

C E R T I F I C A T E O F M A I L I N G

L.A. Superior Court Central

Civil Division

PICO NEIGHBORHOOD ASSOCIATION ET AL

VS.

CITY OF SANTA MONICA

BC616804

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Los Angeles,

CA 90071 3197

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 06/19/18 HONORABLE YVETTE M. PALAZUELOS HONORABLE M. Tavakoli, C.A.	JUDGE JUDGE PRO TEM Deputy Sheriff	N. RAYA NONE	DEPT. 28 DEPUTY CLERK ELECTRONIC RECORDING MONITOR Reporter
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8:45 am	BC616804 PICO NEIGHBORHOOD ASSOCIATION E AL VS CITY OF SANTA MONICA CALIFORNIA	Plaintiff Counsel Defendant Counsel	NO APPEARANCES
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NATURE OF PROCEEDINGS:

RULING ON SUBMITTED MATTER

On the matters previously taken under submission, the Court issues its ruling.

The court's rulings, filed this date, are adopted as the final rulings of the court and incorporated herein by reference to the case file.

The Clerk shall give notice.

See attached service list.

MINUTES ENTERED 06/19/18 COUNTY CLERK

JUN 19 2018

RULING/ORDERS

Sherri R. Carter, Executive Officer/Clerk
By N. Raya Deputy
Neil M. Raya

Pico Neighborhood Association, et al. v. City of Santa Monica,
Case No.: BC616804

Defendant City of Santa Monica's Request for Relief pursuant to CCP § 473 is DENIED.

"The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." CCP § 473(b). "Application 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, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken." CCP § 473(b).

On June 14, 2018, the Court issued a tentative decision denying Defendant City of Santa Monica's motion for summary judgment, or alternatively summary adjudication, on the grounds that Defendant failed to comply with CCP § 437c(a)(2). The Court granted Defendant's counsel's oral request to file a motion on shortened time for relief pursuant to CCP § 473.

Defendant's sole argument was that the motion was timely served because it was also served via e-mail as "another method of delivery providing for overnight delivery." However, electronic service is not permitted unless the parties stipulate to such service or such service is ordered by the Court. CCP § 1010.6(a)(2)(A)(i). Defendant failed to raise in its Reply briefing any caselaw or argument that Plaintiffs Pico Neighborhood Association and Maria Loya ("Plaintiffs") waived the objection to improper notice pursuant to CCP § 437c(a)(2) due to opposing the motion on the merits.

Defendant fails to set forth any basis entitling it to relief pursuant to CCP § 473. The burden on the moving party is to (1) show a satisfactory excuse for the default; and (2) show diligence in making the motion after the discovery of the default. Hopkins & Carley v. Gens (2011) 200 Cal.App.4th 1401, 1410. "[N]eglect is excusable if a reasonably prudent person under similar circumstances might have made the same error."

Austin v. Los Angeles Unified School District (2016) 244 Cal.App.4th 918, 929. Defendant appears to take the position it does not need to seek relief from its failure to address the issue because the Court's ruling was only "tentative" and thus this was to permit the parties to focus their arguments. But Plaintiffs raised the issue of defective notice in their Opposition. Defendant did not address it. Defendant cannot take the position that it can wait to decide which arguments to address until after the Court issues its ruling. "Contentions supported neither by argument nor by citation of authority are deemed to be without foundation and to have been abandoned." Anastos v. Lee (2004) 118 Cal.App.4th 1314, 1318 (failure to cite applicable authority to support contention resulted in contention being waived); Badie v. Bank of America (1998) 67 Cal.App.4th 779, 784-85 (failing to raise a point or raising it and failing to support it with reasoned argument and citation to authority results in the point being treated as waived); Bernard v. Harford Fire Ins. Co. (1991) 226 Cal.App.3d 1203, 1205 (the party has the duty to support its arguments by appropriate references).

Defendant's argument that it did not include any applicable authority or argument because it chose to direct its focus to the substantive issues and Defendant was unaware until the hearing date that electronic service requires stipulation of the parties or Court order is insufficient to obtain relief pursuant to CCP § 473. (Further, as argued by Plaintiffs, service by "USPS Priority Mail" is not "express mail" or another method which provides for overnight delivery. Shenkman Decl. ¶ 2, Exhs. A-B.) Defendant's strategic decisions of how to allocate their Reply briefing and how to respond to Plaintiffs' Opposition was just that, a strategic decision with which Defendant now is unhappy with the outcome. Scottsdale Ins. Co. v. Superior Court (1997) 59 Cal.App.4th 263, 275 (a party was not entitled to relief for "mistake" when the party "made tactical choices which did not yield the results he expected"). And Defendant's ignorance of the law is no excuse and cannot be construed as "excusable" grounds for relief pursuant to CCP § 473. City of Ontario v. Superior Court (1970) 2 Cal.3d 335, 346.

Further, Defendant improperly argues the merits of the Court's decision and other issues beyond whether Defendant is entitled to relief pursuant to CCP § 473. And even if the Court were to consider Defendant's arguments, it would not alter the

outcome of the decision.¹ While this ruling may seem to place form over substance, the law is clear on this issue. The minimum notice requirements are mandatory and cannot be shortened by the Court. Urshan v. Musicians' Credit Union (2004) 120 Cal.App.4th 758, 764-65 n. 5 (noting the lack of discretionary language for the trial court to shorten the notice period for summary judgment or adjudication motions when compared to the general motion notice provision of CCP § 1005 which allows trial courts discretion to hear motions on shortened notice). Plaintiff, by raising this objection, has clearly and unequivocally not consented to a shortened notice period. A summary judgment or summary adjudication motion which is not properly noticed pursuant to CCP § 437c(a)(2) is properly disregarded. Cuff v. Grossmont Union High School District (2013) 221 Cal.App.4th 582, 596.

A party should not be forced into a decision to decide between responding on the merits, and risk wasting its resources, or objecting on the basis that the summary judgment motion was improperly noticed. Robinson v. Woods (2008) 168 Cal.App.4th 1258, 1268; Boyle v. CertainTeed Corp. (2006) 137 Cal.App.4th 645, 650 (waiver is not implied when a party alleges error and makes its objection, but still argues on the merits to act defensively to lessen the impact of the error). And even in such a situation, the best course of action, which Plaintiff took here, is to oppose the motion as best as possible and include the objection on inadequate notice as well as an opposition on the merits and when counsel appears at the hearing the objection should again be raised because of the defective notice. Carlton v. Quint (2000) 77 Cal.App.4th 690, 698. Such objection has been heard, argued, and sustained by the Court. The hearing date was invalid when noticed and continued to be so. Robinson 168 Cal.App.4th at 1267-68.

During hearing on the motion, Defendant's counsel stated that the Court did not provide an analysis of National Grange of the Order of Patrons of Husbandry v. California Guild, which Defendant cited twice, once in a string citation and again within the same paragraph for the quote that "And in voluminously opposing the motion, defendants did not argue that they could have put on an even bigger or better showing in opposition..." without any further analysis of the case. Id.

¹ Defendant's arguments regarding the alleged impropriety of Plaintiff's service of the Opposition is immaterial. Plaintiff served the Opposition in a manner stipulated to by the parties. The parties agreed on May 31, 2018 to electronic service of the Opposition and Reply, but there was no such stipulation regarding service of the moving papers.

(2017) 17 Cal.App.5th 1130, 1146-47 (addressing whether an operative complaint filed after notice for the summary judgment motion was provided could be the basis for a summary judgment motion when the contents of the operative complaint were attached to a motion for leave to amend that was served three weeks prior to the summary judgment motion being noticed).

It is unclear why Defendant did not include a further discussion of the case it now claims to be dispositive. And as noted, such argument goes to the merits of the Court's decision and not Defendant's request for CCP § 473 relief due to the failure to address the notice issue in Defendant's Reply, which is the limited purpose for which Defendant was granted leave to file the briefing. Regardless and even if considered, Plaintiffs objected to the improper notice from the outset in their opposition and the Court will not consider the objection waived. The Court has no discretion to shorten the notice requirement for a summary judgment motion. Defendant failed to set forth a basis for relief pursuant to CCP § 473. By Defendant's argument, the only way Plaintiffs could have preserved their objection would have been to refuse to file any substantive opposition or appear for the hearing, or only appear to raise the objection, and then ask the Court for a continuance if the objection was overruled. But this would leave Plaintiffs in the precarious position of having not opposed the motion for summary judgment and hoping for a continuance if such objection was overruled, which there is no guarantee would be granted. Defendant cannot force Plaintiff into such decision by improperly noticing the summary judgment motion. Defendant's position would render the notice requirements for summary judgment motions meaningless so long as the motion was served with "enough" time to file an opposition, even if it did not comply with the statutory notice requirements. Such statutory notice requirements cannot be altered by the Court. The Court finds Plaintiff timely and properly asserted the objection that the motion was improperly noticed.

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CLERK TO GIVE NOTICE TO ALL PARTIES.

IT IS SO ORDERED.


YVETTE M. PALAZUELOS
JUDGE OF THE SUPERIOR COURT

JUN 19 2018

RULING/ORDERS

Sherri R. Carter, Executive Officer/Clerk
By N. M. Raya Deputy
Neil M. Raya

Pico Neighborhood Association, et al. v. City of Santa Monica,
Case No.: BC616804

Defendant City of Santa Monica's Motion for Summary Judgment, or alternatively Summary Adjudication, is DENIED.

"Notice of the motion and supporting papers shall be served on all other parties to the action at least 75 days before the time appointed for hearing. If the notice is served by mail, the required 75-day period of notice shall be increased by 5 days if the place of address is within the State of California, 10 days if the place of address is outside the State of California but within the United States, and 20 days if the place of address is outside the United States. If the notice is served by facsimile transmission, express mail, or another method of delivery providing for overnight delivery, the required 75-day period of notice shall be increased by two court days." CCP § 437c(a)(2).

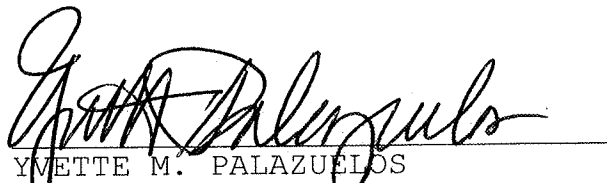
Plaintiff objects that Defendant's service of motion was improper pursuant to CCP § 437c(a)(2). Defendant served the motion by mail. Seventy-five days before the June 14, 2018 hearing date is March 31, 2018. Thus, accounting for the extra five days for mail service the last day to serve the motion via mail was March 26, 2018. But Defendant did not serve the motion until March 29, 2018. The minimum notice requirements are mandatory and cannot be shortened by the Court. Urshan v. Musicians' Credit Union (2004) 120 Cal.App.4th 758, 764-65 n. 5 (noting the lack of discretionary language for the trial court to shorten the notice period for summary judgment or adjudication motions when compared to the general motion notice provision of CCP § 1005 which allows trial courts discretion to hear motions on shortened notice). A summary judgment or summary adjudication motion which is not properly noticed pursuant to CCP § 437c(a)(2) is properly disregarded. Cuff v. Grossmont Union High School District (2013) 221 Cal.App.4th 582, 596. The Court cannot merely continue the motion an extra three days to "cure" the defective notice because the hearing date was invalid when noticed and continued to be so. Robinson v. Woods (2008) 168 Cal.App.4th 1258, 1267-68 (a party that files a written objection to the notice requirements does not need to establish prejudice or argue the merits of the summary judgment

motion and the trial court could not cure such defect by continuing the motion an additional four days because the notice was invalid when provided, thus beginning anew at the point of the continuance, and therefore the court, if it was so inclined, could only continue the motion for the required statutory period). No such continuance is available here because trial is less than 75-days away and pursuant to CCP § 437c(a)(3) a summary judgment or adjudication motion cannot be heard within 30 days of trial unless the Court for good cause orders otherwise.

Defendant contends the motion is timely noticed because it was also served via e-mail and therefore could be served by March 29, 2018 because such method of service is "another method of delivery providing for overnight delivery." But the California Code of Civil Procedure does not permit service via e-mail and such service is not proper unless the parties stipulate to or the court orders such service. CCP § 1010.6(a)(2)(A)(i) ("For cases filed on or before December 31, 2018, if a document may be served by mail, express mail, overnight delivery, or facsimile transmission, electronic service of the document is not authorized unless a party or other person has agreed to accept **electronic service in that specific action or the court has ordered electronic service** on a represented party or other represented person...") (emphasis added). There does not appear to be any stipulation or order on the record permitting email service of the motion. While the parties agreed on May 31, 2018 to electronic service of the opposition and reply, the Court is aware of no such stipulation regarding service of the moving papers. Accordingly, Defendant City of Santa Monica's motion for summary judgment, or alternatively summary adjudication, is denied due to failure to comply with CCP § 437c(a)(2).

CLERK TO GIVE NOTICE TO ALL PARTIES.

IT IS SO ORDERED.


YVETTE M. PALAZUELOS
JUDGE OF THE SUPERIOR COURT