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APPELLATE DIVISION OF THE SUPERIOR COURT
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

ALFREDO GARCIA,
Plaintiff and Appellant,
v.

PETER LIAKOPOULOS and
ELENI LIAKOPOULOS,
Defendants and Respondents,
MORSE MEHRBAN and LAW OFFICES
OF MORSE MEHRBAN,
Objectors and Appellants.

) No. BV 028438
) Downey Trial Court
) No. 07C01665

OPINION

Plaintiff Alfredo Garcia and his attorney Morse Mehrban (Mehrban) appeal the court's granting of defendants' motion for sanctions pursuant to Code of Civil Procedure section 128.7.¹ We reverse the order.²

¹The pertinent portions of section 128.7 of the Code of Civil Procedure are as follows: "[¶] . . . [¶] (b) By presenting to the court, whether by signing, filing, submitting, or later advocating, a pleading, petition, written notice of motion, or other similar paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following conditions are met: [¶] (1) It is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . [¶] (3) The allegations and the other factual contentions have evidentiary support or, if specifically so

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PROCEDURAL HISTORY

On August 8, 2007, plaintiff filed a complaint against defendants alleging violations of Civil Code sections 54 and 54.1. Defendants Peter and Eleni Liakopoulos were the owners of Pete’s Hamburgers, Inc. The complaint alleged that plaintiff, a paraplegic confined to a wheelchair, was unable to use the toilet at the restaurant as it lacked two grab bars and the toilet seat cover dispenser was mounted out of plaintiff’s reach. Defendants’ answer denied the allegations of the complaint and asserted various affirmative defenses. On September 24, 2009, defendants served upon Mehrban a motion for sanctions pursuant to section 128.7, alleging plaintiff’s complaint was factually frivolous and filed for an improper purpose.³ The motion was not accompanied by a notice of motion nor did the face page of the motion provide a hearing date or time. On November 6, 2009, a court trial was held. On February 2, 2010, judgment was entered in favor of defendants. Thereafter, defendants filed with the court and served upon plaintiff a notice of motion and motion for sanctions pursuant to section 128.7 to be heard on March 25, 2010. The motion was continued and heard over the course of two days, April 8, 2010 and May 20, 2010. The court granted defendants’ motion citing subdivisions (b)(1) and (b)(3) of section 128.7, and awarded sanctions in the amount of
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identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. . . [¶] (c) . . . [¶] (1) A motion for sanctions under this section shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). *Notice of the motion shall be served as provided in Section 1010, but shall not be filed with or presented to the court unless, within 21 days after service of the motion, or any other period as the court may prescribe, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.*” (Italics added.)

All further statutory references are to the Code of Civil Procedure unless otherwise specified.

²In light of our disposition, we do not address appellant’s remaining contentions.

³Mehrban contends his office never received the motion and that the proof of service was defective. We do address these contentions here.

1 \$28,581.87 against plaintiff and \$29,213.87 against Mehrban. This timely appeal
2 followed.

3 DISCUSSION

4 The question we must answer is whether defendants' failure to serve a notice of
5 motion prior to filing their motion rendered the motion fatally defective. The trial court's
6 jurisdiction to consider such a motion is subject to our de novo review. (*Day v.*
7 *Collingwood* (2006) 144 Cal.App.4th 1116, 1123.)

8 The facts concerning the motion are not disputed. The record indicates that
9 defendants served Mehrban with a document entitled: "Motion for Sanctions Pursuant to
10 C.C.P. § 128.7; Memorandum of Points and Authorities; Declaration of Gail S.
11 Cooper-Folb." The body of the motion indicated that the hearing date and hearing time
12 were "To be scheduled." Attached to the motion was a proof of service attesting to
13 service by mail on September 24, 2009. After judgment was entered on February 2,
14 2010, defendants filed the previously served motion as well as a formal notice of motion
15 with the court indicating a hearing date of March 25, 2010 at 9:00 a.m. in Department 8.
16 A proof of service by mail to Mehrban's office dated February 16, 2010 was attached.


17 Under the "safe harbor" provisions of section 128.7, filing a motion for sanctions
18 is a two-step process. First, a "[n]otice of motion shall be served as provided in
19 Section 1010 . . ." (§ 128.7, subd. (c)(1).) If within 21 days the claim is not withdrawn
20 or corrected, the motion is to be filed with the court. (*Ibid.*) "A *formal noticed motion* is
21 required to begin the 21-day period. [Citation.] Strict compliance with the statute's
22 notice provisions serves its remedial purpose and underscores the seriousness of a motion
23 for sanctions. [Citations.]" (*Galleria Plus, Inc. v. Hanmi Bank* (2009) 179 Cal.App.4th
24 535, 538, italics added.) Section 128.7 mandates that the motion *shall* be served in
25 compliance with section 1010. "Section 128.7's incorporation of section 1010 is
26 compulsive, not permissive. [Citation.]" (*Galleria Plus, Inc. v. Hanmi Bank, supra*, 179
27 Cal.App.4th at p. 538.)

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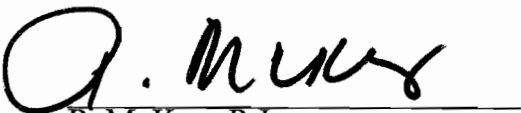
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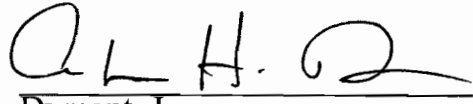
The motion served on Mehrban on September 24, 2009 failed to specify the date and time the motion would be heard. Such a failure contravenes the purpose and intent of the section — putting a party on notice that should the claim not be withdrawn, the motion will be heard as calendared. As stated *ante*, section 128.7 requires a formal *noticed* motion in order to comply with the statute. Therefore, defendants' failure to specify the date and time the motion would be heard rendered it fatally defective.

The order awarding sanctions is reversed. Appellants to recover costs on appeal.


Keosian, J.

We concur.


P. McKay, P.J.


Dymant, J.