

FILED

MAY 04 2021

JAMES M. KIM, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
Paul J. Murphy, Deputy

SUPERIOR COURT OF CALIFORNIA

COUNTY OF MARIN

FRIENDS OF MUIR WOODS;
WATERSHED ALLIANCE OF MARIN,

Petitioners/Plaintiffs,

v.

COUNTY OF MARIN, BOARD OF
SUPERVISORS OF THE COUNTY OF
MARIN AND DOES 1 THROUGH X,

Respondents/Defendants.

DANILE WEISSMAN, AN INDIVIDUAL,
AND DOES XI THROUGH XX,

Real Party in Interest.

Case No.: CIV 2003248

ORDER AFTER HEARING

The motion to dismiss filed by Real Party in Interest Daniel Weissman ("RPI") and Respondents County of Marin and Board of Supervisors of the County of Marin ("Respondents") is **GRANTED**. The Court finds that the required Summons was not issued within the 90-Day period as required under Government Code section 66499.37. (Gov. Code, § 66499.37.) The demurrer filed by RPI and Respondents is **MOOT**.

The motion for discretionary relief under California Code of Civil Procedure section 473(b) filed by Petitioners Friends of Muir Woods Park and Watershed Alliance of Marin ("Petitioners") is **GRANTED**. The Court finds that Petitioners' motion is timely, that RPI and Respondents were not prejudiced and that it was the Court's inadvertent mistake which rendered service of Petitioners'

1 otherwise-timely Summons within the 90-day period “impossible, impracticable, or futile due to
2 causes beyond [Petitioners’] control.” (Code Civ. Proc., § 583.240, subd. (d).) In recognizing that
3 Petitioner’s Petition was dismissed solely as a result of the Court’s error, the Court finds that
4 discretionary relief under section 473(b) is not only appropriate but necessary in the interests of
5 justice, as the fault in failing to timely issue the Summons despite various follow-up emails and
6 telephone calls from Petitioners’ counsel, rests solely with the Court and not with Petitioners who
7 were diligent and who made several good faith attempts to ensure that RPI and Respondents were
8 properly served at the earliest possible opportunity. (Code Civ. Proc., § 473, subd. (b).)
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11 **FACTUAL & PROCEDURAL BACKGROUND**

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13 On April 2, 2020, the Marin County Planning Commission approved a subdivision by the
14 name of The Dipsea Ranch Land Division, also known as the “Dipsea Ranch Tentative Map”
15 (“DRTM”) and accompanying Mitigated Negative Declaration (“MND”). (Yates Decl. ¶ 2.) On
16 August 5, 2020, Petitioners including Friends of Muir Woods Park and Watershed Alliance of Marin
17 signed a petition and appealed the County Planning Commission’s approval of the MDN and DRTM
18 to the Board of Supervisors. (*Id.* at ¶ 3.) On October 6, 2020, the County denied Petitioners’ appeal
19 and approved the subdivision and MND in a 4 to 1 vote. (*Id.* at ¶ 4.) The project allows development
20 of four luxury single family homes, accessory dwelling units and four junior units on the property
21 without further discretionary permitting. (*Ibid.*) The project also includes two new septic systems, the
22 extension of existing driveways and the addition of a stop sign along with a new acceleration lane
23 within double-blind curves. (*Ibid.*)
24

25
26 Following denial of Petitioners’ appeal, on November 3, 2020, Petitioners submitted its
27 Petition for Writ of Mandate for filing with the Marin County Superior Court, through One Legal,
28 along with a Notice Regarding Request for Preparation of the Record, Request for Hearing, and the

1 Summons. (*Id.* at ¶ 5; Exh. A.) Pursuant to existing COVID-19 regulations, One Legal placed these
2 documents in the Marin Superior Court drop box. (*Ibid.*) In an abundance of caution, not having
3 heard from the Clerk of the Court regarding whether a Summons had been issued, Petitioners
4 personally served the Petition for Writ of Mandate and Notice of Preparation of Administrative
5 Record on Joyce Evans, Clerk of the County Board of Supervisors on November 13, 2020. (*Id.* at ¶ 7;
6 Exh. G.) This Proof of Service was filed on November 17, 2020. (*Ibid.*)

8 Petitioner’s initial Summons was rejected for technical reasons but was successfully amended
9 and re-submitted to the Court on December 27, 2020, following multiple exchanges with One Legal
10 and the Court to determine what changes needed to be made. (*Id.* at ¶¶ 8-12; 14.)

12 On December 30, 2020, counsel for Petitioners personally served a copy of the Court’s file
13 and stamped Petition, Notice Regarding Request for Preparation of the Record and Request for
14 Hearing on Respondent County of Marin. (*Id.* at ¶ 15.) On January 3, 2021, the same was served on
15 Brian Case of Marin County Counsel’s Office as well as on Real Party in Interest Daniel Weissman
16 (“RPI”). (*Id.* at ¶ 16.)

18 On January 6, 2020, a CMC “meet and confer” initiated by Petitioners’ counsel was attended
19 by Brian Case on behalf of The County of Marin, Brett Jolley, and Chris Skelton on behalf of RPI,
20 and Ingrid Evans and Edward Yates representing Petitioners. (*Id.* at ¶ 18.) During this CMC “meet
21 and confer” none of Respondents’ respective attorneys nor the attorney for RPI raised any issues
22 which might affect the Court’s jurisdiction or any defects in service. (*Ibid.*) Counsel for Respondents
23 and RPI stipulated to a schedule for preparation of the administrative record, a schedule for
24 certification of the record, a future “meet and confer” for a briefing schedule and hearing dates, a
25 deadline for responsive pleadings and a “meet and confer” regarding a CEQA Settlement Meeting.
26 (*Ibid.*) The parties additionally agreed on mutual acceptance of electronic service. (*Ibid.*)
27
28

1 On January 7, 2021, Counsel for Respondents and RPI filed a joint Case Management
2 Statement and an Administrative Record Preparation Schedule stipulated by the parties to this case
3 with the Court. (*Id.* at ¶ 19.) This Case Management Statement filed on January 7, 2021 did not raise
4 any issue regarding the Court’s jurisdiction over the parties or indicate that there was any defect in
5 service. (*Ibid.*; Exh. H.)

6
7 On January 14, 2021, all parties attended the CMC. (*Id.* at ¶ 19.) Here again, no defects in
8 service were raised and none of the parties questioned the Court’s jurisdiction in this case. (*Ibid.*) On
9 February 11, 2021, Petitioners were served by Respondents with a Notice of Settlement Conference
10 scheduled for February 17, 2021. (*Id.* at ¶ 21.) On February 17, 2021, Petitioners, Respondents and
11 RPI all participated in a Settlement Conference. (*Id.* at ¶ 22.) Again, no objections to service or any
12 issues regarding the jurisdiction of the Court were raised by counsel for RPI or Respondents at this
13 Settlement Conference. (*Ibid.*)

14
15 On February 25, 2021, Petitioners finally received a properly issued, signed, and filed copy of
16 the amended Summons that they submitted to the Court on December 27, 2020. (*Id.* at ¶ 24; Exh. L.)
17 Petitioner’s counsel immediately served Respondents and RPI personally and by email on February
18 26, 2021. (*Id.* at ¶ 25.) In addition, on March 22, 2021 Petitioners immediately moved for relief under
19 California Code of Civil Procedure section 473 in anticipation of an objection based on service of the
20 Summons portion of the Petition past the 90-day period. (Register of Actions (“ROA”).) Despite
21 explanations by Petitioner’s counsel regarding the Court’s near 2-month delay in issuing the
22 Summons, RPI filed its demurrer and motion to dismiss on March 23, 2021. (ROA.)
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1 jurisdiction does not waive their defense that Petitioners served them with a Summons past the strict
2 90-day period prescribed by Government Code section 66499.37.

3 A statute of limitations defense may be asserted by general demurrer if the complaint shows
4 on its face that the statute bars the action. (*Mitchell v. State Department of Public Health* (2016) 1
5 Cal.App.5th 1000, 1007.) However, in order for the bar of the statute of limitations to be raised by
6 demurrer, the defect must clearly and affirmatively appear on the face of the complaint; it is not
7 enough that the complaint shows merely that the action may be barred. (*Geneva Towers Ltd.*
8 *Partnership v. City and County of San Francisco* (2003) 29 Cal.4th 769, 781.)
9

10 While equitable tolling of the statute of limitations would normally apply upon a showing of
11 “timely notice, and lack of prejudice to the defendant, and reasonable and good faith conduct on the
12 part of the plaintiff” (*Mitchell, supra* 1 Cal.App.5th at p. 1008), the language of Government Code
13 section 66499.37 is mandatory and section 66499.37 is not subject to “equitable” tolling. (*Maginn v.*
14 *City of Glendale* (1999) 72 Cal.App.4th 1102, 1109.)
15

16 In the present case, although it is questionable whether the petition shows *on its face* that the
17 Summons was issued past the 90-day period, because RPI and Respondents have additionally filed a
18 motion to dismiss, the Court finds it appropriate to address this issue through RPI and Respondents’
19 motion to dismiss and to grant the motion to dismiss on this basis. Accordingly, the demurrer is moot.
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22 **II. Petitioners Are Entitled to Discretionary Relief from Dismissal Under**
23 **California Code of Civil Procedure section 473(b)**

24 The Court finds that Petitioners are entitled to discretionary relief under California Code of
25 Civil Procedure section 473(b). California Code of Civil Procedure section 473(b) provides in
26 relevant part that:
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1 The court may, upon any terms as may be just, relieve a party . . . from a judgment, dismissal,
2 order, or other proceeding taken against him or her through his or her mistake, inadvertence,
3 surprise, or excusable neglect.”

4 . . .
5 Application . . . shall be made within a reasonable time, in no case exceeding six months, after
6 the judgment, dismissal, order, or proceeding was taken.

7 . . .
8 Notwithstanding any other requirements of this section, the court shall, whenever an
9 application for relief is made no more than six months after entry of judgment, is in proper
10 form, and is accompanied by an attorney’s sworn affidavit attesting to his or her mistake,
11 inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against
12 his or her client, and which will result in entry of a default judgment, or (2) resulting default
13 judgment or dismissal entered against his or her client, unless the court finds that the default
14 or dismissal was not in fact caused by the attorney’s mistake, inadvertence, surprise, or
15 neglect.

16 a. Petitioners’ Motion is Timely

17 Petitioners have brought their motion for relief under section 473 (b) to be heard
18 simultaneously with RPI’s and Respondents’ motion to dismiss and demurrer. Accordingly, the Court
19 finds that Petitioners’ motion for relief was timely filed; well within the six-month limitation required
20 by statute. (Code Civ. Proc., § 473, subd. (b).)

21 b. Summons was Issued past the 90-Day Period Solely Due to Inadvertence, Mistake,
22 and Incapacity of the Court; Not by any Fault of Petitioners

23 In the present case, the Court received Petitioner’s properly amended Summons on December
24 27, 2020, which Petitioner submitted to the Court’s Dropbox pursuant to the Court’s emergency
25 COVID-19 filing procedures. The entire state was subject to a shelter in place order. Due to the
26 emergency health crisis and various orders which required the Court to drastically change its standard
27 operating procedures, the Court was operating under reduced capacity and was unable to timely issue
28 the Summons provided to it by Petitioners until long after the 90-day period had passed. It was

1 therefore the Court's inadvertent error that prevented a properly issued Summons from
2 accompanying the Petition and Request for Preparation of the Administrative Record that Petitioners
3 timely served on RPI and Respondents. RPI suggests compliance with the statute was not impossible
4 because Petitioner could have taken further action between December 27, 2020 when the amended
5 Summons was placed in the drop box and January 4, 2021 when the statute expired. Given the
6 difficulties with the clerk's office, that proposition is not reasonable.
7

8 The Court notes that on January 4, 2021, Brett Jolley emailed Petitioners' counsel informing
9 him that he (Jolley) was representing RPI and that he would attend the CMC "meet and confer"
10 scheduled for January 6, 2020. (Yates Decl. ¶ 17.) Therefore, RPI had notice of the Petition, received
11 a copy of the Petition and Request for Preparation of the Administrative Record prior to the time that
12 the 90-Day period expired and did not suffer any prejudice as a result of the Court's inadvertent error
13 in failing to timely issue the Summons. Similarly, counsel for Respondents had also been personally
14 served a copy of the Petition and Request for Preparation for the Administrative Record prior to the
15 90-day period expiring and all parties were served a copy of the issued Summons as soon as
16
17 Petitioners received the Summons issued by the Court.
18

19 In *Sprague v. County of San Diego* (2003) 106 Cal.App.4th 119, 135, on which Respondents
20 and RPI rely, while the court declined to extend relief under section 437 (b) to instances where failure
21 to serve the summons was the result of attorney error, the case does not stand for the broad
22 proposition that 473(b) relief is never available to address the 90 day statute in Gov. Code section
23 66499.37. In *Sprague*, counsel was at fault. Here, the clerk's office was in chaos due to the COVID-
24 19 pandemic and shelter in place orders. *Sprague* does not address discretionary or mandatory relief
25 in the context of an inadvertent mistake or error by the court.
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1 In the unique circumstances of the present case, the emergency health crisis required the
2 Court to adopt several changes which were intended to maximize the safety of Court employees and
3 the public. However, these changes were in no way intended to penalize litigants for the Court's
4 delays which resulted from those changes that resulted from no fault of their own. Furthermore, the
5 Court is aware that its staff specifically instructed Petitioners not to serve a Summons that was not
6 officially issued, signed and filed, and as the Court recognizes that it was the Court's own inadvertent
7 mistake that resulted in the late issuance of the Summons, in the interests of justice, the Court finds
8 that relief under section 473 (b) must be afforded to Petitioners under these unique and unprecedented
9 circumstances, which were both out of Petitioners' control, and to some extent, out of the control of
10 the Court.
11

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13 c. Code of Civil Procedure section 583.240 Excludes Time During Which Service
14 was "impossible, impracticable or futile due to causes beyond the plaintiff's
15 control" (Code Civ. Proc., § 583.240, subd. (d).)

16 In computing the time within which service must be made, there shall be excluded the time
17 during which service "was impossible, impracticable, or futile due to causes beyond the plaintiff's
18 control." (Code Civ. Proc., § 583.240, subd. (d).)

19 Petitioner submitted its amended Summons to the Court on December 27, 2021. (Yates Decl.
20 ¶14.) Following its submission, the Court finds that it would have been impossible for Petitioners to
21 serve RPI with the Summons due to the Court's failure to have signed and issued it as well as the
22 Court's explicit instructions to Petitioners that Petitioners were not to serve RPI a copy of the
23 Summons that had not officially been issued by the Court. (Yates Decl. ¶13.) As counsel for
24 Petitioners carefully heeded the Court's instructions, the Court finds that it was impossible for
25 Petitioners to have served RPI and Respondents with the Summons until after Petitioners received a
26 copy of the Summons issued by the Court. (Yates Decl. ¶24.)
27
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1 While there are no precedents confirming explicitly whether Code of Civil Procedure section
2 583.240 (d) applies to cases involving petitions brought under Government Code section 66499.37,
3 some courts have considered it, and its remedial intent seems especially applicable in this situation
4 where the Court, in inadvertently retaining possession of Petitioners' Summons beyond the 90-day
5 period, rendered service of the Summons on RPI and Respondents within the 90-day period
6 impossible due to causes beyond Petitioners' control. (Code Civ. Proc., § 583.240, subd. (d).)
7

8
9 d. Relief Under California Code of Civil Procedure section 473 is Liberally
10 Construed

11 It is well settled that appellate courts have always been favorably disposed toward action on
12 the part of the trial courts which permit, rather than prevent, the adjudication of legal controversies
13 upon their merits. (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 255.) Thus,
14 "the provisions of section 473 of the Code of Civil Procedure are to be liberally construed and sound
15 policy favors the determination of actions on their merits." (*Riskin v. Towers* (1944) 24 Cal.2d 274,
16 279.)
17

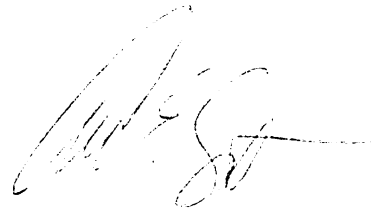
18 Where the mistake is excusable and the party seeking relief has been diligent, courts have
19 often granted relief pursuant to the discretionary relief provision of section 473 if no prejudice to the
20 opposing party will ensue. (*Zamora, supra* 28 Cal.4th at p. 258.) In such cases, the law "looks with
21 [particular] disfavor on a party who, regardless of the merits of his cause, attempts to take advantage
22 of the mistake, surprise, inadvertence, or neglect of his adversary." (*Reed v. Williamson* (1960) 185
23 Cal.App.2d 244, 248.)
24

25 In the present case, RPI and Respondents have suffered no prejudice as the result of the
26 Court's failure to timely issue Petitioners' otherwise-timely Summons. Petitioner served RPI and
27 Respondents with the Petition and Request for Preparation of the Administrative Record within the
28

1 90-day period, counsel for RPI emailed Petitioners' counsel to inform Petitioners' counsel that he
2 would be representing RPI and would be attending the January 6, 2021 CMC "meet and confer"
3 before the 90-day period expired, and all parties appeared at the January 6, 2021 CMC "meet and
4 confer" as well as the January 14, 2021 CMC, indicating that they had actual notice of the Petition
5 and were not prejudiced in any way by the late receipt of the Summons which the Court was unable
6 to issue until after the 90-day period had passed.
7

8 As no prejudice resulted to RPI or Respondents from the Court's late issue of Petitioners'
9 otherwise-timely Summons, discretionary relief under section 473(b) is appropriate to allow
10 Petitioners' Petition to be adjudicated on the merits where the only technicality preventing them from
11 having their Petition adjudicated on the merits was an inadvertent mistake of the Court.
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18 DATED: May 4, 2021
19



20 ANDREW E. SWEET
21 Judge of the Superior Court
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26
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28

MARIN COUNTY Superior Court
3501 Civic Center Drive
P.O. Box 4988
San Rafael, CA 94913-4988

FRIENDS OF MUIR WOODS PARK, ET AL

vs.

COUNTY OF MARIN, ET AL

CASE NO. CV2003248

PROOF OF SERVICE BY
FIRST CLASS MAIL

*Code of Civil Procedure
Sections 1013a and 2015.5*

I am an employee of the Marin County Superior Court. I am over the age of 18 years and not a party to this action. My business address is 3501 Civic Center Drive, Hall of Justice, San Rafael, California.

On May 5, 2021, I served the following document(s): **ORDER AFTER HEARING** in said action to all interested parties, by placing the envelope for collection and mailing on the date shown thereon, so as to cause it to be mailed on that date following standard court practices. I am readily familiar with the court's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

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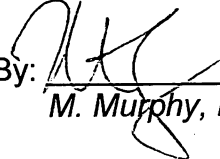
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

JAMES M. KIM
Court Executive Officer

Executed at San Rafael, California

By: 
M. Murphy, DEPUTY