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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LARRY CORTINAS,
Plaintiff,
v.
MORA,
Defendant.

Case No. 1:10-cv-02270 LJO DLB PC
FINDINGS AND RECOMMENDATION
REGARDING DEFENDANT MORA'S
MOTION TO SET ASIDE DEFAULT
JUDGMENT
[ECF No. 34]

Plaintiff Larry William Cortinas (“Plaintiff”), a California state prisoner proceeding pro se and in forma pauperis, filed this civil action pursuant to 42 U.S.C. § 1983 on December 7, 2010. On January 6, 2012, the Court dismissed all defendants except Defendant Mora, and ordered the action to proceed against Defendant Mora for violation of the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment.

On August 1, 2012, Plaintiff moved for summary judgment. On November 9, 2012, the Court construed the motion for summary judgment as a request for entry of default, and ordered default entered as to Defendant Mora. The Clerk of Court entered default on the same date.

On December 28, 2012, Plaintiff filed a motion for default judgment. On July 24, 2013, the undersigned issued Findings and Recommendations which recommended that Plaintiff’s motion for default judgment be granted, and Plaintiff be awarded \$2,500.00 in damages. On August 29, 2013, the District Court adopted the Findings and Recommendations and entered default judgment against

1 Defendant Mora. Plaintiff was awarded \$2,500.00 in compensatory damages.

2 On April 2, 2014, Defendant Mora filed a motion to set aside the default judgment pursuant
3 to Fed. R. Civ. P. 60(b)(1) on the grounds that judgment was entered due to Defendant Mora's
4 mistake, inadvertence, or excusable neglect, and that Defendant Mora has a meritorious defense to
5 Plaintiff's claims. On April 14, 2014, and April 21, 2014, Plaintiff filed oppositions to the motion.
6 On April 22, 2014, and April 29, 2014, Defendant Mora filed replies to the oppositions. The matter
7 is deemed submitted pursuant to Local Rule 230(1).

8 DISCUSSION

9 "Once default judgment has been entered, relief is governed by Rule 60(b)." Brandt v. Am.
10 Bankers Ins. Co. of Florida, 653 F.3d 1108, 1111 (9th Cir. 2011). Rule 60(b) allows the Court to
11 relieve a party from an order for "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly
12 discovered evidence that, with reasonable diligence, could not have been discovered in time to move
13 for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic),
14 misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment
15 has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or
16 vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies
17 relief." Fed.R.Civ.P. 60(b). Where, as here, a defendant seeks relief under Rule 60(b)(1) based upon
18 "excusable neglect," the court's discretion is guided by three factors referred to as the "Falk factors":

19 (1) whether the plaintiff will be prejudiced, (2) whether the defendant has a
20 meritorious defense, and (3) whether culpable conduct of the defendant led to the
21 default.

22 Brandt, 653 F.3d at 1111 (citing Falk v. Allen, 739 F.2d 461, 463 (9th Cir. 1984)). "The
23 determination of what conduct constitutes 'excusable neglect' under Rule 60(b)(1) and similar rules
24 'is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's
25 omission.'" Id. (quoting Pioneer Inv. Svcs. Co. v. Brunswick Assoc. Ltd., 507 U.S. 380, 395 (1993)).
26 As a general matter, Rule 60(b) is "remedial in nature and . . . must be liberally applied." Falk, 739
27 F.2d 461, 463 (9th Cir.1984) (per curiam). The Ninth Circuit has emphasized that default
28 judgments are "appropriate only in extreme circumstances; a case should, whenever possible, be

1 decided on the merits.” Id. “Put another way, where there has been no merits decision, appropriate
2 exercise of district court discretion under Rule 60(b) requires that the finality interest should give
3 way fairly readily, to further the competing interest in reaching the merits of a dispute. TCI Grp.
4 Life Ins. Plan v. Knoebber, 244 F.3d 691, 695-96 (9th Cir. 2001), *as amended on denial of reh'g and*
5 *reh'g en banc* (May 9, 2001).

6 A. Culpable Conduct

7 “[A] defendant’s conduct is culpable if he [or she] has received actual or constructive notice
8 of the filing of the action and *intentionally* failed to answer.” Alan Neuman Prods., Inc. v. Albright,
9 862 F.2d 1388, 1392 (9th Cir. 1988). The term “intentional” in this application means “willful,
10 deliberate, or evidence of bad faith.” American Alliance Ins. Co. v. Eagle Ins. Co., 92 F.3d 57, 61
11 (2d Cir. 1996). “Neglectful failure to answer as to which the defendant offers a credible, good faith
12 explanation negating any intention to take advantage of the opposing party, interfere with judicial
13 decisionmaking, or otherwise manipulate the legal process is not “intentional” under our default
14 cases” Knoebber, 244 F.3d at 697; see also Bateman v. United States Postal Service, 231 F.3d
15 1220 (9th Cir. 2000).

16 In this case, Defendant Mora concedes she received the Summons and Amended Complaint
17 in this case from the U.S. Marshal in 2012 after she had separated from CDCR. Velasquez¹ Decl., ¶
18 7. She states she was advised by the CDCR Director of Nursing to sign the Waiver of Service form
19 and that she would receive further instructions concerning the matter. Id. Defendant Mora states she
20 was not contacted thereafter concerning the matter, so she attempted to contact the Litigation
21 Coordinator at PVSP; however, she states her calls to the Coordinator were never returned. Id. ¶¶ 8,
22 9. Defendant Mora states she noticed that on the lawsuit several defendants were named including
23 physicians and the Warden of PVSP. Id., ¶ 10. She states that based on her prior training, she
24 assumed that since the Warden was involved in the litigation, the Litigation Coordinator had been
25 notified of the suit and would take steps to defend her in the case, along with the other defendants.
26 Id. Defendant Mora states she had separated from CDCR at the time Plaintiff requested default
27 judgment, and she did not receive a copy of the Request for Entry of Default or of the Motion for
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¹ Defendant Mora has since married. Her married name is Velasquez.

1 Default Judgment in this case. Id., ¶¶ 11, 12. She states she first learned a default judgment had
2 been entered against her on March 12, 2014, when she was contacted by a Special Investigator from
3 CDCR. Id., ¶ 13. She then immediately requested that CDCR appoint counsel on her behalf so she
4 could defend against Plaintiff's claims.

5 In his opposition, Plaintiff attempts to attack the veracity of Defendant Mora's declarations
6 by noting that Mora failed to submit telephone records demonstrating she had placed calls to the
7 Litigation Coordinator, or any logs maintained by the CDCR reflecting voicemails or calls made by
8 or to Defendant Mora. However, Defendant Mora states she attempted to obtain telephone records
9 of her cell phone calls, but due to the fact she was on a pre-paid monthly plan with T-Mobile at that
10 time, no such records were available. Velasquez Supp. Decl., ¶¶ 2-6. As to logs maintained by the
11 CDCR, the Litigation Coordinator at PVSP does not log every phone message, phone call, or
12 correspondence received. Herrera Decl., ¶ 2. In addition, the Litigation Coordinator cannot verify
13 whether a specific voice mail was received or phone call was returned. Id.

14 Based on the foregoing, there is no evidence that Defendant Mora acted in bad faith and
15 intentionally attempted to thwart or manipulate the legal process. At most, her actions constitute
16 excusable neglect.

17 B. Meritorious Defense

18 Defendant Mora claims she has a meritorious defense to Plaintiff's allegations. Plaintiff
19 claims Mora withheld medication because he was a Muslim. Mora contends she was unaware that
20 Plaintiff was a Muslim. Velasquez Decl., ¶ 5. Further, Mora states she never denied medication that
21 had been prescribed to Plaintiff, and she never made Plaintiff wait for medication that he had been
22 prescribed. Velasquez Decl., ¶ 4. Mora states she recalled denying Plaintiff's request for Morphine
23 on one occasion, but this was because Plaintiff's physician had discontinued the prescription.
24 Velasquez Decl., ¶ 6. Under these facts, Defendant Mora would not be liable for violation of the
25 Eighth or Fourteenth Amendments. Therefore, Defendant Mora has a meritorious defense.

26 C. Prejudice

27 The Court finds Plaintiff will not be unfairly prejudiced by setting aside the default
28 judgment. Plaintiff will have to prove his case on the merits, and therefore is in the same position he

1 was in prior to entry of default.

2 **RECOMMENDATION**

3 Accordingly, the Court HEREBY RECOMMENDS that Defendant Mora’s motion to set
4 aside the default judgment be GRANTED, and Defendant Mora be DIRECTED to file an answer to
5 the First Amended Complaint.

6 These Findings and Recommendations are submitted to the United States District Judge
7 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within thirty (30)
8 days after date of service of these Findings and Recommendations, the parties may file written
9 objections with the Court. Such a document should be captioned “Objections to Magistrate Judge’s
10 Findings and Recommendations.” The parties are advised that failure to file objections within the
11 specified time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d
12 1153 (9th Cir. 1991).

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14 IT IS SO ORDERED.

15 Dated: January 16, 2015

16 /s/ Dennis L. Beck
17 UNITED STATES MAGISTRATE JUDGE
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