Tentative Rulings for November 4, 2021
Department 503

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.

19CECG01332 ***California Statewide Communities Development Authority v. Wright*** **is continued to Thursday, November 18, 2021 at 3:30 p.m. in Dept. 503**

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Tentative Rulings for Department 503

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(03)

Tentative Ruling

Re: ***Semper v. Castillo***
Superior Court Case No. 19CECG01722

Hearing Date: November 4, 2021 (Dept. 503)

Motion: Defendant Andrea Castillo's Motion for Reconsideration or, in the Alternative, for Equitable Relief from Default

Plaintiff's Motion for Terminating Sanctions against Defendant William Alexander Carney

Tentative Ruling:

To deny defendant Castillo's motion for reconsideration or, in the alternative, for equitable relief from default. (Code Civ. Proc., § 1008, subd. (a).)

To grant plaintiff's motion for terminating sanctions against defendant Carney. (Code Civ. Proc., § 2023.030.) To strike defendant Carney's answer and enter default against him.

Explanation:

Defendant Castillo's Motion for Reconsideration: A party moving for reconsideration must show that there are "new or different facts, circumstances, or law" that justify reconsideration of the order. (Code Civ. Proc. § 1008, subd. (a).) "A party seeking reconsideration also must provide a satisfactory explanation for the failure to produce the evidence at an earlier time." (*New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 212, internal citations omitted.)

"Case law after the 1992 amendments to [Code of Civil Procedure] section 1008 has relaxed the definition of 'new or different facts,' but it is still necessary that the party seeking that relief offer some fact or circumstance not previously considered by the court." (*Id*. at pp. 212-213, internal citations omitted.) The requirements of section 1008 are jurisdictional, and failure to comply with the requirement of demonstrating new facts, circumstances or law requires denial of a motion for reconsideration. (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1104.)

Here, defendant Castillo has not identified any new facts, circumstances, or law that would support her motion. She simply reargues the same law and facts that she cited in her original motion, and contends that the court's decision to deny the motion was erroneous. However, the fact that defendant Castillo disagrees with the court's prior order is not a "new fact" that justifies reconsideration of the court's order. As defendant Castillo has failed to identify any new facts, circumstances, or law that would support her request for reconsideration, the court lacks jurisdiction to reconsider its prior order, and it must deny the motion.

In the alternative, defendant Castillo moves for relief under the court's inherent equitable power to grant relief from defaults or default judgments that were granted due to extrinsic fraud or mistake. "Extrinsic fraud usually arises when a party is denied a fair adversary hearing because he has been 'deliberately kept in ignorance of the action or proceeding, or in some other way fraudulently prevented from presenting his claim or defense.'" (*Kulchar v. Kulchar* (1969) 1 Cal.3d 467, 471, internal citations omitted.)

"'Extrinsic mistake' refers to circumstances outside of the litigation that have prevented a party from obtaining a hearing on the merits. '[A] trial court may . . . vacate a default on equitable grounds even if statutory relief is unavailable.'" (*Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 502, quoting *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981.) As explained by the court in *Kulchar*, "[t]he right to relief has also been extended to cases involving extrinsic mistake. 'In some cases . . . the ground of relief is not so much the fraud or other misconduct of the defendant as it is the excusable neglect of the plaintiff to appear and present his claim or defense. If such neglect results in an unjust judgment, without a fair adversary hearing, the basis for equitable relief is present, and is often called "extrinsic mistake."'" (*Kulchar v. Kulchar*, *supra*, 1 Cal.3d at 471, internal citations omitted.)

"Extrinsic mistake is found when a party becomes incompetent but no guardian ad litem is appointed; when one party relies on another to defend; when there is reliance on an attorney who becomes incapacitated to act; when a mistake led a court to do what it never intended; when a mistaken belief of one party prevented proper notice of the action; or when the complaining party was disabled at the time the judgment was entered. Relief has also been extended to cases involving negligence of a party's attorney in not properly filing an answer; and mistaken belief as to immunity from suit." (*Id*. at pp. 471-472, internal citations omitted.)

"Relief is denied, however, if a party has been given notice of an action and has not been prevented from participating therein. He has had an opportunity to present his case to the court and to protect himself from mistake or from any fraud attempted by his adversary. . . . Courts deny relief, therefore, when the fraud or mistake is 'intrinsic'; that is, when it 'goes to the merits of the prior proceedings, which should have been guarded against by the plaintiff at that time.'" (*Id*. at pp. 472–473, internal citations omitted.)

"Relief is also denied when the complaining party has contributed to the fraud or mistake giving rise to the judgment thus obtained. 'If the complainant was guilty of negligence in permitting the fraud to be practiced or the mistake to occur equity will deny relief.'" (*Id*. at p. 473, internal citations omitted.)

"Relief on the ground of extrinsic fraud or mistake is not available to a party if that party has been given notice of an action yet fails to appear, without having been prevented from participating in the action." (*Cruz v. Fagor America, Inc*., *supra*, 146 Cal.App.4th at p. 503, internal citations omitted.)

In the present case, relief under the court's inherent equitable power is not warranted. First, regardless of whether defendant Castillo has shown that the default was obtained through extrinsic fraud or mistake, she would still have to show that reconsideration of the court's prior decision was available by demonstrating the existence of new or different facts, circumstances, or law. (Code Civ. Proc., § 1008, subd. (a).) As discussed above, defendant Castillo has not met her burden under Code of Civil Procedure section 1008.

Second, defendant Castillo has not shown that there was any extrinsic fraud by plaintiff that caused entry of the default against her. Plaintiff did not mislead defendant Castillo into failing to file an answer to the first amended complaint, and indeed the facts show that plaintiff properly served defendant with the first amended complaint and gave her ample notice before taking her default. Defendant simply failed to file an answer, despite being served with notice of the amended complaint.

On the other hand, defendant Castillo contends that the default was the result of her extrinsic mistake, as she mistakenly believed that she did not need to file an answer to the first amended complaint in order to prevent her default because she had already filed an answer to the original complaint. However, defendant Castillo's mistake in this regard was not reasonable, as the summons for the first amended complaint explained in clear, unambiguous language that she needed to file an answer to the first amended complaint and serve a copy of her answer on plaintiff or she risked being defaulted. Thus, she was clearly on notice that she needed to file an answer to the first amended complaint, and her failure to do so was not the type of extrinsic mistake that justifies equitable relief.

Defendant Castillo argues that she was not represented by an attorney at the time she was served, and thus her error in failing to answer the first amended complaint was a reasonable, extrinsic mistake. However, as a party representing herself, defendant Castillo must still be held to the same standards as if she had been represented by an attorney. "[W]e make clear that mere self-representation is not a ground for exceptionally lenient treatment. Except when a particular rule provides otherwise, the rules of civil procedure must apply equally to parties represented by counsel and those who forgo attorney representation. . . . A doctrine generally requiring or permitting exceptional treatment of parties who represent themselves would lead to a quagmire in the trial courts, and would be unfair to the other parties to litigation." (*Rappleyea v. Campbell*, *supra*, 8 Cal.4th at pp. 984–985.)

Therefore, the court declines to exercise its inherent equitable power to grant relief from the default entered against defendant Castillo here, and it denies the motion for reconsideration in its entirety.

Plaintiff's Motion for Terminating Sanctions against Defendant Carney: "The Civil Discovery Act (section 2016.010 et seq.) imbues trial courts with 'broad' discretion to sanction the 'misuse of the discovery process.' As pertinent here, 'misuse of the discovery process' includes (1) '[f]ailing to respond [to] or to submit to an authorized method of discovery, (2) '[m]aking an evasive response to discovery,' and (3) '[d]isobeying a court order to provide discovery.' When confronted with such misuse, a court may impose (1) monetary sanctions, (2) sanctions that deem specified issues to be 'established' or that 'prohibit' the non-compliant party from raising 'opposing . . . claims or defenses' (so-called 'issue sanctions'), (3) sanctions that preclude the admission of evidence (so-called 'eviden[tiary] sanction[s]'), or (4) 'terminating sanction[s],' which include 'striking [a defendant's] answer'." (*Siry Investment, L.P. v. Farkhondehpour* (2020) 45 Cal.App.5th 1098, 1116–1117, internal citations omitted.)

However, terminating sanctions for failure to comply with a court order are allowed only where the failure was willful. (*R.S. Creative, Inc. v. Creative Cotton, Ltd*. (1999) 75 Cal.App.4th 486, 495-496; *Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1545; *Biles v. Exxon Mobil Corp*. (2004) 124 Cal.App.4th 1315, 1327.)

"When faced with a party's misuse of the discovery process, a trial court 'should' impose '[t]he penalty . . . appropriate to the dereliction.' That is because the purpose of discovery sanctions is to 'protect the interests of the party entitled to[,] but denied[,] discovery,' not to 'punish[ ]' the non-compliant party or to 'put the prevailing party in a better position than he would have had if he had obtained the discovery sought.' Proportionality is critical when it comes to terminating sanctions because they altogether deny the non-compliant party a hearing on the merits and thus implicate due process." (*Siry Investment, L.P. v. Farkhondehpour, supra,* 45 Cal.App.5th at p. 1117, internal citations omitted.)

"To ensure proportionality, trial courts should generally take an 'incremental' approach - that is, they should 'attempt[ ] less severe alternative[sanctions]' unless the 'record clearly shows lesser sanctions would be ineffective.' In calibrating the sanction that is appropriate for the dereliction, trial courts must make a 'meaningful effort to determine whether . . . alternative[, lesser sanctions] would be effective' at inducing the non-compliant party to produce the discovery, thereby 'protect[ing] the interests of the party entitled to . . . discovery.' In undertaking this effort, trial courts should examine the 'totality of the circumstances,' including: (1) whether the party's non-compliance is the latest chapter in a longer 'history of abuse,' which looks to 'the number of formal and informal attempts to obtain the discovery' as well as whether prior court orders compelling discovery have gone unheeded; (2) whether the party's non-compliance was 'willful'; (3) whether the non-compliance persisted despite warnings from the court that greater sanctions might follow; (4) whether the non-compliance encompasses all or only some of the issues in the case; and (5) the extent of the 'detriment to the propounding party' that flows from the inability to obtain the discovery at issue." (*Id*. at pp. 1117–1118, internal citations omitted.)

"Because terminating sanctions are the most 'drastic' penalty, they are typically a 'last resort' to be 'used sparingly.' However, they may still be appropriate 'as a first measure' in 'extreme cases' where a litigant violates a court order and 'persists in the outright refusal to comply with [its] discovery obligations.' Put differently, the imposition of lesser sanctions is 'not an absolute prerequisite' to the imposition of terminating sanctions for violation of a court order." (*Id.* at p. 1118, internal citations omitted.)

In the instant case, plaintiff moves for terminating sanctions against defendant Carney based on his failure to appear for his deposition on several prior occasions. On December 18, 2019, the court ordered defendant Carney to appear for his deposition and sanctioned him $310 for failing to appear at his properly noticed deposition. Defendant Carney then sent a text message to plaintiff's counsel, which stated, "Lmfao. Out of all those motions you wrote, I see you got back $300. Congrats[.] You can schedule my deposition for January 31st as that is the only day I'm available until March."

(Whelan Decl., ¶ 2 & Ex. B.) Plaintiff's counsel then set the deposition for January 31, 2020 and sent a new deposition notice to defendant Carney for that date. However, defendant Carney failed to appear for the deposition on January 31, 2020. He also failed to respond to counsel's attempts to contact him and set another deposition date.

Plaintiff's counsel then moved to have defendant Carney held in contempt for his nonappearance. On August 25, 2020, the date set for the order to show cause for contempt, defendant Carney failed to appear, although his counsel did appear. Defense counsel claimed that defendant Carney was "having a flat tire issue." (Whelan Decl., Ex. G, at R.T. 8:25.) The court held defendant Carney in contempt and ordered him to appear at the next deposition, which was set for October 26, 2020 at the specific request of defendant Carney's counsel. The court also imposed additional monetary sanctions of $3,235 and admonished defendant Carney through his counsel that any further failure to appear for his deposition would subject him to additional sanctions, including terminating sanctions.

Defendant Carney did in fact appear at his deposition on October 26, 2020 as he had been ordered to do. However, his attorney failed to appear, and now claims that he miscalendared the deposition date. Defendant Carney refused to answer any questions, told plaintiff's counsel to "go fuck himself," waved his middle finger at counsel, and left the deposition. (Whelan Decl., ¶ 6.) When counsel tried to get him to return and complete the deposition as he had been ordered to do, defendant Carney stated that he "didn't care[,]" jumped in his car, and drove away. (*Ibid.*) To date, defendant Carney's deposition still has not been completed, and defense counsel has not responded to plaintiff's counsel's inquiries about setting another date. Nor has defendant Carney paid any of the monetary sanctions that he has been ordered to pay. (*Ibid.*)

Thus, the evidence shows that defendant Carney has engaged in a pattern of repeated and flagrantly willful misconduct and abuse of the discovery process. Defendant Carney has either failed to appear, or refused to answer questions, at three separate depositions. He has thus completely thwarted plaintiff's attempts to obtain responses from him regarding the complaint's allegations and his affirmative defenses. The trial date is now only about four months away, and defendant Carney continues to defy all efforts to depose him. His ongoing refusal to appear at his deposition is entirely willful and deliberate, and is causing great prejudice to plaintiff's ability to prosecute his case.

While defense counsel claims that defendant Carney did appear and was willing to answer questions at the October 26, 2020 deposition, he presents no declaration from defendant Carney himself regarding his version of events. Defense counsel was not present at the deposition, so his description of the events at the deposition lacks personal knowledge and is based on nothing more than hearsay. According to plaintiff's counsel, defendant Carney refused to answer questions, cursed at him, raised his middle finger at him, and left without even starting the deposition. Defendant Carney has not submitted any evidence that would rebut plaintiff's version of the events. Defendant Carney's complete refusal to answer questions and sit for a deposition was in blatant defiance of the court's order.

Also, while defense counsel claims that he offered to have defendant Carney return and answer questions later that day, plaintiff's counsel denies that defense counsel ever made such an offer, and there is no documentary evidence, such as a letter or email, that would support defense counsel's claim. Plaintiff's counsel did later attempt to contact defense counsel and inquire about whether defendant Carney would comply with any of the court's orders, but defense counsel never responded to the inquiry. Thus, it appears that defendant Carney is continuing to engage in a willful refusal to comply with the court's orders.

Defendant Carney has also failed to pay any of the sanctions that have been levied against him. While he claims that he is unable to pay due to a lack of income, he offers no declarations or documents to support his claimed inability to pay. Accordingly, it also appears that defendant Carney has willfully refused to comply with the court's monetary sanction orders, in addition to the orders to appear for his deposition.

It does not appear that any sanctions short of terminating sanctions will be effective in motivating defendant Carney to cooperate with the discovery process. As noted above, defendant Carney has not yet paid any of the monetary sanctions imposed against him, so imposing additional monetary sanctions would likely have no effect. Nor does it appear that issue or evidence sanctions would cause defendant Carney to change his behavior.

Therefore, the court grants the request for terminating sanctions against defendant Carney, strikes his answer, and re-enters the default against him.

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: KAG on 11/2/2021 .
(Judge's initials) (Date)