Filed 5/25/12 Sylla v. KatanaMe, Inc. CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

JOHN SYLLA, Plaintiff and Appellant, v. KATANAME INC., et al., Defendants and Respondents.	A130722 (San Mateo County Super. Ct. No. CIV 449726)

INTRODUCTION

Plaintiff John Sylla appeals from a judgment of the San Mateo County Superior Court dismissing defendant IT-Farm Corp. (IT-Farm), a Japanese corporation, from Sylla's action following the quashing of summons purportedly served on IT-Farm in 2008, and the failure of Sylla to serve the summons and complaint upon IT-Farm within three years of the date of filing the original complaint. (Code Civ. Proc., § 583.210.)[1] The underlying action by Sylla against IT-Farm and defendants KatanaMe, Inc., a Delaware corporation, Skipper Wireless Laboratories, Inc., a California Corporation (Skipper California), Skipper Wireless, Inc., a Japanese Corporation (Skipper Japan), and individual defendants P. Jan Long, Victor K.L. Huang and others, arose out of the sale of the company assets of defendant KatanaMe, Inc. and included, among other causes of action, a shareholder's derivative claims on behalf of KatanaMe, Inc. against the individual defendants for breaches of fiduciary duty, claims against Skipper Japan and

[1] All statutory references are to the Code of Civil Procedure and all references to rules are to the California Rules of Court, unless otherwise indicated.

Skipper California for fraudulent conveyance, and intentional interference with economic relationships and for declaratory relief and punitive damages. Sylla also alleged causes of action for breach of contract pertaining to termination of his employment with KatanaMe, Inc.

On this appeal, Sylla contends the court erred in granting IT-Farm's motion to quash service and in dismissing the action as to it. He argues, (1) IT-Farm was served within three years of Sylla designating it as a Doe defendant where: (a) the 2008 service substantially complied with the statutory service requirements because Sylla diligently attempted to serve IT-Farm in Japan and the latter refused service; (b) IT-Farm had actual knowledge of the claims against it before the 2008 service; (c) the action was stayed from December 12, 2008 through at least November 21, 2009, due to KatanaMe, Inc.'s bankruptcy; and (d) IT-Farm made a general appearance by seeking and receiving an extension of time to "answer" the complaint. We shall affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

Sylla was KatanaMe, Inc.'s Chief Operating Officer, Chief Financial Officer, and a shareholder. On September 23, 2003, Sylla resigned from KatanaMe, Inc., but remained a shareholder. On September 20, 2005, Sylla filed an action against named defendants KatanaMe, Inc., Skipper California, Skipper Japan, Long, Huang, Ian L. Sayers[2], and Does 1 to 50 alleging, among other things, breach of employment contract, derivative claims for breaches of fiduciary duty, interference with contractual relations, and fraudulent conveyance. On January 31, 2006, Sylla filed a first amended complaint against the same defendants and, on May 24, 2006, he filed a second amended complaint against them. The crux of Sylla's claims was that, in February 2005, defendants, including IT-Farm (named as a Doe defendant), with help from director defendants Long and Huang, secretly planned to divert KatanaMe, Inc.'s assets into Skipper Japan, a Japanese shell corporation, for the purposes of enriching themselves at the expense of Sylla and other KatanaMe, Inc. shareholders. The sale closed and the

[2] Sayers was never served and was subsequently dismissed.

assets of KatanaMe, Inc. were transferred to Skipper Japan on April 15, 2005. Sylla alleged KatanaMe, Inc.'s shareholders received nothing, but director defendants received lucrative compensation plus indemnity from the buyer for breaches of their fiduciary duties.

On December 13, 2007, Sylla filed an amendment to his second amended complaint naming IT-Farm, a Japanese Corporation, as a Doe defendant. Sylla served counsel for Skipper California and Peter McMahon, counsel for KatanaMe, Inc., Long and Huang with the amendment to the complaint.

On February 25, 2008, through an international process server, Sylla made a "Request for Service Abroad of Judicial or Extrajudicial Documents" under the Hague Convention.[3] The request contains a check-mark in the box stating, service would be

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[3] The methods for service in a foreign country listed in section 413.10, subdivision (c) are "subject to the provisions of the Convention on the 'Service Abroad of Judicial and Extrajudicial Documents' in Civil or Commercial Matters (Hague Service Convention)." (§ 413.10.) We refer to this treaty as the "Hague Convention."

"If the person to be served resides in a country that is a signatory to the Convention, the party attempting service must follow one of the several acceptable methods provided by the Convention, regardless of whether the party to be served has actual notice of the action. [Citation.] These methods are:

"(1) service through the receiving country's designated 'Central Authority' for service of foreign process (art. 5);

"(2) delivery by the Central Authority to an addressee who accepts service voluntarily so long as the method used is not incompatible with the law of the receiving state (art. 5);

"(3) service through diplomatic or consular agents of the sending state (art. 8);

"(4) service through the judicial officers, officials, or other competent persons of the receiving state (art. 10, subdivisions (b) and (c));

"(5) service as permitted by the international law of the receiving state for documents coming from abroad (art. 19). [Citation.]

"In addition, article 10, subdivision (a) of the Convention provides that, absent objection by the state of destination, the Convention will not interfere with the freedom to send judicial documents, by postal channels, directly to persons abroad. There is a split of authority in California as to whether this provision allows service of process by mail. [Citations.] " (1 Lambden, Moore and Thomas, Cal. Civil Practice: Procedure (Thomson/West 2008) § 6:24, pp. 6-24 to 6-25 (Lambden et al., Cal. Civil Practice: Procedure).)

made "(c) by delivery to the addressee, if he accepts it voluntarily (second paragraph of article 5).*" On March 26, 2008, the Tokyo District Court sent a letter to IT-Farm, stating in translation, "The court has received a request . . . that the following documents shall be served to you. Therefore, please appear in person and receive the following documents at the clerk office of No. 24 civil division of the court by April 16, 2008, or in the case you would like to receive the following documents by courier, request the transmittal in writing by the above mentioned date. [¶] However, if you do not appear in person nor request the transmittal by the above mentioned date, we will consider it as your refusal, and the documents will be send back to the requestor."

On April 22, 2008, the Tokyo District Court issued a "Certificate" stating in translation, "The undersigned authority has the honour to certify, in conformity with article 6 of the Convention, [¶] . . . [¶] 2) that *the document has not been served*, by reason of the following facts:* [¶] We have requested the addressee to either personally appear at the court to obtain 'Document to be served' or to place a request if the party wishes to receive the documents via mail by April 16. However, we did not receive any request by the said date. . . ." (Italics added.)

On June 7, 2008, Skipper California filed for bankruptcy.

On December 12, 2008, KatanaMe, Inc. filed for bankruptcy. On November 23, 2009, the bankruptcy court issued an order allowing the derivative action to proceed. On December 21, 2009, Sylla filed a notice of the bankruptcy court's authorization to proceed with the derivative claims.

On January 5, 2010, Sylla filed a second amendment to the second amended complaint, designating IT-Farm Corporation, a Japanese business entity, as a Doe defendant and alter ego of Skipper Japan. On March 15, 2010, IT-Farm received a registered mailing from the Tokyo District Court with the complaint and summons for this action enclosed.

On April 16, 2010, Sylla filed a request for dismissal without prejudice as to Skipper California and Skipper California was dismissed from the action.

On April 6, 2010, at the request of counsel for IT-Farm, Sylla granted IT-Farm a 15-day extension to "answer." On April 14, 2010, IT-Farm informed counsel for Sylla that IT-Farm would move to dismiss it from the action for failure to serve it within the three-year period prescribed by section 583.210. Sylla's counsel responded that the extension was to "answer" only and not to respond by an untimely motion to dismiss and further argued that its 2008 service was valid.

IT-Farm filed its motions to quash service and to dismiss the action as to it on May 7, 2010. Default was entered as to Skipper Japan on May 18, 2010. On December 2, 2010, the trial court granted IT-Farm's motion to quash the summons served in 2008, denied the motion to quash with respect to service in 2010, and granted the motion to dismiss the action against IT-Farm without prejudice, for the failure to serve the summons and complaint upon a Doe defendant within three years of the filing of the original complaint. Sylla filed his notice of appeal on December 22, 2010.

From May 9, 2011 through May 20, 2011, a bench trial was held on Sylla's prosecution of KatanaMe, Inc.'s derivative claims against its former directors Long and Huang and against Skipper Japan, resulting in a damage award of $2.2 million against Long and Huang, jointly and severally.

On August 18, 2011, we granted Sylla's motion to augment the appellate record with documents relating to his discovery, on or about April 21, 2011, of documents he maintains demonstrate "IT-Farm's active involvement in the supervision and defense of this litigation as well as actual knowledge of the Doe Amendment."[4] On February 3,

[4] Sylla filed its augmentation motion on August 1, 2011. After holding the motion for 15 days (rule 8.54(a)(3)) and having received no opposition, we deemed respondent had consented to the granting of the motion (rule 8.54(c)) and we granted the motion to augment the record on August 18, 2011. Respondent filed a belated opposition on August 26, 2011. On further reflection, we conclude Sylla's motion to augment was improvidently granted. These documents were discovered approximately four months *after* entry of the dismissal of IT-Farm and Sylla's filing of his notice of appeal. They were not before the trial court at the time it granted the dismissal motion. As Eisenberg points out, "The record may only be 'augmented' by *matters that were before the superior court.* The augmentation procedure cannot be used to bring up matters *outside*

2012, we granted Sylla's motion to augment the record on appeal with the trial court's January 9, 2012 final statement of decision after court trial.

DISCUSSION

I. Service Statutes

Section 583.210 provides: "(a) The summons and complaint shall be served upon a defendant within three years after the action is commenced against the defendant. For the purpose of this subdivision, an action is commenced at the time the complaint is filed. [¶] (b) Proof of service of the summons shall be filed within 60 days after the time the summons and complaint must be served upon a defendant." The time limits for service are mandatory, unless otherwise expressly provided by statute. (§ 583.250, subd. (b).)

"All cases are subject to dismissal if the summons and complaint are not served within [three] years after commencement of the action. [Citations.]" (Rylaarsdam & Turner, Cal. Practice Guide: Civil Procedure Before Trial Statutes of Limitation (The Rutter Group 2012) ¶ 8.32, pp. 8-3 to 8-4 (Rylaarsdam & Turner, Statutes of Limitation.) " 'A plaintiff ignorant of the identity of a party responsible for damages may name that person in a fictitious capacity, a Doe defendant, and that time limit prescribed by the applicable statute of limitations is extended as to the unknown defendant. *A plaintiff has three years . . . after the commencement of the action to discover the identity of the unknown defendant and effect service of the complaint.* [Citation.] *When the complaint is amended to substitute the true name of the defendant for the fictional name, the defendant is regarded as a party from the commencement of the suit,* provided the complaint has not been amended to seek relief on a different theory based on a general set of facts other than those set out in the original complaint. [Citations.]' " (*Winding Creek*

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the superior court record (e.g., matters occurring during pendency of appeal). [Citations.]" (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2011) ¶ 5:134, p. 5-42.) Sylla asserts these documents confirm IT-Farm's actual knowledge of the litigation before the attempted service in 2008. Because we shall conclude that IT-Farm's actual knowledge of the litigation is not determinative here (see fn. 10 at p. 13, *post*), we need not decide whether to rescind our augmentation order.

Appellant's motion to augment the record, filed July 27, 2011, is denied.

v. McGlashan (1996) 44 Cal.App.4th 933, 940, fn. omitted, italics added; accord, *Bernson v. Browning–Ferris Industries* (1994) 7 Cal.4th 926, 932; see Rylaarsdam & Turner, Statutes of Limitation, *supra*, ¶ 8.32, pp. 8-3 to 8-4; 3 Lambden et al., Cal. Civil Practice: Procedure, *supra*, § 22:23, pp. 22-26 to 22-27.)

Sylla filed his complaint alleging the relevant causes of action against Doe defendants and others on September 20, 2005. Consequently, unless an exception applies, he had until September 20, 2008, to effect service on IT-Farm.[5]

In computing the time within which service must be made, time is excluded during which "[t]he prosecution of the action or proceedings in the action was stayed and the stay affected service." (§ 583.240, subd. (b).)[6] Further, a statutory exception to the three-year service requirement applies where "the defendant enters into a stipulation in writing or does another act that constitutes a general appearance in the action." (§ 583.220.) Neither a motion to quash service nor a motion to dismiss for failure of timely service constitutes a general appearance. (*Ibid.*)

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[5] Sylla argued in his opening brief that allegations that IT-Farm was an alter ego of Skipper Japan related back to the time the amended complaint is filed first naming IT-Farm as a defendant and not to the filing of the original complaint containing Doe allegations. However, he has expressly abandoned that argument as "moot" because the trial court did not award damages against Skipper Japan, but only against the individual director defendants.

[6] Section 583.240 states: "In computing the time within which service must be made pursuant to this article, there shall be excluded the time during which any of the following conditions existed:

"(a) The defendant was not amenable to the process of the court.

"(b) The prosecution of the action or proceedings in the action was stayed and the stay affected service.

"(c) The validity of service was the subject of litigation by the parties.

"(d) Service, for any other reason, was impossible, impracticable, or futile due to causes beyond the plaintiff's control. Failure to discover relevant facts or evidence is not a cause beyond the plaintiff's control for the purposes of this subdivision."

There is no claim here that IT-Farm was "not amenable to the process of the court" (§ 583.240, subd. (a)) or that service was "impossible, impracticable, or futile due to causes beyond the plaintiff's control." (§ 583.240, subd. (d).)

II. 2008 Service

Sylla maintains that the court erred in quashing the 2008 service. He contends that service substantially complied with the statutory service requirements because Sylla diligently attempted to serve IT-Farm in Japan and the latter refused service. We disagree.

California may not exercise jurisdiction in violation of an international treaty. Because the methods enumerated by California statute for serving defendants abroad all require transmission of documents abroad, they are preempted by the Hague Convention as to defendants in signatory countries, of which Japan is one. (See, e.g., *Shoei Kako Co. v. Superior Court* (1973) 33 Cal.App.3d 808, 819-820; see *Honda Motor Co. v. Superior Court* (1992) 10 Cal.App.4th 1043,1049 (*Honda Motor Co.*); Rylaarsdam & Edmon, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2012) ¶¶ 4:316-4:317, (Rylaarsdam & Edmon, Civil Procedure Before Trial).)[7]

Moreover, "[f]ailure to comply with the Hague Convention procedures *voids* the service . . . even though it was made in compliance with California law, and even though the defendant had actual notice of the lawsuit. [Citations.]" (Rylaarsdam & Edmon, Civil Procedure Before Trial, *supra*, ¶ 4:332; *Kott v. Superior Court* (*Beachport Entertainment Corp.*) (1996) 45 Cal.App.4th 1126, 1136.)

From February through April 2008, Sylla attempted to serve IT-Farm pursuant to the procedures set forth in the Hague Convention.[8] The request for service abroad made

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[7] The exception to preemption is service by publication where the parties' whereabouts are unknown (§ 415.50). Such service is not subject to the Hague Convention. (Rylaarsdam & Edmon, Civil Procedure Before Trial, *supra*, ¶ 4:318.)

[8] "The Hague Service Convention states each signatory nation shall designate a central authority through which service of process may be effected. (Hague Service Convention, art. 2.) That authority receives documents and serves them in accordance with either the internal law of the receiving state or a compatible method requested by the sender. The authority then provides the sender with a certificate of service. (Hague Service Convention, arts. 5, 6.) A state may allow other methods of service within its boundaries. (Hague Service Convention, arts. 8-11, 19; see also *Volkswagenwerk Aktiengesellschaft v. Schlunk* [(1988)] 486 U.S. 694, 699.) It may also object to the use

by the applicant on behalf of Sylla requested "prompt service of one copy" of the documents listed, including the summons, second amended complaint, amendment to the complaint and other documents, on IT-Farm at its known address in Shinjuku "by delivery to the addressee, *if he accepts it voluntarily* (second paragraph of article 5)." (Italics added.) The copy of the letter of demand sent by the clerk of the Tokyo District Court to IT-Farm, stated in translation that the court had received a request that the listed documents be served. It requested that someone appear in person to receive the documents at the clerk's office by April 16, 2008, or make a written request for transmittal by courier. It also stated that the failure to appear in person or to request transmittal of the documents would be considered as "your refusal, and the documents will be sen[t] back to the requestor." As the Certificate issued by the Tokyo District Court clerk confirmed, because the court received no request for the documents by the April 16, 2008 date specified, "*the document has not been served* . . ." (italics added). It is clear that no service was effected by this attempt.

Sylla argues that its 2008 service substantially complied with statutory service requirements, that IT-Farm *refused* to accept service, and IT-Farm and its Chief Financial Officer Takeshi Nakabayashi had actual knowledge of the claims against IT-Farm before the 2008 attempted service. We take these claims in order.

First, it is difficult to reconcile the request that service be made "by delivery to the addressee, *if he accepts it voluntarily* (second paragraph of article 5)" (italics added) and the Tokyo court clerk's Certificate stating that the documents had not been served, with Sylla's claim to have "substantially complied" with statutory service requirements. It appears that the documents listed in the letter to IT-Farm (including the summons, second amended complaint and the amendment to the latter) were not even included with the clerk's letter sent to IT-Farm, as the letter specifically requested that someone either

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of a particular method of transmission. (Hague Service Convention, art. 21.)" (*Kott v. Superior Court, supra,* 45 Cal.App.4th at p. 1134.)

personally appear to receive the documents or that IT-Farm make a written request that the documents be transmitted to it by courier.

Second, we are not persuaded by Sylla's attempt to analogize this case to *Trujillo v. Trujillo* (1945) 71 Cal.App.2d 257 (*Trujillo*) for the proposition that service is validly achieved where the defendant *refuses* to accept service of process, after receiving notice it is being served. *Trujillo* is distinguishable on its facts. There, the evidence regarding service was in conflict, but the trial court found personal service on the defendant was properly made, based on the affidavit of the process server, who "averred that the defendant attempted to avoid service of process by entering his automobile which was parked on a street near his place of business with the door of the car locked, but that the window adjacent to which the affiant stood was at first open; that the affiant explained to the defendant the nature of the documents which he attempted to serve and read to him the order to show cause 'in a loud and clear voice,' but that the defendant rolled the window up and refused to accept the documents; that the affiant then placed them under the windshield wiper in plain view of the defendant, who first tried to dislodge the papers by starting the windshield wiper, but failed to do so until after he had driven away." (*Id.* at pp. 259-260.) The differences are apparent. In the instant case, unlike *Trujillo,* the trial court found service was *not* made. There was no indication here that *anyone*—much less someone either authorized to accept service on behalf of or representing IT-Farm—attempted to avoid service, having been advised of the nature of the documents and the documents having been placed near him or her or otherwise delivered. Where the defendant did not refuse to accept the papers and was not attempting to flee or otherwise evade service, even dropping the papers nearby or delivering them to someone else is not sufficient. (See Rylaarsdam & Edmon, Civil Procedure Before Trial, *supra,* ¶ 4:187; *Sternbeck v. Buck* (1957) 148 Cal.App.2d 829, 831-833 [service not valid where process server delivered papers to the wife instead of to defendant husband, who was working 100 feet away out of process server's sight].) The failure of IT-Farm here to voluntarily accept service by either sending a representative to personally receive the documents or to request they be delivered by courier is a far cry from the type of refusal and avoidance

of service that occurred in *Trujillo*.[9] The trial court's finding regarding service was well supported on this record.

Finally, we reject Sylla's claim that actual knowledge by certain IT-Farm employees and officers of the claims against it converts service that was not effected into service substantially complying with statutory service requirements.

We recognize that the California Supreme Court has adopted a "liberal construction" of California statutes governing service of process. (*Pasadena Medi-Center Associates v. Superior Court* (1973) 9 Cal.3d 773, 778; *Summers v. McClanahan* (2006) 140 Cal.App.4th 403, 410 (*Summers*).) So long as the defendant receives actual notice of the lawsuit, substantial compliance with the California statutes governing service of summons generally will be held sufficient. (*Pasadena Medi-Center Associates v. Superior Court,* at p. 778; *Gibble v. Car-Lene Research, Inc.* (1998) 67 Cal.App.4th 295, 313 (*Gibble*); *Dill v. Barquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1436-1437 (*Dill*); *Summers,* at pp. 407-411.) However, we doubt Sylla's premise that substantial compliance, rather than strict compliance with the Hague Convention service requirements, is sufficient to satisfy the requirements for service under that treaty even if actual notice was received by the defendant. As the Hague Convention requirements preempt California law regarding service (e.g., *Honda Motor Co., supra,* 10 Cal.App.4th at p. 1049), liberal construction of California law would seem to be beside the point.

In any event, even liberally construing the California statutes, it is established that *actual notice of the action is not a substitute for proper service* and is insufficient to confer jurisdiction. As recognized by the Court of Appeal in *Summers,* "no California

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[9] We note that where service properly may be made by mail on a foreign defendant, "mail refused, or returned to the sender 'unclaimed,' without a signed receipt, is *not* sufficient to establish service under [section] 415.40. [Citation.]" (Rylaarsdam & Edmon, Civil Procedure Before Trial, *supra,* ¶ 4:386, citing *Stamps v. Superior Court (Wellington)* (1971) 14 Cal.App.3d 108, 110.) We believe that the failure of IT-Farm to respond to the Tokyo court's letter is analogous behavior and is insufficient to establish service under the Hague Convention.

appellate court has gone so far as to uphold a service of process solely on the ground the defendant received actual notice when there has been a complete failure to comply with the statutory requirements for service." (*Summers, supra,*140 Cal.App.4th at p. 414; see also, *Honda Motor Co., supra,* 10 Cal.App.4th 1043, 1049 [service on Japanese corporation that did not conform to the Hague Convention held invalid, even though defendant admitted receipt of the papers].) As the court recognized in *Summers,* "One benefit of the liberal construction rule is its tendency to eliminate unnecessary, time-consuming, and costly disputes over service of process issues. An 'actual notice' rule would do just the opposite. It would create a standardless free-for-all in which defendants would bring motions to quash service claiming they never received actual notice and, in many cases, plaintiffs would be unable to prove otherwise. In addition, such a rule would put a premium on defendants developing creative ways of evading service thereby thwarting the fundamental principle disputes should be resolved in courts, on the merits." (140 Cal.App.4th at p. 415.)

The cases relied upon by Sylla are distinguishable. In *Gibble, supra,* 67 Cal.App.4th 295, 299-300, 313, a copy of the summons and complaint were left with an office manager. The dispute was whether service substantially complied with the California statutes where summons and complaint were served upon corporate agents who were ostensibly, but not actually, designated as agents for service of process. (See *Wagner v. City of South Pasadena* (2000) 78 Cal.App.4th 943, 951 [distinguishing *Gibble* on the basis that service of the initial pleading and summons were performed upon corporate agent ostensibly designated as agent for service of process].) In *Dill, supra,* 24 Cal.App.4th 1426, service on an out-of-state corporation was held insufficient under section 415.50, because the plaintiff had not addressed the envelope containing the summons and complaint to one of the corporate defendant's officers or an agent designated to accept service on its behalf or to their titles, if their names were unknown. Rather, the plaintiff had addressed the envelope to the corporation itself. (*Id.* pp. 1440, 1437.) Had Dill be able to show the corporate officer or agent for service of process had actually received the summons, this would have sufficed to establish that the plaintiff had

substantially complied with the statutes governing service of process. (*Id.* at p. 1437.) In *Summers*, *supra*, 140 Cal.App.4th 403, copies of the summons and complaint were left with the defendant's personal manager, who was not authorized to receive service. (*Id.* at p. 406.) She forwarded them to the defendant's attorney. Nevertheless, service was found inadequate where the plaintiff failed to demonstrate substantial compliance with section 416.90 by delivery to an agent authorized to receive service of process. (*Summers*, at p. 407.)

Whether or not defendants here received "actual notice" of the lawsuit through the relationship between Takeshi Nakabayashi as an investor in Skipper Japan and Chief Financial Officer of IT-Farm or through some other means, such notice was insufficient to constitute substantial compliance with provisions of the Hague Convention for service, even indulging the dubious proposition that "substantial compliance" rather than actual compliance with the Convention would have been adequate.[10]

We need not address IT-Farm's additional argument that the summons Sylla attempted to serve in 2008 was defective because it failed to notify IT-Farm that it was being served as a fictitiously named defendant. (See *Carol Gilbert, Inc. v. Haller* (2009) 179 Cal.App.4th 852, 858-859.) Nor need we address IT-Farm's claim that service was defective in any event because the there is no evidence the clerk of the Tokyo District Court was registered as a process server in California.

III. Stay

Sylla suggests (but does not appear to directly argue) in its opening brief on appeal that KatanaMe, Inc.'s bankruptcy stayed the running of the three-year period within which service must be made.[11] However, KatanaMe, Inc. filed for bankruptcy on

[10] Because actual notice is not determinative here, we need not explore Sylla's claim that evidence discovered after the court's dismissal of IT-Farm from the litigation demonstrated that principals of IT-Farm had actual notice of the litigation and the amendment naming it as a Doe defendant. (See fn. 4, p. 6, *ante*.)

[11] Sylla does not argue in its appellant's closing brief that either bankruptcy of Skipper California or KatanaMe, Inc. tolled the three-year time period. It may be that

December 12, 2008, more than two months after the end of the three-year service period on September 20, 2008.

Nor did the bankruptcy of Skipper California on June 7, 2008, prevent Sylla from serving IT-Farm with the summons and complaint. "As a general rule, '[t]he automatic stay of section 362(a) [of the Bankruptcy Code (11 U.S.C. § 362(a))] protects only the debtor, property of the debtor or property of the estate. It does not protect non-debtor parties or their property. Thus, [Bankruptcy Code] section 362(a) does not stay actions against guarantors, sureties, corporate affiliates, or other non-debtor parties liable on the debts of the debtor.' [Citations.]" (*In re Chugach Forest Products, Inc.* (9th Cir. 1994) 23 F.3d 241, 246; accord, *Boucher v. Shaw* (9th Cir. 2009) 572 F.3d 1087, 1092.) That a named defendant in the case was in bankruptcy and that this action was stayed against such named defendant, did not prevent Sylla from serving and proceeding against IT-Farm, as Sylla himself recognized in his June 25, 2008, "Memorandum Re: The Effect of Bankruptcy of a Single Defendant on Multi-Defendant Civil Action." Therein, he maintained that the bankruptcy of Skipper California had no effect on his proceedings against other defendants and that "Sylla may proceed against all Defendants except Skipper [California]."

The three-year period for service on IT-Farm was not tolled by the bankruptcies of KatanaMe, Inc. or Skipper California.

IV. Extension of Time to "answer" and General Appearance

Sylla contends IT-Farm made a general appearance by seeking and receiving an extension of time to "answer" the complaint on April 6, 2010. That extension was sought by newly-retained counsel for IT-Farm and granted by Sylla long after expiration of the three-year period for service. Further, in the trial court and in an e-mail response to IT-

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Sylla recognizes it served IT-Farm on March 15, 2010, nearly a month *before* it dismissed Skipper California from the action.

Farm's later statement that it intended to seek an extension of time within which to move to dismiss for failure to effect timely service, Sylla argued that the extension and the motions to quash service and to dismiss were *untimely* because they were filed twenty-three days after the thirty-day deadline for IT-Farm to respond to the summons served on it on March 15, 2010. In the trial court, Sylla did not argue that the extension of time to "answer" constituted a general appearance or that there was a substantive distinction between an extension of time to "answer" and extension of time to "plead," as he now argues on appeal. Rather, he argued that the motion to dismiss was "untimely." Sylla has waived the claim that IT-Farm made a general appearance when it sought and received an extension of time to answer. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶ 1:44, p. 1-10.1.)

In any event, the claim is without merit. "The three-year time limit for service does not apply if the defendant does some act *during that time* that constitutes a general appearance. [Citation.]" (3 Lambden et al., Cal. Civil Practice: Procedure, *supra,* § 22:26, p. 22-28, citing § 583.220, italics added.) "To disqualify the defendant from seeking dismissal, the general appearance must have been made during the initial three years provided by [section] 583.210. Making a general appearance after that time does not deprive the defendant of the right to dismissal. [Citations.]" (3 Lambden et al., Cal. Civil Practice: Procedure, *supra,* § 22:26, p. 22-28; *Busching v. Superior Court* (1974) 12 Cal.3d 44, 50-53; *Brookview Condominium Owners' Assn. v. Heltzer Enterprises-Brookview* (1990) 218 Cal.App.3d 502, 509.) Here, counsel for IT-Farm sought the extension of time to answer long after expiration of the three-year period for serving the defendant. Even if seeking the extension in some circumstances could be considered a general appearance, it did not deprive IT-Farm of its right to a dismissal. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 333 ["Even if entering into the stipulation could be deemed to constitute a general appearance, dismissal was nevertheless mandatory" where the three-year service statute had run.].)

Furthermore, "[w]hether a particular act of the defendant reflects an intent to submit to the jurisdiction of the court, constituting a general appearance, depends upon the circumstances. [Citations.]" (*General Ins. Co. v. Superior Court* (1975) 15 Cal.3d 449, 452-453 [defendant's written stipulation accepting service and agreeing to a " 'sixty-day extension of time . . . within which to appear, answer, demur or otherwise plead . . . ' " reflected an intent to submit to the court's jurisdiction].) Here, the court could well determine that newly retained counsel, knowing that IT-Farm had been served on March 15, 2010, sought an extension of time to "answer" and to become familiar with the case, without intending to submit IT-Farm to the jurisdiction of the court, where service had not been made within three years of filing of the original complaint. It is established that a general appearance is *not* made by the act of obtaining an extension of time to plead, even during the three-year period. (*Blank v. Kirwan, supra,* 39 Cal.3d at p. 333 ["a party . . . 'who merely seeks an extension of time to plead cannot reasonably be deemed to make a general appearance. His purpose may be to obtain adequate time to determine whether or not to object to the jurisdiction of the court.' (*Busching v. Superior Court* [,*supra*,] 12 Cal.3d 44, 51.)"].)

IT-Farm did not make a general appearance, subjecting it to the jurisdiction of the court.

DISPOSITION

The judgment dismissing IT-Farm from the litigation is affirmed. IT-Farm shall recover its costs on this appeal.

_____
Kline, P.J.

We concur:

_____
Haerle, J.

_____
Lambden, J.