

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA

Warner v. Delano

No. 21-cv-05666-HSG (N.D. Cal. Mar. 1, 2023) · No. 21-cv-05666-HSG · Decided March 1, 2023

OPINION

Warner v. Delano

PER CURIAM.

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4 UNITED STATES DISTRICT COURT

5 NORTHERN DISTRICT OF CALIFORNIA

6

WADE WARNER,

7 Case No. 21-cv-05666-HSG Plaintiff,

8 ORDER ADOPTING MAGISTRATE

v. JUDGE'S REPORT AND

9 RECOMMENDATION REGARDING

DENNIS DELANO, MOTION FOR DEFAULT JUDGMENT

10 Defendant. Re: Dkt. Nos. 33, 36 11 12 13 Pending before the Court is Plaintiff Wade Warner's
motion for default judgment. Dkt.

14 No. 33. The Court referred the matter to a magistrate judge to prepare a report and

15 recommendation on the motion. Dkt. No. 35. The Court has reviewed Magistrate Judge Kim's
16 report and recommendation, Dkt. No. 36, as well as Plaintiff's objection to the report, Dkt. No.

37. 17 For the reasons stated below, the Court adopts the report's recommended disposition, albeit
on 18 different grounds, and DENIES the motion for default judgment.

19 I. BACKGROUND

20 A. Plaintiff's Allegations 21 Plaintiff alleges that in April 2021—in the midst of the COVID-19
pandemic—he 22 attempted to shop at Defendant Dennis Delano's store, Fairfax Market, but was
denied access 23 because he was not wearing a mask. Dkt. No. 23 ("FAC") at ¶ 3. Plaintiff states
that he is 24 disabled due to severe anxiety, which limits his social interactions and ability to drive
long 25 distances. See id. at ¶ 15. Plaintiff claims that this anxiety is exacerbated when he wears a
mask, 26 so his doctor provided him with "a written medical exemption." Id. at ¶ 16. He offered to
provide 27 this exemption to the staff at Fairfax Market when they refused him access. Id. Despite
1 1, Plaintiff alleges that staff did not offer the opportunity to have someone shop for him and 2
simply refused him access. Id. at ¶¶ 11, 18. Plaintiff thus alleges that he was discriminated 3
against due to his disability, in violation of the Americans with Disabilities Act ("ADA") and the 4

Unruh Civil Rights Act (“Unruh Act”). *Id.* at ¶¶ 12, 14–27. He seeks injunctive relief under the 5 ADA, \$4,000 in statutory damages under the Unruh Act, and attorneys’ fees and costs. See FAC 6 at 7 (“Relief Sought”). 7 B. Procedural History 8 Plaintiff initially filed his complaint in July 2021. See Dkt. No. 1. Defendant moved to 9 dismiss the complaint, Dkt. No. 13, and the Court granted the motion with leave to amend. See 10 Dkt. No. 22. Plaintiff accordingly filed an amended complaint in December 2021. See FAC. 11 When Defendant did not file a response to the amended complaint, Plaintiff moved for entry of 12 default. See Dkt. No. 25. The Clerk entered default, Dkt. No. 26, and Plaintiff filed a motion for 13 default judgment, Dkt. No. 33. Judge Kim recommended that the Court deny the motion for 14 default judgment for failure to state a claim. See Dkt. No. 36. Plaintiff subsequently filed an 15 objection. See Dkt. No. 37. The Court therefore considers Plaintiff’s motion for default 16 judgment.

17 II. LEGAL STANDARD

18 Following an entry of default, the Court may enter a default judgment upon request. Fed. 19 R. Civ. P. 55(b)(2). However, the Court’s decision to enter a default judgment is “discretionary.” 20 *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). The Ninth Circuit has indicated that 21 “default judgments are generally disfavored,” and that “[w]henever it is reasonably possible, cases 22 should be decided upon their merits.” *Pena v. Seguros La Comercial, S.A.*, 770 F.2d 811, 814 (9th 23 Cir. 1985). When considering a motion for default judgment, a court must take “the well-pleaded 24 factual allegations in the complaint as true.” *DIRECTV, Inc. v. Hoa Huynh*, 503 F.3d 847, 854 25 (9th Cir. 2007) (quotation omitted). However, the “defendant is not held to admit facts that are 26 not well-pleaded or to admit conclusions of law.” *Id.* 27 The Court also has an “affirmative duty” to examine its jurisdiction over “both the subject 1 whether service of process on the defendant was proper. See *Craigslist, Inc. v. Naturemarket, Inc.*, 2 694 F. Supp. 2d 1039, 1054 (N.D. Cal. 2010); cf. *Mason v. Genisco Tech. Corp.*, 960 F.2d 849, 3 851 (9th Cir. 1992) (holding default judgment invalid due to improper service, even where 4 defendant had actual notice of the action).

5 III. DISCUSSION

6 As an initial matter, the Court has concerns that service of process was not proper.¹ It is 7 unclear how Defendant was served with the amended complaint. The proof of service states that 8 Defendant was served “by delivery to Plaintiff’s address.” See Dkt. No. 24 at 2. Plaintiff’s 9 counsel states that he “delivered [the amended complaint] to the address shown in a sealed 10 envelope” *Id.* The proof then lists the address of Fairfax Market. *Id.* 11 Under Federal Rule of Civil Procedure 4(e), “an individual . . . may be served in a judicial 12 district of the United States by . . . following state law for serving a summons in an action brought 13 in courts of general jurisdiction in the state where the district court is located or where service is 14 made.” Fed. R. Civ. P. 4(e)(1). California law, in turn, permits both personal and substituted 15 service.

See Cal. Civ. Proc. Code §§ 415.10, 415.20; see also Fed. R. Civ. P. 4(e)(2) (permitting 16 personal service). Yet the proof of service does not state that counsel gave the envelope directly to 17 Defendant as would be required for personal service. See Dkt. No. 24. It is not clear that 18 Defendant was even present at the store when counsel arrived. Rather, the proof simply states that 19 the amended complaint was delivered to Defendant's work address. 20 To the extent the proof suggests that Defendant was served through substituted service, it 21 also does not contain sufficient information to establish that service was proper. Under California 22 Code of Civil Procedure § 415.20: 23 [A] summons may be served by leaving a copy of the summons and 24 complaint during usual office hours in his or her office or, if no physical address is known, at his or her usual mailing address, other 25 than a United States Postal Service post office box, with the person who is apparently in charge thereof, and by thereafter mailing a copy 26 of the summons and complaint by first-class mail, postage prepaid to 27 the person to be served at the place where a copy of the summons and 1 complaint were left. When service is effected by leaving a copy of the summons and complaint at a mailing address, it shall be left with 2 a person at least 18 years of age, who shall be informed of the contents thereof. 3 4 Cal. Civ. Proc. Code § 415.20 (emphasis added). Here, there is no indication that counsel left the 5 amended complaint with anyone "apparently in charge" and over the age of eighteen at the store, 6 or that counsel subsequently mailed the amended complaint as required under § 415.20. In short, 4 the record does not contain sufficient information for the Court to determine that Defendant was 8 properly served." 9

IV. CONCLUSION

10 Accordingly, the Court adopts the report and recommendation on different grounds, and 11 DENIES the motion for default judgment. Plaintiff is further DIRECTED to complete proper 12 service on Defendant—or amend the proof of service with sufficient detail to establish proper 13 service—within 21 days of this order. If Plaintiff fails to complete service by this deadline, the 14 case will be dismissed without prejudice under Federal Rule of Civil Procedure 4(m). 15 IT IS SO ORDERED. 16 Dated: 3/1/2023 = 17 Z 18 □ J g d j/ 19 HAYWOOD S. GILLIAM, JR. United States District Judge 21 22 23 24 || 2 The report and recommendation appears to accept counsel's representation that he properly 25 served Defendant with the amended complaint, and concludes that "Plaintiff's attorney served the Amended Complaint by mail on Defendant." See Dkt. No. 36 at 2. But in looking at the proof of 26 || Service more closely, although counsel states that he placed the amended complaint "in a sealed envelope," he does not state that he placed it in the mail. See Dkt. No. 24. Rather, as explained 7 above, he states that he "delivered [it] to the address" for the Fairfax Market. Id. Counsel appears to have served the motion for default judgment in the same manner. See Dkt. No. 33-3 (noting 28 that the motion was served "by hand" by "deliver[ing] [it] in a sealed envelope addressed" to the Fairfax Market).