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Clerk of the Superior Court

OCT 04 2012

By: D. Edwards, Deputy

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO

Citibank (South Dakota), N.A.,)	Case No. 37-2010-86241-CL-CL-CTL
)	
Plaintiff,)	
)	MEMORANDUM DECISION
v.)	AND ORDER AFTER HEARING ON
)	MOTION FOR ORDER DIRECTING
Diana Baltazar,)	CLERK TO ENTER JUDGMENT
)	
Defendant.)	
)	
)	
)	

I

Introduction

Plaintiff in this action is represented by the firm of Hunt & Henriques. Hunt & Henriques specializes in collection cases. The firm at any time may have hundreds, if not thousands, of cases pending in the San Diego judicial district. Hunt & Henriques is of the opinion that the Clerks' Office of the San Diego Superior Court has placed overly burdensome and illegal restrictions on Plaintiffs seeking to obtain Clerk's Default Judgments in collection cases based upon written agreements.

1 The motion in this case has been filed as an “exemplar” or “test case” to challenge the
2 procedures in the Clerk’s Office. Over one hundred similarly situated cases have Order to
3 Show Cause dates currently set in January/February 2013 awaiting this Court’s ruling in this
4 single “test case.” Therefore, this Court will first discuss the general operations of a Clerk’s
5 Default Judgment in San Diego County and second apply those parameters to the case at
6 hand. This ruling shall serve not only as a ruling in this single case but also, as a practical
7 matter, a recommendation to the Clerk’s Office regarding its current procedures.

8 The motion was heard on August 22, 2012 in Department 5 of the Central Division of
9 the San Diego Superior Court, before the Honorable Cindy Davis, Commissioner. Plaintiff
10 was represented by Kurtiss A. Jacobs, Esq specially appearing for Michael S. Hunt.
11 Defendant was not present. Given that default was entered against the Defendant on February
12 28, 2011; her failure to appear or file an opposition was not unexpected.

13 The matter was taken under submission to allow the Court to review statutory and case
14 law as well as the existing Clerk’s Office procedures. Subsequently on September 11, 2012,
15 the Court received an “Amicus Brief” in the form of a Proposed Memorandum Decision and
16 Order from Aurora Dawn Harris, Esq. of The Harris Law Firm and Elizabeth J. Arleo of The
17 Arleo Law Firm in opposition to Plaintiff’s motion. Neither Ms. Harris nor Ms. Arleo
18 represents the Defendant, Diana J. Baltazar. In addition to the Amicus filing, the Court also
19 received a letter dated September 12, 2012 from the National Association of Consumer
20 Advocates in support of the Amicus filing. Executive Director, Ira J. Rheingold, signed the
21 letter which was copied to Elizabeth Arleo, Esq. and Michael S. Hunt, Esq.

22 On September 21, 2012 the Court received Plaintiff’s Reply in Support of Motion For
23 Order Directing Clerk to Enter Judgment. In its Reply Plaintiff urged the Court not to
24 consider the Amicus Brief since its authors do not represent the Defendant, and even if they
25 did, the Defendant has been defaulted and is therefore barred from filing an opposition. Due
26 to the broad impact this ruling may have on the processing of default judgments, however, the
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1 Court considered all substantive arguments presented, including those of Amicus Counsel,
2 and rules on the merits accordingly.

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4 II

5 **Current Clerk's Office Procedures:**

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7 To obtain a Clerk's Default Judgment in a civil collection case based upon a written
8 agreement (for money only), the San Diego County Superior Court Clerk's Office requires
9 Plaintiff to do the following:

- 10 A) Submit the original contract or a copy of the contract with at declaration stating the
11 original contract cannot be submitted.
- 12 B) If the disclosure statement is submitted alone, the required activation language,
13 "Use of your card constitutes acceptance of the terms and conditions of this
14 statement," must exist in the disclosure statement.
- 15 C) A waiver of security interest must be submitted if the contract indicated a
16 collateral or security clause involving personal property.

17 (San Diego Superior Court – Judgment Checklist – Default by Clerk (CIVIL) SDSC CIV-198
18 Rev. 7/09))

19 Therefore, according to the Clerk's current procedures, in order to obtain a default money
20 judgment based upon a written agreement a Plaintiff must submit either the original contract
21 or a copy of it.

22 Plaintiff argues that the Clerk's requirement is illegal and asserts that no written
23 contract –neither the original nor a copy - need be produced. In support of its argument
24 Plaintiff relies on the plain language of Code of Civil Procedure Section 585(a), which states
25 in pertinent part:

26
27 In an action arising upon contract or judgment for the recovery of money
28 or damages only, if the defendant has, or if more than one defendant, if
any of the defendants have, been served, other than by publication, and

1 no answer, demurrer, notice of motion to strike of the character specified
2 in subdivision (f), notice of motion to transfer pursuant to Section 396b,
3 notice of motion to dismiss pursuant to Article 2 (commencing with
4 Section 583.210) of Chapter 1.5 of Title 8, notice of motion to quash
5 service of summons or to stay or dismiss the action pursuant to Section
6 418.10, or notice of the filing of a petition for writ of mandate as
7 provided in Section 418.10 has been filed with the clerk of the court
8 within the time specified in the summons, or within further time as may
9 be allowed, **the clerk, upon written application of the plaintiff, and
10 proof of the service of summons, shall enter the default of the
11 defendant or defendants, so served, and immediately thereafter
12 enter judgment for the principal amount demanded in the
13 complaint,** in the statement required by Section 425.11, or in the
14 statement provided for in Section 425.115, or a lesser amount if credit
15 has been acknowledged, together with interest allowed by law or in
16 accordance with the terms of the contract, and the costs against the
17 defendant, or defendants, or against one or more of the defendants.
18 (Emphasis added by Court).

19 The Court agrees with Plaintiff that Code of Civil Procedure Section 585(a) does not
20 require submission of any evidence, let alone the contract, to support the amount of damages.
21 Case law supports this interpretation. (See e.g. *Liberty Loan Corp. of North Park v. Petersen*
22 (1972) 24 Cal.App.3d 915, 918 [discussing former §585, subs. 1 & 2 which preceded §585,
23 subd. (a)].) When the Court inquired of the Clerk's Office as to why a copy of the written
24 contract was nonetheless required, the Court was directed to California Rule of Court 3.1806.

25 **Rule 3.1806. Notation on written instrument of rendition of judgment**

26 In all cases in which judgment is rendered upon a **written obligation to pay money,**
27 the clerk must, at the time of entry of judgment, unless otherwise ordered, note over
28 the clerk's official signature and across the face of the writing the fact of rendition of
judgment with the date of the judgment and the title of the court and the case.
(Emphasis added by Court)

The Clerk's Office has historically applied Rule 3.1806 broadly, requiring submission
of all written agreements as "written obligation(s) to pay money" before the clerk will enter a
default judgment. Its application of the rule does not draw any distinction between a
Complaint based upon a simple written contract and a Complaint involving a negotiable

1 instrument. Under current procedure, once an original written contract is obtained by the
2 Clerk's Office, the clerk makes a notation across the face of the contract cancels and merges it
3 into the judgment. The procedure applies equally to original contracts as well as copies. No
4 rationale for canceling and merging non-negotiable instruments has been provided to the
5 Court, nor any explanation as to the legal effect (if any) of doing so.

6 III

7 **CRC Rule 3.1806 Should Apply Only to Defaults Based on**
8 **Negotiable Instruments**

9
10 The title of CRC 3.1806 is "Notation on written instrument." Although the title of the
11 rule is not controlling, use of the word "instrument" in the title is telling. As discussed below,
12 there are significant differences between simple written contracts and negotiable instruments.
13 To apply CRC rule 3.1806 to defaults upon simple written contracts makes no sense
14 particularly where "cancelling and merging" contracts has no apparent substantive legal
15 effect. This Court holds CRC rule 3.1806 should only apply to defaults based upon
16 negotiable instruments.

17 In a recent unpublished decision, the California Court of Appeal, Fourth District
18 addressed an analogous issue.

19 Although it is not controlling precedent, the Court finds the analysis in the case of
20 *Wells Fargo Bank, National Association v. Fox* (2012) 12 Westlaw 1959658 compelling in its
21 reasoning. In *Wells Fargo Bank*, the Court of Appeal overturned Orange County Superior
22 Court's refusal to enter a default judgment in favor of Plaintiff Wells Fargo Bank ("the bank")
23 in a collection case where the defendant borrower had failed to file an answer or any
24 responsive pleading. The bank had filed a complaint for breach of contract, account stated,
25 and money had and received against the defendant. The defendant's debt had begun as two
26 business loans to the bank, one was ultimately converted to a credit card loan. The bank
27 produced copies of letters and other documents evidencing the loans. However, the trial court
28 continued to reject the proposed judgment stating the bank was required to "produce the

1 original instrument of indebtedness.” The bank brought a motion to force the clerk’s office to
2 enter judgment without the original documents, and the trial court denied the motion.

3 The Court of Appeal overturned the trial court on three grounds. It held that by failing
4 to answer, the defendant had admitted the material allegations of the complaint, and therefore
5 the bank had no responsibility to provide the court with sufficient evidence to prove them up.
6 It further held that even if the bank were required to prove up its case, it had submitted
7 admissible evidence to support each element of its cause of action. Finally it held that failure
8 to produce the original “instrument of indebtedness” did not justify denying entry of a default
9 judgment. In discussing this final issue the Court of Appeal noted the trial court may have
10 been relying on CRC 3.1806.

11 The Court of Appeal stated that CRC 3.1806 has only been interpreted in two
12 published decisions, both which involved negotiable instruments. It explained that the use of
13 the word “instrument” as opposed to “obligation” in the title of the rule reflected the “clear
14 purpose of the rule – to protect the makers of negotiable instruments from becoming twice
15 liable for the same obligation through the creditor’s post-judgment negotiation of the
16 instrument to a third-party holder in due course.” *Wells Fargo Bank, National Association v.*
17 *Fox* at 4. Explaining why CRC 3.1806 should apply only to negotiable instruments it stated:

18 The risk of double liability is not present when entering judgment
19 on a non-negotiable obligation, because a subsequent holder takes the
20 written obligation subject to any defense the maker would have against
21 the original holder, including the defense of extinguishment of the
22 obligation by entry of judgment. (Civ.Code, § 1459 [“A non-negotiable
23 written contract for the payment of money ... may be transferred by
24 indorsement, in like manner with negotiable instruments. Such
25 indorsement, shall transfer all the rights of the assignor under the
26 instrument to the assignee, *subject to all equities and defenses existing in
27 favor of the maker at the time of the indorsement*” (italics added)].)
28 “When a party recovers on a judgment for breach of contract, entry of
the judgment absolves the defendant from any further contractual
obligations, and the judgment for damages replaces the defendant’s duty
to perform the contract. [Citation.] Upon entry of judgment, all further
contractual rights are extinguished, and the plaintiff’s rights are
thereafter governed by the rights on the judgment, not by any rights
which might have been held to have arisen from the contract.”

1 (Tomaselli v. Transamerica Ins. Co. (1994) 25 Cal.App.4th 1766, 1770.)
2 *Id.*

3 The *Wells Fargo Court* concluded “Thus, rule 3.1806 has little or no substantive
4 purpose where the obligation sued upon is a simple contract, not a negotiable instrument.” *Id.*
5 at 4.

6 The Los Angeles Superior Court’s Appellate Division has recently come to the same
7 conclusion. In the matter of *HSBC Bank Nevada, N.A. v. Aguilar* (2012) 205 Cal.App.4th
8 Supp.6 the Los Angeles Appellate Division held the clerk should not have required a party
9 seeking a default judgment in a case for money and damages only to provide a copy of the
10 written contract. *Id.* at 8-9. The *HSBC Bank* court held CRC 3.1806 only applies to
11 negotiable instruments and remanded the case to the trial court to order the clerk to enter a
12 default judgment in favor of plaintiff. These recent cases appear to be consistent with
13 majority practice; Plaintiff represents that only eight counties in California currently require
14 additional evidence for entry of clerk’s default judgment, whereas the remaining fifty counties
15 do not.

16 IV

17 Scope of Ruling

18 The scope of this ruling is limited to those defaults where the plaintiff is seeking
19 money damages and court costs only. As articulated in the *HSBC Bank* ruling, the concept
20 behind allowing the immediate entry of a clerk’s judgment pursuant to CCP §585(a) is that
21 the nature of the case is such that the clerk is merely entering judgment based upon a fixed
22 sum that is readily ascertainable from the Complaint. Clerk’s default judgments are
23 appropriate where “no evidence is necessary to disclose the correct amount” *Id.* at 9. This
24 Court is by no means throwing the proverbial “baby out with the bathwater,” but rather
25 clarifying the types of cases in which copies of written agreements should and should not be
26 required prior to entry of a clerk’s default judgment.
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1 For example, if a plaintiff is seeking either attorney's fees or prejudgment interest
2 pursuant to a contract, the contract needs to be produced before default judgment can enter
3 and no modification of the current San Diego County Clerk's procedure is warranted.

4 Likewise, in a case based upon an open book, plaintiffs who wish to obtain attorney's
5 fees pursuant to the court's default schedule and the open book statutes (Civil Code § 1717.5)
6 need to declare the non-existence of a written agreement. The premise behind allowing
7 default attorney's fees upon an open book is the **non-existence** of a written agreement. Civil
8 Code § 1717.5 states in pertinent part "If there is a written agreement between the parties
9 signed by the person to be charged, the fees provided by this section **may not be imposed**
10 unless that agreement contains a statement that the prevailing party in any action between the
11 parties is entitled to the fees provided by this section." (Emphasis added by Court). Thus, as
12 to open book causes of action where attorney's fees are sought, no modification of the current
13 San Diego County Clerk's procedure is warranted.

14 Finally, CCP § 585(a) provides a clerk may enter judgment for a "lesser amount if
15 credit has been acknowledged." Therefore, this ruling does not change the requirement that
16 Plaintiffs file Judicial Council form CIV-100 (CCP §§ 585-587 declarations) under penalty of
17 perjury, acknowledging any credits, and submit them to the Clerk before judgment may enter.
18 To the extent those forms and declarations are deemed incomplete or inadequate by the Clerk,
19 a judgment may still be rejected.

20 V

21 Application to the Baltazar Case

22 On February 23, 2010 Plaintiff filed its complaint alleging a single common count of
23 open book account in the amount of \$1,749.00. The Complaint is based upon a failure to pay
24 a Home Depot credit account that is currently held by Citibank (South Dakota) N.A. In its
25 Complaint, Plaintiff alleges Defendant became indebted to Plaintiff or its predecessor in
26 interest, within the last four years, on an open book account for money due. Plaintiff alleges
27 it was an open book because the account was stated in writing by and between Plaintiff in
28 which it was agreed the Defendant was indebted to Plaintiff. Plaintiff further alleges in its
Complaint the money was lent to Defendant at the Defendant's request and alleges a claim for

1 unjust enrichment. The Plaintiff waives both prejudgment interest and attorney's fees in its
2 Complaint.

3 On March 12, 2010 Plaintiff filed a Declaration of Reasonable Diligence executed by
4 a registered process server indicating three attempts at service on three different calendar
5 dates with substituted service being affected on the third date. Also on March 12, 2010
6 Plaintiff filed an Amended Proof of Service indicating service was effected on Defendant,
7 Diane Baltazar via substitute service upon Jose Perez, Defendant's father who resides at 867
8 Harwood Street, San Diego, CA 92154. The substitute service was effected by a California
9 registered process server. Defendant failed to appear or answer.

10 On February 28, 2011 Plaintiff obtained entry of default against Defendant. On April
11 8, 2011, the Clerk's Office rejected Plaintiff's request for entry of default judgment based
12 upon Plaintiff's failure to submit an original contract, or in the alternative a copy of contract
13 along with a declaration that the original was lost or unavailable.

14 Plaintiff re-submitted a request for entry of default judgment. On June 29, 2011 the
15 Clerk's Office again rejected Plaintiff's request for entry of default judgment stating "For an
16 action based upon a credit card account, Plaintiff must include the credit card contract
17 containing the terms and conditions with the declarations in order to obtain a judgment.
18 Plaintiff failed to submit the original contract and disclosure statement or a copy of the
19 contract and disclosure statement with at declaration why the original contract cannot be
20 submitted; or a statement that the contract is unavailable."

21 On October 11, 2011, Plaintiff attempted for a third time to obtain a default judgment.
22 This time, however, it sought to obtain a "Court" default judgment. The Clerk's office again
23 rejected the judgment based upon a number of grounds,: 1. The missing original contract or
24 copy; 2. A discrepancy between the balance requested in the judgment (\$1,472.00) and the
25 declaration of Shelley R. Baker stating the balance after credits was \$1,208.00; 3. Shelley R.
26 Baker's 585(d) declaration was not signed "under penalty of perjury"; and 4. The case
27 summary is missing a signature and date.

28 Plaintiff uses examples of a variety of rejection notices from clerks' offices around the
state to make the argument they are all unsupported under the plain meaning of CCP § 585(a).
Because many of the examples simply do not apply in this case, the Court will decline to

1 address them here. However, to the extent Plaintiff's argument focuses upon the requirement
2 of the production of the written agreement in order to obtain a clerk's default judgment for
3 money only, in a sum certain, with no attorney's fees and no contract rate of interest on an
4 open book, account stated, or written contract, the Court agrees that no written need be
5 produced.

6 Amicus Counsel's arguments were presented in the form of a "Proposed Statement of
7 Decision & Order." The arguments are wide ranging and include attacks on Plaintiff for
8 failing to attempt to comply with the clerk's check lists. Amicus Counsel question the
9 authenticity of the process server's signature on the proofs of service. They argue Plaintiff's
10 substituted service is defective and did not comply with San Diego Superior Court's local
11 rules. They question the accounting on the proposed judgment. They argue the Complaint
12 does not state a cause of action for breach of contract. They argue it is unclear whether Civil
13 Code sections 1812.10 or 2984.4 apply (notwithstanding they are not checked as applying on
14 the Complaint).

15 Amicus Counsel also make arguments related to policy and the administration of
16 justice. They argue the clerk's checklists promote justice and efficiency by creating
17 uniformity in the work performed by the clerk. They argue the checklists also promote justice
18 since "the clerk's function is not to adjudicate facts." They take the position that clerks (and
19 some attorneys) are not savvy enough "to know the difference between a negotiable document
20 and a non-negotiable one, but a clerk can tell if there is a document or not..." therefore,
21 Amicus Counsel argue, the Court should maintain the status quo and require the production of
22 written agreements in all cases.

23 Finally Amicus Counsel argue that a plaintiff who does not submit a copy of the
24 written agreement is "likely one who is a complete stranger to any purported transaction and
25 without ownership of the very item on which his claims are based." They argue that the debt
26 industry is increasingly complex, with bundles of debt being sold into to vast securitization
27 trusts, and also that the intentional destruction of original documentation of an agreement
28 raises the issue of exoneration from further performance. Since collection Plaintiffs as a
group cannot be trusted, Amicus Counsel conclude, the Court should hold them to a higher
standard.

1 Amicus Counsel barely touch on CCP § 585(a) and do not even mention CRC 3.1806.

2 Upon review of the file and the arguments made, the Court finds Plaintiff has pled a
3 cause of action for common counts on an open book. The Plaintiff waived both prejudgment
4 interest and attorney's fees. The Court finds the substituted service was effective and
5 complied with San Diego Superior Court Rule 2.1.5. Plaintiff attempted personal service on
6 three different calendar dates at three different times and effected substituted service upon the
7 third attempt. Moreover, the declarant was a registered California process server. There is no
8 valid, admissible evidence before the Court to the contrary. The Court finds that Defendant
9 failed to file any responsive pleading, and has therefore admitted the material allegations of
10 the Complaint.

11 As to the policy arguments, the Court finds the legislature determined when it enacted
12 CCP § 585(a) that certain cases were appropriate for expedited processing. This Court has
13 faith in the Clerk's Office's ability to implement procedures consistent with the law and with
14 the ruling of this Court. Although the Court is sensitive to the increasing complexity of the
15 debt industry and the challenge it poses to many consumers, the Court is bound to interpret
16 the Code in the manner the Court believes is rational and supported by the law.

17 The Court agrees with the Amicus Counsel in one respect. Plaintiff's last request for a
18 default judgment was a request for entry of a Court Judgment, as opposed to a Clerk's
19 Judgment (*See* September 6, 2011 Request for Entry of Default Court Judgment). As a result,
20 the Court will decline to order the Clerk to enter the judgment last requested in the file. If the
21 Plaintiff were to file a Request for Entry of Clerk's Judgment in the net sum of \$1,472
22 (reflecting the original prayer of \$1,749.00 minus total credits of \$541) on the appropriate
23 form, filled in completely and accurately, signed under penalty of perjury, the Clerk would
24 then be obligated to enter such a judgment without further documentation.

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IT IS HEREBY ORDERED:

The Motion for Order Directing Clerk to Enter Judgment is denied. The Clerk will not be ordered to enter a Clerk's Judgment in the matter of *Citibank (South Dakota), N.A. v Baltazar* at this time. The Clerk's office will be notified of this Court's recommendation to modify its processing requirements to conform to the mandates of Code of Civil Procedure § 585(a) when processing Clerk's default judgments.

Dated: October 4, 2012

By: 

CINDY D. DAVIS, Commissioner