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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

PICO NEIGHBORHOOD ASSOCIATION and MARIA LOYA,

Plaintiffs,

v.

CITY OF SANTA MONICA, and DOES 1 through 100, inclusive,

Defendants.

CASE NO. BC616804

PLAINTIFFS' OPPOSITION TO DEFENDANT'S "MOTION FOR ORDER (A) REJECTING PLAINTIFFS' UNTIMELY SERVICE ARGUMENT BASED ON ABSENCE OF ANY PREJUDICE; AND/OR (B) GRANTING RELIEF UNDER CODE OF CIVIL PROCEDURE SECTION 473(b)"

[Declaration of Kevin Shenkman filed and served concurrently herewith]

Hearing Date: June 19, 2018
Time: 8:30 a.m.
Dept.: 28

Trial Date: July 30, 2018
[Assigned to the Honorable Yvette Palazuelos]

I. INTRODUCTION.

At the June 14, 2018 hearing, the Court instructed Defendant to file a motion pursuant to Section 473 of the Code of Civil Procedure. Instead, Defendant disregarded the Court's instruction and filed something quite different – more akin to an untimely supplemental reply brief in support of its untimely summary judgment motion.

Defendant's motion falls far short of satisfying the requirements for relief under Section 473. The motion includes no acknowledgement of fault by Defendant's counsel, and it is not "accompanied by a copy of the … pleading proposed to be filed." Instead, Defendant suggests that Section 473 can be used to skirt the express requirements of the summary judgment statute – Code of Civil Procedure Section 437c. It cannot.

Nor does Defendant's belated (and improper) argument – that Plaintiffs somehow waived the insufficient notice afforded by Defendant's summary judgment motion – undermine the rationale of this Court's Tentative Ruling. This Court got it right in its June 14, 2018 Tentative Ruling – Defendant's motion must be "denied due to failure to comply with CCP §437c(a)(2)" and the court cannot cure that defect through a continuance in this case. Even if the Court were to overlook the fact that Defendant failed to include its new argument about waiver in its reply brief, that argument should still be rejected. The discussion in *Carlton v. Quint* (2000) 77 Cal.App.4th 690 on which Defendant relies is dicta addressing a previous version of the summary judgment statute, and has been distinguished and rejected in subsequent cases, including some of the cases cited by this Court in its Tentative Ruling. At most, that discussion in *Carlton* reflects a minority (and inferior) view.

Viewed most charitably, Defendant's motion argues that its Proof of Service should have stated that its summary judgment motion was served by "USPS Priority Mail." But that would make no difference at all, and any proof of service had to have been filed at least five days before the June 14, 2018 hearing. USPS Priority Mail is not "Express Mail," so service by USPS Priority Mail must be made 80 days before the summary judgment hearing. It wasn't; and the only possible result, as correctly explained in the Court's June 14, 2018 Tentative Ruling, is denial of Defendant's summary judgment motion.

II. DEFENDANT'S MOTION FAILS TO SATISFY SECTION 473.

Though the Court instructed Defendant to direct its motion to relief under Section 473 of the Code of Civil Procedure, Defendant only feigns reference to Section 473, and completely fails to meet the requirements of Section 473 for any relief.

First, the declaration of Defendant's counsel (Daniel Adler) lacks any "acknowledgement of fault," as required by Section 473. (*See Prieto v. Loyola Marymount Univ.* (2005) 132 Cal. App. 4th 290, 297). The only thing that even comes remotely close to being an acknowledgement of fault in Mr. Adler's declaration is paragraph 2 – that "because of an [unidentified] oversight" the fact that Defendant's service of its summary judgment motion was made by USPS Priority Mail was "not made explicit in the Proof of Service." But the error was not omitting something from Defendant's proof of service, it was the manner and timing of service being insufficient.[1] "USPS Priority Mail" is not "Express Mail, or another method of delivery providing for overnight delivery." (Code of Civ. Proc. 437c(a)(2)). Rather, the United States Postal Service distinguishes "Priority Mail" from what used to be called "Express Mail" and is now called "Priority Mail Express." (Shenkman Decl. ¶ 2, Exs. A, B). The statutory language – "or another method of delivery providing for overnight delivery" – refers to services provided by common carriers other than the US Postal Service, such as FedEx, UPS and DHL, that are equivalent to the US Postal Service's "Express Mail." "Priority Mail" has the exact same expected delivery time as "First Class Mail," and therefore there is no reason to treat it differently than regular first-class mail under Section 437c(a)(2) – adding five days to the notice period. (Shenkman Decl. ¶ 2, Ex. A). The actual date of delivery of Defendant's motion is immaterial – for each method of service other than personal

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[1] If the error was simply an omission from the proof of service, that could have been corrected five days before the June 14, 2018 hearing, but it was not. (Cal. R. Ct. 3.1300(c) ["Proof of service of the moving papers must be filed no later than five court days before the time appointed for the hearing."]). By that time, Plaintiffs had even pointed out the inadequacy of the notice period for Defendant's summary judgment motion. Instead, Defendant chose to argue in its reply brief that sending its summary judgment motion by email was sufficient (the Court correctly noted in its Tentative Ruling that email service was not acceptable).

delivery, Section 437c(a)(2) adds more days to the notice period than the method of delivery is expected to take (adding two court days for overnight delivery that only takes one day, and adding 5, 10 and 20 days for mail service depending on the place of address even though actual delivery is likely much shorter).

But even if USPS Priority Mail were a "method of delivery providing for overnight delivery" (it's not), that still would not excuse Defendant. Paragraph 6 of Mr. Adler's declaration makes the point. In paragraph 6, Mr. Adler concedes that even if Priority Mail were the same as Express Mail (as he contends), and even if Defendant's proof of service specified service by Priority Mail instead of just "mail," Defendant still would not have complied with CCP 437c(a)(2) because March 30, 2018 was not a court day (the Court was closed in honor of Cesar Chavez day).[2] Indeed, the last day for Defendant to serve its summary judgment motion by overnight delivery was March 27, 2018 – it wasn't served until March 29, 2018, and even then it was served only by mail.

Defendant's motion also claims that its failure to argue that Plaintiffs waived their right to sufficient notice under CCP 437c(a)(2) constitutes excusable neglect. But nothing in the attorney declaration even mentions that "neglect." (*See* Code of Civ. Proc. 473(b) [requiring that the motion be "accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect."]). Moreover, that is not a "mistake" or "neglect"; it was a strategy decision – Defendant chose to argue that its email to Plaintiffs' counsel constituted sufficient notice under Section 437c(a)(2) instead of arguing that Plaintiffs waived their right to sufficient notice. (*Scottsdale Ins. Co. v. Superior Court* (1997) 59 Cal. App. 4th 263, 275 ["We disagree that these acts constitute "mistake" sufficient to qualify for relief. Rather, the declaration reflects that Tao made tactical choices which did not yield the results he expected."]). To now give Defendant an additional four pages of reply beyond what is allowed by Cal. R. Ct. 3.1113(d), and allow Defendant to submit that further reply brief after the

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[2] The coincidence of Defendant's summary judgment motion, which seeks to deny Latinos their voting rights, being untimely, even if its service by USPS Priority Mail could be considered Express Mail, partly because Defendant's counsel failed to recognize Cesar Chavez day, a holiday honoring an iconic Latino civil rights leader, should not go unnoticed.

hearing, would be contrary to the express provisions of Section 437c(b)(4). Section 473 cannot be used to abrogate the provisions of Section 437c. (*Cf. Scottsdale Ins. Co. v. Superior Court* (1997) 59 Cal. App. 4th 263, 274.)

Second, Defendant's motion is not "accompanied by a copy of the … pleading proposed to be filed" as required by Section 473. Presumably, the document "proposed to be filed" in this instance would be a replacement proof of service, specifying service by "USPS Priority Mail" (See Adler Decl. ¶ 2), but no such document accompanies Defendant's motion. Section 473 specifies the appropriate action when a motion made pursuant to that statute is not accompanied by the corrected document – "[a]pplication for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, ***otherwise the application shall not be granted***." (Code of Civ. Proc. § 473(b) (emphasis added)). It is not unreasonable to demand that Defendant follow all of the rules when seeking relief from its failure to follow the rules.

Even if Defendant had satisfied these requirements of Section 473, relief under that statute would still be inappropriate. For the reasons explained in the Court's Tentative Ruling, it is impossible for the Court to grant relief at this point. Though not explained in its motion, presumably Defendant is asking this Court to continue the hearing on its summary judgment motion. But, as the Court correctly concluded in its June 14, 2018 Tentative Ruling, the Court does not have the authority to continue the summary judgment hearing. (Tentative Ruling, pp. 1-2, citing *Robinson v. Woods* (2008) 168 Cal. App. 4th 1258, 1267-68). Certainly it would be inequitable, if the Court is otherwise inclined to grant Defendant's summary judgment motion, to simply treat the matter as submitted and thus deny Plaintiffs the opportunity to address an adverse Tentative Ruling at oral argument; that would just further prejudice Plaintiffs for Defendant's "neglect."

A. Defendant's Belated Complaint About Service of Plaintiffs' Opposition Is A Red Herring

Unable to defend its own actions, and rather than "acknowledge[] fault," Defendant resorts to deflection – "what about Plaintiffs' service of their opposition?" While it is unclear

how anything relating to Plaintiffs' service of their opposition could excuse Defendant's failure to comply with Code of Civ. Proc. § 437c(a)(2) in the first place, Defendant is also wrong that Plaintiff's service of its opposition was defective. As the Court correctly notes on page 2 of its June 14, 2018 Tentative Ruling, "the parties agreed on May 31, 2018 to electronic service of the opposition and reply, [but not] the moving papers." Plaintiffs served their opposition by both mail and email, consistent with that agreement. (Shenkman Decl. ¶ 3, Ex. C).

III. PLAINTIFF DID NOT WAIVE ITS RIGHT TO SUFFICIENT NOTICE.

This Court got it right in its Tentative Ruling. Defendant's summary judgment motion was untimely, and must be denied for that reason alone. A trial court has discretion to shorten the initial 60-day period to bring a motion for summary judgment on a showing of good cause (Code Civ. Proc., § 437c, subd. (a)(1)), or to shorten the 30-day period in which a motion for summary judgment must be heard before trial where circumstances warrant (Code Civ. Proc., § 437c, subd. (a)(3)), but may ***not*** shorten the minimum notice period for hearings on summary judgment motions. (See Code Civ. Proc., § 437c, subd. (a)(2); *Urshan v. Musicians' Credit Union* (2004) 120 Cal.App.4th 758, 764–765, fn. 5; *McMahon v. Super. Ct.* (2003) 106 Cal.App.4th 112, 116; *UAS Management, Inc. v. Mater Misericordiae Hospital* (2008) 169 Cal. App. 4th 357, 367-68 ["The motion … was not scheduled for hearing in accordance with the requirements of [] section [437c]. Appellant properly objected to these failings both in its response and at the hearing. … The court was without authority to shorten the minimum notice for the motion over appellant's objection. To the extent the judgment is based upon the court's grant of summary adjudication of the first cause of action, the judgment must be reversed."]) An untimely summary judgment motion is properly disregarded. (See *Cuff v. Grossmont Union High Sch. Dist.* (2013) 221 Cal.App.4th 582, 596.)

Defendant attempts to escape its failure to provide sufficient notice of its summary judgment by arguing that Plaintiffs somehow waived that deficiency by filing an opposition and appearing at the June 14, 2018 hearing, even though Plaintiffs pointed out the inadequate notice in their opposition brief. Defendant posits that Plaintiffs should be deemed to have waived their objection to the inadequate notice, but that Defendant should not be deemed to

have waived its waiver argument by failing to make that argument in its reply brief. Defendant has it backwards. (*See* Code of Civ. Proc. § 437c(b)(4) [any reply in support of summary judgment must be filed "not less than five days" before the hearing].)

Defendant cites two cases in support of its novel argument – *Carlton v. Quint* (2000) 77 Cal.App.4th 690 ("*Quint*") and *Robinson v. Woods* (2008) 168 Cal.App.4th 1258 ("*Robinson*") – but neither case helps its cause. *Quint,* was decided based on an old version of the summary judgment statute; the discussion Defendant relies on is mere dicta; and that discussion has been distinguished and rejected in subsequent cases. *Robinson* is even less helpful to Defendant, and actually supports Plaintiffs' position.

In *Quint*, the trial court found that the summary judgment motion was served personally 28 days before the hearing (as required under the previous version of Section 437c), even though the non-moving party contended otherwise, and on that basis the appellate court affirmed the grant of summary judgment. (*Quint*, 77 Cal. App. 4th at 696). Therefore, the discussion of waiver in *Quint* that Defendant relies on is mere dicta. *Quint* was decided on a previous version of Section 437c, before the Legislature, in amending Section 437c, expressed the critical importance of not abbreviating the summary judgment notice period. (*See* Assem. Floor Analysis, SB 688 (Aug. 30, 2002), pp. 4-5). And, most importantly, *Quint* has been distinguished by several courts, rejecting precisely the waiver argument that Defendant advances here. (*Urshan v. Musicians' Credit Union* (2004) 120 Cal. App. 4th 758, 767-68; *Boyle v. CertainTeed Corp.* (2006) 137 Cal. App. 4th 645, 648, 650 [distinguishing *Quint*: though the opposing party "addressed the merits at length," "[n]o waiver may be implied where, as here, a party alleging error has made its objection and then acted defensively to lessen the impact of the error.... A party's participation in a hearing after the party's objection to the hearing as unauthorized does not constitute waiver by acquiescence."]; *Robinson v. Woods* (2008) 168 Cal. App. 4th 1258, 1268 [following *Urshan* and *Boyle*, rather than *Quint*, and finding trial court's continuance of the summary judgment hearing for four days to remedy the moving party's insufficient notice to be an abuse of discretion].) At most, the discussion in *Quint* that Defendant relies on is outdated dicta expressing a minority (and inferior) view.

The discussion of *Quint* in *Urshan v. Musicians' Credit Union* ("*Urshan*"), a case cited by this Court in its Tentative Ruling, is particularly instructive. In *Urshan*, the moving party made the same argument as Defendant here – that its opponent "waive[d] [the] defective notice by … filing an opposition to the [summary judgment] motion, appearing and arguing at the hearing …, failing to request a continuance and failing to identify prejudice arising from the lack of notice." (*Urshan,* 120 Cal. App. 4th at 768). The *Urshan* court then noted that the discussion of waiver in *Quint* was merely dicta because "in *Quint* itself the issue of waiver was not determinative because the court found, as a matter of fact, the opposing party received the then statutorily required 28 days' notice of the summary judgment hearing." (*Id.*) Finally, the *Urshan* court rejected the moving party's view of waiver that Defendant here parrots – "In any event, waiver of the right to the statutorily mandated minimum notice period for summary judgment hearings should not be inferred from silence. Waiver of minimum notice in this context should only be based on the affirmative assent of the affected parties." (*Id.*) Here, as in *Urshan*, Plaintiffs never agreed to a shortened notice period; on the contrary, Plaintiffs pointed out the insufficient notice period in their opposition and continued to argue the point at the hearing. That can hardly be said to be a waiver. Defendant attempts to distinguish *Urshan* (and *Robinson*) by arguing that those cases involved the trial court shortening the notice period. Yet, that is precisely what Defendant asks this Court to do. Simply put, and as this Court correctly states in its Tentative Ruling, the Court cannot shorten the notice period of 80 days for service by mail to remedy Defendant's defective notice.

Robinson is even less help to Defendant, and actually supports Plaintiffs' view. In *Robinson*, the defendant served his summary judgment motion by mail 76 days prior to the hearing. (*Id.* at 1268). The trial court continued the summary judgment hearing by four days "in an effort to provide [the required] 80 days' notice." (*Id.*) The appellate court held that continuance was an abuse of discretion, and rejected the notion that the plaintiff had waived its right to the statutorily required notice. (*Id.*) It is hard to understand how Defendant could think that *Robinson* supports its cause.

Moreover, Defendant's entire argument of waiver is premised on the notion that Plaintiffs have not been prejudiced. Even putting aside the fact that, as discussed in *Urshan*, for example, a party is not required to show prejudice in objecting to an insufficient summary judgment notice, Plaintiffs have been prejudiced. If Plaintiffs did not need to address that deficiency in Defendant's motion, Plaintiff would have had more space in their opposition to more fully address Defendant's legal arguments, and Plaintiffs would not have been forced to expend significant time and energy into addressing that deficiency. (Shenkman Decl. ¶ 4). Though Defendant and its counsel continue to look for someone else to blame, their failure to comply with Section 473c(a)(2) is squarely their own fault.

IV. IF DEFENDANT IS GRANTED RELIEF UNDER SECTION 473, PLAINTIFFS ARE ENTITLED TO ATTORNEYS' FEES AND COSTS.

As discussed above, Defendant is not entitled to relief under Section 473. If, however, the Court decides that Defendant is entitled to such relief, then Defendant and its attorneys must pay compensatory legal fees and costs to Plaintiffs. Section 473(b) provides that "[t]he court shall, whenever relief is granted based on an attorney's affidavit of fault, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties." Therefore, Plaintiffs would be entitled to compensatory legal fees and expenses. Because it is unclear how the Court might possibly grant relief to Defendant, it is impossible for Plaintiffs to quantify the fees and costs they might incur as a result of Defendant's "neglect." Therefore, in the event that the Court grants any relief under Section 473, Plaintiff requests the opportunity to quantify their fees and costs following any decision by this Court.

Dated: June 18, 2018

Respectfully submitted:
SHENKMAN & HUGHES PC
KEVIN I. SHENKMAN

By: _____
Attorneys for Plaintiffs

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 28905 Wight Rd., Malibu, California 90265.

On June 18, 2018, I served true copies of the following document(s) described as

OPPOSITION TO MOTION FOR RELIEF UNDER SECTION 473(B)

on the interested parties in this action as follows:

Marcellus McRae, William Thomson, Kahn Scolnick, Tiuania Henry, Helen Galloway, Daniel Adler
Gibson Dunn & Crutcher LLP
333 S. Grand Ave.
52nd Floor
Los Angeles, CA 90071

BY E- MAIL: Pursuant to the agreement of the parties and the direction of the Court, I emailed the above-described document(s) in pdf format.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 18, 2018 at Malibu, California.

Kevin Shenkman