CASENOTE

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TAKING A DEFAULT OF A "DOE" DEFENDANT:

Before the default may be taken of one who purportedly has been served as a "DOE" defendant, specific procedures and notices must be complied with. If not, the default is subject to being vacated or set aside.

Code of Civil Procedure section 474 authorizes a plaintiff, who is ignorant of the true name of certain defendants, to name them as fictitious, or "Doe," defendants. Upon discovering a Doe defendant's true identity, the plaintiff must amend the complaint to allege the defendant's true name, "provided, that no default or default judgment shall be entered against a defendant so designated" unless two requirements are met. First, the summons must bear "on the face thereof a notice stating in substance" that the served person is being sued "under the fictitious name of" a specific, designated Doe defendant. Second, the proof of service filed with the court "must state the fictitious name under which such defendant was served and the fact that notice of identity was given by endorsement upon the document served as required by this section." ***Pelayo v. J.J. Lee Management Co., Inc***. (2009) 174 Cal.App.4th 484, 487-488

Here, plaintiff Rigoberto Guzman Pelayo amended his complaint to designate defendant J.J. Lee Management Co. (JJLM) as fictitious defendant "Doe 4." After JJLM failed to file a responsive pleading, plaintiff obtained clerk's entry of default against JJLM and a default judgment of $3.1 million. JJLM moved to vacate the default and default judgment, arguing that plaintiff had failed to comply with the requirements of section 474 regarding service of summons and proof of service. The trial court denied the motion. JJLM appeals. The court of appeal reverses.

"We conclude that substantial evidence supports the trial court's finding that the summons was properly endorsed—that is, that the summons "bore on the face thereof a notice stating in substance" that JJLM was being sued "under the fictitious name of" Doe 4. (§ 474.) The evidence is undisputed, however, that the proof of service of the summons did not contain the recitals required by section 474—that is, it did not "state the fictitious name under which such defendant was served" (Doe 4), and did not recite "the fact that notice of identity was given by endorsement upon the document [the summons] served as required by this section." Because section 474 makes compliance with the requirements for *both* the summons *and* proof of service mandatory to obtain a default or default judgment, the trial court erred in denying the motion to vacate." ***Pelayo v. J.J. Lee Management Co., Inc***. (2009) 174 Cal.App.4th 484, 488.

Section 474 provides, in relevant part, that "no default or default judgment shall be entered against" a fictitiously named defendant "unless it appears that the copy of the summons ... served upon such defendant bore on the face thereof a notice stating in substance: 'To the

person served: You are hereby served in the within action (or proceedings) as (or on behalf of) the person sued under the fictitious name of (designating it).' The certificate or affidavit of service must state the fictitious name under which such defendant was served and the fact that notice of identity was given by endorsement upon the document served as required by this section. The foregoing requirements for entry of a default or default judgment shall be applicable only as to fictitious names designated pursuant to this section."

Although no case has so held, a leading treatise and two practice guides have concluded that a plaintiff must comply with the statutory requirements for *both* the endorsement of the summons *and* for the recitals in the proof of service before a default or default judgment can be entered. (6 Witkin, Cal. Procedure (5th ed. 2008) Proceedings Without Trial, § 177, p. 619; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2008) ¶ 4:134, p. 4–20.1 & ¶¶ 5:223 to 5:225, p. 5–52; Civil Procedure Before Trial (Cont.Ed.Bar 4th ed.2008) §§ 17.10, 17.61, pp. 789, 817–818.) We agree with their conclusion. ***Pelayo v. J.J. Lee Management Co., Inc***. (2009) 174 Cal.App.4th 484, 496.

First, the plain language of section 474 dictates that result. The relevant language begins with the declaration that "that no default or default judgment shall be entered against a defendant so designated [as a fictitious defendant], unless it appears that the copy of the summons ... bore on the face thereof a notice stating in substance: 'To the person served: You are hereby served in the within action (or proceedings) as (or on behalf of) the person sued under the fictitious name of (designating it).' " The next sentence provides: "The certificate or affidavit of service *must state* the fictitious name under which such defendant was served and the fact that notice of identity was given by endorsement upon the document served as required by this section." (Italics added.) After thus prescribing the contents of the summons and proof of service, section 474) provides in the immediately following sentence: "The foregoing *requirements* for entry of a default or default judgment shall be applicable" to fictitiously named defendants. (Italics added.) The Legislature's use of the plural, "requirements," equates the statutory mandate for the proof of service to that for the summons, and thus makes clear that compliance with *both* mandates is necessary for a default or default judgment to be entered. (See, e.g., ***Mahdavi v. Fair Employment Practice Com***. (1977) 67 Cal.App.3d 326, 334 [Every word in a statute "is presumed to have been intended to have a meaning and perform a useful function."].)

Second, case law interprets the language of section 474 to be mandatory, not directory. In ***Armstrong v. Superior Court*** (1956) 144 Cal.App.2d 420), a defendant initially sued as a Doe defendant was served with summons and complaint. However, the summons did not bear the endorsement required by section 474 that he had been served as one of the fictitious defendants. (*Id.* at pp. 422, 424.) The appellate court held this omission was fatal. It noted that when the Legislature amended the statute in 1953, it included the language that "no default or default judgment shall be entered against a defendant" unless the statutory requirement was met. The court therefore concluded that section 474 "is not directory but mandatory, and its effect is to deprive the court of the right to proceed against a defendant served with such a defective summons." (*Id.* at p. 424; see also ***Fuss v. City of Los Angeles*** (1958) 162 Cal.App.2d 643, 646.)

Although ***Armstrong*** dealt with a plaintiff's failure to comply with the requirement of proper endorsement of the summons, its reasoning applies as well to a failure to comply with the requirements regarding the recitals to be included in the proof of service. Section 474 provides that the proof of service "must" contain the two recitals. Use of the word "must" establishes that

the requirement is mandatory. (***Rosenfield v. Superior Court*** (1983) 143 Cal.App.3d 198, 202; ***California Teachers Assn. v. Governing Board*** (1977) 70 Cal.App.3d 833, 842.)

Third, in the context of defaults and default judgments, the recitals required for the proof of service are not mere formalities devoid of purpose. As we have discussed, section 474 contains requirements for both the summons and the proof of service. If, after being served, the defendant fails to file a responsive pleading to the complaint, the court clerk, on request, has a ministerial duty to enter a default. (See, e.g., ***Goddard v. Pollock*** (1974) 37 Cal.App.3d 137, 143.) To discharge that limited duty, the clerk must review the court file to determine, among other things, that proof of service has been filed. (§ 585, subd. (a).) The requirement of section 474 that the summons inform the served person that he or she is being served as a particular Doe satisfies due process by informing the person that his or her liability, if any, is defined by the allegations of the complaint relating to that Doe defendant. But absent a proof of service containing the recitals required by section 474, the clerk has no way to ascertain whether the summons contained such notice. Nor, generally, would the trial court hearing a later default prove up. Thus, section 474 quite reasonably makes the required recitals for the proof of service a necessary prerequisite to entering a default and default judgment.

Finally, this result is consistent with the general principle that because a default judgment ends a case, "the rules leading to it are precise and should be followed to the letter. Where a plaintiff fails to adhere to those rules, a defendant need not suffer the consequences a default judgment brings." (***Jones v. Interstate Recovery Service*** (1984) 160 Cal.App.3d 925, 928.) ***Pelayo v. J.J. Lee Management Co., Inc***. (2009) 174 Cal.App.4th 484, 496-498.

CONCLUSION:

When served with a "DOE" amendment there are a multitude of issues a Defendant must research – including whether or not the Plaintiff's alleged ignorance in naming this "DOE: defendant is "feigned", whether or not the amendment "relates back" and whether or not the amendment was properly served in the first place [and whether or not it included a proper "Statement of Damages"]. A Defendant has a variety of motions to challenge a defective service, including a "motion to quash", among others. A "DOE" Defendant can now challenge the service of the amendment if the service was not exactly according to the proper requirements.