Tentative Ruling

05/03/24

Dept. 21

1. SFL080250 Whitaker/Whitaker Dissolution

APPEARANCES REQUIRED.

Facts

Petitioner filed this action for Dissolution of Marriage with minor children on June 26, 2018. Minor Child 1 was born in 2016 and Minor Child 2 was born in 2010. Petitioner filed a proof of service indicating personal service upon Respondent with the Summons, Petition for Dissolution of Marriage, and Declaration Under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). A custody and visitation order was entered in March 2020, regarding both children and naming both parties as the parents of both children. Petitioner filed a Request to Enter Default on October 2, 2023, which was entered by the court on that same date. A Judgment of Nonpaternity was issued October 18, 2011 as to Minor Child 2. At the time that Petitioner filed this action, she was residing in Sonoma County. Currently, Petitioner resides in Lake County and Respondent resides in Solano County.

Respondent filed and served his own action for Dissolution of Marriage in Solano County on September 28, 2023 (the "Solano Action"). He obtained entry of default against Petitioner in that case on April 2, 2024.

Petitioner filed the instant Request for Order ("RFO") to Consolidate Cases; Set Aside as Void All Orders Regarding Minor Child 2; and Enter Default Judgment. She moves the court to consolidate the Solano Action with this action with this as the lead case, set aside as void all child custody and visitation orders

issued in either action with respect to Minor Child 2 but not as to Minor Child 1, and that the court enter the proposed default judgment in this action. She further asks that Minor Child 2 "be removed" from this litigation and points out that in prior proceedings in a different case, it was determined that the father of Minor Child 2 is not Respondent but instead a different person.

Respondent filed a Responsive Declaration. He consents to the requested orders regarding child custody and visitation and raises a new issue of spousal support. He asserts, like Petitioner, he wants to be divorced as evidenced by the Solano Action.

Consolidation

Under Code of Civil Procedure ("CCP") §403, on a motion, a court may transfer one or more actions from another court in the state to the court hearing the motion for "coordination" with an action involving common a question of fact or law as set forth in CCP §404. Section 403 sets forth the requirements for such a motion: the motion must include a declaration showing that the actions meet the standards set forth in CCP §404.1 and are *not* complex, and that the moving party has made a good-faith effort to obtain the parties' agreement to transfer; and the moving party must serve notice of the motion on all parties to each action *and* on each court in which an action is pending. It adds that transfer under this provision allows for consolidation of the cases so that the court to which a case is transferred may order the cases consolidated for trial pursuant to CCP §1048 without any further motion or hearing.

CCP §1048(a) allows a party to seek to consolidate separate actions "involving a common question of law or fact...pending before the court...." The moving party must demonstrate that the cases to be consolidated involve the same

common issues of law or fact and that consolidation will avoid "unnecessary costs and delays" to the court and parties. CCP §1048(a); *Jud Whitehead Heater Co. v. Obler* (1952) 111 Cal.App.2d 861, 867. Other factors to consider include whether granting consolidation would prejudice any parties involved, delay the trial of any case involved, and whether consolidation would make the case(s) too complex and confusing. The decision is within the "sound discretion" of the trial court. *Fellner v. Steinbaum* (1955) 132 Cal.App.2d 509, 511.

According to California Rule of Court ("CRC") 3.350, formerly CRC 367, subdivision (b), the lead case shall be the lowest-numbered case "[u]nless otherwise provided in the order...."

When a court orders cases completely consolidated, the pleadings are considered merged, a party appearing in any of the consolidated actions is subject to court jurisdiction in the entire merged action, and there is one set of findings and one judgment. See *Hamilton v. Asbestos Corp., Ltd*. (2000) 22 Cal.4th 1127, 1147-1148. Where the court consolidates actions only for trial, on the other hand, pleadings, verdicts, findings, and judgments remain separate, and appearance in one action is not an appearance in any other action so consolidated. See *Sanchez v. Sup.Ct*. (1988) 203 Cal.App.3d 1391, 1395-1399.

Both parties' papers demonstrate that these two cases involve common questions of law and fact and, moreover, are identical in the issues and potential adjudication of the parties' rights. They are also not complex cases because they are simply cases for marital dissolution. The Solano Action was also filed several years after this one had been filed and served. Accordingly, it is appropriate to transfer the Solano Action to this court for coordination and then consolidation. Petitioner has also demonstrated service on the only other party to the actions, Respondent.

However, Petitioner fails to demonstrate that she served notice on the Superior Court of California, County of Solano. As noted above, this is required before the court is able to grant the motion and consolidate the actions.

The court requires appearances and may continue this motion in order to allow Petitioner to serve the required notice on the Superior Court of California, County of Solano.

Vacating Orders

Petitioner asks the court to vacate all orders regarding custody, visitation, or related issues as to one of the two children only, Minor Child 2, in both of the actions. She explains that she included Minor Child 2 in this case, and the prior order, because she was informed that she needed to, even though Respondent is not the father and has no rights or obligations regarding Minor Child 2.

CCP §473(b) allows plaintiffs and defendants to set aside dismissals or defaults based on mistake, inadvertence, surprise, or excusable neglect. This motion must normally be made within a reasonable time, not to exceed 6 months from the date the order was entered. CCP §473(b). A judgment also may be set aside where void pursuant to CCP section 473(d).

In addition to relief pursuant to CCP §473(b), the court also has inherent equitable power to set aside a judgment on the basis of extrinsic fraud or mistake. *Olivera v. Grace* (1942) 19 Cal.2d 570, 576. A court has discretion to treat a motion brought under §473 as one for equitable relief under the court's inherent powers. *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 982. In *Rappleyea*, the Supreme Court reversed an appellate court decision affirming an order denying a motion for relief under CCP §473. The Supreme Court noted that although relief was not available under CCP §473 because the motion was untimely, relief was

still available, and appropriate, based on the court's inherent equitable power to set aside a judgment on the basis of extrinsic fraud or mistake.

There need be no actual "fraud" or "mistake." *Marriage of Park* (1980) 27 Cal.3d 337, 342. The key is whether there are circumstances extrinsic to the lawsuit itself that deprive the party of a fair hearing. *Estate of Sanders v. Sutton* (1985) 40 Cal.3d 607, 614. As the Supreme Court explained in *In re Marriage of Modnick* (1983) 33 Cal.3d 897, at 905, '[e]xtrinsic fraud is a broad concept that "tend[s] to encompass almost any set of extrinsic circumstances which deprive a party of a fair adversary hearing." ' See also *Estate of Saunders* (quoting and relying on *In re Marriage of Modnick*). This may cover such circumstances as where the opponent's deception or other acts prevented the party from presenting his case or knowing of the lawsuit, where the party relied on another to defend the action, where the party was mentally incompetent, or in other situations where excusable mistake and neglect result in an unfair judgment without a fair adversary proceeding. *Kulchar v. Kulchar* (1969) 1 Cal.3d 467, at 471-472. The court in *Weitz v. Yankosky* (1966) 63 Cal.2d 849, at 855-856, for example, found it appropriate to set aside a default based on the court's equitable powers where the defendant had reasonably relied on an insurance company to defend him, even though more than a year had passed since the entry of default. In another example, the court in *County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, at 1229-1230, ruled that the trial court was required to use its equitable power to set aside a default judgment based on a false proof of service.

The only order on custody and visitation regarding the children in this case is the order entered on March 6, 2020, and described above. Further, there exists an Order After Hearing on Motion To Set Aside Judgment of Paternity filed October 18, 2011 that provides a judgment of nonpaternity to Respondent. Respondent states that he does not object to the requested order in this motion

regarding visitation.

The court has jurisdiction to vacate the order of March 6, 2020 as to Minor Child 2. Doing so also appears to be appropriate for the reasons which Petitioner sets forth, because there is an order granting nonpaternity and because Respondent appears to agree. Because of the procedural issues in this matter, however, the court will not at this time decide on this issue absent the parties' agreement and will instead continue the motion on this point pending resolution of the fundamental procedural issues regarding consolidation and the existence of two competing actions in different courts.

However, this court cannot make orders on the Solano Action since that action is, at this time, in the court in Solano County. If the Solano Action is transferred to this county and the cases are consolidated, then this court may make the orders requested but the transfer and consolidation must occur first.

Default Judgment

The court has already entered the default of Respondent. The court notes that Respondent states he wants to finalize the matter via a judgment. However, it is important to note a proposed Judgment was previously rejected on October 13, 2023 and those issues will need to be resolved before the court can enter a final Judgment of Dissolution of Marriage.

Respondent does contest any order allowing spousal support and asks that the court's authority to order such support be found to be terminated. However, the requested judgment merely states that spousal support will be reserved for future determination as to both parties. The petition also requests that spousal support be reserved for future determination. Moreover, Respondent provides no authority for the requested ruling terminating the court's jurisdiction to make such support determinations. According to *Marriage of Wells* (1988) 206 Cal.App. 3d 1434, at

1439, courts may in the future alter support awards based on changed circumstances and may sua sponte reserve jurisdiction over spousal support in a default case even though support was not requested in the petition.

At this time, given that the two actions are both pending, and there are missing requirements for transfer and consolidation of the actions, the court finds it would be premature to enter a judgment.

Conclusion

Petitioner must correct the defect noted above to obtain an order transferring the Solano Action to this court for consolidation. Absent such consolidation, this court may not at this time address all orders requested. Some orders requested appear not to be in dispute but the current procedural status of the two pending actions renders such orders problematic.

The court **REQUIRES APPEARANCES** of both parties in order to address these matters and to determine if a stipulation or agreement may be reached on some or all of the issues. The court reserves the option to continue the motion to allow Petitioner to cure the defect regarding notice to the other court and to allow the parties additional opportunity to provide supplemental briefing.

2. SFL082609 Reinstein/D'Ambrogi Dissolution

GRANTED

Facts

Respondent filed a Request for Order ("RFO") on March 25, 2024 to compel response to a Demand for Production of Documents without objections and for

monetary sanctions of $2,150, pursuant to Code of Civil Procedure ("CCP") section 2031.300. An opposition has not been filed.

Respondent served Petitioner by first-class mail on February 8, 2024 with a Demand for Production of Documents, Set One ("Demand"). The Demand required a response, per statute, no later than March 15, 2024. Petitioner did not respond timely; Respondent sent a meet-and-confer letter on March 15, 2024, per the Declaration of William J. Rogers, Esq., in Support of Motion to Compel ("Rogers Dec.").

Motion to Compel

According to California Rule of Court 5.2(d) and Family Code section 210, provisions applicable to civil actions generally apply to proceedings under the Family Code unless otherwise provided. This includes the rules applicable to civil actions in the California Rules of Court and the CCP, and specifically the Civil Discovery Act set forth at CCP section 2016.010, et seq. See also, *In re Marriage of Boblitt* (2014) 223 Cal.App. 4th 1004, at 1022.

Where a party seeks to compel responses to a demand for inspection or production under CCP § 2031.300, the moving party need only demonstrate that the discovery was served, the time to respond has expired, and the responding party failed to provide a timely response. See *Leach v. Sup.Ct.* (1980) 111 Cal.App.3d 902, 905-906; *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 411. Failure to provide a timely response waives all objections. CCP §2031.300. Where a party has failed to respond on time to a request for production, the first step is not to compel production but, as with interrogatories, to compel a response. CCP § 2031.300. The normal statutory time to respond is 30 days but with service by mail, as here,

the responding party has an additional 5 calendar days. CCP §§ 2031.260, 1013. Similarly, the date for actual production must also be at least 30 days after service of the demand, plus 5 days for mailing the demand. CCP §§ 2031.030(c)(2), 1013.

Respondent has met her burden. Her evidence demonstrates that she properly served the Demand on Petitioner and the deadline for responding expired before she filed this motion. Petitioner has failed to respond to this motion and failed to respond to the Demand.

The court GRANTS the motion to compel.

Sanctions

For compelling responses to production requests, the court shall impose monetary sanctions on any party who unsuccessfully makes or opposes a motion to compel a response to a demand for documents as in this matter, unless that party acted with substantial justification, or other circumstances make sanctions unjust. CCP §§2023.010, 2023.030, 2031.300. A party may seek relief from sanctions due to mistake, inadvertence, or excusable neglect if it has served responses. CCP §§2030.290(a), 2031.300(a), 2033.280(a).

In order to obtain sanctions, the moving party must request sanctions in the notice of motion, identify against whom the party seeks the sanctions, and specify the kind of sanctions. CCP § 2023.040. The sanctions are limited to the "reasonable expenses" related to the motion. *Ghanooni v. Super Shuttle of Los Angeles* (1993) 20 Cal.App.4th 256, 262.

Respondent requests monetary sanctions of $2,150 for attorney's fees and costs, consisting of 4.8 hours spent plus 1 anticipated for the hearing at $350 an hour, and costs of $120 for the filing fee and e-vendor fee. Rogers Dec., ¶7. Respondent is entitled to an award of sanctions here and the amount sought is

reasonable but the court may not compensate for time or expenses which are only anticipated and not yet actually incurred. The court therefore awards to Respondent, against Petitioner, sanctions in the amount of $1,800, consisting of $1,680 for attorney fees and $120 for costs. The amount is to be withdrawn from Petitioner's portion of the parties' unallocated funds held in the State Bar Trust Account as requested.

Conclusion

The motion to compel is GRANTED and sanctions of $1,800 are awarded to Respondent, against Petitioner.

The prevailing party/Respondent shall prepare and serve a proposed order consistent with this tentative ruling within five days of the date set for argument of this matter. Opposing party/Petitioner shall inform the preparing party of objections as to form, if any, or whether the form of order is approved, within five days of receipt of the proposed order. The preparing party shall submit the proposed order and any objections to the court in accordance with California Rules of Court, Rule 3.1312.

END OF TENTATIVE RULINGS