These are the tentative rulings for civil law and motion matters set for Tuesday, March 22, 2016, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Monday, March 21, 2016. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

NOTE: Effective July 1, 2014, all telephone appearances are governed by Local Rule 20.8. More information is available at the court's website, www.placer.courts.ca.gov.

EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY COMMISSIONER MICHAEL A. JACQUES AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN DEPARTMENT 40, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.

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1. M-CV-0063955 Hirsch, Jack vs. Long, William

This tentative ruling is issued by the Honorable Charles D. Wachob. If oral argument is requested, it shall be heard on March 22, 2016, at 8:30 a.m. in Department 42.

Motion to Set Aside Default and Default Judgment

Defendant William Long dba Spa Scapes, Inc. moves to set aside the default and default judgment for possession entered against him on August 19, 2015, on the grounds of extrinsic mistake. Defendant's motion was filed on February 25, 2016, more than six months after entry of default and default judgment. After six months, while statutory relief based on attorney fault under Code of Civil Procedure section 473(b) is not available, a trial court may still vacate a default on equitable grounds, including extrinsic mistake. (*Rappleyea v. Campbell (1994) 8 Cal.4th 975, 981.*) Extrinsic mistake applies where circumstances extrinsic to the litigation have unfairly cost a party a hearing on the merits. (*Id.*) Equitable relief is permitted only in exceptional circumstances when a default judgment has been obtained. (*Id.*)

To qualify for equitable relief, the moving party must satisfy the three part test articulated in *Stiles v. Wallis* (1983) 147 Cal.App.3d 1143, 1147-1148: "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 has been discovered."

In support of the motion, defendant has filed a proposed verified answer to the complaint, which satisfies the requirement of demonstrating that he has a meritorious case. (*Gudarov v. Hadjieff (1952) 38 Cal.2d 412, 418.*) Counsel for defendant states that the failure to timely file an answer to the complaint was the result of his error in failing to calendar the correct response date. The court finds the inadvertent failure to calendar the correct response date to be a sufficient excuse for the initial failure to timely present a defense to the original action.

This leaves the third necessary element to qualify for equitable relief, that the moving party was diligent in seeking to set aside the default once it was discovered. Based on the evidence submitted by the parties, the court must conclude that the diligence requirement is not established. Defendant's counsel admittedly was apprised almost immediately that default and default judgment had been entered against his client. Defense counsel contacted plaintiff's counsel at least by September 8, 2015, to discuss potential resolution of the matter, but took no steps at that time to set aside the default. Discussions between counsel continued through February 2016 but no final resolution was agreed upon. At that point, defense counsel raised for the first time the question of whether plaintiff would stipulate to set aside the default. Although plaintiff initially agreed, this agreement was withdrawn, and defense counsel was informed on the morning of February 18, 2016, that plaintiff had instructed his attorney to proceed with the eviction.

Defendant's attorney argues that he moved diligently in filing the instant motion upon learning that plaintiff would not stipulate to set aside the default. However, the three part test from *Stiles v. Wallis*, *supra*, requires the moving party to demonstrate diligence in seeking to set aside the default once *the default* is discovered. In this case the default was discovered at least by early September 2015, but defendant took no steps to set aside the default, or even raise the issue, at that time. Instead, defendant waited until the six month deadline to seek relief on the grounds of attorney fault had nearly expired to seek plaintiff's agreement to set aside. Defendant was then informed, on a date falling just prior to expiration of that deadline, that plaintiff was no longer willing to stipulate to the set aside. The instant motion was filed one week later. Counsel fails to demonstrate diligence sufficient to qualify for equitable relief.

Defendant's attorney suggests that his actions in this case may amount to positive misconduct for which defendant should not bear responsibility. It is true that in certain exceptional cases, the court has relieved a client from a default attributable to the inaction or procrastination of his or her counsel, where the client is relatively free from personal neglect. (*See Daley v. Butte County (1964) 227 Cal.App.2d 380, 391; Orange Empire Nat'l Bank v. Kirk (1968) 259 Cal.App.3d 347, 353*.) In this case, however, the court has been provided with no information regarding defendant's actions, inactions, knowledge, or lack of knowledge with respect to the status of the case. There is no evidence that defendant, apart from the attorney, acted diligently in this matter. Defendant therefore fails to satisfy the third element for granting equitable relief on the grounds of extrinsic mistake.

Based on the foregoing, defendant's Motion to Set Aside Default and Default Judgment is denied.

2. M-CV-0064265 Calbi, Michele vs. Borba, Shane, et al

The Motions to Strike are continued to April 12, 2016, at 8:30 a.m. in Department 42 to be heard by the Honorable Charles D. Wachob.

3. S-CV-0033613 Adams, Garnet, et al vs. Del Webb California Corporation

Financial Pacific Insurance Company's Motion for Leave to Intervene on behalf of Image Landscape, Inc. is granted. Moving party shall file its complaint-in-intervention on or before April 1, 2016.

4. S-CV-0033961 Crisostomo, Virgie F., et al vs. Pulte Home Corporation

Sonray Solar, Inc.'s Motion for Determination of Good Faith Settlement is continued to April 5, 2016, at 8:30 a.m. in Department 40.

The proof of service filed in conjunction with the motion fails to identify the parties served. Moving party may file an amended proof of service at least five days prior to the continued hearing date.

5. S-CV-0035393 Seibert, Robert Jr. vs. Seibert, James

Appearance required on March 22, 2016, at 8:30 a.m. in Department 40.

6. S-CV-0035427 Great American Insurance Co. vs. Beaudin Ganze Consulting

Southland Industries' Motion to Sever Cross-Complaint is denied without prejudice at this time. Southland Industries' alternative Motion to Strike Cross-Complaint is granted.

A cross-complaint against third party cross-defendants may be filed without leave of court any time before the court sets the first trial date. Code Civ. Proc. § 428.50(b). After the trial date is set, leave of court must be obtained to file a cross-complaint. In this case, the trial date was set at the case management conference scheduled for March 10, 2015. Defendant and cross-complainant Beaudin Ganze Consulting Engineers, Inc. then filed a cross-complaint, naming third party cross-defendants, on January 22, 2016, without leave of court. As leave of court was not obtained prior to the filing as required by the Code of Civil Procedure, the cross-complaint filed January 22, 2016, is hereby stricken.

7. S-CV-0036023 James, Loretta vs. Lingren, Leif

The Motion to Vacate Order was dropped by the moving party.

8. S-CV-0036453 Piland, Mark, et al vs. Markwort Sporting Goods Co., et al

The Applications for Admission of Donald Chance Mark, Jr., Patrick J. Rooney and Christopher R. Sall to the Bar of This Court *Pro Hac Vice* are continued to April 5, 2016, at 8:30 a.m. in Department 40.

There is no proof of service in the court's file showing service of the applications on the State Bar of California, and there is no indication that the required fee was paid to the State Bar of California, as required by California Rules of Court, rule 9.40(c)(1), (e). Applicants may file further proof of service and declarations with respect to this information at least five days prior to the continued hearing date.

9. S-CV-0037407 Holt of California vs. Cook, Roger

The Application for Right to Attach Order is dropped in light of the stipulation and order filed March 4, 2016, confirming settlement of the action.

10. T-CV-0001512 Weinberger, Charles et al vs. 8050 Tahoe Mezz, LLC. et al

This tentative ruling is issued by the Honorable Charles D. Wachob. If oral argument is requested, it shall be heard on March 22, 2016, at 8:30 a.m. in Department 42.

Motion to Dismiss Based Upon Failure of Plaintiffs to Prosecute

Rulings on Objections to Evidence

Plaintiffs' objections to the Declaration of Robert Mitchell are sustained.

Ruling on Request for Judicial Notice

Plaintiffs' request for judicial notice is granted.

Ruling on Motion

Defendants Robert Chrisman and Sarah Rogers, aka Sarah Chrisman (collectively "the Chrismans") move to dismiss this action pursuant to Code of Civil Procedure section 583.310 based on the failure to bring the action to trial within five years of the filing of the complaint. The complaint in this action was filed June 10, 2009, and has never been brought to trial. However, pursuant to Code of Civil Procedure section 583.340, computation of the five-year period within which an action must be brought to trial excludes the time during which any of the following conditions existed: "(a) the jurisdiction of the court to try the action was suspended. (b) Prosecution or trial of the action was stayed or enjoined. (c) Bringing the action to trial, for any other reason, was impossible, impracticable, or futile."

Plaintiffs first argue that calculation of the five-year deadline to bring the action to trial must exclude the period between the date that default was entered against the Chrismans,

February 1, 2013, and the date that default judgment was set aside, May 18, 2015. The Chrismans admit that the deadline would be tolled between the date default judgment was entered, and the date of set aside, but argue that the time between entry of default and entry of default judgment should not be excluded. (*See Langan v. Superior Court (1969) 76 Cal.App.2d 805, 806.*)

The five-year statute exists to prevent avoidable delay in bringing an action to trial and exceptions to the statute must be recognized where proceeding to trial would be impossible for all practical purposes due to causes beyond the plaintiff's control, and despite the exercise of reasonable diligence in prosecuting the case. (*Moran v. Superior Court (1983) 35 Cal.3d 229, 237-238.*) It follows that the time between entry of default and entry of default judgment may be excluded from the calculation of the five-year deadline under Code of Civil Procedure section 583.340 "if the court finds that the plaintiff used due diligence to obtain entry of judgment, and that in spite of such due diligence, it was impossible, impracticable, or futile to obtain a judgment." (*Hughes v. Kimble (1992) 5 Cal.App.4th 59, 71.*)

Defaults were entered against the Chrismans on February 1, 2013. Such defaults were not set aside prior to entry of default judgment, although plaintiffs did later amend the requests for entry of defaults out of an abundance of caution. Default judgments, however, were not entered against the Chrismans until September 15, 2014. Plaintiffs assert that during this time period, they exercised due diligence in attempting to obtain judgments against the Chrismans. This included engaging in substantial discovery efforts including depositions, subpoenas, and document review, to compile the evidence necessary to prove up their claims. Plaintiffs' counsel contacted the court regarding the scheduling of a prove-up hearing and was informed that the court would not schedule a default prove-up hearing or enter default judgment until the matter had also been resolved as to all other parties. This information comports with the court's general treatment of default judgment applications in multi-party cases. A default judgment prove-up hearing was then scheduled almost immediately after the matter had been disposed of or resolved as to all other parties, on April 28, 2014, a date falling within the five-year deadline to bring the action to trial. However, at the prove-up hearing, counsel was informed by the clerk that the matter had not been calendared correctly by the court, and would not go forward on that date. Due to courtroom unavailability, the court declined to set the matter for hearing for several months, despite several inquiries by plaintiffs' counsel. Ultimately, the matter was finally set for default prove-up hearing September 15, 2014, and default judgment was entered against the Chrismans on that date.

The court finds that plaintiffs did use due diligence to attempt to obtain judgment against the Chrismans during the time between entry of default and entry of default judgment, but due to circumstances beyond their control, it was impossible, impracticable, or futile to obtain a judgment during this time. Consequently, the time between entry of default on February 1, 2013 and entry of default judgment on September 15, 2014, should be excluded from calculation of the five year deadline. (*Code of Civil Procedure section 583.340.*) In addition, as admitted by the Chrismans, the time between entry of default judgment and the granting of the motion to set aside default judgment should also be excluded. (*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal.4th 424, 438.*) Based on this exclusion, the deadline to bring this action to trial has not yet passed.

Based on the foregoing, the Chrismans' Motion to Dismiss Based Upon the Failure of Plaintiffs to Prosecute Pursuant to CCP § 583.310 is denied.

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