

18-7893

No. _____

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

SHEILA HALOUSEK
Petitioner

v.

BANK OF AMERICA, N. A.
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
APPELLATE DEPARTMENT,
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF YUBA,
THIRD APPELLATE DISTRICT

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ORIGINAL

QUESTIONS PRESENTED

The federal mandated civil rights to due process are so vital and inherent to the fundamental and effective operation of law as to warrant two Amendments, the Fifth and the Fourteenth Amendments, to the United States Constitution, which stipulates that no one shall be "deprived of life, liberty or property without due process of law." In this case, the lower court has so far departed from the accepted and usual course of proceedings with regard to these civil rights as to necessitate clarification. First, what constitutes due process in order to provide actual notice as legally required for process service? Second, what is required for the consistent application of this law? Third, what is required for the application of relief when said law is violated?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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For cases from state courts: the opinion of the highest state court to review the merits appears at Appendix A to the petition and is unpublished.

The remaining California court decisions appear at Appendix B through D to the petition and are unpublished.

JURISDICTION

The date on which the highest state court decided this case was November 17, 2017 and filed on November 27, 2017. A copy of that decision, from the Appellate Division of the Superior Court of California, County of Yuba, Third Appellate District, appears at Appendix A.

A timely Petition for Rehearing, filed on December 6, 2017, with the Appellate Court, as above, was thereafter denied on the following date: January 4, 2018; a copy of the order denying rehearing appears at Appendix C.

A timely Petition for Review, filed on January 31, 2018, in the Supreme Court of the State of California, was thereafter denied on the following date: March 14, 2018; this information appears at Appendix D.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Constitution:

The Constitution states only one command twice, the requirement for due process. The genesis of due process found in the United States Constitution is as follows: the Fifth Amendment stipulates that, according to the federal government, no one shall be "deprived of life, liberty or property without due process of law." The Fourteenth Amendment, ratified in 1868, uses the same eleven words, called the Due Process Clause, to describe a legal obligation of all states, which includes California as well as the counties and municipalities incorporated therein. Section One of the Fourteenth Amendment to the United States Constitution states in the relevant part: "...[N]or shall any State deprive any person of life, liberty, or property, without due process of law...." These words have as their central promise an assurance that all levels of American government must operate within the law ("legality") and provide fair procedures.

The U.S. Supreme Court has published many opinions on this issue and has arrived at the conclusion that due process is essentially the right of a party to be provided "notice" and "an opportunity to be heard" on all issues in dispute. Such a requirement provides that notice must be in advance so that one might be speak up to be heard prior to any other action taken. In the U.S. Supreme Court case of *Grannis v. Ordean* (1914) 234 U.S. 385, 34 S. Ct. 779, 58 L. Ed. 1363 [234 U.S. 385], the Court stated, "The fundamental requisite of due process of law is the opportunity to be heard. Petitioner contends that, if she had actually been "heard," the merits of her case would have prevailed.

California Constitution Article 1 – Declaration of Rights:

Section 1. “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.”

Section 7. (a) “A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws;”

Section 13. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated;”

California Code of Civil Procedures Governing Process Service:

With regard to process service related to possession of real property, basic rules, in addition to requirements specific to unlawful detainers, must be strictly followed. California Rules of Civil Procedure § 415.30, governs rules for mailing: which requires, “sending a copy of summons and complaint by first-class mail or airmail to the defendant, together with 2 copies of notice and acknowledgment form; **service is complete on date defendant executes a written acknowledgment; if form not returned.**” However, in Petitioner’s case, these forms were returned by the Postal Service as undeliverable, preventing Petitioner from acknowledging. Accordingly, these legal requirements were not met.

Summary proceedings for obtaining possession of real property in certain cases, with regard to unlawful detainers, improper service is strictly construed against Bank of America under California law. California Courts have explicitly held that service of process is strictly construed against the Respondent. In *Bishop v. Silva*, the Court, quoting the California Law Revision Commission, noted that “[t]he excuse of impossibility, impracticability, or futility

should be strictly construed in light of the need to give a defendant adequate notice of the action so that the defendant can take necessary steps to preserve evidence.” (*Bishop v. Silva* (1991) 234 Cal.App.3d 1317, 1321 [285 Cal.Rptr. 910])

The Summary Proceedings for Obtaining Possession of Real Property in Certain Cases, California Code of Procedure §§1161- 1179a, provide for expedited response times for tenants, limited discovery and trial calendar precedence. Because of the summary nature of Unlawful Detainer proceedings, California Courts require that landlords must strictly comply with all statutory requirements when pursuing an Unlawful Detainer. (See also, *Kwok v. Bergen* (1982) 130 Cal.App.3d 596, 599, 181 Cal.Rptr. 795; *Briggs v. Electronic Memories & Magnetics Corp.*, (1975) 53 Cal.App.3d 900, 126 Cal.Rptr. 34).

Bank of America, Respondent, must fully comply with the state and local procedures for proper service of the Summons and Amended Complaint. For the Court to allow Bank of America’s invalid Summons and Amended Complaint to go forward would work a great hardship and undermine the clear mandate for strict compliance with statutory requirements in Unlawful Detainer cases. Service of the Summons, the Complaint, and subsequent documents, is an integral part of an Unlawful Detainer proceeding, and Bank of America should be held to this strict compliance standard.

Service can be made under California Code of Civil Procedure, 1162(a) (1) “By delivering a copy to the tenant personally.” However, Bank of America made excuses for missing Petitioner at home and secured permission to bypass this step and post instead.

Service can be made under California Code of Civil Procedure, 1162(b) (3) “If, at the time of attempted service, a person of suitable age or discretion is not found at the property

through the exercise of reasonable diligence, then by affixing a copy in a *conspicuous* place on the property, and also sending a copy through the mail addressed to the tenant at the address where the property is situated.” However, **the postings were not in a conspicuous place, and the mailed copies were returned as undeliverable**, accordingly, this form of service was also not complete. Petitioner did not discover the documents timely in order to support her adequate response and be heard.

While Bank of America has represented that their process servers, “knocked on both front and back doors,” this was not adequate as there are far more than just “both front and back doors.” Petitioner also objects to their representation of “hearing a woman inside.” (What exactly does a woman, as opposed to a dog or cat, stirring around inside a house sound like?) Petitioner would dispute this comment, she was not aware of any Process Server attempting to garner her attention. As there are not just both “front and back doors,” but eight doors to the outside, none of which are readily identifiable as a “main” door. Each door should have been knocked on to ensure garnering the attention of someone inside such a large house.

In *The Bank of New York Mellon v. Preciado*, 224 Cal. App. 4th Supp. 1 (Cal. Super. Ct. 2013) In the manner of service employed here, the statute requires that [service is made] by *affixing a copy in a conspicuous place on the property* and delivering a copy to a person residing there, if such a person can be found, and also sending a copy through the mail addressed to the tenant at the place where the property is situated (post and mail service). (See also, *Losornio v. Motta* (1998) 67 Cal.App.4th 110, 113–14 [78 Cal. Rptr. 2d 799]; *Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 513 [65 Cal. Rptr. 2d 457].)”

“[C]ompliance with the statutory procedures for service of process is essential to establish personal jurisdiction. **Thus, a default judgment entered against a defendant who was not served with a summons in the manner prescribed by statute is void.**” (*Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1444.)

Most process serving statutes in California are to be liberally construed, meaning any minor defects in service are generally allowed if the defendant is not prejudiced by the defect. However, because the Unlawful Detainer Act sets forth specific statutory requirements, service must be made in strict compliance with the statute. Deviations from the specific statutory requirements are not allowed, but can be remedied with other evidence of compliance.

In *American Express Centurion Bank v. Zara*, 199 Cal.App.4th 383, 131 Cal.Rptr. 99 (2011) and in *Carol Gilbert, Inc. v. Haller* (2009) 179 Cal.App.4th 852, 855, 865. The Court determined that:

“a distinction should be drawn between the sufficiency of service to support a default judgment, and the sufficiency of service for other purposes, including to avoid dismissal for want of prosecution. Indeed, such a reading is implied by the statute itself. At worst, where defects in service are asserted in derogation of a default judgment, it may be said that both parties are at fault—the plaintiff for not ensuring that service fully complied with the governing statutes, and the defendant for ignoring whatever service was attempted. The question must therefore be who should bear the burden of the difficulty thus created. Arguably, that question should be resolved against the plaintiff, on the grounds both that his is the first and best opportunity to obviate the difficulty, and that the defendant will otherwise incur a forfeiture.”

“[N]o California appellate court has gone so far as to uphold a service of process solely on the ground the defendant received actual notice when there has been a complete failure to comply with the statutory requirements for service.” (*Summers v. McClanahan* (2006) 140 Cal.App.4th

403, 414.) In Petitioner's case, were a rate reduction negotiation was in process, this created a dual tracking situation which is also not allowable.

See also, *California Casualty Ins. Co. v. Appellate Department* (1996) 46 Cal.App.4th 1145, 1147, 1149, "This is a small case, as cases go, but it raises a significant principle: judges, including appellate judges, are required to follow the law. In this case, the Appellate Department of the Los Angeles Superior Court decided a case on a point not raised by the parties, and without notice to the parties that it might do so."

Requirements for a motion to vacate a judgment in California under § 473:

California Code of Civil Procedure § 473(b) "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. Application for this relief shall be accompanied by a copy of the answer *or other pleading proposed to be filed therein*, [emphasis added] 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."

Numerous decisions of the California Supreme Court have stated that the law favors disposing of cases on their merits, and that any doubts must be resolved in favor of the party seeking relief from default. *They have also stated that when a party in default moves promptly to seek relief, very slight evidence is required to justify a trial court's order setting aside a default.*

Code of Civil Procedure Section 473(b) is a remedial measure to be liberally construed, and any doubts existing as to the propriety of setting aside a default there under will be resolved

in favor of a hearing on the merits (*Fasuyi v. Permatex, Inc.* (2008) 167 Cal. App. 4th 681, 694–703, 84 Cal. Rptr. 3d 351; *Berman v. Klassman* (1971) 17 Cal. App. 3d 900, 910, 95 Cal. Rptr. 417).

Petitioner contends that her Motion to Set Aside and Vacate the Judgment filed on February 6, 2017: first, timely moved the Court for relief from default; second, made a sufficient showing of mistake, inadvertence, surprise or excusable neglect; and third, her pleading constituted a sufficient “answer or other pleading.” As Petitioner met all of these necessary statutory conditions, she should have prevailed.

Additional Authorities - Policy of Law Favors Trial on Merits:

The policy of the law is that controversies should be heard and disposed of on their merits (*Fasuyi v. Permatex, Inc.* (2008) 167 Cal. App. 4th 681, 694–703, 84 Cal. Rptr. 3d 351; *Berman v. Klassman* (1971) 17 Cal. App. 3d 900, 909, 95 Cal. Rptr. 417).

STATEMENT OF THE CASE

This petition is from an order made after the judgment, which deprived Petitioner of her substantial rights and civil liberties. It is a travesty of justice that Petitioner’s home, property, and home based agricultural business have been foreclosed upon without due process, which is required to be lawful. If due process had been followed, Petitioner would have completed a hardship loan modification and been able to stay in her home, continuing her agricultural business, cattle ranching, without interruption.

Prior to the foreclosure, Petitioner had started the process for a hardship loan modification. However, before this process could be completed, Petitioner's property was foreclosed upon. The subsequent default judgment and eviction were undertaken without due process or adequate notice and under threat of arrest and of being shot by law enforcement. If due process had been followed, Petitioner would have had the opportunity to complete the loan modification process.

Petitioner contends that the Summons and Complaint were not properly served. Petitioner should have been served in person. However, since Petitioner was not sitting on one of eight door steps waiting to be presented with documents that she had no idea even existed, Bank of America obviously decided to avoid this step. So, on August 31, 2016, Bank of America filed an Application to Serve Summons by Posting and Mailing: There on Order – Unlawful Detainer, claiming that Petitioner was not sufficiently available to suit the convenience of Bank of America and their Agents and Representatives. Petitioner would argue that, in approving this Application, the Trial Court erred or abused its discretion in making this decision.

Thereafter, documents were posted in what Bank of America claims was a "conspicuous location." Again, not true, the residence in question has three sets of sliding glass doors that open from the ground floor to the outside, one regular door that opens from the ground floor to the outside, two regular doors that open from the ground floor into the garages, and two doors that open from the second floor to the outside with three sets of stairs to the ground. With that many doors, depending on the time of day, Petitioner's particular activity outside, where Petitioner happens to be inside when a decision is made to go outside, and thereafter return; Petitioner may use any one of eight doors to exit and enter the residence. That one set of documents, that

Petitioner had no idea existed so had no plan to go on a scavenger hunt to find, were posted on one door, into one of 3 two car garages, documents which then became part of the clutter comprising a pile of recyclables, including plastics, cans, bottles, boxes, paper and newsprint, does not meet the requirement of a “conspicuous location.” (In a garage, where Petitioner ceased parking in due to an unreasonable amount of clutter, in part due to said recyclables.) In fact, Petitioner would argue, that given the number of outside doors, a “conspicuous location” actually does not exist on that residence; a fact that Bank of America process servers should have clearly known.

Thereafter, Bank of America mailed documents via Certified Mail, which Petitioner did not receive and substantiated this via United States Postal Service tracking. Bank of America’s processing to qualify as due process should have been responsible enough to have taken steps to rectify this. Instead, Bank of America thereafter claimed that it only matters that the documents were mailed and that Petitioner’s lack of receipt, and therefore lack of knowledge of such information, is simply irrelevant. Such a position is contrary to the requirement under California Rules of Civil Procedure § 415.30, which governs rules for mailing. Since the burden of proof of compliance with the law is on Bank of America, they should be familiar with this requirement and such failure to comply.

Petitioner also did not timely receive Bank of America’s subsequent property posting, as located on the outside of an upstairs door, which had been appropriated by mud dauber birds and become mostly a bird sanctuary and almost never used due to the risk of disrupting baby birds in nests above said door and the risk of being hit on the head by fresh organic debris dropping.

Thereafter, Petitioner filed Notice of Motion & Motion to Quash Service, dated December 12, 2016; this motion was properly made under Section 418.10 of the Code of Civil Procedure. This filing should have been respected by Bank of America and upheld by the Trial Court. Petitioner argues that the Trial Court grievously erred and abused its discretion in not so doing.

As discussed above, these Bank of America's notices were not received timely, contrary to Respondent's erroneous and mistaken representation in their document of February 27, 2017. Since Petitioner made this clear in her filing of February 6, 2017, Bank of America should have know this prior to their filing of February 27, 2017. Petitioner would also note that she did not receive Bank of America's filing of February 27, 2017 until the hearing on March 2, 2017, when the Judge shared his copy for Petitioner to look at during a brief court recess. Due process requires that Petitioner have Respondent's documents prior to court proceedings so she can be sufficiently informed with time to prepare a response. Petitioner actually had great difficulty acquiring this documentation later from the court, even when requested in person. In fact, the Trial Court initially denied Petitioner access to the file.

REASONS FOR GRANTING THE PETITION

We hold that the federal mandated civil rights to due process are so vital and inherent to the fundamental and effective operation of law as to warrant two Amendments, the Fifth and the Fourteenth Amendments, to the United States Constitution, which states only this one command twice; stipulating that no one shall be "deprived of life, liberty or property without due process of law." In this case, the lower court has so far departed from the accepted and usual

course of proceedings as to necessitate the Court's supervisory power. This case presents important issues and provides the opportunity to provide clarity and consistency in application of law on important points: the due process required for notice with regard to adequate process service, consistent application of due process, and requirements for application of relief.

CONCLUSION

Accordingly, for the foregoing reasons, petitioner requests that this Court grant the petition for certiorari.

Respectfully submitted,

A handwritten signature in cursive script that reads "Sheila Halousek".

Sheila Halousek, in Pro Se

Dated: March 21, 2018