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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SANTA CLARA, SMALL CLAIMS DIVISION

Steven T. Kirsch, an individual,

Case Number: 2-04-SC-001196

Plaintiff

MEMO OF POINTS AND AUTHORITIES

v.

Charles Cunningham, *et al.*

Date: June 16, 2005

Time: 1pm

Defendants

Dept: 86

CCP 116.220 COURT MAY ISSUE CONDITIONAL JUDGMENTS

(b) In any action seeking relief authorized by subdivision (a), the court may grant equitable relief in the form of rescission, restitution, reformation, and specific performance, in lieu of, or in addition to, money damages. The court may issue a conditional judgment. The court shall retain jurisdiction until full payment and performance of any judgment or order.

CCP 116.570 POSTPONEMENT REQUIRES A \$10 FEE TO FILE THE REQUEST. IF GRANTED, THE COURT SHOULD NOTIFY THE PARTIES OF THE NEW DATE

(a) Any party may submit a written request to postpone a hearing date for good cause.

(1) The written request may be made either by letter or on a form adopted or approved by the Judicial Council.

(2) The request shall be filed at least 10 days before the hearing date, unless the court determines that the requesting party has good cause to file the request at a later date.

(3) On the date of making the written request, the requesting party shall mail or personally deliver a copy to each of the other parties to the action.

(4) (A) If the court finds that the interests of justice would be served by postponing the hearing, the court shall postpone the hearing, and shall notify all parties by mail of the new hearing date, time, and place.

(B) On one occasion, upon the written request of a defendant guarantor, the court shall postpone the hearing for at least 30 days,

1 and the court shall take this action without a hearing. This
subparagraph does not limit the discretion of the court to grant
additional postponements under subparagraph (A).

2 (5) The court shall provide a prompt response by mail to any
person making a written request for postponement of a hearing date
under this subdivision.

3 (b) If service of the claim and order upon the defendant is not
4 completed within the number of days before the hearing date required
by subdivision (b) of Section 116.340, and the defendant has not
5 personally appeared and has not requested a postponement, the court
shall postpone the hearing for at least 15 days. If a postponement
6 is ordered under this subdivision, the clerk shall promptly notify
all parties by mail of the new hearing date, time, and place.

7 (c) This section does not limit the inherent power of the court
to order postponements of hearings in appropriate circumstances.

8 (d) A fee of ten dollars (\$10) shall be charged and collected for
the filing of a request for postponement and rescheduling of a
9 hearing date after timely service pursuant to subdivision (b) of
Section 116.340 has been made upon the defendant.

10 CCP 116.780 SMALL CLAIMS APPEALS ARE FINAL

11 (a) The judgment of the superior court after a hearing on
appeal is final and not appealable.

12 CCP 116.830 OBLIGATION TO RETURN SC-133 (Judgment Debtor's Statement of
13 Assets). FAILURE TO RETURN SC-133 IS PUNISHABLE BY CONTEMPT!

14 (a) At the time judgment is rendered, or notice of entry
of the judgment is mailed to the parties, the clerk shall deliver or
15 mail to the judgment debtor a form containing questions regarding the
nature and location of any assets of the judgment debtor.

16 (b) Within 30 days after the clerk has mailed notice of entry of
the judgment, unless the judgment has been satisfied, the judgment
17 debtor shall complete the form and cause it to be delivered to the
judgment creditor.

18 (c) In the event a motion is made to vacate the judgment or a
19 notice of appeal is filed, a judgment debtor shall complete and
deliver the form within 30 days after the clerk has delivered or
20 mailed notice of denial of the motion to vacate, or notice of
dismissal of or entry of judgment on the appeal, whichever is
21 applicable.

22 (d) In case of the judgment debtor's **willful failure to comply**
with subdivision (b) or (c), the judgment creditor may request the
23 court to apply the sanctions, including arrest and attorney's fees,
as provided in Section 708.170, **on contempt of court.**

24 CCP 391 VEXATIOUS LITIGANT IS SOMEONE WHO REPEATEDLY ATTEMPTS TO RELITIGATE
25 THE VALIDITY OF A FINAL DETERMINATION

26 As used in this title, the following terms have the following
meanings:

27 (a) "Litigation" means any civil action or proceeding, commenced,
maintained or pending in any state or federal court.

28 (b) "Vexatious litigant" means a person who does any of the
following:

1 (1) In the immediately preceding seven-year period has commenced,
2 prosecuted, or maintained in propria persona at least five
3 litigations other than in a small claims court that have been (i)
4 finally determined adversely to the person or (ii) unjustifiably
5 permitted to remain pending at least two years without having been
6 brought to trial or hearing.

7 (2) After a litigation has been finally determined against the
8 person, repeatedly relitigates or attempts to relitigate, in propria
9 persona, either (i) the validity of the determination against the
10 same defendant or defendants as to whom the litigation was finally
11 determined or (ii) the cause of action, claim, controversy, or any of
12 the issues of fact or law, determined or concluded by the final
13 determination against the same defendant or defendants as to whom the
14 litigation was finally determined.

15 CCP 391.7 ANY PARTY MAY MOVE TO HAVE A LITIGANT DECLARED VEXATIOUS

16 (a) In addition to any other relief provided in this title,
17 the court may, on its own motion or the motion of any party, enter a
18 prefiling order which prohibits a vexatious litigant from filing any
19 new litigation in the courts of this state in propria persona without
20 first obtaining leave of the presiding judge of the court where the
21 litigation is proposed to be filed. Disobedience of the order by a
22 vexatious litigant may be punished as a contempt of court.

23 CCP 695.010. ALL PROPERTY UNDER THE CONTROL OF THE JUDGMENT DEBTOR, EVEN
24 FOREIGN PROPERTY, IS SUBJECT TO A TURNOVER ORDER

25 (a) Except as otherwise provided by law, all property of
26 the judgment debtor is subject to enforcement of a money judgment.

27 (b) If property of the judgment debtor was attached in the action
but was transferred before entry of the money judgment in favor of
the judgment creditor, the property is subject to enforcement of the
money judgment so long as the attachment lien remains effective.

28 CCP 699.040 A TURNOVER ORDER MAY BE ISSUED ON EX PARTE MOTION IF A WRIT OF
EXECUTION HAS BEEN ISSUED. TURNOVER ORDER REACHES TANGIBLE AND INTANGIBLE
PROPERTY UNDER CONTROL OF THE JUDGMENT DEBTOR

(a) If a writ of execution is issued, the judgment
creditor may apply to the court ex parte, or on noticed motion if the
court so directs or a court rule so requires, for an order directing
the judgment debtor to transfer to the levying officer either or
both of the following:

(1) Possession of the property sought to be levied upon if the
property is sought to be levied upon by taking it into custody.

(2) Possession of documentary evidence of title to property of or
a debt owed to the judgment debtor that is sought to be levied upon.
An order pursuant to this paragraph may be served when the property
or debt is levied upon or thereafter.

(b) The court may issue an order pursuant to this section upon a
showing of need for the order.

(c) The order shall be personally served on the judgment debtor
and shall contain a notice to the judgment debtor that failure to
comply with the order may subject the judgment debtor to arrest and
punishment for contempt of court.

1 CCP 706.109 COURT ORDER REQUIRED TO GARNISH SPOUSE'S WAGES

2 An earnings withholding order may not be issued against
3 the earnings of the spouse of the judgment debtor except by court
4 order upon noticed motion.

5 CCP 708.170 IF AN ORAP WAS SERVED BY A REGISTERED PROCESS SERVER AND THE
6 PERSON FAILS TO APPEAR, A WARRANT CAN BE ISSUED FOR THEIR ARREST **AND** THEY MAY
7 BE PUNISHED FOR CONTEMPT

8 (a) If an order requiring a person to appear for an
9 examination was served by a sheriff, marshal, a person specially
10 appointed by the court in the order, or a registered process server,
11 and the person fails to appear:

12 (1) The court may, pursuant to a warrant, have the person brought
13 before the court to answer for the failure to appear and may punish
14 the person for contempt.

15 CCP 708.205 TURNOVER ORDER MAY BE ISSUED AT THE CONCLUSION OF A DEBTOR EXAM
16 WITHOUT NOTICE AND WITHOUT A WRIT OF EXECUTION

17 (a) Except as provided in subdivision (b), at the
18 conclusion of a proceeding pursuant to this article, the court may
19 order the judgment debtor's interest in the property in the
20 possession or under the control of the judgment debtor or the third
21 person or a debt owed by the third person to the judgment debtor to
22 be applied toward the satisfaction of the money judgment if the
23 property is not exempt from enforcement of a money judgment. Such an
24 order creates a lien on the property or debt.

25 (b) If a third person examined pursuant to Section 708.120 claims
26 an interest in the property adverse to the judgment debtor or denies
27 the debt and the court does not determine the matter as provided in
28 subdivision (a) of Section 708.180, the court may not order the
property or debt to be applied toward the satisfaction of the money
judgment but may make an order pursuant to subdivision (c) or (d) of
Section 708.180 forbidding transfer or payment to the extent
authorized by that section.

CCP 1218 CONTEMPT IS 5 DAYS IN JAIL AND/OR UP TO \$1,000 FINE

(a) Upon the answer and evidence taken, the court or judge shall determine whether the person proceeded against is guilty of the contempt charged, and if it be adjudged that he or she is guilty of the contempt, a fine may be imposed on him or her not exceeding one thousand dollars (\$1,000), or he or she may be imprisoned not exceeding five days, or both. In addition, a person who is subject to a court order as a party to the action, or any agent of this person, who is adjudged guilty of contempt for violating that court order may be ordered to pay to the party initiating the contempt proceeding the reasonable attorney's fees and costs incurred by this party in connection with the contempt proceeding.

FOUR DAYS IN JAIL FOR A CONTEMPT SUCH AS FAILURE TO APPEAR IS NOT AN UNREASONABLE PUNISHMENT

In re Abrams, 108 Cal. App. 3d 685 noted that a California trial court sentenced Abrams, a nonparty, to 4 days in jail for failure to appear as a witness.

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CCP 1219. CONTEMPT MAY INCARCERATE A PARTY UNTIL SUCH TIME AS THAT PARTY COMPLIES WITH THE COURT ORDER

(a) Except as provided in subdivisions (b) and (c), when the contempt consists of the omission to perform an act which is yet in the power of the person to perform, he or she may be imprisoned until he or she has performed it, and in that case the act shall be specified in the warrant of commitment.

CCP 1993 COURT MAY ISSUE BENCH WARRANT FOR a FAILURE TO APPEAR

In case of failure of a witness to attend, the Court or officer issuing the subpoena, upon proof of the service thereof, and of the failure of the witness, may issue a warrant to the Sheriff of the county to arrest the witness and bring him before the Court or officer where his attendance was required.

A TURNOVER ORDER REACHES BOTH TANGIBLE AND INTANGIBLE PROPERTY UNDER CONTROL OF THE JUDGMENT DEBTOR, NO MATTER WHERE IN THE WORLD THAT PROPERTY IS LOCATED SO LONG AS THE COURT MAINTAINS PERSONAL JURISDICTION OVER THE JUDGMENT DEBTOR

See TRG California Practice Guide: Enforcing Judgments and Debts, [6:1849]

A DEBTOR'S PASSPORT MAY BE REVOKED PENDING COMPLETION OF A DEBTOR'S EXAM

The court's power to imprison a debtor held in contempt implies the lesser power to place restrictions on the debtor's freedom. For example, the court may order surrender of the debtor's passport pending completion of the examination hearing. [Herbstein v. Bruetman (7th Cir. 2001) 241 F3d 586,588-589]

AN ORDER TO SHOW CAUSE DOES NOT REQUIRE PERSONAL SERVICE IF AUTHORIZED IN ADVANCE BY THE COURT OVER A PARTY THAT THE COURT ALREADY HAS JURISDICTION OVER

In re Abrams, 108 Cal. App. 3d 685; 166 Cal. Rptr. 749; 1980 Cal. App. LEXIS 2096

[HN9] Normally, personal service of the order to show cause on the alleged contemnor is a jurisdictional prerequisite to a contempt order. That rule is not based on a statutory requirement of personal service of the affidavit, however, for no statute specifically regulates its service. Rather, it is a judicially created rule, believed necessary because the order to show cause is an original pleading in a quasi-criminal action. Courts have, therefore, fashioned certain exceptions to that rule without having to confront the problem of legislative regulation of the field.

Some cases have permitted a substituted service of the order to show cause on the person's attorney, for example, in these circumstances: The alleged contemner was once subject to the court's personal jurisdiction, generally as a party litigant. The court order allegedly disobeyed was made when the court still had personal jurisdiction over the party. The party was present in court, either actually or

1 constructively through his attorney, when the order issued. The party
2 later violated the order, but could not be personally served with the
3 affidavit charging contempt. Undersuch circumstances, substituted
4 service has been authorized as an exercise of the court's continuing
5 jurisdiction to enforce its valid orders. In these cases, the original
6 order which the contemner disobeyed -- analogous to the subpoena here -
7 - was invariably communicated to the contemner during an ongoing
8 lawsuit. The alleged contemner, therefore, unquestionably knew of his
9 obligation. (See, e.g., such cases as Shibley v. Superior Court (1927)
10 202 Cal. 738 [262 P. 332]; [***12] Smith v. Smith (1953) 120
11 Cal.App.2d 474, 485 [261 P.2d 567]; Foley v. Foley (1898) 120 Cal. 33
12 [52 P. 122]; Golden Gate Consol. H. M. Co. v. Superior Court (1884) 65
13 Cal. 187 [3 P. 628]; Eureka L. & Y. Co. v. Superior Court (1885) 66
14 Cal. 311 [5 P. 490]; Olcott v. Superior Court (1945) 68 Cal.App.2d 603
15 [157 P.2d 36]; Moore v. Superior Court (1928) 203 Cal. 238 [263 P.
16 1009].) Most of these cases involved post-dissolution proceedings,
17 [**754] and attempted enforcement of support or custody orders. The
18 cases dealt with the conceptual difficulty of the enforcement procedure
19 being a new, independent action, i.e., a contempt proceeding, either by
20 finding no absolute statutory prohibition [*692] against a
21 substituted service of a contempt charge (Shibley, supra, and Foley,
22 supra), or by articulating the maxim a party cannot defeat the
23 jurisdiction of the court to punish for contempt by concealing himself
24 to avoid service (Olcott, supra, and Moore, supra), or by articulating
25 the continuing jurisdiction concept already alluded to which justifies
26 service on, for example, the party's attorney because the [***13]
27 enforcement is still part of a continuing case during which notices and
28 papers were validly served on the attorney (Smith v. Smith, supra).
Also certain courts relied on the general authority of Code of Civil
Procedure section 187, providing a court may evolve suitable modes to
carry its jurisdiction into effect (Smith v. Smith, supra). (See
general discussion of the subject at 5 Witkin, Cal. Procedure (2d ed.
1971) Enforcement of Judgment, § 162, p. 3523.)

17 THE COURT MAY ORDER THE JUDGMENT DEBTOR TO ASSIGN A RIGHT TO
18 PAYMENT TO THE JUDGMENT CREDITOR

19 Code of Civil Procedure Section 708.510 authorizes a Court to issue an order directing the
20 judgment debtor to assign to a judgment creditor (or to a receiver) all or part of a right to
21 payment due or to become due, including wages due from the federal government that are not
22 subject to withholding under an earnings withholding order, rents, commissions, royalties,
23 payments due from a patent or copyright, insurance policy loan value, accounts receivable,
24 general intangibles, judgments and instruments although the Court may take into consideration
25 all relevant factors, the sole constraints placed on the Court are that the right to payment be
26 assigned only to the extent necessary to satisfy the creditor's money judgment and that, where
27 part of the payments are exempt, the amount of the payments assigned should not exceed the
28 difference between the gross amount of the payments and the exempt amount.

1 [Code of Civil Procedure Section 708.510 (c), (d), (e) and (f)]

2 **II.**

3 THE RIGHT TO PAYMENT MAY BE ASSIGNED UP TO THE FULL AMOUNT DUE ON
4 THE JUDGMENT

5 As shown in the accompanying declaration, the current balance due on the judgment is
6 \$34,005. This balance, of course, accrues interest at the rate of 10% per annum. [Code of Civil
7 Procedure Section 685.010(a)] Therefore, the Court may order assignment of the right to
8 payment in an amount necessary to pay off the judgment in full, including accrued interest.

9 **III.**

10 AN ASSIGNMENT ORDER MAY BE ISSUED BECAUSE THE JUDGMENT MAY BE
11 ENFORCED

12 Since the judgment was entered and/or renewed less than 10 years ago, and since no
13 order exists staying enforcement of the judgment, this Court is authorized to issue an assignment
14 order for the judgment creditor.

15 **IV.**

16 THE COURT CAN RESTRAIN THE JUDGMENT DEBTOR

17 Code of Civil Procedure Section 708.520 authorizes the Court to restrain the judgment debtor
18 from assigning or otherwise disposing of the right to payment sought to be assigned upon a
19 showing of need. Such a showing of need is set forth in the declaration that accompanies this
20 memorandum. Consequently, the debtor must be restrained so that the right to payment sought
21 to be assigned will be available to be applied to the judgment creditor's judgment.

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