

**SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA**

Department 16

(Dept 16 is now hearing cases that were formerly in Dept 2)

Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 09-19-23 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear by video.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.

Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.

The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

TO CONTEST THE RULING: Before 4:00 p.m. today you must notify the:

- (1) Court by calling (408) 808-6856 and
- (2) Other side by phone or email that you plan to appear and contest the ruling (California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

IN PERSON HEARINGS: Courtrooms are again open and all litigants may appear in person at the Downtown Superior Courthouse located at 191 N. First Street, San Jose.

VIRTUAL HEARINGS: You should **appear by video**, unless it is not possible.

To Join Teams Meeting -Click on the below link or copy and paste into your internet browser and scroll down to Department 16.

https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

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COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

LINE #	CASE #	CASE TITLE	RULING
LINE 1	20CV371434 Motion: Quash	CBS FINANCE INC vs STEPHEN COOPER et al	See Tentative Ruling. Plaintiff shall submit the final order.
LINE 2	22CV395368 Hearing: Demurrer	Artemio Floresca et al vs Ruperto Arzadon et al	Notice appearing proper, and good cause appearing, Plaintiffs' unopposed Demurrer to the unverified answer is GRANTED on all bases with 10 days leave to amend. Plaintiffs shall submit the final order.
LINE 3	22CV395368 Motion: Strike	Artemio Floresca et al vs Ruperto Arzadon et al	Given the granting of the demurrer, Plaintiffs' motion to strike is rendered moot.
LINE 4	22CV396064 Hearing: Motion to determine FMV of Membership Interest	Brenda Robles et al vs Frances Hills et al	See Tentative Ruling. Plaintiff shall submit the final order.

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**The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court
3.1312.)**

LINE 5	22CV404294 Motion: Stay Pending Probate Proceeding	Kelly Kincaid vs Marleen Kutiner et al	See Tentative Ruling. Defendant shall submit the final order.
LINE 6	17CV309789 Motion: Set Aside Default/Judgment	Cach, LLC vs Andre Robbins	See Tentative Ruling. Andre Robbins and his attorney are ordered to appear in person for the hearing.
LINE 7			
LINE 8			
LINE 9			
LINE 10			
LINE 11			
LINE 12			

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Calendar Line 1

Case Name: *CBS Finance Inc. v. Stephen Cooper, et al.*

Case No.: 20CV371434

Plaintiff CBS Finance Inc. (“Plaintiff” or “CBS”) brings claims arising out of an alleged contract between itself and defendants Stephen Cooper (“Cooper”), Bryan Holmes (“Holmes”), Megan Nijmeh (“Nijmeh”), and SVFFC, LLC (“SVFFC”) (collectively, “Defendants”). Before the Court is the motion to quash service of summons and a motion to vacate and set aside default brought by defendant Bryan Holmes. Plaintiff has filed written opposition. As discussed below, the Court DENIES the motions.

I. BACKGROUND

As set forth in the operative Complaint, Plaintiff is wholly owned by Pramod Anand (“Anand”). (Complaint, ¶ 1.) Defendants Cooper, Holmes, and Nijmeh are each equity owners and managers of defendant SVFFC. (*Id.*, ¶¶ 2-5.) On May 23, 2018, Cooper and Holmes contacted Anand with an investment opportunity. (*Id.*, ¶ 12.) They promised a 25% return on a six-month investment of \$550,000 to complete a property renovation. (*Ibid.*) Under the agreement, CBS would invest \$550,000 and was guaranteed a return of \$750,000 in six months. (*Id.*, ¶ 15.) The agreement was documented in a promissory note secured by property or deed of trust, dated June 11, 2018. (*Id.*, ¶ 16.) The note was personally guaranteed by Cooper and Holmes and provided for 6% interest in the event of default. (*Ibid.*) CBS agreed to a further investment of \$95,500 under the same terms, such that the total return due to CBS on December 11, 2018 was \$880,227.27. (*Id.*, ¶ 17.)

Defendants acquired the subject property but did nothing to renovate it and prepare it for sale as they had promised. (Complaint, ¶ 18.) Plaintiff rejected Defendants’ proposal to drastically alter the agreement and sell the property without renovation. (*Ibid.*) In breach of the agreement, Defendants failed to maintain the property, renovate the property, and pay property taxes. (*Id.*, ¶ 19.) The property fell into default and the lender seized it. (*Ibid.*) Defendants have yet to make payment of the \$880,227.27 due to Plaintiff. (*Ibid.*)

On October 2, 2020, Plaintiff filed the Complaint, alleging causes of action for (1) breach of written agreement; (2) breach of oral agreement; (3) breach of the duty of good faith and fair dealing; and (4) unfair business practices under Business Professions Code section 17200.

Plaintiff’s application for entry of default as to defendant Holmes was entered as requested on June 7, 2021. Holmes filed a motion to vacate and set-aside default on April 10, 2023 and a motion to quash service summons and vacate and set aside default on June 21, 2023. At the hearing on July 18, 2023, this Court (Hon. Rosen) granted Defendant Holmes’ request to withdraw the motion of April 10, 2023. The motion of June 21, 2023 was ordered to remain as set for September 19, 2023. Plaintiff’s opposition was filed September 6, 2023.

II. MOTION TO QUASH SERVICE OF SUMMONS

A. Legal Standard

Without valid service of summons as to a particular defendant, the court does not have personal jurisdiction over that defendant. (*American Express Centurion Bank v. Zara* (2011))

199 Cal.App.4th 383, 387 (*Zara*) [“Compliance with the statutory procedures for service of process is essential to establish personal jurisdiction”].) A defendant may serve and file a motion to quash service of summons within the time allowed for filing a response to the complaint, “or within any further time that the court may for good cause allow.” (Code Civ. Proc., § 418.10, subd. (a)(1).)

If such a motion is timely made, no act by the party making such a motion, “including filing an answer, demurrer, or motion to strike,” shall be deemed a general appearance.” (Code Civ. Proc., subd. (e)(1); *Synalski v. Superior Court* (2009) 172 Cal.App.4th 1, 8, fn. 2.) If the motion is granted, the court may dismiss the action without prejudice as to moving defendant. (Code Civ. Proc., § 581, subd. (h).)

On a challenge to personal jurisdiction by a motion to quash, the plaintiff has the burden of proving, by a preponderance of the evidence, the factual bases justifying the exercise of jurisdiction. The plaintiff must come forward with affidavits and other competent evidence to carry this burden and cannot simply rely on allegations in an unverified complaint. If the plaintiff meets this burden it becomes the defendant’s burden to demonstrate that the exercise of jurisdiction would be unreasonable.

(*ViaView, Inc. v. Retzlaff* (2016) 1 Cal.App.5th 198, 209-210 [internal quotation marks and citations omitted]; see also *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 449.)

B. DISCUSSION

As preliminary matter, to the extent the current motion could be considered untimely, the Court finds good cause to consider it. A defendant may file such a motion “on or before the last of his or her time to plead or within any further time that the court may for good cause allow.” (Code Civ. Proc., § 418.10, subd. (a).) Unless the time limit is extended by stipulation or court order, a defendant’s answer is due within 30 days after service of the complaint. (*Id.*, § 412.20, subd. (a)(3).) Here, the amended proof of service of summons as to defendant Holmes states he was served on October 15, 2020, meaning that his answer (or motion to quash) was due on November 14, 2020. However, as defendant Holmes contends he was not served on October 15, 2020, the Court finds good cause to rule on the merits of the motion to quash service of summons. Furthermore, Plaintiff interposes no objection as to the timing of the motion by Holmes.

Plaintiff makes three arguments to establish the Court’s personal jurisdiction over Holmes: (1) general appearance; (2) personal service; (3) substantial compliance.¹

1. General Appearance

¹ Plaintiff requests the Court take judicial notice of a variety of pleadings filed in this matter. The request is DENIED as unnecessary because the documents in question are already part of the record in this matter. (See *Jordache Enterprises, Inc. v. Brobeck, Phelger & Harrison* (1998) 18 Cal.4th 739, 748, fn. 6 [a court need not take judicial notice of a matter unless it is “necessary, helpful, or relevant”].)

“A general appearance by a party is equivalent to personal service of summons on such party.” (Code Civ. Proc., § 410.50, subd. (a).)

A general appearance occurs when the defendant takes part in the action or in some manner recognizes the authority of the court to proceed. Such participation operates as consent to the court’s exercise of jurisdiction in the proceeding. ... By generally appearing, a defendant relinquishes all objections based on lack of personal jurisdiction or defective process or service of process. A general appearance has these effects even if the defendant is unaware that a jurisdiction objection is available. ... A California defendant preserves objections to personal jurisdiction only by making a *special* appearance, i.e., an appearance for the *sole* purpose of objecting to the court’s jurisdiction. A special appearance does not confer jurisdiction on the court for any purpose other than determining the question of jurisdiction over the person.

(*In re Marriage of Obrecht* (2016) 245 Cal.App.4th 1, 7-8 [internal quotation marks and citation marks omitted].)

“An attorney’s appearance for a party at a hearing can also result in a general appearance.” (*Mansour v. Superior Court* (1995) 38 Cal.App.4th 1750, 1757.) For example, in *In re Vanessa Q.* (2010) 187 Cal.App.4th 128, 135, the defendant made a general appearance when he authorized his attorney to request a continuance of the trial, and the attorney did so without raising the issue of personal jurisdiction.

Here, Plaintiff asserts Holmes made general appearances when his attorney appeared at case management conferences on October 13, 2022 and April 13, 2023. (Opp., p. 3; Tran Decl., ¶ 10.) The Court’s minute order for the hearing on October 13, 2022 states that Adam Fullman appears as counsel for Defendant and makes no reference to a challenge of jurisdiction or to a special appearance by Mr. Fullman. However, because there are multiple defendants and this minute order does not specify that Mr. Fullman appeared on behalf of defendant Holmes, it does not establish that Holmes made a general appearance at the hearing on October 13, 2022.

As Plaintiff observes, Holmes’ attorney filed a notice of limited scope representation on April 10, 2023. The signatures of both defendant Holmes and his attorney (Christopher Peters of The Fullman Firm, PC), both dated September 16, 2022, appear on the document. The notice of limited scope representation makes no reference to challenging personal jurisdiction, nor does it say attorney Peters would only be making a special appearance. Rather, the document states the scope of representation was to include “Preparing, serving, and filing a responsive pleading to the Complaint.”² (See *Fireman’s Fund Ins. Co. v. Sparks Construction, Inc.* (2004) 114 Cal.App.4th 1135, 1145 [a responsive pleading to a complaint “on the merits” constitutes a general appearance].) The Court’s minute order for the hearing on April 13, 2023 indicates that counsel for Bryan Holmes appeared remotely, again making no reference to either a special appearance or to a challenge of jurisdiction. In the Court’s opinion, these facts

² While not raised by the parties, the Court notes in its own review of its records that concurrent with its filing of the notice of limited scope representation on April 10, 2023, Holmes’ counsel filed a notice of lodgment of proposed answer to unverified complaint, which makes no reference to challenging jurisdiction.

are sufficient to establish that defendant Holmes made a general appearance through his counsel at the hearing on April 13, 2023.

Defendant Holmes' reply does not convince the Court otherwise. Holmes contends there has been no general appearance because he has not filed any documents other than the present motion and his counsel spoke at a case management conference stating Holmes' intent to file the instant motion. (Reply, p. 1.) However, Holmes makes no assertion that his attorney has made only a special appearance in this matter, and offers no authority in support of his position. (See *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 (*Kim*) [a court "is not required to discuss or consider points which are not argued or which are not supported by citation to authorities or the record].)

Thus, the motion to quash is denied on the ground that defendant Holmes has made a general appearance. (Code Civ. Proc., § 410.50, subd. (a).)

2. *Personal Service*

Plaintiff further contends that this Court has personal jurisdiction over Holmes because he was personally served with the summons on October 15, 2020. (Opp., pp. 4-7; Mazzocco Decl.)

"The Code of Civil Procedure specifies the various methods by which service may be made upon defendants who are sued as individuals." (*Zara, supra*, 199 Cal.App.4th at p. 389.)

According to section 684.220, subdivision (b),³ proof of service made pursuant to section 415.10 "may be made by affidavit to the person making the service showing the time, place, and manner of service and the facts showing that the service was made in accordance with the applicable statutory provisions. The affidavit shall recite or in other manner show the name of the person to whom the papers served were delivered and, if appropriate, the title of the person of the capacity in which the person was served." Evidence Code section 647 provides that a registered process server's declaration of service establishes a presumption affecting the burden of producing evidence of the facts stated in the declaration. (See also *Floveyor Internat., Ltd. v. Superior Court* (1997) 59 Cal.App.4th 789, 795 [69 Cal. Rptr. 2d 457] [filing of proof of service that complies with the applicable statutory requirements creates a rebuttable presumption of proper service].)

(*Id.*, p. 390.)

In this case, attached to Plaintiff's opposition is the declaration of reasonable diligence completed by process server Bret Mazzocco ("Mazzocco"), who declares under penalty of perjury that he personally served a person answering to the name of "Bryan Holmes" on October 15, 2020 at 3:21 p.m. at 1018 Windfield Street in Redwood City, California. (Opp., attachments.) Mazzocco states there were no issues at the time of service, and that he recognized the person he served as being the person in the photo attached to his declaration, which was signed by Mazzocco on September 6, 2023. (*Ibid.*) Further, on October 27, 2020

³ Further unspecified references are to the Code of Civil Procedure.

Plaintiff filed an amended proof of service of summons signed by Mazzocco on October 16, 2020. The facts set forth in Mazzocco's recent declaration corroborates those set forth in the proof of service.

In support of his motion, defendant Holmes submits his own declaration and supporting evidence. (See Holmes Decl., filed April 10, 2023.)⁴ Holmes does not dispute that his residence on October 15, 2020 was the address indicated on the proof of service, but asserts that he could not have been served there at 3:21 p.m. because he was not home at that time. (*Id.*, ¶ 3.) Holmes states he specifically recalls he was at a site inspection at 1625 University Avenue in Palo Alto, California, from 2:00 p.m. to 4:00 p.m. on October 15, 2020. (*Id.*, ¶ 4.) As proof, he presents screenshots from his work software and calendar. (*Id.*, ¶¶ 5-7, Exs. B-D.) Holmes also presents photographs he took that day, with time stamps shortly before and after 2:00 p.m. (*Id.*, ¶ 8, Ex. E.) Finally, Holmes states he did not learn of this lawsuit until March 22, 2022 when he was looking up details of another matter, and that he has a valid defense in this case. (*Id.*, ¶¶ 9-10.)

Here, the Court finds Plaintiff has established by a preponderance of the evidence that defendant Holmes was personally served with the summons on October 15, 2020. More specifically, the proof of service and declaration of due diligence signed by process server Mazzocco establishes a rebuttable presumption that there was proper service. (*Zara, supra*, 199 Cal.App.4th at p. 390.) The evidence presented by Holmes is insufficient to rebut this presumption. Significantly, Holmes has presented no evidence other than his own declaration and its attachments. For example, there is no statement from a third party corroborating Holmes' claim that he was in Palo Alto until 4:00 p.m. on October 15, 2020. Holmes' assertion that he must have been at a site inspection (and therefore not at his home) from exactly 2:00 p.m. until exactly 4:00 p.m., because that timeframe was blocked off on his calendar, is simply not credible. Since Holmes' own evidence shows that he was at the site taking pictures before 2:00 p.m., it is equally possible that he left the location and went home before 4:00 p.m. In sum, Holmes is unable to rebut the presumption of proper service established by Plaintiff. (*Falahati v. Kondo* (2005) 127 Cal.App.4th 823, 828 ["It is the province of the trial court to determine the credibility of the declarants and to weigh the evidence"]; *Johnson v. Pratt & Whitney Canada, Inc.* (1994) 28 Cal.App.4th 613, 622 ["Credibility is an issue for the fact finder"].)

Based on the entirety of the record before it, the Court finds that Plaintiff has met its burden of proving by a preponderance of the evidence that there was proper service of summons as to defendant Holmes. Thus, the motion to quash is denied for this additional reason.

C. *Substantial Compliance*

Plaintiff further asserts jurisdiction is proper because defendant Holmes had actual notice and service substantially complied with the statutory requirements. (Opp., pp. 7-11.) Because this Court finds that Defendant was properly served, there is no need to address this argument.

⁴ Plaintiff has submitted objections to defendant's Holmes' evidence. The objections are OVERRULED.

IV. MOTION TO VACATE AND SET ASIDE DEFAULT

As part of the instant motion, defendant Holmes argues the default against him should be set aside for lack of personal jurisdiction. (Mot., pp. 8-10.) He contends he need not plead a meritorious defense because the default was obtained without due process of law. (*Id.*, pp. 10-11.) In opposition, Plaintiff asserts that setting aside the entry of default against Holmes would result in substantial prejudice, that Holmes has no meritorious defense, and that Holmes' culpable conduct led to the default. (Opp., pp. 11-12.) In reply, Holmes argues that the default against him was obtained by extrinsic fraud and is void. (Reply, pp. 3-4.)

A. LEGAL STANDARD

The appellate court in *Bae v. T.D. Service Co. of Arizona*, (2016) 245 Cal.App.4th 89 (*Bae*), detailed the legal standard for relief from a default and default judgment.

Although a trial court has discretion to vacate the entry of default or subsequent judgment, this discretion may be exercised only after the party seeking relief has shown that there is a proper ground for relief, and that the party has raised that ground in a procedurally proper manner, within any applicable time limits. Code of Civil Procedure section 473 and 473.5 authorize challenges to defaults and default judgments on various grounds within certain periods.

Under Code of Civil Procedure section 473, subdivision (b), a party may seek relief on the grounds of mistake, inadvertence, surprise, or excusable neglect within a reasonable time, but not more than six months after the entry of the default or default judgment. Code of Civil Procedure section 473.5 permits the court to set aside a default or default judgment if the defendant, through no inexcusable fault of his own, received no actual notice of the action, provided that relief is requested within a reasonable time, but not more than two years after the entry of the default judgment. In addition, under subdivision (d) of Code of Civil Procedure section 473, the court may set aside orders and judgments that are void, including orders and judgments void for want of fundamental jurisdiction or personal jurisdiction. In some instances, that relief is subject to the time period specified in Code of Civil Procedure section 473.5, for example, when the party seeking relief maintains that the judgment, although facially valid, is void due to lack of proper service of process.

Apart from any statute, courts have the inherent authority to vacate a default and default judgment on equitable grounds such as extrinsic fraud or extrinsic mistake. Extrinsic fraud usually arises when a party is denied a fair adversary hearing because he has been deliberately kept in ignorance of the action or proceeding, or in some other way fraudulently prevented from presenting his claim or defense. In contrast, the term extrinsic mistake is broadly applied when circumstances extrinsic to the litigation have unfairly cost a party a hearing on the merits. Extrinsic mistake is found when among other things ... a mistake led a court to do what it never intended.

(*Id.*, pp. 97-98 [internal quotation marks and citations omitted].)

B. DISCUSSION

In this case, defendant Holmes does not direct the Court to any statutory authority as the basis for his motion to set aside default. Based on the authority outlined above and the arguments presented by Holmes, his motion could be relying upon Code of Civil Procedure section 473.5 or the Court's inherent equitable authority. However, neither basis provides relief to Holmes in this instance because, as discussed previously, the Court has found that he was properly served with the summons on October 15, 2020. Holmes has failed to credibly rebut the presumption of valid service or establish that he "deliberately kept in ignorance of the action or proceeding, or in some other way [was] fraudulently prevented from presenting his claim or defense." (*Bae, supra*, 245 Cal.App.4th at p. 97 [quoting and citing *Kulchar v. Kulchar* (1969) 1 Cal.3d 467, 471].)

Accordingly, the motion to vacate and set aside default is DENIED.

V. CONCLUSION

The motion to quash the service of summons as to defendant Holmes is DENIED because he made a general appearance, and because he has not rebutted the presumption that he was personally served with the summons. The motion to set aside entry of default against defendant Holmes is DENIED. Plaintiff shall submit the final order.

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Calendar line 4**Case Name: Brenda Robles et al v. Frances Hills et al.****Case No.: 22CV396064****Facts**

The parties ask the court to determine the fair market value of the membership interests in Hills Starnes Rentals LLC (the “LLC”), a limited liability company that owns two commercial real properties in Palo Alto and Mountain View, California. The parties have submitted the three appraisals, as required by Cal. Corp. Code § 17707.03(c). Because the appraisals have been completed, the parties now present those appraisals to the Court for review. The appraisers all reached different values of the collective 50% fractional membership interests that are subject to purchase, with the appraisals of the 50% membership interest as follows: (1) \$2,900,000 (Kidder Matthews), (2) \$3,920,000 (Hamilton, Ricci & Associates, Inc.), and (3) \$4,570,000 (Valbridge Property Advisors).

Legal Standard

The appraisals are not binding on the Court. *Dickson v. Rehmke*, 164 Cal. App. 4th 469 (2008) (the Court determines the value, and “[t]he award of the appraisers does not bind the trial court”). Rather, the Court reviews the appraisals and can either adopt the unanimous or majority value (if determined by the appraisers), or alternatively, can fix the value of the interests *de novo*. *Ibid.* (“the court is free to select among conflicting opinions or decide the matter *de novo*”).

Plaintiffs’ Evidentiary Objections

The Court overrules objection #1, as it is argument of counsel and the Court is able to give it the weight it deserves. The Court overrules objection #2 as the parties stipulated to Kidder Matthews as one of the three appraisers and the Court is free to consider the report as it deems appropriate. The Court sustains objection #3.

Analysis

Having reviewed all of the appraisals, the briefs and all supporting documentation, the Court determines that the value of the membership interests is \$3,920,000, as appraised by Hamilton, Ricci & Associates. The Court found its appraisal complete, reasonable, and the basis for its findings well-documented. The Kidder Matthews report was not well supported, as it failed to state the appraised value of each property and did not state the basis for any discount applied. The Valbridge report was also thorough and well-documented, but the Court was not as persuaded by its appraisal value of the two properties as it was by the Hamilton, Ricci report. Plaintiff shall submit the final order.

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Calendar Line 5

Case Name: Kelly Kincaid v. Marleen Kutiner et al.

Case No.: 22CV404294

Defendant Debra Harville requests a stay of this case, pending the outcome of the probate case as to the validity of Jane Griffin's will. Ms. Griffin ("Decedent") died. Her partner, Kelly Kincaid ("Plaintiff"), filed a Petition to Probate (21PR191373) in order to probate Decedent's will which leaves Decedent's entire estate to Plaintiff. Defendant, the decedent's sister, has filed an objection in the probate action, challenging the will as invalid. In this case, Plaintiff has filed for (1) Quasi-specific Performance of Contract to make a Will; (2) Breach of the Partnership Agreement; (3) Quantum Meruit; and (4) Declaratory Relief.

In opposing the motion for stay, Plaintiff first claims that Defendant has cited no authority for a grant of stay and that the cases cited by Plaintiff do not authorize a stay. But Defendant is correct that "[a] court ordinarily has inherent power, in its discretion, to stay proceedings when such a stay will accommodate the ends of justice. (*People v. Bell* (1984) 159 Cal.App.3d 323, 329, 205 Cal.Rptr. 568.) As the court in *Landis v. North American Co.* (1936) 299 U.S. 248, 254, 57 S.Ct. 163, 81 L.Ed. 153 explained, 'the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.'" (*OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 141, cert. denied sub nom. *OTO, L.L.C. v. Ken Kho* (2020) 141 S.Ct. 85 [Even if statutory stay in arbitration rules did not apply, Court retained authority to stay proceedings.])).

Plaintiff next states that a stay would only serve to delay the case and thus cause her prejudice. She asserts that the probate case concerns the validity of the Decedent's will, whereas the civil action concerns a partnership agreement between Plaintiff and Decedent. But, as Defendant points out, if the will is found valid, there would be no or at least a greatly reduced need for the civil action, as Plaintiff will receive the entirety of Decedent's estate. Because of the overlapping issues and parties, the civil case, while not consolidated with the probate matter, will be reassigned to the probate judge so that both cases can be heard by the same judge in the interests of both judicial efficiency and economy. As such, this Court will defer to the probate court and deny the motion to stay without prejudice. The motion for stay is DENIED without prejudice and this matter is REASSIGNED to Department 13.

The CMC hearing set for October 3, 2023 in Department 16 is vacated. The parties are ordered to a status conference in Department 13 on October 20, 2023 at 10:30. Defendant shall submit the final order.

Calendar Line 6

Case Name: Cach, LLC v. Andre Robbins

Case No.: 17CV309789

Defendant asks the court to set aside the default and vacate the default judgment. Defendant has provided evidence suggesting that the summons served on him for the complaint was served on the wrong person. He declares that he has no ties to the address served and the physical description of the person served is different from the physical description provided on Defendant's driver's license issued on December 31, 2019. The proof of service indicates that Defendant is no more than 5'4", is aged 35-45, and has black hair. Defendant declares that he is 5'10" and was 50 years old in 2017 with brown hair. He includes his driver's license which corroborates these facts.

Defendant also declares that he did not learn of the lawsuit or judgment against him until receiving notice of the garnishment of his wages in May 2023. This seems unlikely given that every document since the summons has been served on him at the address he admits is his correct address, including the entry of default, the judgment, and the memorandum of costs. Nevertheless, if the summons was never served on him, then the default judgment should never have been entered, is void, and must be set aside regardless of the amount of time elapsed. See *Stevenson v. Turner* (1979) 94 Cal. App. 3d 315, 318 (holding that an exception to the six-month time rule of CCP 473 arises where it is clear that the default should not have been entered. In such a case, the subsequent judgment is void and relief from the default on which it rests may be sought at any time). Moreover, there is no opposition to the motion to set aside the default.

Accordingly, given that it appears that the summons was personally served on someone other than the defendant and that the motion is unopposed, the default is set aside, the judgment is vacated, and Defendant is ordered to file his answer within 10 days of the final order. Defendant shall submit the final order.

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