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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

KEVIN M. HALL, an individual,	)	No.: C 10-03799 RS
	)	
Plaintiff,	)	<b>DEFENDANT'S OPPOSITION TO MOTION</b>
	)	<b>FOR DEFAULT JUDGMENT</b>
vs.	)	
	)	
CARLOS A. GARCIA, in his official capacity as	)	
Superintendent of the San Francisco Unified	)	
School District,	)	
	)	
Defendant.	)	
_____	)	



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

5 The motion should be summarily denied for several reasons. First, although plaintiff  
 6 served the summons and complaint on the District's office manager, Denise Berndt, on August 31, and  
 7 she accepted them on behalf of Mr. Garcia,<sup>1</sup> plaintiff did not at that time serve the Supplemental  
 8 Materials required to be served with the summons and complaint under Civil Local Rule 4-2.<sup>2</sup>  
 9 Plaintiff did not serve those papers until September 9, 2010. *See* Declaration of Denise Berndt, filed  
 10 herewith ["Berndt Decl."], ¶ 2. As a result, service was not complete until September 9. Indeed,  
 11 defense counsel expressed the belief that service had been completed on September 9 in defendant's  
 12 motion for extension of time and accompanying declaration, filed September 20, 2010, two days  
 13 before plaintiff filed the motion for default judgment. Docs. #11, 12.

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

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

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23 <sup>1</sup> Ordinarily, this would not be proper service under federal or state law since an individual defendant  
 24 can only be served by (1) substitute service under California law, which would have required plaintiff  
 25 to also mail the summons and complaint (*see* Cal. Code of Civ. Proc., § 415.20) or (2) personal  
 26 service. Simply leaving the summons and complaint with the office manager is not proper under  
 27 Federal Rule of Civil Procedure 4(e)(2)(B) because the District's office was not Mr. Garcia's  
 28 "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.

<sup>2</sup> Plaintiff did not request that defendant waive service under Rule 4(d).



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



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).

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