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Attorney for Plaintiff
Pro se

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

KENDRICK MOXON

Plaintiff,

vs.

GRAHAM BERRY,

Defendant.

Case No. BC429217

MOTION FOR SUMMARY JUDGMENT

Date: July 1, 2010
Dept: 58
Time: 8:30 am

TO DEFENDANT GRAHAM BERRY AND THIS HONORABLE COURT:

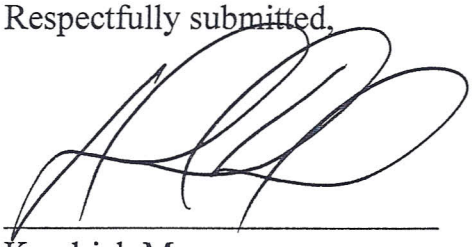
Please take notice that at 8:30 a.m., on July 1, 2010, in Department 58, before the Hon. Rolf M. Treu, located at 111 N. North Hills St., Los Angeles, California, Plaintiff Kendrick Moxon will and hereby does move for Summary Judgment in this action, consisting of renewal of a monetary judgment against defendant, Graham Berry.

The motion is predicated on the absence of any disputed material fact and plaintiff's entitlement to renewal of his monetary judgment. The motion is based upon the declaration of Kendrick Moxon and the exhibits appended thereto, the attached

memorandum of points and authorities, and such evidence and argument which may subsequently be provided to the Court at the hearing of this motion.

Dated April 7, 2010

Respectfully submitted,



Kendrick Moxon
Counsel for plaintiff pro se

I - INTRODUCTION

This is an action brought solely to renew a monetary judgment against defendant Graham Berry. This simple case is based upon the following events:

- a monetary judgment issued against Mr. Berry in the United States District Court, Central District of California, in 1999 in favor of Kendrick Moxon, in the amount of $27,484.72 arising out of sanctions against Mr. Berry for filing a frivolous and vexatious lawsuit against Mr. Moxon;

- Mr. Berry sought to vacate the judgment, which motion was denied;

- he appealed the judgment and denial of the motion to vacate;

- the appeal was dismissed in January 2001 making the judgment final;

- the judgment was never paid; and

- with interest, the judgment is now $ 48,876.76.

In accordance with Rule 69(a), F.R.Civ.P., proceedings supplemental to and in aid of collection of judgment must proceed in accordance with state procedures in which the court is located – in this case, in California. Pursuant to California Code of Civil Procedure §683.020 et seq., the judgment may be renewed for a further period of 10 years to permit collection thereof.

Accordingly, the judgment should be renewed in the amount of $ 48,876.76.

II - STATEMENT OF FACTS

In May of 1998, attorney Graham Berry filed a Complaint in the case of *Pattinson v. Church of Scientology International, et al.,* Cv-98-3958 CAS (SHX), U.S. District Court, Central District of California. (Separate Statement of Undisputed Material Facts No. 1, hereinafter "UMF __.")[1] The Complaint, which was 166 pages in length, sued over 50 defendants in 24 counts, alleging various conspiracies and torts against Mr. Pattinson. (UMF 2.) One of the defendants in the *Pattinson* case was Kendrick Moxon,

[1] All exhibits are appended to plaintiff's Evidence Filed in Support of Summary Judgment and authenticated by the Declaration of Kendrick Moxon filed in support of the instant motion for summary judgment.

an attorney who had represented several churches of Scientology for more than a decade at that time. (UMF 3.) The only defendant served with the complaint was Mr. Moxon – the plaintiff herein. (UMF 3.)

The case was assigned to the Hon. Christina A. Snyder, U.S. District Judge, who dismissed the complaint with leave to replead. (UMF 6.)

The First Amended pleading was worse. It was 312 pages in length, asserting 30 causes of action for racketeering, conspiracy, fraud, infliction of emotional distress, civil rights and other assorted alleged claims against 58 named defendants and Does 1-500. (UMF 4.) Included as purported co-conspirators were President William Clinton, Secretary of State Madeline Albright, National Security Advisor Sandy Berger, and a host of others. (UMF No. 5.) Characterizing the amended complaint as a "rambling tale of irrelevancy," Judge Snyder dismissed the amended complaint but again gave Mr. Berry leave to replead. (UMF 6.)

But, he persisted with irrelevant and unmeritorious assertions in his amended complaints, and on April 15, 1999, Judge Snyder entered an order of sanctions pursuant to both Rule 11, F.R.Civ.P., and 28 U.S.C. §1927 (the federal vexatious litigant statute). (UMF No. 7.) The Court subsequently entered judgment against Mr. Berry in the amount of $28,484.72 on July 19, 1999. (UMF No. 8), which is the judgment sought to be renewed in this action.

Mr. Berry sought to vacate the sanctions ruling and judgment pursuant to Rule 60, F.R.Civ.P., arguing that, "the sanctity of the justice system, the equitable principals underpinning Rule 60(b) … demand that the Rule 11 memorandum order of April 15, 1999 and the Rule 11 sanctions order of July 19, 1999, be vacated …" (UMF No. 9.) The Motion to Vacate also argued, *inter alia*, that Berry was the victim of psychological warfare and "various criminal, fraudulent and unethical activities." (UMF No. 10.)

Judge Snyder denied the motion to vacate by Order dated June 30, 2000. (UMF No. 11.)

Mr. Berry appealed the rulings to the Ninth Circuit Court of Appeals. However, he failed to prosecute the appeal or to file a brief and the appeal was dismissed by the Court on Jan 17, 2001. (UMF No. 12.) The mandate was issued by the same Order, (*id.*), constituting finality of the judgment on that date.

Mr. Berry also filed for bankruptcy on July 13, 1999, during the pendency of the motion seeking sanctions against him. *In re Graham Edward Berry*, LA99-32264ER, U.S.B.C, C.D.Cal. (UMF No. 13.) In the bankruptcy action, Mr. Berry sought discharge of the *Pattinson* judgment. However, after some substantial litigation, the sanctions order and judgment against him were found to be non-dischargeable by Order entered in the Bankruptcy Court on December 18, 2000. (UMF No. 14.)

Meanwhile, the California State Bar instituted proceedings against Mr. Berry for numerous counts of alleged misconduct. Mr. Berry entered into a "Stipulation Re Facts, Conclusions of Law and Disposition and order Approving Actual Suspension" with the State Bar, in support of a *nolo contendere* plea. (UMF No. 15.) In seeking the *nolo contendere* plea, Mr. Berry affirmed on October 25, 2001, that "I, the Respondent in this matter… plead nolo contendere to the charges set forth in this stipulation and I completely understand that my plea shall be considered the same as an admission of culpability …" (UMF No. 16.) The Stipulation of Facts appended thereto, noted at the outset, "The parties intend to be bound and are hereby bound by the stipulated facts contained in this stipulation." (UMF No. 17.)

The stipulation of facts to which Mr. Berry agreed as part of his plea bargain with the State Bar, contained a stipulation respecting the *Pattinson* case judgment sought to be renewed herein. The stipulation noted, in part, that the *Pattinson* complaints "each failed to state facts supporting a basis for liability against Moxon resulting in a finding of the court that [Berry] acted in bad faith. The court found that [Berry] had violated 28 U.S.C. section 1927 prohibiting the unreasonable and vexatious multiplication of proceedings as well as Federal Rule of Civil Procedure, Rule 11 …" (UMF No. 18.) The stipulated

"Legal Conclusion" as to this Count, found that by failing to pay these costs, expenses and attorneys fees [to Mr. Moxon] as ordered, Mr. Berry willfully disobeyed or violated" a court order requiring him to perform an act, "which he ought in good faith to do." (UMF No. 19.) [2]

Mr. Berry has not paid the judgment, and judgment debtor examinations over the past 8 years have failed to reveal accessible assets to satisfy the judgment. (UMF No. 20, 21.)

III - THE JUDGMENT IS SUBJECT TO RENEWAL IN THIS ACTION

Federal Rule of Civil Procedure 69(a) requires that proceedings to execute on a judgment or proceedings supplemental to collection of a judgment, be pursued in accordance with state law in the state in which the federal court was located that entered the judgment. Thus, the renewal of the judgment must be pursued under California law, where the court rendering the judgment is located (and where both parties are located). The statute of limitations on collection of a judgment is 10 years. C.C.P. §337.5(3) (for an "action upon a judgment or decree of any court of the United States or of any state within the United States.") Thus, the statute of limitations for enforceability of the judgment is 10 years. C.C.P. §683.020.

The application of the expedited procedure of filing a simple form for renewal of a judgment, is available where the renewal application is filed within 10 years of the initial entry of judgment. C.C.P.§683.020. The judgment sought here to be renewed was entered by Judge Snyder on July 19, 1999, and became final on appeal on January 17, 2001. It was also stayed for over a year in bankruptcy. However, because of ambiguity in calculation of the 10-year period to bring an expedited renewal pursuant to C.C.P. §683.020, plaintiff opted to bring a separate action pursuant to C.C.P. §683.050.

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[2] The facts relating to Mr. Berry's State Bar proceedings and his stipulation of misconduct respecting the underlying judgment at issue, are set forth herein in anticipation of Mr. Berry arguing, as he asserted in his proposed cross-complaint and his request for leave to file that cross-complaint as a vexatious litigant, that the Judgment against him should be vacated by this Court.

When the Enforcement of Judgments Law became operative in 1983, in which the expedited procedure for renewal set forth in §683.110 *et seq*, was established, the existing renewal procedure was specifically preserved, of filing a separate action to renew a judgment. C.C.P. §683.050. Thus, as addressed at length in *Jonathan Neil Associates, Inc. v. Jones* (2006) 138 Cal.App.4th 1481, 1487-89, *rev. den.*, and *Barkley v. City of Blue Lake* (1993) 18 Cal.App.4th 1745, 1749-1751, a separate action for renewal of a judgment may be brought within 10 years of the date the judgment became final, or within 10 years of finality minus any periods of tolling.

As stated in *Archdale v. American Intern. Specialty Lines Ins. Co.* (2007) 154 Cal.App.4th 449, 479:

> The basic rule is that while an appeal is pending, a judgment is not final. (*McKee v. National Union Fire Ins. Co.* (1993) 15 Cal.App.4th 282, 286, 19 Cal.Rptr.2d 286.) This is because "a judgment does not become final so long as the action in which it was rendered is pending and an action is deemed pending until it is finally determined on appeal or until the time for appeal has passed. The determination of the issue in the case is held in abeyance until the appeal is finally decided by an appellate court and the appeal operates to 'keep alive the case ... as it existed before the judgment was rendered.'" (*Id.* at p. 288, 19 Cal.Rptr.2d 286.) An appeal is final on the date remittitur issues. (*Hoover v. Galbraith* (1972) 7 Cal.3d 519, 525-526, 102 Cal.Rptr. 733, 498 P.2d 981; *Cory v. Poway Unified School Dist.* (1983) 147 Cal.App.3d 1158, 1165, 195 Cal.Rptr. 586; *Macedo v. Bosio* (2001) 86 Cal.App.4th 1044, 1051, fn. 5, 104 Cal.Rptr.2d 1.)

In this case, the judgment did not become final at the earliest, until after the appeal was dismissed in January 2001. Dismissal of the appeal on the monetary judgment against Mr. Berry and issuance of the remittitur in the *Pattinson* case occurred on January 17, 2001, which was also the same date the mandate issued to the lower court. (UMF No. 12.) The instant renewal action was filed on January 5, 2010, less than 9 years after the judgment became final, leaving more than one year of statute left to run.

Moreover, even had the judgment not been appealed by Mr. Berry and finality of it accordingly delayed, any action to enforce or collect the judgment was independently tolled during the period of the automatic stay imposed by Mr. Berry's bankruptcy.

California Courts have held that pursuant to 11 U.S.C. §362(a), the period of an automatic stay in bankruptcy proceedings tolls the statute of limitations to seek an action to renew or enforce a judgment. *Kertesz v. Ostrovsky* (2004) 115 Cal.App.4th 369, 376. The bankruptcy action was filed a week before the July 19, 1999 judgment issued, staying enforcement until the bankruptcy court determined the judgment was not dischargeable on December 18, 2000. The beginning date upon which the statute of limitations for collection of the judgment would begin to run in consideration of the bankruptcy stay, would be no earlier than December 18, 2000 – nine years and one month before the date this renewal action was filed. (UMF No. 22.)

No disputed facts or issues of law prevent the renewal of the judgment.

IV - COLLATERAL ESTOPPEL BARS RE-LITIGATION OF THE ISSUES DECIDED IN PRIOR PROCEEDINGS LEADING TO A FINAL MONETARY JUDGMENT

Mr. Berry's Answer and proposed cross-complaint make various and wild assertions as to why the judgment against him should be vacated. But, he has been down this road and repeatedly lost. Mr. Berry would therefore be barred by the doctrine of collateral estoppel from once again litigating the issues he has repeatedly lost. "In general, collateral estoppel … precludes a party from relitigating an issue of fact or law if the issue was litigated and decided in a prior proceeding." *Lumpkin v. Jordan* (1996) 49 Cal. App. 4th 1223, 1229.

> Collateral estoppel bars relitigation of an issue that was previously adjudicated if (1) the issue was identical to an issue decided in a prior proceeding; (2) the issue was actually litigated; (3) the issue was necessarily decided; (4) the decision in the prior proceeding is final and on the merits; and (5) the party against whom collateral estoppel is asserted was a party to the prior proceeding . . .

Bostick v. Flex Equipment Co., Inc. (2007) 147 Cal.App.4th 80, 96, citing *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.) "The 'identical issue' requirement addresses whether 'identical factual allegations' are at stake in the two proceedings, not whether the

ultimate issues or dispositions are the same." (*Id.* at 96-97, quoting *Lucido* at p. 342.) "The 'necessarily decided' requirement means only that the resolution of the issue cannot have been 'entirely unnecessary' to the judgment in the prior proceeding." *Id.*, quoting *Lucido*.

All these elements are met here. (1) Berry litigated the sanctions issue before Judge Snyder, he lost and a judgment was awarded. His motion to vacate filed in 2000, as to why the judgment was allegedly erroneous also failed. In that motion he filed the same declarations and made the same assertions of fraud, intimidation of witnesses, etc., that he asserted in the Answer and proposed cross-complaint. He even argued that the motion to vacate was timely filed in April 2000 because it was filed within one-year of the April 15, 1999 ruling finding him to have violated Rule 11 and the federal vexatious litigant statute. His appeal was dismissed. He re-litigated the issues yet *again* in the bankruptcy court, again making assertions of fraud, criminality, abuse, psychological pressure and conspiracy, which he is wont to argue before every court. After full litigation, the judgment was found to be non-dischargeable as an intentional tortuous act.

(2) The issue was actually litigated these several times addressed above.

(3) The issue was first necessarily decided when Mr. Moxon moved for Rule 11 and vexatious litigation sanctions against Berry. It was again necessarily decided in Berry's motion to vacate, and again before the bankruptcy court when the issue of the propriety of the judgment was also raised by Berry.

(4) The judgment is final, having been appealed a decade ago and the appeal dismissed. The bankruptcy decision, issued in December 2000, is also final.

(5) Berry was a party in each of the proceedings.

Each element is met. Thus, collateral estoppel bars relitigation of the issues giving rise to the judgment at issue.

V - BERRY'S STIPULATION TO THE BAR PRECLUDES FURTHER CHALLENGE TO THE JUDGMENT

While the issues of finality and collateral estoppel bar any re-litigation of the propriety of the judgment against him, it is the stipulation before the Bar which should moot any conceivable re-litigation. Mr. Berry's admitted misconduct giving rise to the judgment at issue, should prevent any further disinterment of the conspiracy claims a moldy decade later to challenge the judgment against him. Indeed, the Bar should be apprised of the events in this case, as Mr. Berry is in need of some further restraint.

VI - A NEW JUDGMENT SHOULD ISSUE IN THE AMOUNT OF $48,876.76

Plaintiff is therefore entitled to renew the judgment of $28,484.72, plus interest from the date of July 19, 1999 until the date the debt is collected. With interest, the total value of the judgment, as of the date of filing of this motion on April 7, 2010, is $48,876.76.[3] (UMF No. 23.)

VII - CONCLUSION

The judgment against Graham Berry, dated July 19, 1999, in the amount of $28,484.72, should be renewed for a period of 10 years from the date of the Complaint herein, to January 5, 2020, with interest running from the date of entry on July 19, 1999, for a renewed judgment in the amount of $48,876.76 and including further interest running on any uncollected amount to the date of collection.

Dated: April 7, 2010

Respectfully submitted,

Kendrick Moxon
Counsel pro se
MOXON & KOBRIN

[3] The interest calculations are those applicable to federal judgments, 28 U.S.C. §1961, and not the higher rate applicable for a state court judgment. See interest calculation tool at www.nationaljudgment.net/intcalc.php, applying interest rates to federal judgments.

PROOF OF SERVICE

I am employed in Los Angeles County, California, at Moxon & Kobrin, 3055 Wilshire Blvd., Ste. 900, Los Angeles, CA, 90010.

On April 7, 2010, I served by First Class Mail, postage prepaid the following document:

MOTION FOR SUMMARY JUDGMENT

on the following person:

Graham Berry
3384 McLaughlin Ave.
Los Angeles, CA 90066

Courtesy copy to:

Barry Van Sickle
1079 Sunrise Ave.
Suite B315
Roseville, CA 95661

Executed on April 7, 2010, in Los Angeles, California. I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Kendrick Moxon