Vivian Vetter v. Mark Gardiner, et al. 17LCP-0533

Hearing: Motion to Set Aside Default

Date: February 6, 2018

On September 22, 2017, Vivian Vetter ("Plaintiff") filed an unlawful detainer complaint against Mark and Valerie Gardiner ("Defendants"). According to the complaint, the month-to-month tenancy was terminated based on a 30-day notice to quit. Plaintiff seeks possession of the premises, back rent, holdover damages, and unpaid utilities.

In response, Defendants filed a demurrer asserting the complaint failed to state a cause of action on various grounds. The Court overruled the demurrer on November 21, 2017, and instructed defendants to file their answer within five (5) days of the order. Defendants were served with the Notice of Ruling on November 27, 2017.

That same day, Defendants filed a motion to strike arguing the complaint was not properly verified. The Court denied the motion on the ground Defendants had been ordered to answer the complaint, and could not subsequently file a motion to strike. (Weil & Brown, Cal. Practice Guide: Civ. Proc. Before Trial (The Rutter Group 2017) ¶ 5:55 ["If a demurrer is overruled and defendant ordered to answer, no other motion or pleading will prevent entry of default."]; see also ¶ 7:165, [if a demurrer or motion to strike is filed separately, there is no extension of time to file the other, citing Code of Civ. Proc. § 435(d)].)

Plaintiff took Defendants' default on December 19, 2017,[1] and the Court entered a default judgment on December 27, 2017. The judgment awarded possession of the premises and $8,103.72 in damages. A writ of execution and possession was issued thereafter on January 3, 2018.

Defendants now seek to set aside the entry of default and default judgment under Code of Civil Procedure sections 473(b) and 473(d).[2] There is no opposition.

Under section 473(b), the court may relieve a party from both a default judgment and the entry of default that preceded it, which was "caused by [his or her] attorney's mistake, inadvertence, surprise, or neglect." When accompanied by an attorney's affidavit of fault, relief is mandatory. (§ 473(b).)

Here, defense counsel (Harold Mesick) filed a declaration stating he mistakenly

[1] Plaintiff had previously sought entry of default on December 8, 2017, but the request was denied due to the pending motion to strike.

[2] All statutory references are to the Code of Civil Procedure unless indicated otherwise.

interpreted section 472 to allow a motion to strike to be filed separately after the denial of a demurrer. Attorney Mesick states he did not file the motion as a delay tactic but believed the motion was permitted and timely. He states he was surprised by the Court's tentative ruling on the matter and appeared personally at the hearing on December 19, 2017, to advise the Court he was not being dilatory but had simply been mistaken.

As relief is mandatory under section 473(b) upon the filing of an attorney's affidavit of fault, the Court does not reach Defendants' arguments that the judgment is void under section 473(d).[3]

The unopposed motion to set aside entry of default and the default judgment is granted. As defendants are no longer in possession of the premises, the matter is converted from an unlawful detainer action to a civil action.

[3] Defendants reassert their claims that the complaint, which was signed "Vivian Vetter by Ann Ketcherside, attorney-in-fact," was not properly verified because it was not accompanied by an affidavit explaining why Plaintiff was unable to personally verify the complaint. (See § 446 [verification], § 1166 [UD complaint shall be verified].)