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District of New Mexico

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

IN RE:
ROBERT LENDELL CARVER and
ROSALIE DIANE CARVER,
Debtors.

No. 13-03-11768 SA

MEMORANDUM OPINION ON LIEN AVOIDANCE

This matter is before the Court on Debtors' Motion to Avoid Lien ("Motion") of ENGS Motor Truck Co., Inc. ("ENGS") (doc. 6), and the Objection thereto filed by ENGS (doc. 10). ENGS moved for summary judgment (docs. 33, 35) to which Debtors responded (doc. 37) and ENGS replied (docs. 42, 43). Debtors also filed for summary judgment (doc. 38) to which ENGS responded (docs. 42, 43) and Debtors replied (doc. 44). Countrywide Home Loans, Inc. filed a response in objection to ENG's motion for summary judgment (doc. 39) to which ENGS replied (doc. 41). Debtors appear in this proceeding through their attorney Davis & Pierce, P.C. (Cynthia M. Tessman). ENGS appears through its attorney Fairfield, Farrow & Strotz, P.C. (John E. Farrow). Countrywide Home Loans, Inc. appears through its attorney Roibal Law Firm, P.A. (Edward J. Roibal). This is a core proceeding. 28 U.S.C. § 157(b)(2).

Federal Rule of Civil Procedure 56(c) provides, in part, "The judgment sought shall be rendered forthwith if the

pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Therefore, if the Court finds that a material fact is in dispute, summary judgment should be denied. The Court's task at summary judgment is not to assess the credibility of conflicting testimony. Starr v. Pearle Vision, Inc., 54 F.3d 1548, 1557 (10th Cir. 1995)(citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)("Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict.")). Finally, the Court examines the factual record and reasonable inferences therefrom in the light of the nonmovant. Thomas v. International Business Machines, 48 F.3d 478, 484 (10th Cir. 1995); Cole v. Ruidoso Municipal Schools, 43 F.3d 1373, 1377 (10th Cir. 1994).

New Mexico Local Bankruptcy Rule 7056-1 governs summary judgment procedures. Relevant portions are set out:

> The memorandum in support of the motion shall set out as its opening a concise statement of all of the material facts as to which movant contends no genuine issue exists. The facts shall be numbered and shall refer with particularity to those portions of the record upon which movant relies.

> A memorandum in opposition to the motion shall contain a concise statement of the material facts as to which the party contends a genuine issue does exist. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies, and shall state the number of the movant's fact that is disputed. All material facts set forth in the statement of the movant shall be deemed admitted unless specifically controverted.

Whether a fact is material is determined by the substantive law governing the case. Anderson, 477 U.S. at 248. Therefore, the Court will briefly review Debtors' Motion and the Objection thereto. The Motion is contained in Debtors' Plan as ¶6. It states "The Debtor hereby MOVES, pursuant to § 522(f)(1)(A)[1] and § 522(f)(1)(B)[not relevant to this case], to avoid the judicial lien or non-purchase money security interest held by the following creditors: [ENGS]. Absent timely objection from a creditor, the Order of Confirmation will avoid its lien, and its claim will be treated in paragraph 2(d) [unsecured claims]." (Emphasis in original document.) ENGS' objection states that it is a

[1] Section 522(f)(1)(A) provides: "Notwithstanding any waiver of exemptions but subject to paragraph (3), the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is--
(A) a judicial lien, ... "

judgment creditor based on a New Mexico judgment[2] entered February 6, 1995, and that it filed a transcript of judgment in Valencia County on June 21, 1995. After a partial satisfaction, Debtors still owe $130,120.54. After the filing of the transcript of judgment Debtors purchased two different pieces of real property in Valencia County and have voluntarily impaired any exemption to which they would have been entitled.

Therefore, facts material to either parties' motions for summary judgment would include the existence and validity of ENGS's lien[3], whether it is a "judgment lien", whether Debtors are entitled to a homestead exemption, and whether Debtors have impaired their homestead exemption. As discussed below,

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[2] In 1989 New Mexico adopted its version of the Uniform Enforcement of Foreign Judgments Act (1964). See § 39-4A-1 et. seq. NMSA 1978. As discussed in detail below, ENGS obtained a California judgment and filed it in Bernalillo County, New Mexico.

[3] Normally, a proceeding to determine the validity, priority, or extent of a lien or other interest in property requires an adversary proceeding. Bankruptcy Rule 7001(2). However, an exception is made for "a proceeding under Rule 4003(d)". That Rule states: "A proceeding by the debtor to avoid a lien or other transfer of property exempt under § 522(f) of the Code shall be by motion in accordance with Rule 9014 [Contested Matters]." Therefore, the Court is convinced that no adversary proceeding is required in this case as between Debtors and ENGS. To the extent Countrywide seeks any affirmative relief, however, the Court is without jurisdiction to award any.

because the Court finds that ENGS does not have a valid lien, the Court need not discuss the other matters raised.

I. ENGS' UNDISPUTED FACTS

The Court will first address each of ENGS' alleged material facts.

1. Debtor Rosalie D. Carver is married to Robert L. Carver, and was formerly known as Rosalie Barney ("Barney"). (Admitted.) (In this opinion, the Court will generally refer to Ms. Barney as Ms. Carver, except where it is taking text verbatim from ENGS' pleadings.)

2. On November 9, 1994, ENGS filed a complaint in California against Barney, Waste Tech of New Mexico, and others. (Admitted.)

3. At all times material, Barney was President of Waste Tech. (Denied, attaching 2 affidavits.) The Court finds that this is a disputed fact.

4. As reflected in the Proof of Service and "affidavit" of process server filed in the California action (Exhibit C)[4], Barney was served with copies of the Summons and Complaint "pursuant to California law." Debtors dispute this "fact" and claim it is a legal conclusion. However,

[4] ENGS' Exhibit C is examined in detail in the DISCUSSION section, below.

the Court will assume that Debtors are not disputing that the record shows what it shows[5]. The Court will not read "pursuant to California law" as meaning "in full compliance with California law." Therefore, this fact will be considered undisputed, with this understanding.

5. No answer was filed by Barney or other defendants "within the time required by California law" and their default was entered by the Clerk. Debtors dispute this fact, and attach affidavits that Barney was never served; therefore, they claim there was no time required to respond. However, the record speaks for itself, and the Court finds it undisputed that no answer is in the record within the time allowed by California law.

6. On February 1, 1995, counsel for Barney filed a Motion to Set Aside Default Judgment, to allow the filing of an answer to the complaint. Debtors dispute this fact. They attach affidavits that show that Barney did not retain an attorney to enter an appearance, did not authorize the retention of an attorney, did not know of

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[5] In fact, there is no affidavit. An affidavit is "A voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths, such as a notary public." Black's Law Dictionary (8th ed. 2004). Rather, Exhibit C contains an unsworn declaration executed by the process server, albeit it is signed underneath a declaration "under penalty of perjury".

the retention, and never spoke to an attorney. However, the record speaks for itself, and the Court finds that an attorney, at least purporting to represent Barney, took those actions.

7. The California Court entered judgment against all defendants, including Barney. Debtors dispute this fact, claiming that the judgment was void. However, the Court finds that, according to the record, this judgment was entered.

8. The California Court heard and denied the motion to set aside default judgment. Debtors dispute this fact is relevant, but dispute it because she had not authorized the motion and had no knowledge of it. However, the Court finds that, according to the record, this Order was entered.

9. Thereafter, ENGS served the Order on Barney's attorney. Debtors' affidavits show that she never received this Order, and had never hired the attorney or authorized the Motion. However, the Court finds that, according to the record, this is undisputed.

10. On February 24, 1995, ENGS filed a Certificate of Notice of Filing Foreign Judgment in the New Mexico Bernalillo

County Court, with notice mailed by certified mail to each of the defendants. (Admitted.)

11. No response was filed and the Court issued a Transcript of Judgment, which was filed in Valencia County on June 21, 1995. (Admitted.)

12. On June 27, 1995, counsel for Defendants Barney and others filed a motion in the New Mexico action to stay execution pending a disposition of a motion for relief from judgment, and a motion to quash writ of garnishment. Debtors dispute this based on the affidavits. Barney never hired or authorized the retention of an attorney. However, the Court finds that these documents were filed in the New Mexico action.

13. On July 3, 1995, a Partial Satisfaction of Judgment was filed in Valencia County. (Admitted.)

14. On September 7, 1995, the New Mexico Court denied the motions to set aside and quash. Debtors dispute this based on the affidavits. Barney never hired or authorized the retention of an attorney. However, the Court finds that these documents were filed in the New Mexico action.

15. On September 25, 1995, the New Mexico Court entered a judgment on the writ of garnishment, ordering First

Security Bank to pay $33,180.49, which was paid. (Admitted.)

16. The judgment against Barney was entered prior to her marriage to Mr. Carver. (Admitted.)

17. On March 9, 1999, Debtors purchased real estate in Valencia County (“Lot 10"). (Admitted.)

18. Lot 10 was later conveyed. (Admitted.)

19. On June 16, 1999, Debtors purchased real estate in Valencia County (“Lot 7"). (Admitted.)

20. The Transcript of Judgment attached to Barney’s interest in Lot 7 as of June 16, 1999, as a first lien prior in time to any other lien except those identified in the deed. Debtors dispute this fact. They argue that it is a legal conclusion, and that because the original judgment was void, no lien could attach. The Court agrees this is a legal conclusion, so does not deem it undisputed.

21. On or about November 22, 2000, Debtors granted a mortgage in favor of America’s Wholesale Lender, in the amount of $220,800.00. (Admitted.)

22. This mortgage was released on or before April 30, 2001. (Admitted.)

23. On April 30, 2001, Debtors granted a mortgage in favor or Countywide Home Loans, Inc., in the amount of $223,250.00. (Admitted.)

24. This mortgage has not been released. (Admitted.)

25. Debtors granted a mortgage to secure a line of credit in favor of Countywide Home Loans, Inc. in the amount of $15,000, on or after April 30, 2001. (Admitted.)

26. Debtors have not conveyed Lot 7 and claim it as their homestead with a fair market value of $245,000.00. (Admitted.)

27. On December 18, 2003, Debtors amended their bankruptcy Schedule C to claim a homestead under New Mexico law. (Admitted.)

28. Debtors seek to avoid the lien of the Transcript of Judgment. (Admitted.)

29. ENGS' fact 29 is a copy of California Code § 473.5(a)[6]. The Court can take judicial notice.

30. ENGS' fact 30 sets out New Mexico Rule 1-012(H)(1). The Court can take judicial notice.

31. ENGS asks the Court to take judicial notice. It does.

II. DEBTORS' UNDISPUTED FACTS

First, Debtors correctly point out in their reply that ENGS' Response does not specifically controvert any of their facts. Therefore, under NM LBR 7056-1, "all material facts set forth in the statement of the movant shall be deemed admitted." Those facts are:

1. From the inception of Waste Tech of New Mexico, Inc. through its cancellation, Ernie Byers ("Byers") was at all times the individual responsible for the operation of

[6] That rule provides:
(a) When service of a summons has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered against him or her in the action, he or she may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the action. The notice of motion shall be served and filed within a reasonable time, but in no event exceeding the earlier of: (i) two years after entry of a default judgment against him or her; or (ii) 180 days after service on him or her of a written notice that the default or default judgment has been entered.

the business. Byers was also the sole shareholder of the outstanding stock.

2. Rosalie Carver (f/k/a Barney) never conducted business at the office of Waste Tech, 6313 State Road 47, S.E., Albuquerque, NM.

3. Carver never maintained an office at Waste Tech, 6313 State Road 47, S.E., Albuquerque, NM.

4. Carver did not spend time at Waste Tech, 6313 State Road 47, S.E., Albuquerque, NM.

5. The only activity Carver performed for Waste Tech was the filing of the initial corporate documents. That activity was not done at Waste Tech, 6313 State Road 47, S.E., Albuquerque, NM.

6. Carver was never employed by Waste Tech.

7. Carver did not have any control over operations at Waste Tech.

8. Paperwork was prepared for filing to remove her as President and/or Secretary shortly after the incorporation. Such documents were given to Waste Tech’s attorney for filing.

9. Carver believed that she had been removed as any type of officer from Waste Tech shortly after the incorporation.

10. Byers did not receive the documents served at the office of Waste Tech at 6313 State Road 47, S.E., Albuquerque, NM regarding the California action brought by ENGS and the New Mexico domestication of the judgment obtained in such action; however, he did learn of the actions.

11. Byers never informed Carver of the actions and Byers never provided Carver with any documentation relating to the actions.

12. Byers retained an attorney to enter an appearance in the California action, as well as the New Mexico domestication of the ENGS' judgment.

13. Carver did not know of the ENGS action and did not authorize the retention of any attorney to represent her in those matters. Carver did not know of the retention and never spoke to any attorney, Byers handled all communications with the attorneys.

14. No one ever asked Byers if Carver was employed by Waste Tech or if there was an address to which she could be personally served.

15. The lease that is the basis for the ENGS judgment in California was signed by Byers. Byers handled the paperwork in regards to leases. Byers signed his own name and on behalf of Waste Tech and returned the

documents to ENGS. When Byers returned the documents to ENGS Carver had not signed the guarantee accompanying the lease. Such documentation was never returned to Byers to have Carver sign the guarantee.

16. Carver did not sign the guarantee.

17. Carver never agreed to be a guarantor of that lease and she did not sign the guarantee.

18. The Transcript of Judgment was filed June 21, 1995.

19. The foreclosure action was filed on December 27, 2002.

III. ENGS' LEGAL ARGUMENT

ENGS argues that the Full Faith and Credit Clause of the United States Constitution limits the power of a court to reopen or vacate a foreign judgment, and that foreign judgments cannot be collaterally attacked[7]. ENGS admits that

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[7] Modern legal theory no longer distinguishes between "direct" and "collateral" attacks on a judgment.

> Modern changes in procedural concepts and notions of due process have also substantially diminished the intelligibility and usefulness of other distinctions and classifications in older remedial doctrine. Formerly, for example, a distinction was drawn between direct and collateral attacks on judgments. As explained later on in this Introduction, the evolution of merged procedure and the Rule 60(b) type of motion have made this distinction, always an uncertain one, an even less reliable basis for determining when and in what court relief may be obtained.
>
> ...
>
> [T]raditional terminology undertook to draw a

(continued...)

[7](...continued)
distinction between "direct" and "collateral" attacks on a judgment. Relief by way of a motion for new trial or an appeal was categorized as direct attack. Defensive relief, wherein a judgment was attacked in the course of another action in which the judgment was relied on by an opposing party, was usually categorized as collateral attack. But other forms of relief were sometimes characterized as "direct" and sometimes as "collateral." Thus, the independent action to set aside a judgment has been called direct attack because its immediate or direct object is to nullify the judgment. Such an action has also been called collateral attack because it is made in an action separate from, and thus collateral to, the action in which the judgment was rendered. The motion for relief from judgment, of which the modern exemplar is prescribed in Rule 60(b) of the Federal Rules, is "direct" in that its immediate aim is nullification of the judgment and in that it is made in the original action itself. On the other hand, at least as to some grounds on which the motion may be based, 60(b) relief is "collateral" in that it involves consideration of matters outside of, and thus collateral to, the record in the original action, for example when the attack is grounded on fraud in the proceeding.
...
[T]he distinction between "direct" and "collateral" attack is not helpful in analysis of the essential questions involved in determining whether relief from a judgment is appropriate in any given set of circumstances. The essential questions are as follows: First, does the person seeking relief have standing to obtain relief from the judgment in question on the ground upon which he relies? Second, is the forum in which relief is sought the appropriate one for considering the particular attack? Third, may evidence be offered in support of the attack when it "contradicts the face of the record"? The rules of this Chapter are formulated in terms of these questions rather than the characterization of an attack as "direct" or

(continued...)

lack of jurisdiction, lack of due process, or fraud may operate as a defense to destroy full faith and credit. However, ENGS claims that these defenses were never raised in either prior court proceeding. Specifically, the proposed answer attached by the California attorney to his motion to set aside default raised affirmative defenses but did not challenge jurisdiction of the California courts. Furthermore, ENGS claims that the California court already heard the motion to set aside, and denied it. And, because no challenge was made to the domestication in New Mexico, those defenses are now waived. ENGS also implicitly argues that California Code of Civil Procedure § 473.5(a) prohibits setting aside the California judgment because it is outside the time prescribed by that rule.

IV. DEBTORS' LEGAL ARGUMENTS

Debtors argue that the California judgment is void. Mrs. Carver was not served properly, so the California court never

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[7](...continued)
"collateral."
Restatement (Second) of Judgments 5 IN NT (1982). However, under former law, "the taking of independent proceedings in equity to prevent the enforcement of the judgment is a 'direct attack' as the term is used in the Restatement of this Subject." Restatement (First) of Judgments § 11, comment a (1942). But, in the case where the judgment was "void", it could be attacked either directly or collaterally. Id. § 4 comment a. Therefore, the distinction between a direct and collateral attack are not relevant at all to this case.

obtained jurisdiction over her. Debtors claim that application of the two year limitation of § 473.5(a) would deny Mrs. Carver her due process because she was not served and never had knowledge of the case. All arguments based on her alleged representation by an attorney must fail, they argue, because Mrs. Carver never authorized an attorney to act on her behalf. Finally, the California judgment is not entitled to full faith and credit because it is void, and any lien based upon it must be void.

V. DISCUSSION

This decision involves a determination of the validity of a judgment obtained in a California court against a New Mexico resident. It deals with Full Faith and Credit, the power of one court to set aside judgments of another, due process, and the California Code of Civil Procedure. Before turning to these issues, the Court will first address an issue of concern. Specifically, that is the ability of this Court to go behind the California judgment by looking at the documents and exhibits submitted in connection with the motions for summary judgment.

Restatement (Second) of Judgments § 77 (1982) states:

> (1) When a judgment is sought to be avoided through a procedure referred to in §§ 78 to 82[8], the fact that evidence supporting the claim for avoidance does not appear in the record of the proceeding in which the judgment was rendered is a relevant consideration in determining whether the procedure being used is appropriate, but does not make the evidence inadmissible.
> (2) When a judgment is sought to be avoided on the basis of evidence contradicting the record of the proceeding in which the judgment was rendered, it may be avoided only if the evidence is clear and convincing.

Comment b to this section provides the rationale for this paragraph:

> The modern rule begins with the premise that the opportunity to be heard is an interest generally paramount to that of insuring the finality of judgments. There is a comparably superior interest in protecting a person against judgment by a court

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[8] Section 80 is the applicable section. That section states:

> When a judgment is relied upon as the basis of a claim or defense in a subsequent action, relief from the judgment may be obtained by appropriate pleading and proof in that action if other means of obtaining relief from the judgment are unavailable to the applicant or the convenient administration of justice would be served by determining the question of relief in the course of the subsequent action.

Restatement (Second) of Judgments § 80 (1982). Because the bankruptcy court (as a unit of the district court) has "exclusive" jurisdiction over property of the bankruptcy estate, 28 U.S.C. § 1334(e), and because the bankruptcy court is designed to deal with, in one forum, all aspects regarding the debtor and the debtor's property, see, e.g., Elscint, Inc. v. First Wisconsin Fin. Corp. (In re Xonics, Inc.), 813 F.2d 127, 131 (7th Cir. 1987), the Court finds that the "convenient administration of justice" is served by determining this matter. See also 28 U.S.C. § 157(b)(2)(K) (proceeding to determine validity of lien is a core proceeding).

> lacking territorial jurisdiction over him or subject matter jurisdiction over the controversy. Accordingly, evidence is admissible to show that there was no opportunity to be heard or that the court lacked territorial or subject matter jurisdiction, even if the record of the action indicates otherwise. It is similarly admissible to show a fraudulently procured judgment.

The comment concludes with the observation that "the only practical accommodation is an evidentiary rule that the proof contradicting the record must be clear and convincing." Id.

In this case, the Debtors have filed a motion for summary judgment alleging facts that go directly to "territorial" jurisdiction. The "undisputed" facts in the motion were not disputed by ENGS, and are therefore deemed admitted. Therefore, the Court finds that Debtors have provided clear and convincing proof of their allegations.

A. FULL FAITH AND CREDIT AND ABILITY OF NEW MEXICO COURT OR BANKRUPTCY COURT TO VOID FOREIGN JUDGMENT

Article 4, Section 1 of the Constitution of the United States provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Full Faith and Credit is not required for another state's judicial proceedings, however, if the foreign court had no personal jurisdiction over the defendant[9].

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[9] ENGS' citation to Morris v. Jones, 329 U.S. 545 (1947) is not to the contrary. "The single point of our decision is that the nature and amount of petitioner's claim has been conclusively determined by the Missouri judgment and may not be relitigated in the Illinois proceedings, it not appearing that the Missouri court lacked jurisdiction over either the parties or the subject matter." Id. at 554. (Emphasis added.) Rather, Morris holds that if a matter has been litigated by a court with jurisdiction, that matter is binding on sister states. Accord 18A C. Wright, A. Miller & E. Cooper, Fed. Prac. & Proc. § 4430 ("If a defendant appears to challenge personal jurisdiction, disposition of the challenge is directly binding as a matter of res judicata.")

Similarly, ENGS cites Jordan v. Hall, 115 N.M. 775, 777, 858 P.2d 863, 865 (Ct.App. 1993). It is true that this case states that New Mexico courts have long given full faith and credit to judgment of sister states; however it adds "unless the judgment is void." It also states "Only the defenses of fraud or lack of jurisdiction may be raised to destroy the full faith and credit owed a foreign judgment." Id. at 778, 858 P.2d at 866.

Finally, ENGS citation to Halwood v. Cowboy Auto Sales, Inc., 124 N.M. 77, 82-83, 946 P.2d 1088, 1093-94 (Ct.App.) cert. denied, 123 N.M. 626, 944 P.2d 274 (1997) is not to the contrary:

> Under the doctrine of comity, state courts recognize foreign judgments where the proceedings on which the judgment is based are not contrary to the public policy of the forum, where the judgment sought to be recognized was rendered under circumstances wherein the foreign court had jurisdiction over the subject matter and the parties, and where the parties were given an opportunity for a full and fair hearing on the issues.

(Emphasis added.) In the instant case, the Debtors argue, and the undisputed facts tend to indicate, that the California court lacked personal jurisdiction.

> It is now too well settled to be open to further dispute that the "full faith and credit" clause and the act of Congress passed pursuant to it do not entitle a judgment in personam to extraterritorial effect if it be made to appear that it was rendered without jurisdiction over the person sought to be bound.

May v. Anderson, 345 U.S. 528, 533 (1953). (Citations omitted.) See also Restatement (Second) of Conflict of Laws § 105 (1971)("A judgment rendered by a court lacking competence to render it and for that reason subject to collateral attack in the state of rendition will not be recognized or enforced in other states.")

Full Faith and Credit does, however, require the Court of the second state to look at the local law of the state of rendition to determine whether the judgment is void for lack of competence. Id., comment b.

Similarly, Full Faith and Credit is also not required if the judgment was rendered in violation of due process rights. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980). See also Willis v. Willis, 104 N.M. 233, 235, 719 P.2d 811, 813 (1986); Barker v. Barker, 94 N.M. 162, 165, 608 P.2d 138, 141 (1980). And see U.S. v. Bigford, 365 F.3d 859, 864 (10th Cir. 2004):

> A judgment may therefore be attacked in a collateral proceeding in another jurisdiction on the basis that it was rendered without jurisdiction. Durfee v. Duke, 375 U.S. 106, 110, 84 S.Ct. 242, 11 L.Ed.2d

186 (1963); Pennoyer v. Neff, 95 U.S. 714, 730-33, 24 L.Ed. 565 (1877), overruled on other grounds by Shaffer v. Heitner, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977); Thompson v. Whitman, 18 Wall. 457, 85 U.S. 457, 469, 21 L.Ed. 897 (1873); see also Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 706, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982) ("A defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding."); United States v. Thompson, 941 F.2d 1074, 1080 (10th Cir. 1991) ("Only void judgments are subject to collateral attack."); First Nat'l Bank & Trust Co. of Wyo. v. Lawing, 731 F.2d 680, 684 (10th Cir. 1984) (quoting Ins. Corp. of Ireland, 456 U.S. at 706, 102 S.Ct. 2099); V.T.A., Inc. v. Airco, Inc., 597 F.2d 220, 224 n. 9 (10th Cir. 1979) ("[I]f a judgment is void, it is a nullity from the outset."); United States v. Indoor Cultivation Equip. From High Tech Indoor Garden Supply, 55 F.3d 1311, 1317 (7th Cir. 1995) ("[V]oid judgments are legal nullities[.]"); Rodd v. Region Constr. Co., 783 F.2d 89, 91 (7th Cir. 1986) ("[A] void judgment is no judgment at all."); Jones v. Giles, 741 F.2d 245, 248 (9th Cir.1984) ("A void judgment, as opposed to an erroneous one, is legally ineffective from inception."); Jordon v. Gilligan, 500 F.2d 701, 704 (6th Cir.1974) ("A void judgment is a legal nullity[.]").

(Footnote omitted.)

The proposition that the judgment of a court lacking jurisdiction is void traces back to the English Year Books, see Bowser v. Collins, Y.B.Mich. 22 Edw. IV, f. 30, pl. 11, 145 Eng.Rep. 97 (Ex. Ch. 1482), and was made settled law by Lord Coke in Case of the Marshalsea, 10 Coke Rep. 68b, 77a, 77 Eng.Rep. 1027, 1041 (K.B. 1612). Traditionally that proposition was embodied in the phrase coram non judice,"before a person not a judge"--meaning, in effect, that the proceeding in question was not a judicial proceeding because lawful judicial authority was not present, and could therefore not yield a judgment. American courts invalidated, or denied recognition to,

> judgments that violated this common-law principle long before the Fourteenth Amendment was adopted. See, e.g., Grumon v. Raymond, 1 Conn. 40 (1814); Picquet v. Swan, 19 F.Cas. 609 (No. 11,134) (CC Mass.1828); Dunn v. Dunn, 4 Paige 425 (N.Y.Ch. 1834); Evans v. Instine, 7 Ohio 273 (1835); Steel v. Smith, 7 Watts & Serg. 447 (Pa.1844); Boswell's Lessee v. Otis, 9 How. 336, 350, 13 L.Ed. 164 (1850). In Pennoyer v. Neff, 95 U.S. 714, 732, 24 L.Ed. 565 (1878), we announced that the judgment of a court lacking personal jurisdiction violated the Due Process Clause of the Fourteenth Amendment as well.

Burnham v. Superior Court of California, County of Marin, 495 U.S. 604, 608-09 (1990).

A judgment debtor may challenge the validity of a foreign judgment in the New Mexico courts for lack of subject matter jurisdiction or personal jurisdiction, lack of due process, fraud, or any other grounds that make the judgment invalid or

unenforceable.[10] Conglis v. Radcliffe, 119 N.M. 287, 289, 889 P.2d 1209, 1211 (1995).

In New Mexico, the procedure to challenge the validity of a judgment is set forth in SCRA 1-060(B), which provides in part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons:
> ...
> (4) the judgment is void;
> ...; or
> (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one-year after

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[10] As ENGS correctly points out, Thoma v. Thoma, 123 N.M. 137, 934 P.2d 1066 (Ct.App. 1996), cert. denied, 122 N.M. 808, 932 P.2d 498 (1997) will restrict this challenge if the issue of personal jurisdiction was raised unsuccessfully in the foreign action. In the instant case, as shown below, Debtors did not challenge personal jurisdiction in the California case, so that issue is not collaterally estopped. See also Durfee v. Duke, 375 U.S. 106, 111 (1963):

> However, when it is established that a court in one State, when asked to give effect to the judgment of a court in another State, may constitutionally inquire into the foreign court's jurisdiction to render that judgment, the modern decisions of this Court have carefully delineated the permissible scope of such an inquiry. From these decisions there emerges the general rule that a judgment is entitled to full faith and credit– even as to questions of jurisdiction– when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.

> the judgment, order or proceeding was entered or taken.

In federal courts,[11] the procedure to challenge the validity of a judgment is set forth in Fed.R.Civ.P. 60(b), which provides in part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: ... (4) the judgment is void; ... or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

New Mexico courts have no discretion to not set aside a judgment if it is void. Classen v. Classen, 119 N.M. 582, 585, 893 P.2d 478, 481 (Ct.App. 1995). Similarly, federal courts have no discretion to not set aside a judgment if it is void. Jackson v. FIE Corp., 302 F.3d 515, 522 (5th Cir. 2002)("It is a per se abuse of discretion for a district court to deny a motion to vacate a void judgment.")(Citation omitted.); Thos. P. Gonzales Corp. v. Consejo Nacional de Produccion de Costa

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[11] As a general rule, federal courts must enforce a state court judgment under full faith and credit when an action is brought for that purpose. "A federal court is as free as state courts, however, to deny enforcement if the state court lacked subject matter jurisdiction or personal jurisdiction." 18B Fed. Prac. & Proc. § 4469. (Footnotes omitted.)

Rica, 614 F.2d 1247, 1256 (9th Cir. 1980); V.T.A. Inc. v. Airco, Inc., 597 F.2d 220, 224 n.8 (10th Cir. 1979).

If service did not meet due process requirements, a judgment obtained thereon is voidable at any time. Classen, 119 N.M. at 582, 893 P.2d at 481. See also SCRA 1-060(B)(6) (no one year time requirement if judgment is void); Fed.R.Civ.P. 60(b) (same.)

B. DUE PROCESS

> The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant. Kulko v. California Superior Court, 436 U.S. 84, 91, 98 S.Ct. 1690, 1696, 56 L.Ed.2d 132 (1978). A judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere. Pennoyer v. Neff, 95 U.S. 714, 732-33, 24 L.Ed. 565 (1878). Due process requires that the defendant be given adequate notice of the suit, Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313-14, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950), and be subject to the personal jurisdiction of the court, Int'l Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

World-Wide Volkswagen Corp., 444 U.S. at 291.

> Historically, the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of court was prerequisite to its rendition of a judgment personally binding him. Pennoyer v. Neff, 95 U.S. 714, 733, 24 L.Ed. 565 (1878). But now that the capias ad respondendum has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not

> present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." Milliken v. Meyer, 311 U.S. 457, 463, 61 S.Ct. 339, 343, 85 L.Ed. 278, 132 A.L.R. 1357.

Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

> Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations.

Id. at 319.

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment. Hanson v. Denkla, 357 U.S. [235,] 251, 254, 78 S.Ct. [1228,] 1238, 1240, [2 L.Ed.2d 1283] (1958).

World-Wide Volkswagen Corp., 444 U.S. at 294. See also Yu v. Signet Bank/Virginia, 69 Cal.App.4th 1377, 1385, 82 Cal.Rptr.2d 304, 309 (Ct.App.), cert. denied, 528 U.S. 965 (1999)("A judgment of a court lacking personal jurisdiction is a violation of due process, and it is null and void everywhere, including the state in which it is rendered.")(citing Burnham, 495 U.S. at 609).

C. CALIFORNIA LAW ON JURISDICTION

California's long arm statute, Code of Civil Procedure § 410.10 provides: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." This provision manifests the state's intention to exercise the broadest possible jurisdiction, limited only by constitutional considerations. Sibley v. Superior Court of Los Angeles County, 16 Cal.3d 442, 445, 546 P.2d 322, 324, 128 Cal. Rptr. 34, 36, cert. denied, 429 U.S. 826 (1976). This allows California to exercise personal jurisdiction over a nonresident only if he or she has "minimal contacts" with the state such that "the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Id. (citing Int'l Shoe, 326 U.S. at 316-17).

In 2002, the California Supreme Court revisited the issue of personal jurisdiction over nonresident defendants in Pavlovich v. Superior Court, 29 Cal.4th 262, 268-69, 58 P.3d 2, 6-7, 127 Cal.Rptr.2d 329, 334-35 (2002):

> Under the minimum contacts test, an essential criterion in all cases is whether the 'quality and nature' of the defendant's activity is such that it is reasonable and fair to require him to conduct his defense in that State.
> ...
> When determining whether specific jurisdiction exists, courts consider the relationship among the

> defendant, the forum, and the litigation. A court may exercise specific jurisdiction over a nonresident defendant only if: (1) the defendant has purposefully availed himself or herself of forum benefits; (2) the controversy is related to or arises out of defendant's contacts with the forum; and (3) the assertion of personal jurisdiction would comport with fair play and substantial justice. The purposeful availment inquiry focuses on the defendant's intentionality. This prong is only satisfied when the defendant purposefully and voluntarily directs his activities toward the forum so that he should expect, by virtue of the benefit he receives, to be subject to the court's jurisdiction based on his contacts with the forum. Thus, the purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person.

(Citations and all internal punctuation omitted.)

D. CALIFORNIA JURISDICTION OVER MS. CARVER

This Court does not doubt that California could assert jurisdiction over Waste Tech in the California case based on the forum selection clause in the lease. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 n.14 (1985)(If forum selection provisions are “freely negotiated” and are not “unreasonable and unjust”, their enforcement does not offend due process.) See also Hunt v. Superior Court, 81 Cal.App.4th 901, 908, 97 Cal.Rptr.2d 215, 219 (Ct.App. 2000).

However, California’s assertion of jurisdiction over Ms. Carver, based on the established facts of this case, is

another matter[12]. It is undisputed that she did not negotiate the contract (Byers affidavit ¶ 17, Carver affidavit ¶ 18). She did not sign the guarantee (Carver ¶ 19).

ENGS' complaint (Exhibit A, doc. 35) ¶ 5 states "Each of the defendants is and was doing business in California within the jurisdictional boundaries of this Court at all times herein mentioned for the purpose of realizing pecuniary profit in connection with the matters hereinafter mentioned." Paragraph 21, specific to Ms. Carver, states "The obligations guaranteed by defendant Rosalie Barney ("Barney") and hereinafter mentioned were to be performed by defendants within the jurisdictional boundaries of this Court and were incurred within the jurisdictional boundaries of this Court, and this Court is the proper court for the trial of this action." The complaint does not allege any other contacts

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[12] Lack of personal jurisdiction is a defense that is personal to each defendant; the strength of the jurisdictional showing as to one defendant does not assist in or detract from a finding of jurisdiction as to another. Instead, each defendant's contacts with the forum must be considered individually. The requirement that a court have personal jurisdiction is based on due process, representing a restriction on judicial power in order to protect the individual liberty interests of the defendants.
1 A. Schwing, Cal. Affirmative Def. § 4:1 (2004 ed.)

with Ms. Carver or any other basis for California's jurisdiction. In California, once a defendant moves to quash service based on a lack of personal jurisdiction, the plaintiff bears the burden of proving that all jurisdictional criteria are met. Nobel Farms, Inc. v. Pasero, 106 Cal.App.4th 654, 657-58, 130 Cal.Rptr.2d 881, 884-85 (Ct.App. 2003). Therefore, once the Debtors raised the issue that the judgment was void for lack of personal jurisdiction, the burden shifted to ENGS to show there was jurisdiction. ENGS did not. See also Pavlovich, 29 Cal.App.4th at 273, 58 P.2d at 10, 127 Cal.Rptr.2d at 338 (2002)(Plaintiff has burden of demonstrating facts justifying jurisdiction.)

Also, even if Ms. Carver had signed the guaranty, which she has established she has not, a guaranty agreement for payment due a California corporation is not alone a sufficient basis to sustain personal jurisdiction. Sibley, 16 Cal.3d at 444, 546 P.2d at 323. Accord FDIC v. Hiatt, 117 N.M. 461, 464, 872 P.2d 879, 882 (1994)(A California resident's signing of a guaranty of a debt owed to a New Mexico creditor was insufficient to create personal jurisdiction over the guarantor in New Mexico.) Furthermore, the guaranty agreement itself (Exhibit 3 to Complaint, which is Exhibit A, doc. 35) does not contain a forum selection clause designating

California as the forum. It does state that all acts, transactions, rights and obligations "shall be governed, construed and interpreted in accordance with the laws of the State of California." (¶ 11). This is a choice of law provision only, not a forum selection clause. Hunt, 81 Cal.App.4th at 909, 97 Cal.Rptr.2d at 220 (Holding that execution of lease agreement and guaranty agreement with choice of law provision was insufficient to establish personal jurisdiction.) Accord Misco Leasing, Inc. v. Vaughn, 450 F.2d 257, 260 (10th Cir. 1971)(Execution in Oklahoma of a guaranty contract for a Kansas lease that was governed by Kansas law does not constitute to submission to Kansas jurisdiction.)

Hailing Ms. Carver into California court at this point to defend a document that she has undisputedly established that she did not sign or negotiate, and for a business she did not own or participate in, would offend the "traditional notions of fair play and substantial justice." Int'l Shoe Co., 326 U.S. at 316. Therefore, this Court concludes[13] that assertion of jurisdiction over Ms. Carver by the California courts violated due process and was not in accordance with either the

[13] The Court recognizes that it has the benefit of hindsight in this matter. Debtors, through their motion for summary judgment, have established facts that demonstrate the lack of jurisdiction. None of these facts were known to the California court.

United States Constitution or California law. Accordingly, the judgment should be set aside as void. Accord Galbraith & Dickens Aviation Ins. Agency v. Gulf Coast Aircraft Sales, Inc., 396 So.2d 19, 23 (Miss. 1981) (Mississippi court analyzed defendant's contacts with Oklahoma and set aside Oklahoma judgment obtained without minimum contacts.)

E. SERVICE OF PROCESS

Even if California could have constitutionally asserted jurisdiction, the facts establish that Ms. Carver was not properly served and never received actual notice of the case. Therefore, the judgment can be set aside on those grounds also.

ENGS' Exhibit C consists of the various summons, proofs of service, and process server's declaration that appear in the record of the California case. The proof of service for Rosalie Barney shows that the process server served the summons and complaint on "Rosalie Barney", defendant (and "other" box also checked, but no indication of name of other person), "by delivery", "at business", on November 29, 1994 at 12:45 p.m., at "6313 St. Rd. 47, SE, Albuq., NM". He also mailed on December 1, 1994 to "6313 St. Rd. 47, SE, Albuq., NM 87105." The Proof of Service states that the manner of service was "Substituted service on natural person" under CCP

415.20(b)[14]. The "Notice to Person Served" indicates that it was served "as an individual defendant." The required declaration of reasonable diligence submitted states, in part:

> I declare that before using substituted service under CCP 415.20(a) [sic, 415.20(a) applies to service on a business or other "entity"; service was attempted under CCP 415.20(b) which pertains to individuals], I diligently attempted to personally serve the defendant, Rosalie Barney.
>
> A substituted service was made on the above defendant as a personal service was not possible, due to the following reasons:

Residence Address:	1120 Green Acres Lane, Bosque Farms, New Mexico 87068
Attempts Made:	November 13, 1994; 2:15 p.m. advised Rosalie Barney was foreclosed on and no longer resided there.

[14] That Rule states:
(b) If a copy of the summons and complaint cannot with reasonable diligence be personally delivered to the person to be served, as specified in Section 416.60, 416.70, 416.80, or 416.90, a summons may be served by leaving a copy of the summons and complaint at the person's dwelling house, usual place of abode, usual place of business, or usual mailing address other than a United States Postal Service post office box, in the presence of a competent member of the household or a person apparently in charge of his or her office, place of business, or usual mailing address other than a United States Postal Service post office box, at least 18 years of age, who shall be informed of the contents thereof, and by thereafter mailing a copy of the summons and of the complaint by first-class mail, postage prepaid to the person to be served at the place where a copy of the summons and complaint were left. Service of a summons in this manner is deemed complete on the 10th day after the mailing.

Business Address:	6313 State Road 47, S.E., Albuquerque, New Mexico.
Attempts Made:	November 29, 1994; 12:45 p.m.

> Substituted service was made by leaving the papers with Connie Kelly, Office Manager of Waste Tech of New Mexico, at 6313 State Road 47, S.E., Albuquerque, New Mexico.

The declaration makes apparent that the process server made only one attempt at personal service, and believing that the attempt was being made at the wrong address, he proceeded directly to substitute service at what he believed was her usual place of business. The declaration does not state that he made any attempt at locating Ms. Carver's new residential address or that he inquired about any facts or circumstances from the unknown party that "advised" him that Ms. Carver had been foreclosed on and no longer resided there[15]. Nor does it disclose that he attempted to contact the United States Post Office or any other entity which would aid in the search. Nor does it disclose that he attempted to determine if her telephone number still worked, or if a new number could be provided by the telephone company. The Byers affidavit ¶ 16 states that no one ever inquired if Ms. Carver worked there or

[15] This statement is obviously hearsay, and the Court cannot use it as evidence that in fact Ms. Carver had been foreclosed on or moved. It does explain, in the mind of the process server, why he did not reattempt service at that location, however.

if anyone knew her address. The Court finds that this service was inadequate.

First, personal service is the method of choice in California under the statutes and constitution. Olvera v. Olvera, 232 Cal.App.3d 32, 41, 283 Cal.Rptr. 271, 277 (Ct.App. 1991). "When substituted or constructive service is attempted, strict compliance with the letter and spirit of the statutes is required." Id. (citation omitted.) See also In re Abrams, 108 Cal.App.3d 685, 692-93, 166 Cal.Rptr. 749, 754 (Ct.App. 1980) ("[T]he California cases have consistently enforced the requirement of strict statutory compliance for all types of constructive and substituted service, even where authorized by statute."; Zirbes v. Stratton, 187 Cal.App.3d 1407, 1417, 232 Cal.Rptr. 653, 658 (Ct.App. 1986)(Substituted service is a secondary method of service and in order to obtain personal jurisdiction, there must be strict compliance.) Accord Texas Western Fin. Corp. v. Edwards, 797 F.2d 902, 905 (10th Cir. 1986)(Tenth Circuit reviewed Texas case law and found that substitute service is a valid extension of that state's long-arm jurisdiction only upon a showing of strict compliance with the manner and mode of service of process.) There is an exception to the strict compliance rule, which is not applicable in this case. In

1969 California modernized its laws to allow substituted service on individual defendants. Espindola v. Nunez, 199 Cal.App.3d 1389, 1391, 245 Cal.Rptr. 596, 598 (Ct.App. 1988):

> [T]he provisions of the new law, according to its draftsmen, are to liberally construed... As stated in the Nov. 25, 1968, Report of the Judicial Council's Special Committee on Jurisdiction, pp. 14-15: "The provisions of this chapter should be liberally construed to effectuate service and uphold the jurisdiction of the court if actual notice has been received by the defendant, and in the last analysis the question of service should be resolved by considering each situation from a practical standpoint ..."

(Emphasis added.) Ms. Carver never received actual notice, so this liberal construction is not warranted. See also Bein v. Brechtel-Jochim Group, Inc., 6 Cal.App.4th 1387, 1392, 8 Cal.Rptr.2d 351 (Ct.App. 1992)(Acknowledging liberal construction if actual notice is received, but stating:

> To be constitutionally sound the form of substituted service must be "reasonably calculated to give an interested party actual notice of the proceedings and an opportunity to be heard ... [in order that] the traditional notions of fair play and substantial justice implicit in due process are satisfied."

(Citation omitted.))

Second, "the requirement that the plaintiff attempt personal service with reasonable diligence before use of substituted service is mandatory. ... If the requirement is not satisfied, the substituted service will be ineffective."

1 A. Schwing, Cal. Affirmative Def. § 2:14 (2004 ed.)(footnote omitted).

In this case, there was only one attempt at personal service, at a location discovered to be the wrong address. This amounts to no attempt at service at all. Thereafter, the process server proceeded directly to substituted service by leaving the legal documents at a business address which was not Ms. Carver's "usual place of business." If, indeed, this were her usual place of business, the process server should have attempted to serve her personally at that address, and if she were not there, to inquire when she would be expected. If he had done so, he would have been informed that this was not her "usual place of business" (or even an occasional place of business) and would have been aware at the time that the substituted service was inappropriate at that address.

"Ordinarily, ... two or three attempts at personal service at a proper place should fully satisfy the requirements of reasonable diligence and allow substituted service to be made." Espindola, 199 Cal.App.3d at 1392, 245 Cal.Rptr. at 598 (quoting, Note, Substituted Service of Process on Individuals: Code of Civil Procedure 415.20(b), 21 Hastings L.J. 1257, 1277 (1970).) See also Bein, 6 Cal.App.4th at 1392, 8 Cal.Rptr.2d at 353 ("The process server

made three separate attempts to serve the [defendants] at their residence. Each time, the gate guard denied access. Substitute service was appropriate.") In this case, the process server made one attempt. This is insufficient to justify substitute service. Compare Olvera, 232 Cal.App.3d at 42, 283 Cal.Rptr. at 278:

> [T]he standards of diligence required by the local rules of Los Angeles Superior Court [are]: recent inquires of all relatives, friends, and other persons likely to know defendant's whereabouts; searches of city directories, telephone directories, tax rolls, and register of voters; and inquires made of occupants of all real estate involved in the litigation.

(Discussing reasonable diligence for purposes of CCP 415.50 (substitute service by publication; emphasis in original.) The Court also notes that Ms. Carver gave the United States Postal Service a change of address. ENGS could have obtained service by mail through CCP 415.40[16] "[W]here mailing of summons was reasonably feasible, any method of service less likely to provide actual notice is insufficient." Donel, Inc.

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[16] That Rule, entitled "Service on person outside state", provides:

> A summons may be served outside this state in any manner provided by this article or by sending a copy of the summons and of the complaint to the person to be served by first-class mail, postage prepaid, requiring a return receipt. Service of a summons by this form of mail is deemed complete on the 10th day after such mailing.

v. Badalian, 87 Cal.App.3d 327, 332, 150 Cal.Rptr. 855, 858 (Ct.App. 1978). See also Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950):

> But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, or where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes."

(Citations omitted.)

Furthermore, service of process at a former place of business does not satisfy the requirements of CCP 415.20. Zirbes, 187 Cal.App.3d at 1418, 232 Cal.Rptr. at 659. See also Corcoran v. Arouh, 24 Cal.App.4th 310, 315, 29 Cal.Rptr.2d 326, 329 (Ct.App. 1994)("It is critical that a connection be shown between the address at which substituted service is effectuated and the party alleged to be served.")(Citation omitted.) See also CCP § 415.20 comment ("Section 415.20 authorizes substituted service, in lieu of delivery of process to a defendant personally, to be made on a defendant by delivering a copy of the summons and of the complaint to a person closely connected with him, usually at the debtor's place of business, dwelling house, or usual place

of abode. ... The term ‘usual place of business’ includes a defendant's customary place of employment as well as his own business enterprise.”)

Finally, in California, once a defendant challenges jurisdiction by alleging failure of process, the plaintiff bears the burden of proving the facts requisite to an effective service. Dill v. Berquist Constr. Co., Inc., 24 Cal.App.4th 1426, 1439-40, 29 Cal.Rptr.2d 746, 753-54 (Ct.App. 1994). Therefore, once the Debtors raised the issue that the judgment was void for lack of service, the burden shifted to ENGS to show there was effective service. ENGS did not.

In this case, delivery to a business address at which Ms. Carver never actually transacted business, to its “office manager” (which the record fails to even allege had any connection to Ms. Carver at all) did not satisfy the requirements for substitute service, even if substitute service had been justified.

ENGS argues that Ms. Carver participated actively in both the California and New Mexico cases. The undisputed facts, supported by the Byers and Carver affidavits, demonstrate otherwise. She never was aware of the cases, she never contacted an attorney to represent her, she never retained an attorney, and she never authorized the retention of an

attorney. See, generally, Restatement (Third) of Law Governing Lawyers § 27 (2004):

> A lawyer's act is considered to be that of the client in proceedings before a tribunal or in dealings with a third person if the tribunal or third person reasonably assumes that the lawyer is authorized to do the act on the basis of the client's (and not the lawyer's) manifestations of such authorization.

Therefore, the acts of the attorneys in the California and New Mexico cases cannot be attributed to Ms. Carver.

Three California cases demonstrate that the appearance of an unauthorized attorney cannot create personal jurisdiction over a party, or otherwise bind them. See Milrot v. Stamper Medical Corp., 44 Cal.App.4th 182, 186, 51 Cal.Rptr.2d 424, 426 (Ct.App. 1996):

> An appearance of an attorney does not create jurisdiction unless the attorney was authorized to appear. If the only basis of jurisdiction of the person in the particular case is appearance, a purported appearance by an unauthorized attorney cannot confer such jurisdiction and the resulting judgment is void.

(Citations and internal punctuation omitted. Emphasis in original.); Zirbes, 187 Cal.App.3d at 1414, 232 Cal.Rptr. at 657 ("Horrigan's appearance for Mrs. Stratton was unauthorized, thus the trial court was without jurisdiction to enter the judgment against her."); and Promotus Enter., Inc. v. Jiminez, 21 Cal.App.3d 560, 562, 98 Cal.Rptr. 571, 573

(Ct.App. 1971)(Defendant had no oral or written communications with attorney at any time and did not authorize him to enter an appearance on his behalf. The resulting judgment was void.)

Therefore, Ms. Carver cannot be deemed to have waived personal jurisdiction or consented to anything in either lawsuit. Furthermore, she should not be bound under collateral estoppel by any matters decided in them.

In sum, Ms. Carver was improperly served and never received actual notice of the California proceedings against her, and she did not consent to jurisdiction or waive any rights. Due to the lack of personal jurisdiction, the California judgment is void.

F. ENGS STATUTE OF LIMITATIONS ARGUMENT

ENGS argues that § 473.5(a) prevents Debtors from setting aside the default judgment at this time. First, the Debtors are not seeking to set aside the default judgment in the California court; rather, they are asking for this Court in a separate action in equity[17] to declare it void. If a judgment is void, any lien based on that judgment is also void, see Western States Collection Co. v. Shain, 83 N.M. 203, 204, 490

[17] To the extent that the distinction between law and equity is relevant, Bankruptcy Courts are traditionally courts of equity. Katchen v. Landry, 382 U.S. 323, 327 (1966).

P.2d 461, 462 (1971), and that is all Debtors need. See also Restatement (First) of Judgments § 13, comment c (1942)

Third, relief would be available in California courts despite § 473.5(a). California cases hold that due process requires setting aside default judgments obtained without service:

> Undoubtedly, if Binkert was not served with summons he was absolutely within his rights in moving to have the judgment set aside, because he was thereby, in violation of a fundamental principle, deprived of his property without due process of law; and this right he possessed irrespective of sections 473 or 473a[18] of the Code of Civil Procedure.

Washko v. Stewart, 44 Cal.App.2d 311, 317, 112 P.2d 306, 309 (Ct.App. 1941); Yeung v. Soos, 119 Cal.App.4th 576, 582, 14 Cal.Rptr.3d 502, 506 (Ct.App. 2004)("A void judgment may be challenged at any time." (Citing CCP 473(d)[19]); Ellard v. Conway, 94 Cal.App.4th 540, 544, 114 Cal.Rptr.2d 399, 401 (Ct.App. 2001):

> Compliance with the statutory procedures for service of process is essential to establish personal

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[18] Section 473a was repealed by Stats. 1969, c. 1610, p. 3373, § 22, operative July 1, 1970. It is now § 473.5.

[19] That rule provides: "The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order." Therefore, § 473(d) is an alternate way to set aside void default judgments.

> jurisdiction. Thus, a default judgment entered against a defendant who was not served with a summons in the manner prescribed by statute is void. Under section 473, subdivision (d), the court may set aside a default judgment which is valid on its face, but void, as a matter of law, due to improper service.

(Citations omitted.); Milrot, 44 Cal.App.4th at 188, 51 Cal.Rptr.2d at 427 ("A judgment entered without jurisdiction is void, and a void judgment may be set aside at any time. The time limitations stated in Civil Code of Procedure sections 663, 663a and 473 therefore do not apply.")(Citations omitted.) See also Munoz v. Lopez, 275 Cal.App.2d 178, 180-81, 79 Cal.Rptr. 563 (Ct.App. 1969):

> Appellant contends that a motion to set aside a default judgment not void on its face but void in fact for lack of jurisdiction over the person of the defendant must be made within one year of the date upon which the judgment is entered as provided in Code of Civil Procedure section 473a. That contention however, ignores the reality that a motion made pursuant to section 473a is not the only method of setting aside a default for failure of service.
>
> A trial court has an inherent equity power under which, apart from statutory authority, it may grant relief from a default judgment obtained through extrinsic fraud or mistake. That equitable power may be invoked by the party seeking to set aside the default judgment either by the filing of a separate suit for the purpose or by a motion made in the action in which the default was taken. The time limit for the filing of such a motion or separate suit is a reasonable time from discovery of the default judgment irrespective of when it may actually have been entered.
>
> While the grounds for an equitable action to set aside a default judgment are commonly stated as

> being those of extrinsic fraud or mistake, the terms are given a very broad meaning which tends to encompass all circumstances that deprive an adversary of fair notice of hearing whether or not those circumstances would qualify as fraudulent or mistaken in the strict sense. Thus a false recital of service although not deliberate is treated as extrinsic fraud or mistake in the context of an equitable action to set aside a default judgment.

(Footnotes and citations omitted.) Accord Hill v. Walker, 297 Ky. 257, 261, 180 S.W.2d 93, 95 (Ct.App. 1944):

> KRS 413.130 provides that relief for mistake or fraud must be commenced within five years after discovery of the fraud or mistake but not longer than ten years after the commission of the act. This statute has no application to a judgment that is void because the defendant was not before the court. He must have been a party to the suit with an opportunity to know of the fraud or mistake or to discover it after it was committed. A void judgment is no judgment at all, and no rights are acquired by virtue of its entry of record. A court may, in a proper proceeding, vacate it at any time. The lapse of time is no bar to such relief.

(Citations omitted.)(applying Kentucky law.)

Finally, state rules of preclusion yield to a federal default-judgment defendant's ability to contest personal jurisdiction in a federal proceeding. Jackson, 302 F.3d at 522-23:

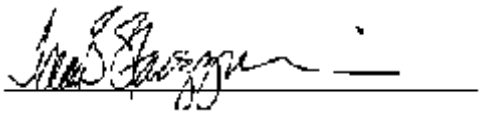
> [Rule 60(b)(4)] embodies the principle that in federal court, a "defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds. Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 706 (1982). ... As we clarified last year in Harper Macleod Solicitors v. Keaty & Keaty, 260 F.3d 389 (5th Cir.

> 2001), when a state rule of preclusion would operate to undermine a federal default-judgment defendant's ability to contest personal jurisdiction in federal enforcement proceedings, the state rule must yield to Rule 60(b)(4). ... The principle that a party may silently suffer a default judgment and later challenge personal jurisdiction is a "foundational principle of federal jurisdictional law." Id. at 397 and n.9.

Therefore, this Court finds that ENGS statute of limitations argument based on CCP § 473.5(a) must fail in this action.

CONCLUSION

Based on the above, the Court finds that the California judgment is void and that the lien on the Valencia County real estate is void and should be stricken.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on October 15, 2004, a true and correct copy of the foregoing was electronically transmitted, faxed, delivered, or mailed to the listed counsel and/or parties.

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