

Nationwide Prop. & Appraisal Services, LLC v. Nicole Andrews et al.
SACV 20-2126 JVS (KESx)

TENTATIVE Order Regarding Motion to Set Aside Default

Defendant Fastapp Inc. (“Fastapp”) moved for an order setting aside the Default entered against it on December 28, 2020. Mot., Dkt. No. 42, at 4. Plaintiff Nationwide Property & Appraisal Services, LLC (“Nationwide”) opposed. Opp’n, Dkt. No. 48. Fastapp replied. Reply, Dkt. No. 57.

For the following reasons, the Court **DENIES** the motion.

I. BACKGROUND

The following facts are alleged in Fastapp’s motion to set aside default and Nationwide’s reply brief.

On November 4, 2020, Nationwide filed suit against Fastapp and Andrews. Dkt. No. 1. Fastapp does not dispute the effectiveness of service. Id. at 4.

Fastapp’s Answer was due on December 15, 2020. Id. at 4. Nationwide filed a request for the Clerk’s entry of default judgment against Fastapp on December 28, 2020, nearly two weeks after Fastapp’s deadline passed. Id. Nationwide personally served Fastapp the motion for entry of default the same day it was filed. Id. at 20. The Clerk entered a default against Fastapp on December 29, 2020. Id. at 4. Nationwide filed for default judgment and personally served Fastapp on March 11, 2021. Mot., Dkt. 42, at 9. On March 15, 2021, Fastapp retained William Cumming (“Cumming”) as counsel in this matter and brought forth this motion on March 28, 2021. Id. 9-10.

Shortly after Nationwide filed this suit, Cumming spoke with Fastapp and Andrews about possibly representing both of them in this suit. Id. at 8. Fastapp informed Cumming that it was still determining what firm would represent it in this matter. Id. Andrews and Cumming both submitted declarations confirming this conversation. Id. at 9; Mot., Dkt. 42, at 14 (Cumming Decl. ¶ 3); Mot., Dkt. 42, at 18 (Andrews Decl. ¶ 7.) Andrews retained Cumming, while Fastapp did not. Id.

Under Federal Rule of Civil Procedure 55(c), a district court “may set aside an entry of default for good cause.” The party moving to set aside the entry of default bears the burden of demonstrating good cause. TCI Grp. Life Ins. Plan v. Knoebber, 244 F.3d 691, 696 (9th Cir. 2001). The good cause standard for setting aside an entry of default is slightly more favorable to the party in default. McManus v. American States Ins. Co., 201 F.R.D. 493, 500 (C.D. Cal. 2000). The Court’s discretion is “especially broad where entry of default is being set aside, rather than a default judgment.” Mendoza v. Wight Vineyard Mgmt., 783 F.2d 941, 945 (9th Cir. 1986).

“When a default judgment would be set aside, a mere entry of default should also be set aside. Thus, any default, whether entry or judgment, can be set aside when the party in default establishes ‘mistake, inadvertence, surprise or excusable neglect.’” Id.; see Fed. R. Civ. P. 60(b).

Alternatively, “a motion to set aside default can be denied, when: “(1) the plaintiff would be prejudiced if the judgment is set aside, (2) [the] defendant has no meritorious defense, or (3) the defendant’s culpable conduct led to the default.”” Id. A sufficient finding against the movant on any one factor negates good cause. Franchise Holding II, LLC v. Huntington Rests. Grp., Inc., 375 F.3d 922, 926 (9th Cir. 2004) (“As these factors are disjunctive, the district court was free to deny the motion if any of the three factors was true.”).

III. DISCUSSION

A. Culpable Conduct

“[A] defendant’s conduct is culpable if he has received actual or constructive notice of the filing of the action and *intentionally* failed to answer.” Mesle, 615 F.3d at 1092 (emphasis in original) (quoting TCI Group, 244 F.3d at 697). “Neglectful failure to answer as to which the defendant offers a credible, good faith explanation negating any intention to take advantage of the opposing party, interfere with judicial decision making, or otherwise manipulate the legal process is not ‘intentional.’” TCI Group, 244 F.3d at 697. Rather, a defendant’s conduct should be deemed culpable when “there is no explanation of the default inconsistent with a devious, deliberate, willful, or bad faith failure to respond.” Id. at 698.

Fastapp argues that its misunderstanding in regard to representation resulted in its failure to answer over the course of four months. The Court finds this argument unconvincing for the following three reasons.

1. Actual Notice

Nationwide argues that Fastapp received actual notice of its duty to file an answer when Fastapp was personally served the complaint and summons. Fastapp does not dispute the validity of service. *Id.* At 9. The Court agrees that Nationwide's personal service to a Fastapp agent satisfies actual notice. American Tire Distributors, Inc. v. American Tire Corporation, No. CV 08-02971 MMM (JTLx), 2009 WL 10672266, at 8 (C.D. Cal. March 2, 2009) (finding that actual notice is met when the defendant is personally served).

2. Intentionality

“‘Intentionally’ means that a movant cannot be treated as culpable simply for having made a conscious choice not to answer; rather, to treat a failure to answer as culpable, the movant must have acted with bad faith.” U.S. v. Signed Personal Check No. 730 of Yubran S. Mesle, 615 F.3d 1085, 1092 (9th Cir. 2010). When considering the culpability of a “legally sophisticated entity or individual” in a default, “an understanding of the consequences of its actions may be assumed, and with it, intentionality.” *Id.* at 1093 (reconciling holding of TCI Group with Franchise Holding II).

Although it is unclear whether Fastapp had representation in this lawsuit before March 15, 2021, Fastapp has experience in consulting its lawyers as the plaintiff in the New York case. Mot., Dkt. 48, at 11; compare Signed Personal Check, 615 F.3d at 1092 (finding that a layman ignorant of the law, unable to understand his legal obligations, and without representation is not a sophisticated entity); with Coen Co. v. Pan Int'l, Ltd., 307 F.R.D. 498, 506 (N.D. Cal. 2015) (“[a]bsent some explanation... it is fair to expect that individuals who have previously been involved in litigation or have consulted with a lawyer appreciate the consequences of failing to answer and do so only if they see some advantage to themselves.”).

Therefore, Fastapp is a sophisticated party. The Court assumes that Fastapp understands its responsibility to affirmatively retain counsel and file its answer.

3. Lack of Credible Explanation

The Court does not find Fastapp's explanation regarding the misunderstanding between it, Cummings, and Andrews to be credible. Mot., Dkt.

42, at 9. Fastapp provides no explanation of how it came to believe Cumming represented it, or why it failed to inquire about the status of this lawsuit within the last four months. Mot., Dkt. 42; see Perciballi v. Ng, No. SACV 08-01168 JVS (ANx), 2013 WL 12334833, at 3 (C.D. Cal. July 22, 2013) (finding defendant's statements to lack credibility when he failed to provided details other than self-serving declarations).

Additionally, the Court finds Fastapp's arguments to be inconsistent with Andrews' declaration, which was intended to support Fastapp's misunderstanding regarding representation. Fastapp claims to have spoken with Cumming shortly after Nationwide filed this lawsuit, at which time it declined Cumming's offer of services. Mot., Dkt. 42, at 8-9. Fastapp informed Cumming at that moment that it was still determining what law firm it wanted for representation in this lawsuit. Id.

Andrews was present at or had knowledge of this meeting. Mot., Dkt. 42, at 18 (Andrews Decl. ¶ 7). In her declaration, Andrews discusses how Cumming spoke with Fastapp representatives and herself about retaining his services and explained why Fastapp declined Cumming's services. Id. at 17-18 (Andrews Decl. ¶¶ 5, 7). Andrews knew that Fastapp considered retaining its New York attorneys for the California lawsuit at that time. Id. Indeed, Andrews proceeded to retain Cumming for her individual representation after the meeting. Id. at 18 (Andrews Decl. ¶ 6).

Fastapp argues that because it believed Andrews had retained Cumming on its behalf, and because Cumming had issues receiving Nationwide's motions, it was not culpable in failing to file its answer. Mot., Dkt. 42, at 8-10. However, the Court is unconvinced that Fastapp had reason to believe that Andrews and Cumming, given that Fastapp had specifically declined Cumming's services, would orchestrate Cumming's representation of Fastapp anyway. Mot., Dkt. 42, at 8-9. Further, Fastapp fails to show any facts to explain why it believes Andrews retained Cumming on its behalf, or why Andrews believed Cumming represented Fastapp.

Therefore, this factor weighs against setting aside entry of default.

B. Meritorious Defense

A party seeking to set aside the entry of default must allege sufficient facts that, if true, would constitute a defense. Mesle, 615 F.3d at 1094 (citing TCI Group, 244 F.3d at 700). This burden is "not extraordinarily heavy." TCI Group, 244 F.3d at 700. "Where timely relief is sought from a default . . . and the movant has a meritorious defense, doubt, if any, should be resolved in favor of the motion

to set aside the default so that cases may be decided on their merits.” Mendoza v. Wight Vineyard Mgmt., 783 F.2d 941, 945-46 (9th Cir.1986). The “meritorious defense” requires only that the party seeking to set aside the entry of default allege facts that, if true, would constitute a defense. TCI Group, 244 F.3d at 700. Resolution of factual issues is left to a later stage of litigation. Id.

Fastapp claims to have “a meritorious defense and intended to demonstrate” that claim, but failed to name its meritorious defense or state any specific facts in support of it. Fastapp’s general claims are “precisely the type of conclusory statements that are insufficient to justify setting aside default.” North Face Apparel Corp. v. Niman, No. CV 05–3628 DSF (PLAx), 2008 WL 11399764, at 3 (C.D. Cal. Jan. 8, 2008) (denying defendant’s general denial of connection to California’s personal jurisdiction).

Therefore, this factor weighs against setting aside entry of default.

C. Prejudice to Nationwide

To constitute prejudice, the harm that would result from setting aside the entry of default must be something more than delay or the costs associated with the litigation itself. TCI Group, 244 F.3d at 701. Merely “being forced to litigate on the merits” is not considered prejudice. Id. Examples of prejudice include “loss of evidence, increased difficulties of discovery, or greater opportunity for fraud or collusion.” Id. (internal quotation marks and citation omitted).

Fastapp and Nationwide raise three issues of prejudice: ongoing misappropriation, fees and costs associated with the default, and stages of the lawsuit.

First, Fastapp argues that setting the default aside would not prejudice Nationwide because this lawsuit was only filed nearly five months ago and remains at its beginning stages. Mot., Dkt. 42, at 10. The Court agrees. See Board of Motion Picture Industry Health Plan v. Rozenberg, No. CV 10–07070 GAF (JCGx), 2011 WL 13217789, at 3 (C.D. Cal. June 7, 2011) (weighing in favor of setting aside default when the action is in its early stages and little action has been taken).

Second, Nationwide argues that “substantial prejudice may result from FastApp’s ongoing trade secret misappropriation and its consequences, such as stealing Nationwide’s customers and a decrease in Nationwide’s goodwill in the market.” The Court agrees that such potential consequences support a finding of

prejudice against Nationwide. See Tire Stickers, LLC v. Scuderia Automobili, No. CV 18-5128-MWF (KSx), 2019 WL 6844721, at 6 (C.D. Cal. Oct. 16, 2018) (finding that the consequences of ongoing infringement weigh against setting aside default).

Third, Nationwide argues that it spent “significant expenses in preparing the motion for default judgment and opposing the instant motion to set aside” and requests the payment of attorney’s fees and costs incurred as a result of the default. The Court agrees that such expenses are prejudicial to Nationwide; however, this argument could be balanced against the award of attorney’s fees and costs to Nationwide. Id. (granting attorney’s fees and costs to balance the prejudice incurred against plaintiff).

In considering all three issues, the Court disagrees that Nationwide would be prejudiced by setting aside entry of default. “Any increase in damages due to continued [misappropriation] by [Fastapp] in the intervening months of this litigation can be claimed if [Nationwide] prevails on the merits. Moreover, there is nothing to prevent [Nationwide] from seeking immediate injunctive relief if warranted.” Essociate, Inc v. Clickxchange Corp., No. SACV 09-536 JVS (MLGx), 2009 WL 1069935, at 3 (C.D. Cal. Oct. 5, 2009).

Therefore, this factor weighs in favor of setting aside default judgment.

D. Amount of Damages

As Fastapp states, Nationwide seeks to recover \$58,577,483.50 in damages. This is not substantial amount of damages in terms of federal civil litigation. This weighs in favor of denying the motion.

E. Timing of Motion to Set Aside Entry of Default

Fastapp submitted its motion on March 28, 2021. Mot., Dkt. 42. Fastapp argues that it was not put on notice until March 15, 2021, and therefore timely made its motion. Id. at 12.

However, Nationwide argues that Fastapp received notice of the default against it when it was personally served the motion for entry of default judgment on December 28, 2021. Opp’n, Dkt. 48, at 20. The Court agrees. Fastapp was untimely in waiting three months to set aside a default it had knowledge of.

Therefore, this weighs against setting the default entry aside.

F. Balancing the Factors

The majority of factors weigh against setting aside the default against Fastapp. Additionally, the Court places more weight on Fastapp's lack of a credible good-faith explanation for its failure to answer the complaint than on the substantial amount of damages. See Abu-Assal v. Abu-Assal, No. EDCV 01-0153 GAF (SGLx), 2010 WL 11508162, at 4 (C.D. Cal. Feb. 8, 2010) (finding default judgment for \$30 million dollars in damages because the plaintiff presented evidence of conspiracy).

Overall, the factors weigh against setting aside the entry of default against Fastapp.

Accordingly, Fastapp did not meet its burden of showing good cause for its failure to file an Answer. The Court **DENIES** the motion with respect to this request.

IV. CONCLUSION

For the foregoing reasons, the Court **DENIES** the motion.

IT IS SO ORDERED.

Effective immediately all oral arguments are VACATED. The Court will continue to post tentatives in the afternoon of the Court day prior to the scheduled hearing (e.g., Friday afternoon for Monday hearings). Any party may file a request for hearing of no more than five pages no later than 5:00 p.m. the day following the scheduled hearing (e.g., Tuesday 5:00 p.m. for a Monday hearing) stating why oral argument is necessary. If no request is submitted, the matter will be deemed submitted on the papers and the tentative will become the order of the Court. If the request is granted, the Court will advise the parties when and how the hearing will be conducted. The Court asks for the parties' understanding and patience in these difficult times.