

Re: Motion to Compel Discovery

Date: February 6, 2018

On March 24, 2017, Katherine Bryan and Kristie Greiss (“Plaintiffs”) filed this action against Karen, Matthew, and Mary Willer.¹ The complaint alleges Plaintiffs received a judgment of \$393,046.75 in June 2012, against Matthew and Mary in an action filed with the Los Angeles County Superior Court (Case No. NC053600). This action is an attempt to enforce that judgment, by setting aside a transfer of real property in Colorado under the Uniform Voidable Transactions Act (Civ. Code, § 3439, et seq.).

On August 28, 2017, Plaintiffs propounded a first set of Special Interrogatories and Requests for Production on Matthew. The attached cover letter acknowledged that the discovery was being served electronically, but asked Matthew’s counsel (Victor Fernandez, Jr.) to contact Plaintiffs’ counsel (Terry Bell) if other arrangements were needed. (Bell Decl., Ex. 1.)

On October 17, and October 24, 2017, Attorney Bell reached out to Attorney Fernandez regarding the fact that discovery responses had not yet been received. (Bell Decl., Exs. 2 and 3.) Attorney Fernandez replied, on October 24, 2017, stating service of the discovery via email was improper as he had not authorized service in that manner. He then stated that he would nonetheless prepare responses but that his “email is not an authorization to accept service of any documents via email.” (Bell Decl., Ex. 4.)

A week later, however, Attorney Fernandez responded again stating he would not be responding to the propounded discovery due to concerns that doing so would constitute a waiver or acceptance of electronic service. He stated he would provide responses when the discovery was properly served. (Bell Decl., Ex. 5.)

On November 9, 2017, the first set of Special Interrogatories and Requests for Production were re-served by “Priority Mail Express” to Attorney Fernandez’s address of record. (Bell Decl., Exs. 6 and 10 [completed proof of service].) However, because there was “no secure location available” for delivery, the postal service left a Notice advising Attorney Fernandez of the attempted delivery which included a “reminder to schedule redelivery of your item.” (Bell Decl., Ex. 11; Fernandez Decl., Ex. B.) When Attorney Fernandez failed to pick up the package, it was returned to Attorney Bell on December 8, 2017.

After return of the mailed package, Attorney Bell emailed another courtesy copy of the propounded discovery on December 12, 2017, to Attorney Fernandez stating “[i]t has come to our attention that your office failed to retrieve discovery mailed to your office on November 9, 2017.” (Bell Decl., Ex. 7.) Attorney Fernandez responded stating again that

¹ When needed, the Willers are referred to by their first names for clarity and ease of reference. No disrespect is intended by the use of their first names.

Matthew would not respond until properly served. (Bell Decl., Ex. 8.)

On December 25, 2017, Attorney Bell again emailed Attorney Fernandez because the prior email of December 12, 2017, had failed to attach copies of the discovery. In the email Attorney Bell set a response date of January 2, 2018. (Bell Decl., EX. 9.) The next day, Attorney Bell explained (in a meet and confer letter) Plaintiff's position that service of the propounded discovery was completed on November 9, 2017, when mailed to Attorney Fernandez's office. (Bell Decl., Ex. 12.)

Plaintiffs now seek a motion to compel Matthew to respond to the first set of Special Interrogatories and Requests for Production. Plaintiffs also seek monetary sanctions (\$4,496) against Matthew and Attorney Fernandez and issue sanctions for misuse of the discovery process. Matthew opposes the motion.²

Special interrogatories and requests for production require service on the party to whom they are directed. (Code of Civ. Proc., §§ 2030.080, 2031.040.) When served by mail, service is complete at the time the document is deposited in the mail. (Code of Civ. Proc., § 1013(a), (c).) The sender does not have the burden of showing the item was actually received by the addressee. (*Silver v. McNamee* (1999) 69 Cal.App.4th 269, 280.) Instead, the addressee incurs "the risk of the failure of the mail." (*Ibid.*)

Here, the evidence shows Plaintiffs complied with Code of Civil Procedure sections 1012 and 1013 by correctly addressing the package and depositing it into the mail. Service was therefore complete on November 9, 2017. In addition, the evidence shows that the post office left a notice for Attorney Fernandez alerting him of the package and to reschedule delivery. Attorney Fernandez does not address that notice in the opposition. As the addressee, he incurs the risk of the failure of the mail.

The motion is granted. As Matthew did not seek to be relieved from the waiver of objections for failure to respond (Code of Civ. Proc., §§ 2030.290(a), 2031.200(a)), he is directed to file responses without objections to the first set of Special Interrogatories and Requests for Production within 20 days from service of notice of the order.

Plaintiff's request for issue sanctions is denied. (Weil & Brown, Cal. Practice Guide: Civ. Proc. Before Trial (Rutter 2017) ¶ 8:1184 [normally only monetary sanctions can be imposed on a motion to compel where there has been no prior court order compelling discovery].) The request for monetary sanctions are likewise denied as the motion to compel could have been averted by simply re-serving the discovery requests by regular mail or personal service.

² In addition to arguing Plaintiffs were never properly served with the discovery, Attorney Fernandez also argues this motion is untimely because it was served by mail; requiring completion of service by January 7, 2018. (Code of Civ. Proc., § 1013(a).) However, the proof of service indicates the moving papers were served by Express Mail, which only requires two extra court days for service. (Code of Civ. Proc., § 1013(c).) As service was made on January 9, 2018, notice of the motion was timely.