Tentative Rulings 5.17.24

Zeng v. Wang, SFL089529

DENIED

Facts

Petitioner filed this action in October 2021 for a Domestic Violence Restraining Order ("DVRO") against Respondent, her ex-husband. Eventually, the court issued a Restraining Order After Hearing ("ROAH") on March 4, 2022, imposing a limited restraining order in order to allow the parties time to improve their ability to communicate and become better caregivers to their child, and finding no criminal protective order. The court in its ruling stated, in part,

> The relevant Court findings and orders are as follows:
>
> The Court grants Restraining Order After Hearing (ROAH) as stated on record. There is no finding for additional protected person.
>
> The ROAH is granted for 2 years and it is set to expire on March 4, 2024.
>
> The intention of the Court is to give parties opportunity to learn communication skills and make them better caregivers to their daughter. If this does not occur, Petitioner can return to Court and ask for an extension.
>
> There is no Criminal Protective Order on record.
>
> Respondent acknowledges and agrees to accept ROAH by mail. The Court grants temporary sole legal and sole physical custody of their child to Petitioner.

It also required Petitioner and Respondent to attend joint therapy sessions and to work to approve their communications.

On February 26, 2024, Petitioner filed a notice of request to renew the ROAH (the "Request"). At the hearing on the renewal, the court found that Petitioner had not proven the basis for renewing the ROAH and thus denied her request to extend or renew it. As Petitioner stated, "part of the basis of her request for a renewal" was Respondent's alleged two years of excessive and meritless litigation by Respondent…." The court explained that it felt that Respondent had a "legal and statutory right to pursue his appeal" and that issuing a restraining

order based on litigation activity would improperly interfere with his right to free speech and petition in the litigation process. It added that there are other potential remedies to address allegedly frivolous litigation conduct.

Motion

Petitioner moves the court for reconsideration of the order denying her request to renew the ROAH. She argues that two days after the court denied the Request, the court of appeal issued its decisions on two of Respondent's appeals and these decisions provide new facts and information relevant to this matter which warrant reconsideration. Petitioner also argues that on March 22, 2024, after the court denied the Request, Respondent made a "veiled threat of new litigation against Petitioner's counsel" something which she claims he had done in the past.

Bases for Reconsideration: New Facts, Law, or Circumstances

A party seeking reconsideration must first demonstrate new facts, law, or circumstances that were not previously considered. Code of Civil Procedure ("CCP") §1008(a); *Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 692. The moving party must also provide an adequate explanation why the new information was not provided earlier. *Garcia, supra; Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494, 1500. The need for an explanation is a requirement for due diligence. *Gilberd*.

Mere lack of a chance to make oral argument is not a valid basis for a motion for reconsideration. *Garcia*, 691; *Gilberd*, 1500. In addition, decisions such as *Film Packages, Inc. v. Brandywine Film Productions, Ltd.* (1987) 193 Cal.App.3d 824, at 829, and *Pender v. Radin* (1994) 23 Cal.App.4th 1807, at 1811-1812, ruled that evidence was "new" since it was since obtained through discovery and could not reasonably have been provided earlier.

Petitioner claims that there are new facts or circumstances which warrant reconsideration. First, she asserts that the appellate decisions entered after the denial of the underlying Request show the appeals to have been frivolous. She claims that when this court stated "at this point" in denying the Request, that implies that it would have taken into account an appellate decision finding the appeals to be frivolous. She also relies on information in the appellate decisions which supports her claim that Respondent's litigation activity is intended to "disturb her mental calm and financially starve her." Second, she claims that on March 22, 2024, after the court

denied the Request, Respondent made a "veiled threat of new litigation against Petitioner's counsel" something which she claims he had done in the past.

Petitioner's arguments are unpersuasive. The "information" in the appellate decisions consists of both factual statements and the appellate court's determinations. The factual statements were known to Petitioner beforehand and should have been, and in fact were, raised in the underlying Request. They are thus not "new." The fact that the appellate court denied the appeals and found them to be frivolous is not a new fact or circumstance supporting reconsideration since it was an issue which was already known and pending and was raised in the underlying proceedings even though the appellate court had not actually made a decision. Moreover, arguments raised by Petitioner do not have bearing on the court's decision to deny the Request. The court made it clear that it found it improper to issue a restraining order based solely on litigation activity, frivolous or otherwise. It gave no indication that it would have altered the decision had there been information showing further litigation activity or threats of litigation against Petitioner's counsel, or showing the litigation to have been frivolous. The court also in fact stated that there are other avenues for addressing frivolous litigation conduct. As for Respondent allegedly making a new "veiled" threat of litigation against Petitioner's counsel, Petitioner in this motion expressly states that Respondent had already done that before and accordingly such information was already considered when the court denied the Request. It is thus not a "new" circumstance.

The Court DENIES Petitioner's motion for reconsideration.

Cuadras Segura/Gallagher, SFL091853

APPEARANCES REQUIRED.

Jin v. Wang, SFL091924
GRANTED

Facts

Petitioner filed a Petition for Dissolution of Marriage on September 1, 2022 ("Petition"). Very little occurred in these proceedings, and Respondent did not file a Response and Request for Dissolution of Marriage before Petitioner obtained entry of default on December 6, 2022. Attorney J. Zimmerman ("Zimmerman") then filed an "FCS Declaration" of Respondent on December 22, 2022. No further litigation occurred and Respondent made no first appearance, until Petitioner filed a Stipulation and Order for Custody or Visitation on August 4, 2023. Respondent signed the stipulation. In the interim, the court records show an attempt to file some papers on behalf of Respondent in February and May 2023, but these were not filed and were returned due to defects, one of which was directly related to Zimmerman and a Substitution of Attorney. Petitioner obtained a default Judgment of Dissolution of Marriage on October 10, 2023 ("Judgment").

Motion

Respondent moves the court to vacate the default and default Judgment under Code of Civil Procedure ("CCP") section 473(b) based on mistake, inadvertence, surprise, or excusable neglect, and because the Judgment exceeds the relief requested in the petition, in violation of CCP section 580. She also seeks sanctions or penalties under CCP section 473(c) as against Zimmerman and Petitioner's counsel. Respondent relies on CCP section 473(b) due to the errors of Zimmerman, and his failure to appear or properly represent her as promised. She states that she hired Zimmerman to represent her prior to the default; she understood that he was doing what was necessary; she thought Zimmerman was still negotiating on her behalf through July 2023; and, her understanding of the situation was limited due to the fact that she is a recent immigrant and English is a second language.

Petitioner opposes the motion. He argues that he communicated with Respondent's current attorney after the latter substituted into the case in November 2023, and provided the declaration for property assets and debts. He also contends that the motion is untimely based on the 6-month deadline set forth in CCP section 473(b).

Setting Aside Default and Judgment

CCP §473(b) allows for a set aside of dismissals or defaults. 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). The motion must be brought within 6 months and the grounds for seeking the relief do not affect the deadline. *Arambula v. Union Carbide Corp*. (2005) 128 Cal.App.4th 333, 345. An order setting aside the default is discretionary where based on mistake, inadvertence, surprise, or excusable neglect. CCP § 473(b).

"Surprise" is "some condition or situation in which a party... is unexpectedly placed to his injury, without any default or negligence of his own, which ordinary prudence could not have guarded against." *Credit Managers Ass'n of So. Calif. v. National Independent Business Alliance* (1984) 162 Cal.App.3d 1166, 1173.

"Excusable neglect" comes down to whether the moving party has shown a reasonable excuse for the default. *Davis v. Thayer* (1980) 113 Cal.App.3d 892, 905. The moving party must show that the default would not have been avoided through ordinary care. *Elms v. Elms* (1946) 72 Cal.App.2d 508, 513. The test ultimately is thus one of reasonable diligence. *Jackson v. Bank of America* (1983) 141 Cal.App.3d 55, 58. A showing that the defendant was unable to understand what he was served with is sufficient to justify relief. *Kesselman v. Kesselman* (1963) 212 Cal.App.2d 196, 207-208. Another valid basis is if the defendant mislaid or misfiled the papers and as a result failed to obtain an attorney in time. *Bernards v. Grey* (1950) 97 Cal.App.2d 679, 683-686. Simply forgetting about the lawsuit or being too "busy" is not adequate. *Andrews v. Jacoby* (1919) 39 Cal.App. 382, 383-384. Excusable neglect by attorneys includes situations where, despite reasonable supervision, an attorney's secretary misfiled papers or failed to enter an appearance date. *Elston v. City of Turlock* (1985) 38 Cal.3d 227, 234; *Alderman v. Jacobs* (1954) 128 Cal.App.2d 273.

As Petitioner argues, the motion is technically untimely pursuant to CCP section 473(b). Respondent filed it on April 12, 2024. Judgment was entered on October 10, 2023 and the default was entered on December 6, 2022. The motion is untimely by 2 days as to the Judgment and untimely by approximately 16 months as to the entry of default.

Equitable Power & Extrinsic Fraud or Mistake

The court 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. The court has discretion to treat a motion brought under CCP §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..

The moving party must show three elements: a meritorious defense, a satisfactory excuse for not presenting a defense, and diligence in seeking to set aside the default once discovered. *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 982. 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 a 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 court finds that Respondent has provided a basis for equitable relief. She shows that her failure to appear was the fault of her original attorney Zimmerman, and her reliance on his communications that he was representing her in these proceedings, when in fact he essentially failed to do so. This occurred at least up through July 2023. She also acted promptly in attempting to hire her new attorney and resolve the matter following the entry of Judgment.

The Court GRANTS the motion on this basis as to the set aside of the default and Judgment.

Judgment Exceeding Relief Requested in the Petition

Respondent claims the Judgment exceeds the relief requested in the Petition because it contains a division of community property assets and debts which was not requested in the Petition, and the Petition was never amended.

CCP section 580(a) states, in full, "The relief granted to the plaintiff, if there is no answer, cannot exceed that demanded in the complaint, in the statement required by Section 425.11, or in the statement provided for by Section 425.115; but in any other case, the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issue. The court may impose liability, regardless of whether the theory upon which liability is sought to be imposed involves legal or equitable principles."

"It is a fundamental concept of due process that a judgment against a defendant cannot be entered unless…given proper notice and an opportunity to defend. (U.S. Const., [Amend.] XIV....)" *In re Marriage of Lippel* (1990) 51 Cal.3d 1160. The court in Lippel held that it was a denial of due process to enter a default judgment ordering a husband to pay child support where the wife's petition for marital dissolution did not request it, and no notice of a request for child support was ever served on the husband.

CCP § 580(a) applies in marital dissolution proceedings. *In re Marriage of Kahn* (2013) 215 Cal.App.4th 1113, 1117. Its purpose is to "guarantee defaulting parties adequate notice of the maximum judgment that may be assessed against them." [Citations.]' *Stein v. York* (2010) 181 Cal.App.4th 320, 325.

A default judgment that exceeds the scope of relief requested in the petition is void as to the excess part of the judgment and subject to set-aside on that basis at any time. See *Marriage of Andresen* (1994) 28 Cal.App.4th 873, 885-886; compare *Marriage of Eustice* (2015) 242 Cal.App.4th 1291, 1304 (although petitioner failed to list specific assets and debts in her petition, she did so in her property declaration and preliminary declaration of disclosure, thereby satisfying respondent's right to notice of relief requested and property subject to disposition.)

Respondent is correct. The Petition here only requests division or judgment regarding confirmation of separate property. The section regarding community property and quasi-community property is left blank, so the Petition makes no request that the judgment address those types of property. Petitioner asserts that after filing the Petition he provided a declaration regarding the property division. However, this is insufficient to cure the defect here, as occurred in *Marriage of Eustice, supra,* because there the petition requested property division and failed to list the property at issue. Here, the Petition requests only a determination as to separate property and states that the list would be provided later. Petitioner's subsequent declaration may cure the issue as to separate property, in the manner of *Marriage of Eustice*, *supra*, but it is insufficient to provide a basis for division of community or quasi-community property since the Petition does not request such a division.

The Judgment is thus void as to the division of community or quasi-community property. The Court GRANTS the motion on this basis as to the Judgment.

Sanctions

Respondent requests sanctions against Petitioner's attorney and Zimmerman, based on CCP section 473(c)(1). The Court finds insufficient basis to warrant such sanctions at this time and DENIES the request.

Conclusion

The prevailing party 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 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.