

AUG 05 2014

MICHAEL D. PLANET  
Executive Officer and Clerk  
BY: ~~Susanne Leon~~ Deputy  
SUSANNE LEON

1  
2  
3  
4  
5  
6  
7  
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 FOR THE COUNTY OF VENTURA  
10 APPELLATE DIVISION  
11

12 CACH LLC,  
13 Plaintiff/Respondent,

14 vs.

15 KATHLEEN RODGERS ,  
16 Defendant/Appellant.  
17

Case No.: 56-2012-00420026-CL-CL-VTA

OPINION AND JUDGMENT

18  
19 STATEMENT OF CASE

20 This case is a civil debt collection proceeding. Respondent alleges that Appellant opened a  
21 revolving credit account with Washington Mutual/Chase Bank and failed to pay. After the debt became  
22 delinquent Respondent CACH LLC purchased the debt from Washington Mutual/Chase Bank and made  
23 attempts to collect from Appellant by filing this litigation.

24 The lawsuit was initiated on June 18, 2012. Appellant was duly served and filed an answer to the  
25 complaint on February 28, 2013. On May 1, 2013 Respondent filed a declaration pursuant to Code of  
26 Civil Procedure, (hereinafter CCP,) Section 98 authored by 'Magic West,' stating Respondent's  
27 intention to introduce the documentary evidence in lieu of direct testimony of the declarant. In his  
28 declaration, Magic West states, "I am currently located in Denver, Colorado, therefore I authorize

1 service to be accepted on my behalf within a reasonable period of time prior to trial in order to allow  
2 for necessary travel. Service will be accepted on my behalf at the office of Plaintiff's attorney located at  
3 Mandarich Law group, LLP, 6301 Owensmouth Ave. Suite 850, Woodland Hills, California, 91367,  
4 which is within 150 miles of the place of trial." On June 3, 2013, appellant filed a pretrial brief  
5 objecting to the introduction of the documentary evidence pursuant to CCP Section 98. Attached to her  
6 motion as Exhibit C was a record of attempted, but failed, service of Magic West at 6301 Owensmouth  
7 Ave. Ste. 850, Woodland Hills, CA 91367. The reason for failure of service states, "*Def't. Does Not*  
8 *Work at This Address—Personal Service Only For Civil Subpena.*" The date of attempted service was  
9 May 7, 2013. In her pretrial brief Appellant objected to Respondent's intended use of the Magic West  
10 declaration and the records contained there-in pursuant to CCP Section 98 and pursuant Evidence Code  
11 Section 1270-1271 business records.

12 On June 10th, 2013, trial was commenced, Honorable Vincent O'Neill Presiding. Argument was  
13 heard on Appellant's objection to the introduction of the Magic West Declaration and to its contents.  
14 Counsel for CACH prevailed in her argument to the trial court to disregard the decision of *Target v.*  
15 *Rocha* (2013) 216 Cal. App. 4<sup>th</sup> Supp. 1, because it was not binding authority. Counsel for Respondent  
16 also argued, "The most damaging factual difference in this case is that this Defendant has made zero  
17 effort in effecting service on our witness. There's no prejudice to the Defendant when service is not  
18 effected, so therefore I think it should be disregarded." (R.T. P. 1-2, ll. 25-1). Appellant pointed out  
19 that she did try to effect personal service as it was required by CCP 98, and that the witness actually was  
20 a resident of Colorado. The trial court rejected appellant's argument and admitted Respondent's  
21 documentation over objection.

22 Respondent called appellant as a witness. Appellant's testimony, in content, *had to do with her*  
23 *identity, her residences, and her personal information, or to categorize it more aptly, lack of her*  
24 *knowledge pertaining to those things.* Respondent then introduced the declaration of Magic West and  
25 relied on its content's to establish that a debt was owed to Respondent by Appellant. Appellant  
26 produced no evidence. Appellant argued that the court erroneously relied on the documents in the CCP  
27 98 declaration because they did not comply with the requirements of CCP Section 98. Appellant further  
28 contended that the contents of the records did not meet the requirements of Evidence Code Sections

1 1270-1271 and that Magic West was not, and never had been, a custodian of records for Washington  
2 Mutual/Chase Bank, from which the underlying documents were generated.

3 The trial court found in favor of Respondent, specifically commenting, "I also find that Ms.  
4 Rodgers was evasive and unbelievable in testifying to certain things, such as she can't remember where  
5 she lived one year ago." Judgment was entered on behalf of Respondent for \$2,956.52, costs and  
6 attorney fees. This appeal followed.

7  
8 **GROUND ON APPEAL**

9  
10 Appellant contends that the trial court erred in admitting the CCP 98 documents over her  
11 objection. Appellant also contends error in over-ruling her hearsay objections to the documents  
12 themselves on various grounds, including hearsay, lack of personal knowledge and failure to  
13 authenticate.

14  
15 **STANDARD OF REVIEW**

16  
17 The reviewing court generally applies the 'abuse of discretion' standard when reviewing a trial  
18 court's decision concerning the admissibility of evidence. *City of Ripon v. Sweetin* (2002) 100 Cal. App.  
19 4<sup>th</sup> 887, 900. However, statutory interpretation and the proper application of a statute are questions of  
20 law that are reviewed de novo. *Boy Scouts of America National Foundation v. Superior Court* (2012)  
21 206 Cal. App. 4<sup>th</sup> 428, 443. Erroneous introduction of evidence must result in a miscarriage of justice  
22 and reversal should be granted only where the reviewing court is convinced that it is reasonably  
23 probable that a result more favorable to the Appellant would have been reached but for the error.  
24 Evidence Code Section 353, *Brokopp v. Ford Motor Co.* (1977) 71 Cal. App. 3d 841, 853.

25 \\\

26 \\\

27 \\\

28

1 DISCUSSION

2  
3 The primary issue before us is whether we should elect to follow the decision rendered in *Target*  
4 *v. Rocha* (2013) 216 Cal.App. 4<sup>th</sup> Supp. 1. Respondent urges us to disregard it as “non-binding” which  
5 prompts us to realize that our own decision in this case, regardless of which way we rule, need have no  
6 lasting precedent on any future decisions by other jurisdictions. Respondent urges us to accept a  
7 statutory interpretation of CCP Section 98 which is somewhat tortured. The language of the statute  
8 should be given its clear meaning. If ambiguous, the language should be scrutinized in light of the  
9 legislative intent. *Boy Scouts of America National Foundation v. Superior Court* (2012) 206 Cal. App.  
10 4<sup>th</sup> 428, 443. In any event, in this particular case, we are satisfied that the rule of law set forth in *Target*  
11 *v. Rocha, supra* should be followed.

12 *Target v. Rocha* admittedly, is a case of first impression. *Target v. Rocha, supra*, at 5. It is also  
13 almost factually identical to the issues before us. Rocha owed Target money on a revolving account. A  
14 lawsuit was filed by Target. A declaration was filed pursuant to CCP Section 98 stating that the  
15 declarant was available for service and authorized service at a location one mile from the court house,  
16 although declarant was actually physically in Minnesota. Prior to trial counsel for Rocha attempted  
17 service at the specified address, complete with witness fees, only to be told that the witness did not work  
18 at that location. “As the process server was only authorized to personally serve (Lewis), he left without  
19 serving the subpoena.” *Target v. Rocha, supra* at 7.

20 CCP Section 98 provides that prepared testimony in lieu of direct testimony is admissible at trial  
21 under certain conditions. **“(a) a copy has been served on the party against whom it is offered at**  
22 **least 30 days prior to the trial, together with a current address of the affiant that is within 150**  
23 **miles of the place of trial, and the affiant is available for service of process at that place for a**  
24 **reasonable period of time during the 20 days immediately prior to trial.”** We agree with the court  
25 in *Target v. Rocha, supra*, that merely providing an address within 150 miles of the location of the trial  
26 is insufficient to effectuate service of a subpoena. Service of subpoenas is governed by CCP Section  
27 1987(a) and (b). The witness needs to be served personally in order to compel appearance at trial, CCP  
28 1987(a,) or needs to be an officer director, or managing agent of a party, CCP 1987(b) with written

1 notice to the party or its attorney to procure attendance at trial. The record in this case indicates that  
2 Magic West was **not** available for service of process at the address specified by Respondent. This is  
3 evidenced by the fact that no one at the specified address was instructed to make him, 'available for  
4 service' within the 20 days before trial upon request. If the address specified for service of Magic West  
5 was indeed the law offices of Mandarich LLC, someone at the office could have accepted the subpoena  
6 on his behalf and requested his appearance consistent with his declaration that he would accept it at that  
7 location and make himself available for trial. Instead attempts by Appellant to secure his attendance at  
8 trial were refused. Although Respondent's attorney claimed to be unaware of Appellant's attempts to  
9 secure the attendance of Magic West, we impute knowledge to Respondent, if not because of the refusal  
10 of service purported to be an address of her law firm, but because Appellant attached a copy of her  
11 attempt to serve Magic West to her pre-trial motions, a week prior to the actual trial and objected to the  
12 introduction of the documents based on her inability to serve Magic West at the pre-trial. Respondent  
13 was well aware that Appellant desired the attendance of Magic West and contested the admissibility of  
14 the documents.

15 We perceive the necessity of proceeding to trial in cases of this nature by way of declaration as  
16 opposed to live witnesses. In the vast majority of cases, where the matters are uncontested or otherwise  
17 unchallenged, CCP Section 98 makes perfect sense. However, when documentation is challenged in the  
18 trial court, and plausible arguments are made concerning the authenticity or accuracy of the underlying  
19 declarations or documents, and where a litigant has made good faith efforts to compel the declarant's  
20 testimony at trial, the litigant should be allowed to cross-examine the declarant(s). The spirit of CCP  
21 Section 98 was most certainly not to deprive litigants of the right of cross-examination. "A person's  
22 right to cross-examination and confrontation of witnesses against him in noncriminal proceedings is a  
23 part of procedural due process guaranteed by the Fifth Amendment and the Fourteenth Amendment of  
24 the federal Constitution, where there is a threat to life liberty or property." *August v. Department of*  
25 *Motor Vehicles* (1968) 264 Cal. App. 2d 52, 60 "Thus a party may only introduce a witness's  
26 declaration if the opposing party had the opportunity to cross examine the witness at deposition or could  
27 require the witness to be subject to cross-examination at trial." *Target v. Rocha supra*, at 9.

1 If the legislature had intended to allow long distance service without complying with CCP  
2 Section 1987, or making a third or hybrid type of service permissible, they certainly know how to say  
3 so. Although requiring personal service, or having a local declarant literally available for service within  
4 150 miles, is unwieldy in cases of this nature, in a contested matter, where the litigant has made efforts  
5 to effectuate service, the right of cross-examination at trial should prevail over the convenience of the  
6 litigants and the witnesses. CCP Section 98(b) also contains an alternative provision to attendance of  
7 the witness at trial by allowing for the admission of testimony taken at a deposition. If the statute needs  
8 to be amended to clearly provide for service of a subpoena that is not accomplished by personal service  
9 on the person who is sought for trial, then the legislature needs to make those changes. We agree with  
10 the holding of *Target v. Rocha, supra*, and find its logic persuasive. Magic West was not available for  
11 service within 150 miles and was not at the location for a reasonable period of time during the 20 days  
12 immediately prior to the trial as required by statute.

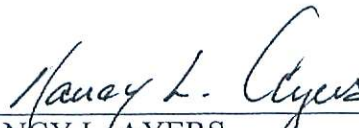
13 Because we agree with appellant's contention that the documents attached to the Magic West  
14 declaration were inadmissible, we need not address appellant's other contentions.

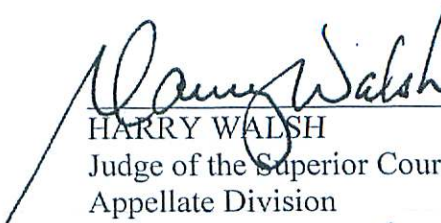
15 We have reviewed the record of the trial to decide if admission of the evidence resulted in a  
16 miscarriage of justice which requires reversal. If the declaration and its contents had been refused as  
17 evidence, Respondent could not have prevailed in this matter. We have reviewed the testimony offered  
18 by Respondent in the form of Appellant's testimony, which was the only other evidence introduced by  
19 Respondent. Although Appellant's testimony lacked candor, was contentious, and was disbelieved by  
20 the trial court, it did not constitute grounds for a civil judgment to be entered for the cause of action  
21 stated in the complaint. As such, we must conclude that there is a reasonable likelihood that Appellant  
22 may have prevailed but for the admission of the declaration of Magic West and the documents subject  
23 matter of his declaration.

ORDER

The judgment entered on June 10, 2013, is REVERSED and the matter is remanded for a new trial.

Dated: August 05, 2014

  
NANCY L. AYERS  
Judge of the Superior Court  
Appellate Division

  
HARRY WALSH  
Judge of the Superior Court  
Appellate Division

  
MATTHEW GUASCO  
Judge of the Superior Court  
Appellate Division

1 SUPERIOR COURT OF CALIFORNIA, COUNTY OF VENTURA  
2 APPELLATE DIVISION

3 CASE NO.: 56-2012-00420026-CL-CI-VTA Cach v. Rodgers

4 I am employed in the County of Ventura, State of California. I am over the age of 18 years and not  
5 a party to the above-entitled action. My business address is 800 S. Victoria Avenue, Ventura, CA  
6 93009.

7 I served the following document described as:

8 OPINION AND JUDGMENT

9 by placing a true copy thereof for collection and mailing so as to cause it to be mailed on the above  
10 date, following standard court practices, in sealed envelopes addressed as follows:

11  
12 Honorable Brian J. Back  
13 Presiding Judge  
14 Ventura County Superior Court

Ryan Vos  
6301 Owensmouth Ave. #850  
Woodland Hills, CA 91367

14 Honorable Vincent O'Neill  
15 Ventura County Superior Court

16 Ian Chowdhury  
17 8853 Fullbright Ave.  
18 Winnetka, CA 91306

19 I am readily familiar with the County's practice of collection and processing  
20 correspondence for mailing. Under that practice it would be deposited with the U.S. postal service  
21 and/or interoffice mail on that same day with postage thereon fully prepaid at Ventura, California  
22 in the ordinary course of business.

23 I declare under penalty of perjury under the laws of the State of California that the above is  
24 true and correct.

25 Dated and executed at Ventura, California on August 05, 2014.

26 MICHAEL D. PLANET, Superior Court  
27 Executive Officer and Clerk

By [Signature]  
Deputy Clerk



28 **DECLARATION OF MAILING**

I hereby certify that the annexed instrument  
is a true and correct copy of the original on file  
in my office. MICHAEL D. PLANET,  
Executive Officer and Clerk.

Dated SEP 23 2014

By Dusanne Lem  
Deputy Clerk

