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FILED
LOS ANGELES SUPERIOR COURT
AUG 06 2002
JOHN A. CLARKE, EXECUTIVE OFFICER/CLERK
BY JENNY CHEA, DEPUTY

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF LOS ANGELES**

11 GERALD CUCCO and RANDY CUCCO,
12 *Plaintiffs,*
13 vs.
14 DANIEL B. SPITZER,
15 ET AL,
16 *Defendants.*

Case No. BC 253181
NOTICE OF MOTION
AND MOTION FOR AN
ORDER SETTING ASIDE
ORDER OF DISMISSAL
PURSUANT TO
CCP § 473;
MEMORANDUM OF
POINTS AND AUTHORITIES;
DECLARATION.

17 TO DEFENDANT CHRIS RUSSELO, IN PROPRIA PERSONNA, AND
18 DEFENDANT, DANIEL B. SPITZER, AND HIS ATTORNEY OF RECORD AND
19 CROSS-COMPLAINANT, DANIEL B. SPITZER, IN PROPRIA PERSONNA:

20 PLEASE TAKE NOTICE that on September 4, 2002 at 8:30 am, or
21 as soon thereafter as the matter can be heard, in Department 7
22 of the above-entitled Court located at 111 N. Hill St., Los
23 Angeles, California, PLAINTIFFS AND CROSS-DEFENDANTS, RANDY
24 JERRY CUCCO, will move the Court for an order setting aside the
25 order of dismissal of their complaint pursuant to CCP § 473.

26 This motion is made on the grounds that said dismissal
27 occurred because of the negligence of their attorney, LELAND L.
28

CI/CASE: BC253181 LEA/HEF#:
RECEIPT #: CCH471920073
DATE PAID: 08/06/02 02:42:14 PM
PAYMENT: \$23.00
RECEIVED: 0310
CASH: 23.00
CHECK: 00.00
CASH: 00.00
CHECK: 00.00

1 WHITNEY.

2 This motion will be based on the Notice of Motion, the
3 Memorandum of Points and Authorities, the Declaration of Leland
4 L. Whitney, the records and files of this case, and any further
5 oral or documentary evidence introduced at the hearing of this
6 motion.

7
8 DATED: August 2, 2002



9
10
11 BY: LELAND (L. L.) WHITNEY
12 LAWYER FOR PLAINTIFFS/CROSS-DEFENDANTS

13
14 **MEMORANDUM OF POINTS AND AUTHORITIES**

15
16 INTRODUCTION

17 As shown in the following declaration, incorporated herein by this
18 reference, plaintiffs' attorney, on May 24, 2002, was convinced all was
19 well. First, all of the orders had been made by a judge [the honorable
20 M. L. Hoffman] who was not assigned the case 'for all purposes'.
21 Consequently, he believed that any orders she made would be void.
22 Second, the absence of further orders in the month of May indicated that
23 the matter was closed. [Those beliefs were in error. That error was
24 created by numerous negligent acts of said attorney, the author of this
25 document]. However, CCP § 473, as currently revised, protects the
26 clients from that negligence if it is noted in such an attorney's
27 declaration. The incorporated declaration is such a declaration. [See
28 *Metro Service v. Casa de Palms* [1995, 2nd] 31 C. A. 4th 1481.]

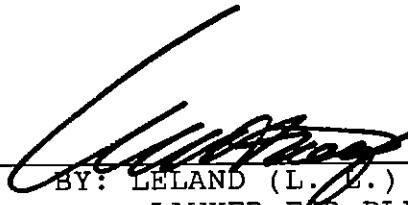
1
2 WHERE A COMPLAINT IS ORDERED DISMISSED BECAUSE OF THE NEGLIGENCE OF
3 PLAINTIFF'S ATTORNEY, THE COURT SHALL SET ASIDE SAID ORDER UPON A MOTION
4 PURSUANT TO CCP § 473 SUPPORTED BY A DECLARATION OF SAID ATTORNEY
5 CONFESSING SAID NEGLIGENCE.

6 In 1989, the Legislature modified CCP § 473 to include the
7 provision noted above. Early cases still required due diligence. In
8 1990, the Legislature clarified that issue to note explicitly that as
9 long as the motion was made within 6 months of the order, it must be
10 granted if supported by a declaration noting the attorney's negligence.
11 One such case noting that is *Metro Service v. Casa de Palms* [1995, 2nd]
12 31 C. A. 4th 1481. Herein, this motion is brought within 6 months of
13 the order of dismissal and the negligence of the attorney is confessed in
14 the supporting declaration incorporated herein. The Court must grant
15 this motion.

16 CONCLUSION

17 The order of dismissal was caused by the negligence of plaintiffs'
18 attorney. He has so declared herein. This court must grant this motion
19 and set aside the order dismissing plaintiffs' complaint.

20 DATED: August 1, 2002

21
22 

23 BY: LELAND (L. L.) WHITNEY
24 LAWYER FOR PLAINTIFFS

25 ///
26 ///
27 ///
28 ///

1 the sheriff concerning their attempts to serve said documents.

2 d. The first document confirmed service on Daniel B. Spitzer
3 ['Spitzer'] on December 10, 2001. He had called me that date confirming
4 service.

5 e. The next two documents appeared, at first glance, to be
6 the same type and style of documents. I merely glanced at ¶ "2. A.
7 Party Served:" and noted Chris Russelo's name [and aka's] was on one
8 document and American Generation Escrow Co.'s name was on the other.

9 f. At that time, on or about December 16, 2001, I negligently
10 believed that all defendants had been served.

11 g. On or about January 10, 2002, a demurrer was filed on
12 behalf of Spitzer and served upon me.

13 h. On January 11, 2002, the Court served upon me an OSC
14 regarding Chris 'Rommelo' and AmGen. I believed it was in error
15 because, when the complaint was filed, I had been noticed that this
16 matter would be handled by J. Weisburg in Dept. 55 'for all purposes'.
17 I enclose that notice as Exhibit 1. As a member of the California bar
18 for over 25 years, I was, at that time, aware that at one time, and for
19 all I knew, currently, there were two systems being used in LASC: the
20 'fast track' and the 'master calendar'. I was aware that, on occasion,
21 cases were misplaced between the two systems. I had not received any
22 notice that the case had been transferred from Dept. 55, the honorable
23 Stanley S. Weisburg to the honorable Marilyn L. Hoffman of Dept. 78. I
24 negligently believed that any orders by the honorable Marilyn L. Hoffman
25 were void as being a master calendar order. I was negligently unaware
26 of how this Court got involved in this matter; I still am. I
27 negligently believed that I could ignore all of her orders and that, at
28 hearing, the discrepancy would be resolved and the matter ordered off

1 calendar. On August 2, 2002 I spoke with 'Lorna' to, *inter alia*, obtain
2 a date for this motion. In discussing the file, she said that she had
3 no indication that the case had ever been assigned to the honorable S.
4 M. Weisberg and that, as she saw the file, it had always been with the
5 honorable M. L. Hoffman.

6 i. On January 12, 2002, I moved to Tijuana ['TJ'] hoping to
7 take advantage of NAFTA and create a boat-building business [the boat of
8 my own design]. [Because of my poverty, caused by my disability
9 stemming from an 18-wheeler truck vs. my small Italian sports car, my
10 wife and I were not getting along. Although unable to practice law full
11 time, I believed I could supervise a boat building effort using contacts
12 I had previously made in Mexico. I believed that if I could do so, my
13 marriage would be OK.]

14 j. Shortly after moving to TJ, I was prevailed upon to take
15 custody of a terminally ill ferret; my wife and I had had to give up our
16 ferret ['Bandit'] some time before; I would have wanted whoever had our
17 ferret to care for it if it were terminal; I agreed to do what I could
18 for this ferret. It was on a holistic regimen which was executed over a
19 16 hour day. I got it admitted to the Hoxsey clinic [not a veterinarian
20 clinic] in TJ who prescribed their tonic. I adjusted the ferret's
21 regimen to include the Hoxsey tonic which required doses every 6 hours
22 [24 hours a day]. I became deeply and emotionally involved with this
23 ferret ['Señorita Bandita'] just as if it had been my beloved Bandit.
24 It appeared to be getting well on that regimen.

25 k. I negligently failed to file notices of changes of address
26 reflecting my move to TJ.

27 l. I returned to my wife on or about February 1, 2002 to help
28 pay the bills and review the mail. It was on that occasion that I

1 received the demurrer and OSC.

2 m. As to the demurrer, on February 4, I called Spitzer's
3 attorney and agreed to amend my complaint to satisfy her demurrer. She
4 agreed to take the demurrer off calendar.

5 n. As to the OSC, that same day, I, believing that all
6 defendants had been served, looked for the sheriff's documents so that
7 I might file them. It was then, to my surprise, I saw that the document
8 which noted service of a defendant and the document which noted failure
9 to serve a defendant were identical as to ¶ 2. A. Elsewhere in the
10 document it noted that the 'served defendant' was in fact not served.

11 o. I immediately began a full time effort to locate said
12 defendants. It proved successful and on February 7, 2002, I served
13 defendant Chris Russelo [his true name] ['CR'] with the first amended
14 complaint. [I filed said first amended complaint the next day.] I
15 learned that AmGen was merely a then non-existent dba of his. He agreed
16 to immediately answer and file said answer. From my conversation with
17 him, it appeared quite likely that he had done nothing wrong and that,
18 as soon as discovery had confirmed this, that I would likely dismiss him
19 [and, of course, AmGen]. I told him so.

20 p. I again, pressed by the service effort and needing to
21 return to TJ, negligently failed to file a notice of change of address
22 herein and negligently failed to note the date of the OSC in my calendar
23 because I planned to file the POS in D 78 on February 9, before
24 returning to TJ, but negligently failed to do so mostly because of my
25 concern to promptly return to TJ to care for Srta. Bandita and problems
26 I had collecting the money due my from clients so that I could pay the
27 bills before services were disconnected.

28 q. On March 1, 2002, I moved into what I thought would be

1 permanent quarters in TJ; on or about midnite, March 3, 2002, I again
2 left TJ to return to my wife to pay the bills. On March 4, 2002, I
3 called CR to confirm he had filed his answer. He said he had done so
4 the previous week and mailed a copy of it to me in TJ. On March 4,
5 2002, I also called Spitzer's attorney who told me she intended to
6 answer [not demurrer to] my first amended complaint [as soon as the
7 answer was due].

8 r. On or about March 6, 2002 [March 6 herein], I served
9 notices of change of address in all of my pending cases including this
10 one. I negligently did so by mail herein rather than personally filing.

11 s. On March 6, 2002 an OSC re 1st amended complaint was
12 served on me noting a hearing date of April 8, 2002.

13 t. On March 24, 2002, I received, at my address in TJ,
14 Spitzer's answer to the first amended complaint together with requests
15 for discovery. It had been served on me on March 13, 2002.

16 u. I again returned to pay the bills on or about April 3,
17 2002, I don't exactly remember the date. I remember going to the bank
18 with a client and roommate [who I thought would be a key player in the
19 boat-building project] on April 1 in San Diego. I was very pressed for
20 time because I had to be back in TJ to leave on business for Sheridan,
21 Wyoming on April 5, 2002 with said client to return on April 12, 2002.

22 v. On April 4, 2002, I called my clients and told them of the
23 discovery and mailed it to them. I had not received the answer from CR.
24 I also called him on April 4, 2002. He told me he had mailed it to me
25 in TJ [to my original TJ address], but he did not have it with him at
26 work so he could not FAX it to me; he would mail it again the next day;
27 I told him to mail it to POB 4027, Long Beach, CA 90814 [the permanent
28 POB for my wife and myself]. He said he would do so. I also received

1 on April 4, 2002, the OSC noted above set for April 8, 2002. I
2 negligently believed that since the answer had been filed, it would go
3 off calendar. I negligently failed to arrange for a friend to appear to
4 be sure.

5 w. I returned to TJ April 4, 2002, left for Sheridan as
6 scheduled on April 5, 2002 and returned to TJ on April 12, 2002.

7 x. I received no other notices from the Court and negligently
8 thought the matter resolved. On my May trip to pay bills, I proceeded
9 with discovery. At that time, I picked up the answer of CR from the
10 POBox. The POS with it was dated February 15, 2002. On or about May
11 13, 2002 [business had kept me in town longer than normal], I called CR
12 to confirm my receipt. He told me that there had been a problem with
13 the initial filing and that he had but recently filed the answer. Later
14 that same day, I called the clerk, Superior Court, and confirmed that
15 the answer had been filed May 6, 2002. I still believed the matter was
16 without problems.

17 y. Then, on the afternoon of May 24, 2002 I received at my
18 address in TJ, a large packet of mail held together by a rubber band.
19 It was the first time I had received mail en masse. The OSC of May 8,
20 2002 together with the OSC's of April 8, 2002 and April 23, 2002 setting
21 a hearing for May 24, 2002 were in said packet. The explanation by CR
22 that his answer had not been filed until recently I thought explained
23 the OSC's of April. I negligently believed that since the OSC had been
24 issued so shortly after the answer had been filed that the Court had
25 been unaware of that fact that the answer had been filed and that at the
26 hearing of May 24, 2002, already past, the matter would go off calendar
27 when that was called to the Court's attention. In that same bunch of
28 mail, I received the order of May 10, 2002, re-setting the hearing for

1 May 23, 2002. Since that order violated CCP § 1005, requiring 20 days
2 notice for a person in a foreign country [not to mention the 10 days
3 required for notice of hearing], I negligently, but most confidently,
4 believed the matter must have gone off calendar on May 23, 2002. [I
5 don't understand why the notice of April 8, 2002 was returned. I
6 received mail at that address continuously from the middle of March
7 until June. Normally, it took about 7-10 days for the mail to get from
8 the LA basin to me in TJ, however, the Court will note that the mailing
9 of May 8, 2002 took somewhat longer. [Most of the packet had been
10 mailed 15-20 days before.]

11 z. I again returned to the LA basin June 1, 2002. My beloved
12 Srta. Bandita had died. I came back to pay the bills and make funeral
13 arrangements. My wife and I grieved long and hard. The client noted
14 above had renegged on his contract with me. I determined to return to
15 the LA basin, at least for the summer, and have done so. On June 7, I
16 again confirmed with the Clerk, Superior Court that the answer had been
17 filed May 6, 2002. I then called the clerk, Dept. 78, and asked if
18 'everything was A-OK' regarding CR's answer and was told it was fine;
19 there was a hearing set for late June concerning a cross-complaint but
20 nothing concerning me. I negligently relied upon said telecon.

21 aa. Despite all of the above, when I returned to TJ for the
22 last time on or about June 10, 2002, I received the order of dismissal
23 dated May 23, 2002. [I don't understand why the Court's research
24 attorney could not reach me by phone on May 8, 2002. During that period
25 of time [from the first of March to the end of May], my wife was calling
26 me most every week using that number. She never had any problems. Also
27 my client herein reached me on that number about the first of May. I
28 note that I have received the message reported, 'your call cannot be

1 completed as dialed, ...' when calling that number from the LA basin {to
2 contact my roommate} from a phone line that is not routed automatically
3 through a long distance carrier. On such a phone, as is my phone number
4 noted above, a long distance carrier must first be dialed -- I use
5 1016868.]

6 6. Although I am still grieving for Srta. Bandita, I make this
7 motion now.

8 7. I had been told, by CR, that the cross-complaint was dismissed
9 on June 24, 2002. On July 31, 2002, Spitzer's secretary could not
10 confirm. On August 2, 2002, Lorna, in D78, confirmed it was not.

11 8. Plaintiffs' answer thereto will be filed together with this
12 motion..

13 I swear under the penalty of perjury that the foregoing is true and
14 correct. Executed August 4, 2002 at Carson, California.

15
16 
17 _____
18 Declarant
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28

(PROOF OF SERVICE)
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a employed in the county of Los Angeles in the state of California; I am over the age of eighteen (18) years; my business address is POBox 4027, Long Beach, CA 90814

I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service, and the fact that the correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business.

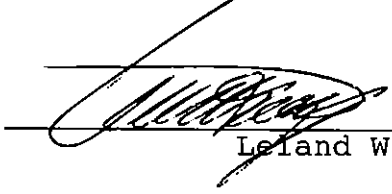
On August 5, 2002, I served the foregoing NOTICE OF CHANGE OF ADDRESS and NOTICE OF MOTION AND MOTION FOR AN ORDER SETTING ASIDE ORDER OF DISMISSAL PURSUANT TO CCP 473 on the interested parties in this action by placing a true copy thereof, enclosed in a sealed envelope with proper postage on this date at Carson, California, addressed as follows:

Mary G. Whitaker
LEWIS, et al.
221 N. Figueroa Street, Suite 1200
L. A., CA 90012

Chris Russello
c/o ALOHA DIVE & TRAVEL
9250 Reseda Blvd, # 16
Northridge, CA 91324

Daniel B. Spitzer
16311 Ventura Blvd., Suite 1200
Encino, CA 91436

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct. Executed
this 5th day of August, 2002, at Carson, California.


Leland Whitney