Tentative Rulings for August 23, 2024
Department 54

For any matter where an oral argument is requested and any party to the hearing desires a remote appearance, such request must be timely submitted to and approved by the hearing judge. In this department, the remote appearance will be conducted through Zoom. If approved, please provide the department's clerk a correct email address. (CRC 3.672, Fresno Sup.C. Local Rule 1.1.19)

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)
The above rule also applies to cases listed in this "must appear" section

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The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

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Tentative Rulings for Department 54

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(24)

Tentative Ruling

Re: ***Javaherie v. Heidari***
Superior Court Case No. 20CECG01471

Hearing Date: August 23, 2024 (Dept. 54)

Motion: Plaintiff Morteza Javaherie's Motion to Tax Costs

Tentative Ruling:

To grant.

Explanation:

Facts

Judgment in this case was entered on May 8, 2024. (Ybarra Decl., ¶¶ 1-2.) On May 29, 2024, after not having received service of a Notice of Entry of Judgment from defendants, plaintiff's counsel, H. Ty Kharazi, emailed defense counsel, Alaina N. Ybarra, and inquired about it. (Kharazi Decl., ¶ 8; Reply Decl., ¶ 2, Ex. 1.)[1] Ms. Ybarra advised him that she would send it shortly, and a few hours later Mr. Kharazi received the Notice of Entry of Judgment dated May 29, 2024 ("NOE1"). (Kharazi Decl., ¶ 8 and Ex. 1; Ybarra Decl., ¶ 3; Reply Decl., ¶ 4 and Ex. 1.) The proof of service attached to NOE1 reflects that it was served as follows: (1) mail notice was given to plaintiff's counsel, Mr. Kharazi (at his Fresno address, when his new address was in Arroyo Grande), and to counsel for defendant/cross-complainant Mostafa F. Heidari, Daniel L. Harralson; and (2) electronic (email) notice was given to Mr. Kharazi and his co-counsel, as well as to Mr. Harralson (at two email addresses). (Kharazi Decl., Ex. 1.)

However, NOE1 was never filed with the court. (Kharazi Decl., ¶ 5; court's judicial notice of its own file.[2]) Even so, plaintiff relied on the service of NOE1 as the date setting the deadline to file appeal, and Mr. Kharazi confirmed this with defense counsel. (Kharazi Decl., ¶ 4; Reply Decl., ¶ 4 and Ex. 1 (emails sent May 29, 2024, at 9:19 a.m. and 10:21 a.m.).) In at least the past year, all counsel have routinely communicated by electronic means, often as a preferred method over mailing material to each other. (Reply Decl., ¶ 6.)

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[1] The court has elected to consider the additional evidence filed on reply, since it merely confirms information included in counsel's initial supporting declaration; the new evidence is not used to make new arguments, so defendants are not placed at a disadvantage. (*Alliant Ins. Services, Inc. v. Gaddy* (2008) 159 Cal.App.4th 1292, 1308 (trial court has discretion whether to accept new evidence with reply papers, as long as other party has opportunity to respond); see also *Plenger v. Alza Corp.* (1992) 11 Cal.App.4th 349, 362, fn. 8.) Here, defendants have an opportunity to respond by calling for a hearing, and the court will also consider a request made at oral argument to file a written response.

[2] The court may take judicial notice of its file, even when not requested to do so. (Evid. Code, § 452, subd. (d) ["Records of . . . any court of this state"].)

On June 18, 2024, defendants filed another Notice of Entry of Judgment ("NOE2"). (Kharazi Decl., ¶ 3; Ybarra Decl., ¶ 4.) Ms. Ybarra states that she noticed, during the process of scanning NOE1 to e-file it, that its proof of service listed Mr. Kharazi's old mailing address. (Ybarra Decl., ¶ 4.) This appears to be her explanation for why she did not file NOE1 and why she instead filed NOE2 *over 3 weeks later,* on June 18, 2024.

On June 19, 2024, Mr. Kharazi questioned via email why NOE2 was prepared, advising that he had already received NOE1. (Ybarra Decl., ¶ 4, Ex. A; Reply Decl., ¶ 3, Ex. 2.) Ms. Ybarra responded that NOE2 was served "in the abundance of caution" since NOE1 listed Mr. Kharazi's old mailing address on the proof of service. (*Ibid.*) Mr. Kharazi responded that he had received NOE1 and "as per agreement we will use that date for our NOA [Notice of Appeal] deadline." (Reply Decl., Ex. 2 (email sent June 20, 2024, at 8:26 a.m.).)

Defendants' Memorandum of Costs was filed on June 21, 2024, and served by mail on that same date. The Motion to Tax Costs was timely filed on July 10, 2024.

Merits[3]

As relevant here, a memorandum of costs must be served and filed "within 15 days of service of the notice of entry of judgment . . . under Code of Civil Procedure section 664.5." (Cal. Rules of Court, rule 3.1700(a)(1).) This time limit is mandatory, and the failure to timely file and serve a cost bill may result in the waiver of costs. (*Hydratec, Inc. v. Sun Valley 260 Orchard & Vineyard Co.* (1990) 223 Cal.App.3d 924, 929.) The parties may agree, in writing, to extend the time to serve and file the memorandum of costs and the motion to strike/tax, or the court may extend the time. (Cal. Rules of Court, rule 3.1700(b)(3).) It seems evident that the parties did not agree to an extension. And the court can confirm it never ordered one.

The court must find that defendants have waived their right to claim costs, since they rely on essentially making up their own procedure regarding notice of entry of judgment based solely on their attorney's decision not to file NOE1 after it had been duly and properly served, and to instead wait three weeks to file and serve NOE2, and use that as the date from which to compute the deadline to file their memorandum of costs.

Defendants *served* NOE1 on May 29, 2024, but it was never *filed*. Ms. Ybarra states that she was scanning that document in order to e-file it, but she stopped when she noticed that the proof of service listed Mr. Kharazi's old address, and she decided not to file NOE1. She makes no mention of the fact that, even though the mailing address was not correct, NOE1 was properly served electronically. Thus, NOE1 was validly served. Service was not made defective by the inclusion of an old mailing address on the proof of service. Thus, there is no support for defendants' decision, especially with no notice to or discussion with plaintiff, to not file NOE1 and to instead rely on filing and serving NOE2

[3] The court wholly rejects plaintiff's first argument that the time to file the memorandum of costs must be calculated from May 8, 2024, when the court signed the judgment, so this argument is not discussed. Plaintiff offers no authority for the premise that the deadline is based off of notice of acceptance given to the filing attorney within the e-filing system.

on June 18, 2024 as starting the time limit to file the cost bill. Ms. Ybarra told opposing counsel that the process of essentially swapping out NOE2 for NOE1 was done "in the abundance of caution," which in context would appear to mean she did this in order *to protect plaintiff from her error on the proof of service*, when in actuality the process *benefitted only defendants* by extending their deadline to file their cost bill. This cannot be countenanced. A party cannot benefit from its own error to the detriment of the other side. The "error" with the mailing address did not invalidate NOE1. It would be unjust to allow an unwarranted extension of the time to file the cost bill when the service of NOE1 was perfectly valid, and plaintiff's counsel had asked defense counsel to confirm that plaintiff's time to appeal would run from service of NOE1, and defense counsel answered "yes." (Reply Decl., Ex. 1 (emails sent May 29, 2024, at 9:19 a.m. and 10:21 a.m.)

Defendants cite to *Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, for the proposition that a notice of entry of judgment must be both filed and served in order to be valid. (*Id.* at p. 65, fn. 5.) However, this case is inapposite and has no bearing on the analysis. There, the Supreme Court was considering the timeliness of an appeal, which in turn was dependent on whether the clerk's mailing of the judgment constituted the notice of entry of judgment "pursuant to [Code of Civil Procedure] section 664.5." (*Id.* at pp. 57-58.) There was no dispute that the prevailing party did not serve or file a notice of entry of judgment (*Id.* at pp. 54, 57), so the Supreme Court was not considering what invalidated a notice of entry of judgment by the prevailing party, which is at issue here. The Court merely observed, in a footnote, that Code of Civil Procedure section 664.5 required the notice of entry to be (1) served on all parties; (2) filed with the court; and (3) include a proof of service. (*Id.* at p. 65, fn. 5.) The Court was not considering a situation, such as the case at bench, where the party responsible for the notice of entry of judgment *serves* it but then unilaterally causes that document not to meet the requirements of section 664.5 by *not filing* it. Said another way, NOE1 was validly served, so to the extent defendants argue it is invalid because it was not filed, then defendants were responsible for making it invalid. They cannot extend their time to file their memorandum of costs through such methods.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KAG on 8/21/2023.
(Judge's initials) (Date)