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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FOURTH APPELLATE DISTRICT  
DIVISION TWO**

HERITAGE SQUARE RIVERWALK  
COMMONS,

Petitioner,

v.

THE SUPERIOR COURT OF  
RIVERSIDE COUNTY,

Respondent;

COMERICA BANK,

Real Party in Interest.

E055947

(Super.Ct.No. RIC1112528)

OPINION

ORIGINAL PROCEEDINGS; petition for writ of mandate. Pamela Thatcher,  
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Petition granted.

The Alvarez Firm, Andrew W. Zepeda, Justin M. Alvarez, Sean M. Finerty; and  
Richard K. Deason for Petitioner.

No appearance for Respondent.

Buchalter Nemer, Debra Deem, Scott O. Smith, and Efrat M. Cogan for Real Party in Interest.

## INTRODUCTION

In this matter, we have reviewed the petition, the opposition filed by real party in interest, and petitioner's reply. We have determined that resolution of the matter involves the application of settled principles of law, and that issuance of a peremptory writ in the first instance is therefore appropriate. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178.)

## DISCUSSION

The first problem in this case is that real party in interest's motion to vacate its default was calendared for hearing on March 20, 2012, but the trial court purported to rule on it on March 8. The trial court could not "advance" the matter on its own motion where petitioner had no prior indication that the default motion was to be argued and decided.

Next, the trial court "decided" that motion on the basis of a statute (Code Civ. Proc., § 1281.7), which neither party had cited and which is not *directly* controlling; hence, it was clearly error not to allow petitioner, as the party on the wrong end of that argument, the opportunity to research and address the issue. The essence of due process is notice and the opportunity to be heard. (*Mathews v. Eldridge* (1976) 424 U.S. 319.) Petitioner had no notice of the trial court's intended reliance on that statute and certainly no realistic opportunity to address it.

These errors compel that we grant relief to petitioner and we, therefore, need not address whether petitioner's agreement (apparently implicit) that a commissioner could hear

the *reference* motion constitutes an equally implicit agreement that the commissioner could hear the *default* motion scheduled for another day. We also need not address the issue of whether petitioner should have been given the opportunity to supplement its briefing on the reference motion.

Real party in interest's arguments in support of the trial court's actions are without merit. The fact that petitioner noted the existing default and the scheduled motion to vacate in its response to the reference motion did *not* "put the propriety of the default in issue." Only real party in interest's motion to vacate did that, and that motion was simply not yet before the court. As we have discussed above, petitioner's due process rights *were* affected. Finally, real party in interest's arguments on the merits of the two motions are simply premature. The default motion is no more before us than it was before the trial court. While the default stood, the trial court had no power to rule on the motion to enforce a purported agreement for judicial reference.

#### DISPOSITION

Accordingly, the petition for writ of mandate is granted. Let a peremptory writ of mandate issue, directing the Superior Court of Riverside County to vacate its orders granting real party in interest's motions. The trial court shall further set a new hearing date for the motion for relief from default and, *thereafter*, if that motion is granted, set a new date for the hearing on the motion for judicial reference. All related matters are left for the trial court's exercise of its sound discretion.

Petitioner to recover its costs.

Petitioner is directed to prepare and have the peremptory writ of mandate issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties.

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KING  
J.

We concur:

RAMIREZ  
P. J.

McKINSTER  
J.