Tentative Rulings for January 11, 2022
Department 403

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

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(Tentative Rulings begin at the next page)

Tentative Rulings for Department 403

Begin at the next page

(36)

Tentative Ruling

Re: ***Kan-Di-Ki, LLC v. Dycora Transitional Health – Clovis LLC, et al.***
Superior Court Case No. 21CECG00359

Hearing Date: January 11, 2022 (Dept. 403)

Motion: By Defendants to Set Aside Default and Default Judgment

Tentative Ruling:

To deny with prejudice.

Explanation:

Relief pursuant to Code of Civil Procedure, section 473, subdivision (b):

The trial court has broad discretion to vacate the judgment and/or the clerk's entry of default that preceded it. However, that discretion can be exercised only if the moving party establishes a proper ground for relief, by the proper procedure, and within the statutory time limits. (*Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 495.) The court is empowered to relieve a party "upon any terms as may be just … from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief … shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken." (Code Civ. Proc., § 473, subd. (b).) The outside time limit for seeking relief under Code of Civil Procedure, section 473, subdivision (b) is six months. This limit is jurisdictional in the sense that the court has no power to grant relief after this time regardless of whether an attorney affidavit of fault is filed or how reasonable the excuse for the delay. (*Austin v. Los Angeles Unified School Dist.* (2016) 244 Cal.App.4th 918, 928.)

Both parties, relying on Code of Civil Procedure, section 473, subdivision (b), have determined a different deadline in filing a motion for section 473 discretionary relief. Defendants argue that the six month timeline accrues from entry of default judgment, whereas the opposition argues that the six month timeline accrues from entry of default.

Where the motion is filed more than six months after entry of default (though less than six months after entry of the default judgment), the default may not be set aside under Code of Civil Procedure, section 473, subdivision (b). (*Moghaddam v. Bone* (2006) 142 Cal.App.4th 283, 290; *Rutan v. Summit Sports, Inc.* (1985) 173 Cal.App.3d. 965, 970; *Kramer v. Traditional Escrow, Inc.* (2020) 56 Cal.App.5th 13, 39.) Further, setting aside the default judgment without setting aside the default would be an "idle act" and thus not permitted even though technically timely. (*Pulte Homes Corp. v. Williams Mechanical, Inc.* (2016) 2 Cal.App.5th 267, 273.) In certain circumstances, the default judgment may be set aside without disturbing the default. Such relief is appropriate where the default judgment as entered is erroneous (e.g., in excess of amount demanded in the

complaint). (*Jonson v. Weinstein* (1967) 249 Cal.App.2d 954, 958; *Behm v. Clear View Technologies* (2015) 241 Cal.App.4th 1,17 [lack of adequate notice of punitive damages and excess damages rendered default judgment improper but had no effect on underlying default].) Thus, as Plaintiffs point out, the motion for discretionary relief must be filed within six months after the clerk's entry of default. The motion is ineffective if filed thereafter, even if it is within six months after entry of the default judgment.

Here, Defendants concede that default was entered against them on May 28, 2021, and default judgment was entered on July 14, 2021. (Memo. 2:13-15.) Defendants filed their motion to set aside their defaults and default judgments on December 16, 2021, exactly 6 months and 15 days after May 28, 2021. Consequently, Defendants did not file their motion to set aside until after the six month period. Additionally, Defendants have not asserted any grounds under which the default judgment entered would be erroneous. Thus, Defendants are not entitled to relief under Code of Civil Procedure, section 473, subdivision (d).

Public Policy:

Defendants further rely on *Comunidad en Accion v. Los Angeles City Council* (2013) 219 Cal.App.4th 1116, 1134 to argue that "[b]ecause the law favors trial and disposition on the merits, any doubts in applying CCP § 473 must be resolved in favor of the party seeking relief from default." (Reply, 3:16-18.) However, beyond the six month period in which relief can be obtained under Code of Civil Procedure, section 473, subdivision (b), "there is a strong public policy in favor of the finality of judgments and only in exceptional cases should relief be granted." [*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 982.)

Equitable Set Aside:

"Where, as in the present case, a motion to vacate a default judgment is made more than six months after the default was entered, the motion is not directed to the court's statutory power to grant relief for mistake or excusable neglect under [Code of Civil Procedure,] section 473, but rather is directed to the court's inherent equity power to grant relief from a default or default judgment procured by extrinsic fraud or mistake." (*Moghaddam v. Bone* (2006) 142 Cal.App.4th 283, 290 [internal citations omitted, brackets added.].)

"Extrinsic fraud occurs when a party is deprived of the opportunity to present his claim or defense to the court; where he was kept ignorant or, other than from his own negligence, fraudulently prevented from fully participating in the proceeding. Examples of extrinsic fraud are: … failure to give notice of the action to the other party, and convincing the other party not to obtain counsel because the matter will not proceed (and then it does proceed). The essence of extrinsic fraud is one party's preventing the other from having his day in court. Extrinsic fraud only arises when one party has in some way fraudulently been prevented from presenting his or her claim or defense. Extrinsic mistake involves the excusable neglect of a party. When this neglect results in an unjust judgment, without a fair adversary hearing, and the basis for equitable relief is present, this is extrinsic mistake." (*Ibid* [internal citation omitted].) "[W]hat constitutes excusable neglect depends upon the facts of each case." (*Pearson v. Continental Airlines* (1970)

11 Cal.App.3d 613, 617.) However, to entitle a party to relief, the acts which brought about the default must have been the acts of a reasonably prudent person under the same circumstances. (*Jackson v. Bank of America* (1983) 141 Cal.App.3d 55, 58.)

While the moving parties rely on *Shamblin v. Brattain* (1988) 44 Cal. 3d 474, 478 ("*Shamblin*") to argue that only *a slight amount of evidence* is required to justify a court in setting aside a default, *Shamblin* is distinguishable from the facts here. "[W]hen a party in default moves promptly to seek relief, very slight evidence is required to justify a trial court's order setting aside a default." (*Ibid* [brackets added, internal citations omitted.].) As the court points out in *Shamblin*, "[the defendant] promptly moved to have the default judgment set aside once he learned of it." (*Ibid* [brackets added.].) Specifically, the defendant discovered that a default judgment had been filed against him in May 1985, and retained new counsel and moved to vacate the default judgment in July 1985. Here, defendants did not move promptly to move to set aside their default, as defendants did not file this motion until five months after learning of the default judgment and over six months after having knowledge of default. Moreover, in *Shamblin*, the defendant moved to set aside the default pursuant to Code of Civil Procedure, section 473. While the *slight amount of evidence* standard is well-established in the determination of statutory relief, defendants have not cited any authority to indicate that this is the standard for determining equitable relief.

Defendants provide that there were three extrinsic circumstances, or the combination of the three, which prevented them from answering Plaintiffs' complaint: 1) the impacts of COVID-19 and COVID-19 protocols; 2) Plaintiffs' excessive billing and invoicing errors; and 3) Defendants' belief that no action would be taken on the complaint during the parties' ongoing settlement negotiations.

Defendants argue that federal and state mandates required Defendants to restructure all of its facilities and reallocate its resources to protect patients and health care workers to support its motion. Further, that Defendants had to implement mandated mitigations plans, such as daily reporting for personal protective equipment, frequent monitoring, reporting of potential symptoms or respiratory infections, increasing staff training and hours, extensive cleaning of the facilities and COVID-19 screening of visitors. (Memo. 3:10-28.)

While the COVID-19 pandemic and subsequent impacts were and still are significant, Defendants have not sufficiently explained how this prevented them from answering Plaintiffs' complaint and/or requesting for an extension to answer. Defendants also fail to address how the impacts of COVID-19 prevented them from timely filing their motion to set aside. Defendants concede that Plaintiffs served Defendants with their complaint on or about March 22, 2021. (Decl. Williams 2:11-15.) There is also an acknowledgement of receipt filed in Odyssey signed by Defendants' counsel on March 22, 2021. Further, the opposition provides that Defendants were provided notice of the entry of the defaults against them as early as May 28, 2021. Consequently, Defendants have failed to appear in the instant action for almost 9 months after receiving notice.

Defendants further argue that a reasonably prudent person would have acted in the same manner as Defendants in failing to timely respond to the complaint in the same circumstances. (Memo. 8:3-5.) However, it is difficult to consider the merit of this

argument, as it would imply that most—or at least a significant amount of, health care providers, more specifically—nursing facilities, long term care facilities, rehabilitation facilities, and memory care facilities, have been unable to participate in the legal process since the start of the pandemic in March 2020, which simply is untrue. While the COVID-19 pandemic has been an arduous and trying time, this does not excuse Defendants from all other obligations to Plaintiffs and the court.

Additionally, Defendants contend that they were burdened with reviewing and auditing Plaintiffs' invoices, as they contained excessive billing errors. More specifically, that Defendants had spent hundreds of hours reviewing Plaintiffs' invoices by October 2020, that Defendants terminated their contracts with Plaintiffs on October 26, 2020, and that Defendants had to scramble to find alternative services on or around October 26, 2020. However, Defendants fail to provide how the review and auditing of Plaintiffs' invoices prevented them from answering Plaintiffs' complaint, filed on February 5, 2021. Defendants did not indicate that they were still spending time reviewing these invoices after the termination of their contracts with Plaintiff in October 2020. As such, it is difficult to see how this has impacted Defendants' ability to participate in these proceedings.

Defendants also argue that they entered into negotiations for settlement with Plaintiffs' counsel and were under the impression that no actions would be taken on the complaint. (Memo. 4:20-22.) Other than to provide this statement, Defendants do not elaborate further on why or how they came to this belief. It is notable that Defendants do not allege that Plaintiffs expressly told them that no action would be taken on the complaint. As such, it appears this circumstance is Defendant's mistake, rather than due to the existence of any fraud, and is subject to the reasonable prudent person standard.

Without further information, it is likely that a reasonably prudent person <u>*would not*</u> have acted in the same manner as Defendants in both failing to timely respond to the complaint and failing to timely file a motion to set aside the default and default judgment. Even if the parties were in negotiations for settlement, it is highly unlikely that a reasonably prudent defendant would assume that a plaintiff, who has filed a complaint against him, <u>*would not*</u> take action on the complaint. Moreover, it is also highly unlikely that a defendant, who was *surprised* by the entry of default and subsequent default judgment taken against him during settlement discussions, would wait for six months for statutory relief to expire prior to bringing his motion for relief. It is more probable that a reasonably prudent "surprised" defendant would move swiftly as soon as he learned of the default, which defendants did not do.

Additionally, "[t]o set aside a judgment based on extrinsic fraud or extrinsic mistake, the moving party must satisfy three elements: First, *the defaulted party* must demonstrate that it has a meritorious case. Secondly, *the party seeking to set aside the default* must articulate a satisfactory excuse for not presenting a defense to the original action. Lastly, *the moving party* must demonstrate diligence in seeking to set aside the default once it had been discovered." (*Moghaddam v. Bone* (2006) 142 Cal.App.4th 283, 290-291 [internal citations omitted.].)

Defendants have demonstrated that they have a meritorious case by supplying a proposed pleading and explaining their reasoning for questioning Plaintiffs' billing and performance of contractual services. However, as explained above, Defendants have

not articulated a satisfactory excuse for failing to present a defense to Plaintiffs' complaint. Consequently, as explained below, even if the third prong—diligence was considered to be sufficient, the motion would have to be denied.

Diligence:

"Of the three items a defendant must show to win equitable relief from default, diligence is the most inextricably intertwined with prejudice. If heightened prejudice strengthens the burden of proving diligence, so must reduced prejudice weaken it." (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 983-984.) The burden of proof to show such prejudice is on the opposing party. (*Aldrich v. San Fernando Valley Lumber Co., Inc.* (1985) 170 Cal.App.3d 725, 740.) Plaintiffs argue that they will suffer significant prejudice if Defendants' motion is granted, in that Plaintiffs have incurred meaningful legal fees and costs as a result of Defendants' failure to respond and alleged evading of service. (Opp., 9:24-27.) To support their argument, Plaintiffs submit a copy of a non-service report indicating at least 16 attempts at service of the Application and Order for Appearance and Examination at different locations and using different methods of service, and copies of three additional lawsuits filed by Plaintiffs against subsidiaries of Defendants in Sacramento County.

Plaintiffs fail to provide any authority indicating that a defendant's (rather, a subsidiary of such defendant) acts conducted in other lawsuits may be considered in determining prejudice. As such, the matters related to the Sacramento County lawsuits will not be considered here. It is clear that Plaintiffs have expended a significant amount of time, effort, and expense to both locate and attempt service upon Defendants. As Defendants point out, however, Plaintiffs have not provided any authority to show that a plaintiff's expenditure for legal fees and costs constitute prejudice. Regardless whether Plaintiff has suffered significant prejudice, however, Defendants have failed to articulate a satisfactory excuse for failing to present a defense to Plaintiffs' complaint and their mistakes are inexcusable. Thus, Defendants have not sufficiently shown they meet required grounds for equitable relief.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 01/10/22.
(Judge's initials) (Date)