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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

PAUL DAVID JOHNSON,
Plaintiff,
v.
J.A. BEARD, et al.,
Defendants.

No. 2:15-cv-1313 TLN KJN P
ORDER AND FINDINGS AND
RECOMMENDATIONS

Plaintiff is a state prisoner, proceeding pro se. On July 22, 2021, plaintiff filed a document styled, “Motion to Schedule Inquest Hearing After Entry for Default Judgment Filed: May 17, 2021.” (ECF No. 155.) Plaintiff notes that defendants Collinsworth and Naku failed to timely respond to the complaint, clerk’s entry of default was entered, and plaintiff’s motion for default judgment is pending. Plaintiff asks the court to schedule an “inquest” hearing in order to resolve this matter. (ECF No. 155 at 2.)

As discussed below, plaintiff’s request for hearing is denied. The undersigned recommends that: (a) his motion for default judgment be denied with prejudice as to defendant Collinsworth, and without prejudice as to defendant Naku; defendant Collinsworth’s motion to set aside default be granted, and that he be granted an extension of time in which to file a responsive pleading.

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1 **Request for “Inquest”**

2 First, plaintiff’s reference to an “inquest” is not clear. Plaintiff claims that this court was
3 required to “have the plaintiff in an inquest” within seven days from May 17, 2021, the date
4 plaintiff filed his motion for default judgment. But plaintiff cites no authority supporting his
5 position, other than asking the undersigned to follow the Rules of Federal Civil Procedure. (ECF
6 No. 155 at 2.)

7 Rule 55 governs the entry of default and default judgment. Fed. R. Civ. P. 55. However,
8 Rule 55 does not require this court to hold a hearing. Id. Rather, Rule 55(b)(2) states:

9 The court *may* conduct hearings or make referrals--preserving any
10 federal statutory right to a jury trial--when, to enter or effectuate
11 judgment, it needs to: (A) conduct an accounting; (B) determine
the amount of damages; (C) establish the truth of any allegation by
evidence; or (D) investigate any other matter.

12 Fed. R. Civ. P. 55 (emphasis added). In addition, the Eastern District’s Local Rule 230(l)
13 provides that all motions filed by prisoners “shall be submitted upon the record without oral
14 argument unless otherwise ordered by the Court.” Id. Plaintiff presents no facts demonstrating
15 that a hearing is required. Therefore, plaintiff’s motion for default judgment will be addressed on
16 the papers, as provided in Local Rule 230(l).

17 **Motion to Set Aside Clerk’s Default/Motion for Default Judgment**

18 The motion to set aside the clerk’s default was filed on May 5, 2021. (ECF No. 140.)
19 Plaintiff moved for default judgment on May 17, 2021. Plaintiff did not file an opposition to the
20 motion to set aside the default. Defendant Collinsworth filed an opposition to the motion for
21 default judgment. (ECF No. 150.)

22 **Motion for Default Judgment**

23 **Legal Standard**

24 As set forth above, Rule 55¹ governs the entry of default by the clerk and the subsequent
25 entry of default judgment by either the clerk or the district court. “When a party against whom a
26 judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is

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¹ Citation to the “Rule(s)” are to the Federal Rule of Civil Procedure unless otherwise noted.

1 shown by affidavit or otherwise, the clerk must enter the party's default." Rule 55(a). Entry of
2 default judgment, either by the Clerk or the Court, requires that the moving party file an affidavit.
3 Rule 55(b)(1), (2).

4 In addition, "[i]f the party against whom a default judgment is sought has appeared
5 personally or by a representative, that party or its representative must be served with written
6 notice of the application at least 7 days before the hearing." Rule 55(b)(2).

7 Obtaining a default judgment is a "two-step process," consisting of: (1) seeking a clerk's
8 entry of default, and (2) filing a motion for the entry of default judgment. See Eitel v. McCool,
9 782 F.2d 1470, 1471 (9th Cir. 1986); accord Symantec Corp. v. Global Impact, Inc., 559 F.3d
10 922, 923 (9th Cir. 2009).

11 Analysis

12 Plaintiff's motion for default judgment fails for several reasons.

13 First, plaintiff failed to sign his motion. (ECF No. 114.) Parties proceeding without
14 counsel are required to sign all pleadings, motions, and other papers submitted to the court for
15 filing. Rule 11(a). Usually the undersigned grants parties an extension of time in which to re-file
16 the motion bearing his or her signature. However, as discussed next, because plaintiff did not
17 comply with Rule 55(b)(2), having plaintiff sign the instant motion is futile.

18 Second, plaintiff failed to provide a proof of service attesting to service of the motion on
19 defendant Naku, and failed to demonstrate timely service on counsel for defendant Collinsworth.
20 Because both defendants have appeared in the action, plaintiff was required to provide them at
21 least seven days' notice that he was seeking default judgment. Rule 55(b)(2). Plaintiff's proof of
22 service reflects service of process on the court, Office of the Attorney General, and himself, but
23 does not include defendant Naku. As argued by defendant Collinsworth, plaintiff failed to
24 provide the required seven-day notice, plus three days for mailing, prior to filing the motion.
25 (ECF No. 150 at 4.)

26 Third, plaintiff failed to provide the required affidavit or declaration in support of his
27 motion. Plaintiff refers to an "attached declaration," but no such declaration was appended as

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1 required under Rule 55(b)(1). Because plaintiff cannot obtain relief absent such declaration, the
2 undersigned does not address defendant's other arguments.

3 For all of the above reasons, plaintiff's motion for default judgment should be denied with
4 prejudice as to defendant Collinsworth, and without prejudice as to defendant Naku.

5 **Motion to Set Aside Clerk's Default**

6 **Legal Standard**

7 A court may set aside an entry of default for good cause. Rule 55(c). The party seeking
8 relief from the entry of default bears the burden of showing good cause to set aside the entry of
9 default. See Franchise Holding II, LLC v. Huntington Rests. Group, Inc., 375 F.3d 922, 926 (9th
10 Cir. 2004) (reviewing district court's set aside of default for abuse of discretion). A court
11 considers three factors when examining good cause: "(1) whether [the party seeking to set aside
12 the default] engaged in culpable conduct that led to the default; (2) whether [it] had [no]
13 meritorious defense; or (3) whether reopening the default judgment would prejudice the other
14 party." United States v. Signed Personal Check No. 730 of Yubran S. Mesle, 615 F.3d 1085,
15 1091 (9th Cir. 2010) (quoting Franchise Holding II, LLC, 375 F.3d at 925-26).

16 Under this disjunctive standard, "a finding that any one of these factors is true is sufficient
17 reason for the district court to refuse to set aside the default." Brandt v. Am. Bankers Ins. Co.,
18 653 F.3d 1108, 1111 (9th Cir. 2011). However, a court may within its discretion grant relief from
19 default even after finding one of the "good cause" factors to be true. See, e.g., id. at 1112 ("A
20 district court may exercise its discretion to deny relief to a defaulting defendant based solely upon
21 a finding of defendant's culpability, *but need not.*") (emphasis added). "The court's discretion is
22 especially broad where . . . it is entry of default that is being set aside, rather than a default
23 judgment." O'Connor v. State of Nev., 27 F.3d 357, 364 (9th Cir. 1994). The factors are more
24 liberally applied with respect to a request to set aside the entry of default, because "there is no
25 interest in the finality of the judgment with which to contend." Mesle, 615 F.3d at 1091 n.1.

26 Additionally, the Ninth Circuit has emphasized that resolution of a motion to set aside the
27 entry of default is necessarily informed by the well-established policies favoring resolution of
28 cases on their merits and generally disfavoring default judgments. See Mesle, 615 F.3d at 1091

1 (“Crucially, . . . judgment by default is a drastic step appropriate only in extreme circumstances; a
2 case should, whenever possible, be decided on the merits”) (citations and quotation marks
3 omitted); Westchester Fire Ins. Co. v. Mendez, 585 F.3d 1183, 1189 (9th Cir. 2009) (“As a
4 general rule, default judgments are disfavored; cases should be decided upon their merits
5 whenever reasonably possible”). Moreover, the Ninth Circuit’s “rules for determining when a
6 default should be set aside are solicitous towards movants, especially those whose actions leading
7 to the default were taken without the benefit of legal representation.” Mesle, 615 F.3d at 1089.

8 **A. Culpable Conduct**

9 Only intentional conduct is sufficiently culpable to deny a motion to set aside default.
10 See TCI Group Life Ins. Plan v. Knoebber, 244 F.3d 691, 698 (9th Cir. 2001) (“[W]e have
11 typically held that a defendant’s conduct was culpable for purposes of the [Rule 55(c) or 60(b)]
12 factors where there is no explanation of the default inconsistent with a devious, deliberate,
13 willful, or bad faith failure to respond.”), overruled on other grounds by, Egelhoff v. Egelhoff ex
14 rel. Breiner, 532 U.S. 141, 147-50 (2001).

15 Defendant Collinsworth provided a sworn declaration stating that he does not recall
16 receiving the January 21, 2021 order, or anything from the court since he wrote his initial letter.
17 Collinsworth declares he has never been sued before and was unfamiliar with what he needed to
18 do next. In addition, he left the CDCR over ten years ago, and had not been in regular contact
19 with CDCR or CCHCS. Around March 26, 2021, he received a letter from CCHCS about the
20 case. That same day he contacted CCHCS by email, and since then has been preparing to respond
21 by contacting his medical malpractice insurance carrier, and completing the necessary paperwork.
22 The CDCR accepted tender of his defense on April 28, 2021, but by then, clerk’s entry of default
23 had been entered on April 27, 2021. Defendant Collinsworth moved to set aside default eight
24 days later. He argues his prompt response supports setting aside the clerk’s default.

25 In addition, defendant Collinsworth declares it was never his intention to evade this action
26 or otherwise violate or fail to respond, and intends to defend against this action. He points out
27 that similar deliberate indifference claims were dismissed against defendant Chen, which supports
28 Collinsworth’s motion to set aside the clerk’s default. (ECF No. 140 at 8.)

1 **B. Meritorious Defense**

2 The movant “is required to make some showing of a meritorious defense as a prerequisite
3 to vacating an entry of default.” FOC Fin. Ltd. P’ship v. Nat’l City Commercial Capital Corp.,
4 612 F. Supp. 2d 1080, 1082-85 (D. Ariz. 2009) (citing Haw. Carpenters’ Trust Funds v. Stone,
5 794 F.2d 508, 513 (9th Cir. 1986)). To satisfy the “some showing” standard, the movant
6 must “present specific facts that would constitute a defense.” FOC Fin. Ltd. P’ship, 612 F. Supp.
7 2d at 1082-85 (quoting TCI Group Life Ins. Plan, 244 F.3d at 700).

8 Defendant Collinsworth argues that plaintiff has failed to state a cognizable Eighth
9 Amendment claim against defendant Collinsworth. In his view, the third amended complaint
10 suffers from the same pleading defects as plaintiff’s prior pleadings, the conclusory allegations
11 fail to meet the pleading standards required by Rule 12(b)(6), and do not rise to the level of an
12 Eighth Amendment violation. “Plaintiff’s only allegations against Defendant Collinsworth
13 include a recitation of case law and his allegation that Defendant Collinsworth delayed
14 recommending or referring Plaintiff see a specialist, and this caused his health to deteriorate.”
15 (ECF No. 54 at 5-6.) Defendant contends plaintiff fails to allege how or when defendant treated
16 plaintiff, what plaintiff’s condition was at the time, and how defendant’s response was deliberate
17 indifference or delayed care. (ECF No. 140 at 10.) Such conclusory allegations lacking factual
18 support constitute an improper “formulaic recitation of the elements of a constitutional claim.”
19 (Id.) (citing Ashcroft v. Iqbal, 556 U.S. 662, 681 (2009)).

20 Defendant denies he was deliberately indifferent (ECF No. 140 at 10.) He cites to the
21 medical records appended to plaintiff’s pleading and argues they demonstrates plaintiff was
22 receiving regular medical from a number of doctors and other medical staff while plaintiff was
23 housed at the same prison as defendant:

24 For example, between 2005 and 2008, . . . [plaintiff] received a
25 number of medical appointments with doctors and nurses and
26 several rounds of tests, including several PSA tests to determine his
27 level of prostate specific antigens. (ECF No. 54 at 26, 28-37, 40-
42.) During that time, each of Plaintiff’s tests for prostate cancer
showed that his prostate specific antigens were not out of range. (Id.
at 32, 37.)

28 (ECF No. 140 at 10.) Plaintiff’s pleading does not contain medical records for 2009-2011, but

1 plaintiff received a consult from an outside physician and additional tests and appointments in
2 2013. (ECF No. 54 at 49-52.) Defendant argues that plaintiff's bare allegations constitute at
3 most a difference of opinion with his doctors, not deliberate indifference.²

4 **C. Prejudice**

5 To prevent setting aside default, prejudice to a non-moving party "must result in greater
6 harm than simply delaying resolution of the case[,] [r]ather, the standard is whether [the
7 nonmovant's] ability to pursue his claim will be hindered." FOC Fin. Ltd. P'ship., 612 F. Supp.
8 2d at 1082-85 (quoting TCI Group Life Ins. Plan, 244 F.3d at 701). "[M]erely being forced to
9 litigate on the merits cannot be considered prejudicial for purposes of lifting a default judgment."

10 Id.

11 Defendant argues that plaintiff will not be prejudiced if entry of default is set aside
12 because plaintiff will merely be forced to litigate his case on the merits, which does not amount to
13 prejudice. Moreover, one defendant has not yet appeared or been served, and the claims against
14 defendant Chen were dismissed. In addition, discovery has not been opened in this case as to any
15 defendant or any claim.

16 **Analysis**

17 Defendant Collinworth has set forth specific facts relevant to a meritorious defense as
18 required by Rule 55(c), giving the court discretion to grant defendant's motion and set aside the
19 entry of default against him. Defendant also provided evidence that his failure to timely respond
20 to the third amended complaint was the result of his lack of knowledge as to what steps to take
21 next, and that he did not receive the court's order. Once he received the letter from CCHCS,
22 defendant diligently acted to retain counsel to defend against this case. Although default was
23 entered before the process of representation could be completed, defendant promptly filed a
24 motion to set aside the default. The record reflects no evidence that defendant willfully or
25 intentionally delayed his response. In addition, another defendant has not yet been served,
26 another defendant's motion to dismiss is pending, and discovery has not yet been opened. Thus,

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28 ² Defendant also contends that upon further investigation and discovery, plaintiff's claims may
be barred by the statute of limitations. (ECF No. 140 at 11 n.1.)

1 as argued by defendant, plaintiff will merely be forced to litigate his case on the merits, which
2 does not amount to prejudice.

3 Taking all of the factors into consideration, the court finds that defendant has shown good
4 cause to set aside the Clerk's entry of default.

5 **Request for Extension**

6 Now that counsel has been retained, defendant asks that if the request to set aside the
7 default is granted, that he be granted a brief seven-day extension of time in which to file a
8 responsive pleading. Good cause appearing, the undersigned recommends that the request be
9 granted.

10 **Orders and Recommendations**

11 Accordingly, IT IS HEREBY ORDERED that plaintiff's motion for hearing (ECF No.
12 155) is denied.

13 Further, IT IS RECOMMENDED that:

- 14 1. Plaintiff's motion for default judgment (ECF No. 144) be denied with prejudice as to
15 defendant Collinsworth, and without prejudice as to defendant Naku.
- 16 2. Defendant Collinsworth's motion to set aside clerk's default (ECF No. 140) be granted.
- 17 3. The Clerk of the Court be directed to set aside the clerk's default, entered on April 27,
18 2021 (ECF No. 137).
- 19 4. Within seven days from any district court order adopting these findings and
20 recommendations, defendant Collinsworth shall file a responsive pleading.

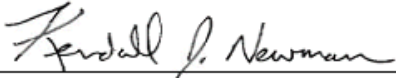
21 These findings and recommendations are submitted to the United States District Judge
22 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days
23 after being served with these findings and recommendations, any party may file written
24 objections with the court and serve a copy on all parties. Such a document should be captioned
25 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
26 objections shall be filed and served within fourteen days after service of the objections. The

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1 parties are advised that failure to file objections within the specified time may waive the right to
2 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 Dated: August 9, 2021

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6 KENDALL J. NEWMAN
7 UNITED STATES MAGISTRATE JUDGE

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