TENTATIVE RULINGS
LAW & MOTION CALENDAR
Friday, June 27, 2024 9:30 a.m.
Courtroom 22 –Hon. James G. Bertoli
3055 Cleveland Avenue, Santa Rosa

TO JOIN "ZOOM" ONLINE:
Meeting ID: 161-312-0396
Passcode: 219644
https://sonomacourt-org.zoomgov.com/j/1613120396

TO JOIN "ZOOM" BY PHONE:
By Phone (same meeting ID and password as listed above):
(669) 254-5252

The following tentative rulings will become the ruling of the Court unless a party desires to be heard. If you desire to appear and present oral argument as to any motion, it will be necessary for you to contact the department's Judicial Assistant by telephone at (707) 521 - 6836 by 4:00 p.m. on the day before the hearing. Any party requesting an appearance must notify all other opposing parties/counsel of their intent to appear.

1. **SFL38476 Fox Disso**
   APPEARANCES REQUIRED.

2. **SFL087783 County of Sonoma vs Munoz**
   Motion for Change of Venue is granted. Upon payment of appropriate fees or filing of a fee waiver, this matter shall be transferred to Santa Clara County Superior Court.

3. **SFL092867 Ochoa Dissolution**
   Motion to Be Relieved as Counsel is granted. Petitioner's attorney of record, Carla A. Hernandez Castillo, is hereby relieved as counsel.

4. **SFL093766 Johnson/Mackey Dissolution**
   Motion for Relief from Judgment and Default [CCP §473(b)] GRANTED in part. The court GRANTS the motion as to setting aside the default but DENIES the motion as to setting aside the DVRO.

Facts

Petitioner filed the petition for dissolution of marriage with minor child, along with a Declaration Under Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), on June

6, 2023. The petition requests divorce and determination of custody and visitation of the minor child, Cameron Goulding Mackey ("Cameron"), with a request to reserve the determination on support. However, it also seeks confirmation of real property at 850 Palou Street, Sonoma (the "House") as Petitioner's separate property, and a determination of community assets and debts. She filed a proof of service for the summons, petition, UCCJEA declaration and notice of assignment on July 6, 2023. This proof of service stats that Petitioner served Respondent by "Email to attorney of record Arvin Lugay" on June 20, 2023. It includes an attached acknowledgment of receipt for the documents, signed by Arvin Lugay ("Lugay") on that date.

On July 19, 2023, Petitioner also filed a request for domestic violence restraining order ("DVRO"). That date, Respondent through attorney Lugay filed a response to the DVRO request, asserting that he himself had filed a request for DVRO earlier on June 13, 2023, in SFL093788 and claiming that Petitioner has been abusive and has filed her request as retaliation. The court granted a domestic violence temporary restraining order ("DVTRO"), setting the hearing on the DVRO for August 8, 2023. On July 28, 2023, Respondent filed a form substituting Lugay out and leaving Respondent self represented. Petitioner then filed proof of personally serving Respondent with the DVRP papers on July 30, 2023. Respondent requested a continuance of the DVRO hearing and the court granted the request, continuing it to September 12, 2023. Respondent also filed a request for order ("RFO") regarding his retrieval of personal property and income for living expenses on August 18, 2023, the court setting that hearing for December 4, 2023.

At the hearing on the DVRO on September 12, 2023, the parties were present. The court granted the DVRO.

The parties took part in additional litigation and filed additional papers before Petitioner on January 31, 2024 filed a request to enter default. That request states that the petition does not make any request regarding money, property, costs, or attorney fees. The court entered the default that date. The court rejected Petitioner's judgment packet noting, among other things, that the petition failed to specify the property to be determined or to equalize community property. On March 21, 2024, Petitioner filed an amended request for entry of default which did not claim that the petition does not make any request regarding money, property, costs, or attorney fees. The court entered the default as requested the same date.

Motion

In his Request for Order ("RFO") and Motion for Relief from Judgment and Default [CCP §473(b)], Respondent moves the court to set aside the default and the DVRO. He claims that during the period when the court entered these, he was suffering from severe depression and financial

problems which caused confusion and a mental fog that impaired his ability to understand what was going on, what was required, how he was supposed to handle the court proceedings, or what the default papers meant. He asserts that he eventually came out of that state to discover the situation and, with help from friends and family, hired an attorney. He contends that this amounts to mistake, inadvertence, surprise or excusable neglect sufficient to set aside the orders pursuant to Code of Civil Procedure ("CCP") §473(b) and Family Code ("Fam.Code") § 2122. Respondent attaches to the RFO a proposed response to the petition.

Petitioner opposes the motion, arguing that Respondent had actively participated in the litigation, appeared to have understood the process and what was occurring, and was even represented by counsel at the very beginning for about one month, during the initial DVRO proceedings.

Discussion

CCP §473(b) allows plaintiffs and defendants to set aside 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. The motion "shall be accompanied by a copy of the answer or other pleading proposed to be filed… otherwise the application shall not be granted…." CCP § 473(b).

An order setting aside the default is discretionary where based on mistake, inadvertence, surprise, or excusable neglect. CCP § 473(b). There is also a policy in favor of hearing cases on their merits and the motion to vacate should be granted if the moving party shows a credible, excusable explanation. *Elston v. City of Turlock* (1985) 38 Cal.3d 227. The provision of this section authorizing court to relieve party from a judgment or order resulting from mistake, inadvertence, surprise or excusable neglect is remedial in its nature and is to be liberally construed so as to dispose of cases on their merits. *Ramsey Trucking Co. v. Mitchell* (1961) 188 Cal.App.2d Supp. 862.

"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.

Significant health problems or family tragedies may be sufficient to support a showing of mistake, inadvertence, surprise, or excusable neglect. *Shapiro v. Clark* (2008) 164 Cal.App.4th 1128 (death of a son is sufficient excuse); *Kesselman v. Kesselman* (1963) 212 Cal.App.2d 196, 207-208; *Fink & Schindler Co. v. Gavros* (1925) 72 Cal.App.688 (illness sufficient excuse where party had tried to hire attorney before falling ill).

Within the six-month period for seeking relief under CCP § 473(b), a party may also seek relief pursuant to Fam.Code § 2120 et seq., specifically as set forth in § 2022. *Marriage of Thorne & Raccina* (2012) 203 Cal.App. 4th 492, 499, fn. 3; *Marriage of Kieturakis* (2006) 138 Cal.App. 4th 56, 87. After the deadline for CCP § 473, a party may still seek relief from default judgment in family proceedings only in accordance with the grounds in Fam. Code §§s 2121 and 2122. *In re Marriage of Zimmerman* (2010) 183 Cal.App.4th 900, 910-911; *Marriage of Thorne & Raccina, supra; Marriage of Kieturakis, supra*.

Fam. Code § 2122 sets forth the various bases for relief pursuant to that provision. As to stipulated or uncontested judgments, or any part thereof, a motion under Fam. Code § 2122 may be based on mutual or unilateral mistake of law or fact. Fam.Code § 2122(e). Under this provision, "mistake" is broader than the "extrinsic mistake" standard applying to the court's inherent power to set aside. See *Marriage of Brewer & Federici* (2001) 93 Cal.App. 4th 1334, 1345, fn. 10; *Marriage of Varner* (1997) 55 Cal.App. 4th 128, 144. Authority indicates that a party may seek relief on various grounds not otherwise recognized by the statute as long as they can be found to fall within the scope of "mistake" as broadly applied. See *Marriage of Walker* (2012) 203 Cal.App. 4th 137,

147, (upholding validity of § 2122(e) motion to vacate community property ruling based solely on erroneous legal conclusion). No wrongdoing is necessary for relief based on mistake. *Marriage of Brewer & Federici* (2001) 93 Cal.App.4th 1334, 1347, (wife honestly stated value of one of her pensions was "unknown" but valuation information was readily available to her).

In proceedings to set aside pursuant to Fam.Code § 2121, the court also "shall find that the facts alleged as the grounds for relief materially affected the original outcome and that the moving party would materially benefit from the granting of the relief." Fam.Code § 2121(b); see also *Marriage of Walker* (2012) 203 Cal.App. 4th 137, 146; *Marriage of Brewer & Federici* (2001) 93 CA4th 1334, 1345; *Marriage of Varner* (1997) 55 CA4th 128, 137, 63 CR2d 894, 899.

In other words, the moving party bears the burden of demonstrating both the presence of at least one of the statutory grounds for relief and that the circumstances resulted in a material disadvantage to the moving party. *Marriage of Kieturakis* (2006) 138 Cal.App. 4th 56, 89; *Marriage of Rosevear* (1998) 65 Cal.Ap. 4th 673, 685

Respondent is persuasive that it is appropriate to vacate the default here based on both CCP §473(b) and Fam. Code §2122. He actively participated in the proceedings prior to the default but rather than weakening Respondent's position, as Petitioner contends, in the court's view this supports the motion. Respondent appears form the record of these proceedings, to have been attempting actively to litigate the issues, demonstrating diligence. He claims that he did not fully understand the proceedings or what was required, and cites a period of severe depression which added to confusion and difficulty comprehending exactly what was required, or the details of papers or proceedings. Such a situation is within the range of explanations sufficient to support the requested relief under CCP §473(b). Although he participated in the proceedings, this does not contradict Respondent's explanation and instead the court finds that given his active attempts to participate in the litigation, his explanation is the most reasonable and persuasive for the failure to file a response to the petition and avoid a default. Otherwise, his failure to do so is inexplicable. Petitioner notes that the summons was clear about the obligation and that Respondent initially had an attorney representing him, but these facts are not dispositive and the court finds them insufficient here to deny the requested relief. Parties are, as explained in the discussion of the authority above, entitled to vacate a default if they failed to comprehend aspects of what was occurring, and a summons always sets forth the obligation to respond. If it the language of the summons were sufficient to defeat a motion based on such an explanation, that would be true in every instance, yet the applicable authority demonstrates that it not the case. As for the attorney, Respondent in fact only was represented very briefly at the outset, for about 9 days from the date he first filed documents to oppose the DVRO. Nothing about that brief representation gives any indication that Respondent did receive sufficient advice or understanding about the proceedings, or that he should

have done so. The context of the early proceedings, involving active litigation over the DVRO rather than the ultimate issues of marital dissolution and property division, further supports Respondent's claim because it would easily explain that Respondent was distracted and confused by the nature of those proceedings so that he failed to realize or fully understand that he had not officially responded to the actual petition. The fact that he had filed responses to the DVRO and the parties actively participated in that issue for months further supports his contention that he did not understand that he still was required to file a response to the petition in order to avoid a default. That he had an attorney who initially filed a response to the DVRO, but nothing else, also is consistent with a claim that he failed to understand the procedures. The court further notes that Respondent in his prior papers regarding the DVRO has repeatedly explained his dire financial and personal situation, a situation which he now cites as part of the circumstances which lead to his failure to understand the proceedings fully. The papers filed demonstrate a consistency in these claims, adding to his credibility, and the court further finds that such a situation is also consistent with Respondent's explanation. The default could also impair Respondent's position regarding the property division, so that the default may materially affect Respondent's interests.

These facts also support relief based on mistake under Fam. Code §2122. For the reasons explained, it appears to the court that Respondent was mistaken or confused about the nature of the events and that he still needed to file a response to the petition to avoid a default.

However, the motion is less persuasive as to the DVRO. As noted, Respondent actively participated in the DVRO and at least seems to have understood the proceedings sufficiently in that regard. The court finds the motion unpersuasive as to the DVRO.

The court GRANTS the motion in part. The court GRANTS the motion as to setting aside the default but DENIES the motion as to setting aside the DVRO.

Conclusion

Motion GRANTED in part. The court GRANTS the motion as to setting aside the default but DENIES the motion as to setting aside the DVRO. The moving 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.