

## **Tentative Rulings –January 26, 2006**

To request a hearing on any matter on this calendar, you must call the Court at (209) 223-6360 by 4:30 p.m. today. Notice of the intention to appear must also be given to all other parties. If the clerk is not notified of a party's intention to appear, there will be no hearing and the tentative ruling becomes the order of the court.

### **Kendrick v. DeVoile: 05CV3766**

#### ***Defendants' Motion to Set Aside Default***

Defendant's motion to set aside the default is hereby granted.

Defendants moved for relief from default pursuant to both the mandatory and the discretionary provisions of Code of Civil Procedure §473, subdivision (b). Defendants are not entitled to discretionary relief, as counsel failed to submit an attorney affidavit of fault in support thereof. Generally, a declaration under penalty of perjury may be substituted in lieu of an affidavit. (C.C.P. §2015.15.) However, to be valid, said declaration must state, "I declare, under penalty of perjury, that the foregoing is true and correct." (C.C.P. §2015.15.) Defendants' counsel's declaration is not made under penalty of perjury, as required. Therefore, as there is no attorney affidavit or declaration of fault submitted, mandatory relief is inappropriate.

However, Defendants also requested relief under the discretionary provision of §473, subdivision (b). To obtain relief from default under this provision, a party must show mistake, inadvertence, surprise, or excusable neglect.

There is a judicial policy favoring relief and allowing trial on the merits. Doubtful cases must be resolved in favor of the party seeking relief. (Elston v. City of Turlock (1985) 38 Cal.3d 227, 233.)

It is the policy of the law to favor, whenever possible, a hearing on the merits. Appellate courts are much more disposed to affirm an order when the result is to compel a trial on the merits than when the default judgment is allowed to stand. [Citations.] Therefore, when a party in default moves promptly to seek relief, very slight evidence is required to justify a trial court's order setting aside a default. (Shamblin v. Brattain (1988) 44 Cal.3d 474; see also Mink v. Superior Court (1992) 2 Cal.App.4th 1338.)

If there are any doubts in applying Code of Civil Procedure Section 473, they should be resolved in favor of granting relief. (Mink, supra.)

There is no dispute between the parties that, at one point, they agreed to select an arbitrator and submit this matter to arbitration pursuant to the arbitration clause in the contract. Defendants submit that the reason that no answer was filed is because there was also an agreement that no answer would be filed, pending the outcome of the arbitration. Defendants presented sufficient grounds to set aside the default, especially in light of the eye towards liberality in allowing a party to have its day in court.

Plaintiffs also contend that the motion should be denied because Defendants' motion to compel arbitration was filed separately and not attached to the instant motion. However, this requirement has been interpreted with an eye towards "substantial compliance." (Puryear v. Stanley (1985) 172 Cal.App.3d 291, 294.) Filing the motion to compel

arbitration at the same time as the motion to set aside default constitutes substantial compliance with the statutory requirements.

Upon granting a motion to set aside under the discretionary provision of §473(b), the court may award attorneys' fees and costs in connection to the default hearing and procedure, as well as the motion to set aside default. The court may also impose sanctions, up to \$1000, upon the offending party.

The court hereby imposes sanctions against Defendants in the amount of \$1000 for the fees incurred in connection with the instant motion.

Unless a hearing is requested, this minute order is effective immediately. No formal order per California Rules of Court, Rule 391 is needed, nor is further notice of this ruling required.

**Kendrick v. DeVoile: 05CV3766**

***Defendants' Motion to Compel Arbitration***

Defendants' motion to compel arbitration is granted. This matter is hereby stayed pending the outcome of said arbitration.

Unless a hearing is requested, this minute order is effective immediately. No formal order per California Rules of Court, Rule 391 is needed, nor is further notice of this ruling required.