CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA
DEPARTMENT: 21
HEARING DATE: 04/21/21

1. TIME: 9:00 CASE#: MSC16-01331
CASE NAME: ELKHOURY VS SEARS ROEBUCK
HEARING ON MOTION TO/FOR LEAVE TO FILE THIRD AMENDED COMPLAINT
FILED BY SOUHEIL B ELKHOURY
**** TENTATIVE RULING: ****

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Before the Court is plaintiff's motion for leave to file a third amended complaint ("3AC"). For the reasons set forth, the motion is **granted**. Plaintiff shall file his 3AC within 10 days of the date of the hearing.

Factual Background

Plaintiff's claims arise out of what he contends are two defective products, a Craftsman wireless keyless entrypad used to input a code to open a garage door and a Craftsman 1/2 horsepower garage door motor. On December 16, 2020, the Court denied Mr. ElKhoury's motion for class certification for the reasons stated in the Court's ruling of that date, including the fact that Plaintiff's second amended complaint ("2AC") did not include the allegations necessary to support class certification.

Mr. ElKhoury seeks leave to file the 3AC to "cure the defects" the Court found in denying his motion for class certification.

Standards Governing Motion for Leave to Amend

Plaintiff cites Code of Civil Procedure § 472 to support his right to amend. That statute, however, is inapplicable as it pertains to amendment once as a matter of course "before the answer or demurer is filed." (Code Civ. Proc. § 472(a).) Chamberlain has already responded to the 2AC.

However, the Court has discretion to allow the amendment of pleadings under Code of Civil Procedure § 473(a)(1) "in furtherance of justice," and "upon any terms as may be just." The decision whether to grant leave to amend is committed to the sound discretion of the trial court. (*Sullivan v. City of Sacramento* (1987) 190 Cal. App. 3d 1070, 1081.)

"California courts have 'a policy of great liberality in allowing amendments at any stage of the proceeding so as to dispose of cases upon their substantial merits where the authorization does not prejudice the substantial rights of others.' [Citation omitted.] Indeed, 'it is a rare case in which 'a court will be justified in refusing a party leave to amend his pleading so that he may properly present his case.' [Citation and internal quotations omitted.]" (*Douglas v. Superior Court* (1989) 215 Cal.App.3d 155, 158 [noting the fact that the party had already amended his pleading twice before was not by itself grounds to deny leave to amend again].) (*See also Hong Sang Market, Inc. v. Peng* (2018) 20 Cal.App.5th 474, 488 [" '[A]bsent a showing of prejudice to the adverse party, the rule of great liberality in allowing amendment of pleadings will prevail.' [Citation omitted.]," quoting *Board of Trustees v. Superior Court* (2007) 149 Cal.App.4th 1154, 1163]; *Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 760-761.) Without a showing of prejudice, the failure to grant leave to amend may be an abuse of discretion. (*Fair v. Bakhtiari*

(2011) 195 Cal.App.4th 1135, 1147; *Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 544-545.)

Analysis

Defendant Chamberlain Group, Inc. ("Chamberlain") opposes the motion. Acknowledging the strong policy favoring amendment, Chamberlain's opposition is based on argument that Plaintiff has unreasonably delayed, that Chamberlain will incur increased costs of preparing for trial and conducting discovery based on the potential class action claims alleged in the 3AC, that it will be prejudiced by having to engage experts and specialized legal counsel to address the class action, and that the 3AC is legally deficient and the class action frivolous. (Opp. p. 4.) None of these arguments or the authorities relied on by Chamberlain are sufficient to deny the motion.

1. Delay in Moving to Amend

Delay alone is not a basis to deny a motion for leave to amend. (*Higgins v. Del Faro* (1981) 123 Cal.App.3d 558, 564-565 [reversing judgment on the pleadings for defendant after plaintiff's motion to amend made on the day of trial was denied; defendant was not surprised or misled by the proposed amendment, and the short delay in the trial which would result from the amendment did not prejudice defendant]; *Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048.) Courts allow leave to amend even up to the time of trial. (*Ventura v. ABM Industries Inc.* (2012) 212 Cal.App.4th 258, 267-268 [finding no abuse of discretion in trial court granting leave to plaintiff to file second amended complaint based on an ex parte application made the day before trial].)

2. Proposed 3AC Legally Deficient

Under the case law, the "better practice" is for the Court not to address the merits of a proposed amended pleading in the motion for leave to amend, and to allow the merits instead to be addressed through a demurrer, motion for judgment on the pleadings, or other appropriate pleading after the amended pleading is filed. (*Atkinson v. Elk Corp., supra,* 109 Cal.App.4th 739, 760-761; *Kittredge Sports Co. v. Superior Court, supra,* 213 Cal.App.3d at 1048.) The Court does not address the merits or legal sufficiency of the 3AC in ruling on this motion.

3. Prejudice

Chamberlain did not present any evidence that it will suffer prejudice by the filing of the 3AC. (*Higgins v. Del Faro, supra,* 123 Cal.App.3d 564-565 [when no prejudice is shown, leave to amend should have been granted].) The allegations of the 3AC involve the same general set of facts and claims Plaintiff has asserted since Chamberlain has been a party to the action. Chamberlain does not claim any surprise. Chamberlain does not argue the 3AC raises entirely new and materially different facts and legal theories from those Plaintiff has attempted to allege throughout the case. Cases such as *Magpali v. Farmers Group* (1996) 48 Cal.App.4th 471 and *Estate of Murphy* (1978) 82 Cal.App.3d 304, cited by Chamberlain, are therefore distinguishable. (*Magpali v. Farmers Group, supra,* 48 Cal.App.4th at 487-488 [denial of leave to

amend the day before trial proper where plaintiff tried to assert a new cause of action focused on a different set of issues that would have required, at a minimum, a trial continuance for new discovery]; *Estate of Murphy*, *supra*, 82 Cal.App.3d 304, 311 [motion to amend made at the start of trial opening up new complicated "field of inquiry" reflecting a "major change in point of attack"].)

4. Cal. R. Ct. 3.1324 and 3.1110

The Shalaby declaration attaches the proposed 3AC and a document marked to show all the changes in the 3AC (Exhs. A and B). The motion makes clear the purpose of the amendment is to try to cure the deficiencies cited in the Court's denial of class certification based on the 2AC. The discovery letters attached as Exhibits C and D to the Shalaby declaration explain the delay in Plaintiff's seeking leave to file the 3AC. The pleadings as a whole sufficiently provide the substantive information outlined in Rule 3.1324 to support the request for leave to amend. The notice of motion and memorandum together state the basis for the relief sought. Chamberlain has cited no authority that failure to strictly follow the requirements of Rule 3.1324 or Rule 3.1110 is a ground to deny leave to file the 3AC, notwithstanding the policies and law cited above.

Defendant's Evidentiary Objections

Chamberlain objects to two exhibits offered by Plaintiff (Shalaby Exhs. C and D) addressing a discovery dispute between the parties on the grounds of relevance. The objections are **overruled**.

Plaintiff's Request for Sanctions or OSC re Sanctions

Plaintiff raises the issue of sanctions under Code of Civil Procedure § 128.7 and issuance of an order to show cause, alleging Chamberlain has failed to investigate the product defects Plaintiff asserts exist in the wireless entry pads and garage door motors. Plaintiff's request for sanctions is not properly made under the procedures of that statute and the Court finds no grounds to issue an order to show cause.

2. TIME: 9:00 CASE#: MSC17-02191
CASE NAME: BERMAN VS KACKLEY
SPECIAL SET HEARING ON: HEARING ON APPL OF WRIT OF POSSESSION
SET BY COURT
**** TENTATIVE RULING: ****

Vacated.

3. TIME: 9:00 CASE#: MSC18-01307
CASE NAME: PEYVAN VS. AHMAD
HEARING ON MOTION TO/FOR ENTRY OF JUDGMENT PURS TO CCP 664.6
FILED BY MANIJEH PEYVAN
**** TENTATIVE RULING: ****

Vacated.

4. TIME: 9:00 CASE#: MSC19-00791
CASE NAME: PATRICK RILEY VS JORDAN SCHUST
HEARING ON MOTION TO/FOR TAX COSTS FILED BY PATRICK RILEY
**** TENTATIVE RULING: ****

Plaintiff's motion to tax costs is denied.

Defendants have demonstrated that the bulk of the challenged expenses are attributable to courier fees. Such fees are recoverable in the court's discretion. CCP 1033.5(a); *Doe v. Los Angeles County* (2019) 37 Cal.App.5th 675, 679). The court finds messenger fees to be reasonable and necessary to the litigation and allows the costs.

Plaintiff asks the court to exercise its discretion to strike half of the mediation fees. The court declines to do so. The court finds the mediation was reasonable and necessary regardless of the fact that the cross-complaint remains unresolved.

Plaintiff also suggested that defense counsel did not attend the September 2020 CMC via court call. The minutes reflect defense counsel's appearance so the CourtCall charge is allowed.

Defense counsel withdrew a different CourtCall charge of $94 which had been refunded. Accordingly, costs in the amount of $4,169.29 are awarded to the defendants.

5. TIME: 9:00 CASE#: MSC19-00791
CASE NAME: PATRICK RILEY VS JORDAN SCHUST
HEARING ON MOTION TO/FOR BE RELIEVED AS COUNSEL FILED BY PATRICK RILEY
**** TENTATIVE RULING: ****

Mr. Launay's motion to be relieved as counsel for Patrick Riley is granted. The court will sign the order provided.

6. TIME: 9:00 CASE#: MSC19-01885
CASE NAME: RAHMANY VS SEENO CONSTRUCTION
HEARING ON MOTION TO/FOR LEAVE TO FILE 1ST AMENDMENT TO COMPLAINT FILED BY NAJIB RAHMANY
**** TENTATIVE RULING: ****

Plaintiff's unopposed motion for leave to file an amendment to the complaint is granted. Plaintiff shall file the amended pleading within 10 days of the hearing.

7. TIME: 9:00 CASE#: MSC19-02061
CASE NAME: RETAIL CAPITAL VS CISCO MEDICA
HEARING ON MOTION FOR SUMMARY JUDGMENT FILED BY RETAIL CAPITAL LLC, A LIMITED LIABILTY
**** TENTATIVE RULING: ****

Plaintiff Retail Capital LLC's Motion for Summary Judgment is continued to July 28, 2021. Plaintiff is directed to immediately re-notice the motion and file proof of service of the motion with the court.

Plaintiff failed to give the required notice for the current hearing date. "Notice of the motion and supporting papers shall be served on all other parties to the action at least 75 days before the time appointed for hearing. If the notice is served by mail, the required 75-day period of notice shall be increased by 5 days if the place of address is within the State of California…." (CCP § 437c(a)(2).)

Given the express mandatory language of the statute, "'trial courts do not have authority to shorten the minimum notice period for summary judgment hearings.' [Citation.]" (*Robinson v. Woods* (2008) 168 Cal.App.4th 1258, 1262.)

According to the Proof of Service, this motion was served on Defendants by U.S. Mail on February 3, 2021 to an address in California, which required the addition of 5 days for mailing. The Proof of Service does not show service by any other method. According to the Court's calculation, per CCP § 12c, the notice given was only 77 days. The Court cannot continue the hearing a mere three days to correct the error. Such would be a violation of due process. The notice period has to begin anew. (*Robinson v. Woods* (2008) 168 Cal.App.4th 1258, 1267-1268.) Moreover, Defendant Baz has not responded to the motion and the Court may not infer implied consent to the shortened notice period.

"The importance of providing the minimum statutory notice of a summary judgment hearing cannot be overemphasized." (*Robinson v. Woods* (2008) 168 Cal.App.4th 1258, 1262.) "Because it is potentially case dispositive and usually requires considerable time and effort to prepare, a summary judgment motion is perhaps the most important pretrial motion in a civil case. Therefore, the Legislature was entitled to conclude that parties should be afforded a

minimum notice period for the hearing of summary judgment motions so that they have sufficient time to assemble the relevant evidence and prepare an adequate opposition." (*Urshan v. Musicians' Credit Union* (2004) 120 Cal.App.4th 758, 765.) "The Legislature recognized this reality of litigation and by its use of mandatory language deprived a trial court of the authority to shorten the notice period for hearing summary judgment motions." (*Robinson v. Woods* (2008) 168 Cal.App.4th 1258, 1263.)

8. TIME: 9:00 CASE#: MSC19-02681
CASE NAME: CAUGHREN VS MORETTI
HEARING ON MOTION TO/FOR LEAVE TO FILE FIRST AMENDED COMPLAINT
FILED BY CHRISTINE CAUGHREN
**** TENTATIVE RULING: ****

Unopposed motion for leave to file first amended complaint is granted. Plaintiff shall file the FAC within 10 days of this hearing.

9. TIME: 9:00 CASE#: MSC20-00735
CASE NAME: ISLAND BREEZE SYSTEMS CA, L.L.
HEARING ON MOTION TO/FOR SET ASIDE DEAFAULTS AGAINST DEFENDANTS
FILED BY ONE GRO, INC, DANIEL ISAACSON
**** TENTATIVE RULING: ****

Before the Court is a motion to set aside default pursuant to Code of Civil Procedure section 473(b), filed by defendants One Gro, Inc. and its CEO, defendant Daniel Isaacson ("defendants"). The motion is made on the grounds that defendants' failure to respond was the result of excusable inadvertence, mistake or neglect. The motion is **granted**.

Defendants shall prepare, file, and serve the proposed responsive pleadings attached to counsel's declaration on or before May 3, 2021.

Background

In 2019 One Gro and Island Breeze Systems, LLC ("plaintiff"), entered into a Settlement Agreement requiring One Gro to pay plaintiff $450k in installment payments from April 15, 2019 through December 23, 2020. As security for the agreement, in addition to a personal guaranty from Isaacson and other documents, One Gro executed a "Confession of General Judgment" in the amount of $500k, which plaintiff could file in an Oregon court if One Gro defaulted.

Plaintiff filed this case on April 20, 2020, attaching the Settlement Agreement to its complaint and alleging causes of action for breach of contract, fraud and accounting against One Gro and Isaacson, as well as three other individuals. According to the affidavits of service, the summons and complaint were served personally on August 22, 2020, though defendant

Isaacson states in his declaration that the documents were left not with him, but with a property caretaker.

In his declaration, Isaacson further states, under penalty of perjury, that he believed plaintiff's only recourse for One Gro's alleged breach of the settlement agreement was to enforce the Confession of General Judgment in Oregon. Upon learning of the attempted service, Isaacson states he immediately called plaintiff's counsel, Attorney Cohen, and left a voicemail. While he never received a call back from Attorney Cohen, Isaacson believed the silence meant plaintiff had reconsidered its lawsuit and opted to instead enforce the "Confession of General Judgment" that had been attached to the Settlement Agreement. When Isaacson learned that another defendant had been served in December 2020, Isaacson called plaintiff's Oregon attorney who stated he was no longer representing plaintiff. Isaacson also left another voicemail with Attorney Cohen.

Plaintiff took the default of One Gro on November 13, 2020. On January 20, 2021, it took the default of Daniel Isaacson.

On January 20, 2021, Isaacson spoke with plaintiff's current counsel who informed Isaacson that his default, as well as that of One Gro, had been entered. Counsel did not provide a clear response to Isaacson's inquiries about the executed "Confession of General Judgment."

Isaacson immediately retained counsel for defendants and on March 4, 2021, defendants' counsel emailed plaintiff's counsel to request a stipulation to set aside the defaults. (Declaration of Aileen R. Mazanetz in Support of Motion to Set Aside Defaults, ¶3.) Plaintiff's counsel did not agree to stipulate. (*Ibid*.)

Defendants then filed this motion on March 19th. Plaintiff opposes the motion, or, in the alternative, seeks fees and costs.

Discussion

Code of Civil Procedure section 473(b) provides for discretionary relief from default where the default was taken against a party due to that party's mistake, inadvertence, surprise, or excusable neglect, so long as application for relief is made within a reasonable time, and in no case exceeding six months, after the default was taken. Section 473 is a remedial statute to be "applied liberally" in favor of relief if the opposing party will not suffer prejudice. The law strongly favors trial and disposition on the merits. "Unless inexcusable neglect is clear, the policy favoring trial on the merits prevails." (*Minick v. City of Petaluma* (2016) 3 Cal.App.5th 15, 24, quoting *Elston v. City of Turlock* (1985) 38 Cal.3d 227, 235.)

Where the party in default moves promptly to seek relief, and the party opposing the motion will not suffer prejudice if relief is granted, "very slight evidence will be required to justify a court in setting aside the default." (*Murray & Murray v. Raissi Real Estate Development, LLC* (2015) 233 Cal.App.4th 379, 385.)

The evidence presented by defendants supports setting aside the defaults. Isaacson, having signed a Confession of Judgment for what appears to be the same debt as the one referenced in this case, had an understandable—if not legally informed—reason for believing he did not need to respond to an out-of-state lawsuit on the same debt. Isaacson attempted on multiple occasions to contact plaintiff's attorneys, who did not help clarify why a new suit had been initiated in light of the Confession of Judgment.

When Isaacson learned his default had been taken on January 20th, he retained counsel, who promptly reached out to plaintiff's counsel regarding setting aside the defaults. The current motion was filed within two months after Isaacson's default was entered and only about four months after One Gro's default was entered, both well within the six-month jurisdictional timeframe for relief under Code of Civil Procedure section 473(b). The motion is accompanied by proposed responsive pleadings, as required by the statute. The Court also notes that defendants do not challenge service, though there is some evidence that the record does not reflect Isaacson was properly served.

In light of the above, plaintiff's argument that defendants have not met their burden because they intentionally failed to respond is not persuasive. The record shows no evidence the failure was intentional.

The Court finds the defaults were entered based on moving defendants' inadvertence, mistake, surprise, or excusable neglect, and grants relief to allow this case to move forward on the merits.

Fees and Costs, Signing of Papers

Plaintiff's request for compensatory legal fees and costs is denied. While such award is mandatory where relief from default is based on an attorney's affidavit of fault, a party's own mistake, inadvertence, surprise, or excusable neglect does not yield the same result. (Code Civ. Proc., § 473 (b).) Nor is a discretionary award legal of fees and costs warranted. Plaintiff was given the option to stipulate to set aside the defaults, but refused.

The opposition brief filed with the Court is unsigned. Code of Civil Procedure, § 128.7 (a) provides that "[a]n unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party." Plaintiff shall submit a signed copy of the opposition by the date of the hearing, or the brief will be stricken.

The served copy of the Declaration of Michael Hartmann was apparently also unexecuted. Code of Civil Procedure, § 1005 (b) provides that the served papers should be copies of what was filed with the Court. Unless it has done so already, plaintiff is ordered to provide defendants with an executed copy of the declaration by the date of the hearing.

Evidentiary Matters

Defendants' Objection to Evidence No. 1 (Hartman Decl., ¶3, Ex. A) – sustained - hearsay

Defendant's Objection to Evidence No. 2 (Hartman Decl., ¶4) - sustained – lack of foundation / no personal knowledge

Defendant's Objection to Evidence No. 3 (Hartman Decl., ¶5) – sustained – lack of foundation / no personal knowledge