Case3:10-cv-03799-RS Document16 Filed09/24/10 Page1 of 4

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8	UNITED STATES	DISTRICT COURT
9	NORTHERN DISTRICT OF CALIFORNIA	
10	SAN FRANCISCO DIVISION	
11	KEVIN M. HALL, an individual,	No.: C 10-03799 RS
12	Plaintiff,)) DEFENDANT'S OPPOSITION TO MOTION) FOR DEFAULT JUDGMENT
13	vs.) FOR DEFAULT JUDGMENT)
14 15	CARLOS A. GARCIA, in his official capacity as Superintendent of the San Francisco Unified School District,)))
16	Defendant.))
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	DEFENDANT'S OPPOSITION TO MOTION FOR	

DEFAULT JUDGMENT - NO.: C 10-03799 RS

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On September 22, 2010, plaintiff Kevin M. Hall filed a motion for default judgment, claiming that defendant Carlos A. Garcia, Superintendent of the San Francisco Unified School District, was properly served on August 31, 2010, and had not responded to the complaint within 21 days of such service, or by September 21, 2010. Doc. #14.

The motion should be summarily denied for several reasons. First, although plaintiff served the summons and complaint on the District's office manager, Denise Berndt, on August 31, and she accepted them on behalf of Mr. Garcia, plaintiff did not at that time serve the Supplemental Materials required to be served with the summons and complaint under Civil Local Rule 4-2.² Plaintiff did not serve those papers until September 9, 2010. See Declaration of Denise Berndt, filed herewith ["Berndt Decl."], ¶ 2. As a result, service was not complete until September 9. Indeed, defense counsel expressed the belief that service had been completed on September 9 in defendant's motion for extension of time and accompanying declaration, filed September 20, 2010, two days before plaintiff filed the motion for default judgment. Docs. #11, 12.

Second, defendant's motion for an extension of time to respond was also filed prior to any alleged deadline to respond. Thus, defendant appeared in the case prior to September 21 and announced his intent to defend against the action. This should be reason enough for the court to deny any default request. See Eidson v. Arenas, 155 F.R.D. 215, 218 (M.D. Fla. 1994) (motion for default judgment denied where defendant filed a motion for a twenty day extension to file answer and filed a motion to dismiss within the extension period; motion to dismiss stayed defendant's time to answer until issuance of the court's order); de Antonio v. Solomon, 42 F.R.D. 320 (D. Mass. 1967) (intent to defend by asserting privilege against self-incrimination prevented entry of default).

Third, defaults are disfavored and cases should be decided on the merits. As a result, all

Ordinarily, this would not be proper service under federal or state law since an individual defendant can only be served by (1) substitute service under California law, which would have required plaintiff to also mail the summons and complaint (see Cal. Code of Civ. Proc., § 415.20) or (2) personal service. Simply leaving the summons and complaint with the office manager is not proper under Federal Rule of Civil Procedure 4(e)(2)(B) because the District's office was not Mr. Garcia's "dwelling or usual place of abode." Thus, plaintiff's service of process on August 31, did not comply with statutory requirements. Nonetheless, the District accepted service of the summons and complaint.

Plaintiff did not request that defendant waive service under Rule 4(d).

Case3:10-cv-03799-RS Document16 Filed09/24/10 Page3 of 4

doubts are resolved against the party seeking default. *Pena v. Seguros La Commercial, S.A.*, 770 F.2d 811, 814 (9th Cir. 1985). Thus, even if the complaint was properly served on August 31, this court should exercise its discretion to refuse to enter default judgment against defendant for what is, at most, a technical default of three days. *Lau Ah Yew v. Dulles*, 236 F.2d 415, 416 (9th Cir. 1956) (affirming denial of motion for entry of default judgment where defendant did not timely respond to amended complaint as "within the discretion of the court").

Among the factors that a court may consider in exercising its discretion is whether a matter of substantial public importance is at issue. *General Motors Corp. v. Blevins*, 144 F. Supp. 381, 389 (D.C. Colo. 1956) ("the important question of the constitutionality of a state statute should not be determined on default"). Here, plaintiff has raised the issue of whether the United States Supreme Court's decision in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) renders California Penal Code section 626.9 of the Gun Free School Zone Act of 1995 unconstitutional. He has specifically requested a declaratory judgment that defendant's denial of an exemption under Penal Code 626.9 is unconstitutional under the Second and Fourteenth Amendments. Such an issue should be determined on the merits.

Further, any alleged failure to timely respond to the complaint was technical at most and hardly rises to the level of delinquency Federal Rule of Civil Procedure 55 is designed to rectify. As explained above, defense counsel had a good faith belief that the complaint was not served until September 9. She sought an extension of time to answer the complaint from plaintiff in a conversation on September 17. Doc. #12, ¶ 4. When plaintiff did not respond, defendant filed a timely motion for extension of time on September 20, one day before a response was due if the complaint was properly served on August 9, and ten days before a response was due if the complaint was actually served on September 9. Docs. #11, 12, ¶ 4. Finally, defendant's answer accompanies this opposition, and is thus filed only three days after the date plaintiff contends was the deadline for a response. Plaintiff has not suffered any conceivable prejudice to his case by a three-day delay in the filing of the answer.

This set of facts calls for a denial of the motion for default judgment. *McKnight v*. *Webster*, 499 F. Supp. 420, 424 (D.C. Pa. 1980) (denying motion for default judgment where defendant township sought extension of time to answer complaint when petition for a default judgment

Case3:10-cv-03799-RS Document16 Filed09/24/10 Page4 of 4

was filed, took no action while awaiting court's response, and wrote to court asking whether it had permission to file an answer); see also Meehan v. Snow, 652 F.2d 274, 277 (2d Cir. 1981) (motion for default judgment should have been denied where answer to amended complaint was filed ten days late); Spurio v. Choice Security Sys., Inc., 880 F.Supp. 402, 404 (D.C. Pa. 1995) (denying motion for default judgment where answer filed two days late); Martin v. Delaware Law Sch. of Widener Univ., 625 F. Supp. 1288, 1296, n.3 (D.C. Del. 1985) (denying motion for default judgment where answer filed three days after motion for default judgment); Dr. Ing. H.C.F. Porsche, AG v. Zim, 481 F. Supp. 1247, 1248, n.1 (N.D. Tex. 1979) (denying motion for default judgment where answer filed four days after motion for default judgment filed); Moriani v. Hunter, 462 F.Supp. 353, 354-55 (S.D.N.Y. 1978) (denying motion for default judgment where answer was filed 21 days late because defense attorney mistakenly believed that defendant had not been served). Any default was essentially technical, shortlived, caused by a good faith mistake as to the effective service date of the complaint, and a good faith belief that the time to respond would be extended. Defendant demonstrated to both plaintiff and this court his full intention to respond to the complaint – and vigorously defend the constitutionality of Penal Code section 626.9 – prior to the filing of the motion for default judgment, and should be allowed to do so. Finally, an entry of default must be requested and entered before a default judgment. Fed. R. Civ. P. 55. Plaintiff has not yet sought an entry of default.

For all these reasons, defendant requests that the Court deny plaintiff's motion for default judgment and grant defendant's pending request for an extension of time in which to respond to the complaint, which was made "before the original time...expire[d]." Fed. R. Civ. P. 6(b)(1)(A).

Dated: September 24, 2010

Respectfully submitted,

REMCHO, JOHANSEN & PURCELL, LLP

By: /s/
Thomas A. Willis

Attorneys for Defendant Carlos A. Garcia

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DEFENDANT'S OPPOSITION TO MOTION FOR DEFAULT JUDGMENT – NO.: C 10-03799 RS

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