasadena, CA 91101

Timothy B. Sottile, Esq.
Timothy B. Sottile APLC
31365 Oak Crest Drive, Suite 220
Westlake Village, CA 91361

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on March 8, 2010 in Laguna Hills, California.


Bob Mullen

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