

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOE HAND PROMOTIONS, INC.,  
Plaintiff,  
v.  
MIULER REYES,  
Defendant.

No. C 11-6334 CW  
ORDER GRANTING  
MOTION TO VACATE  
DISMISSAL (Docket  
No. 42).

United States District Court  
For the Northern District of California

Plaintiff Joe Hand Productions, Inc. moves for relief from this Court's December 3, 2012 order dismissing this case for failure to prosecute and asks that the case be reinstated. Defendant Miuler Reyes, proceeding pro se, opposes the motion. The Court took the matter under submission on the papers and now reluctantly grants Plaintiff's motion.

BACKGROUND

On March 15, 2012, the Clerk entered default against Defendant. Defendant moved to set aside default in June 2012. After granting Defendant's motion, the Court scheduled a case management conference for November 28, 2012. Civil Local Rule 16-10(a) provides that "lead trial counsel for each party must attend the initial Case Management Conference" unless excused by the Court.

Plaintiff is represented by Thomas P. Riley, a sole practitioner. Mr. Riley failed to appear at the November 28 case management conference. Instead, another attorney -- James Beck, who is not a member of Mr. Riley's law firm nor listed in the pleadings -- appeared in his place, albeit late. It was at least

1 the third time that Mr. Riley has sent another attorney to attend  
2 a hearing in his place without obtaining leave of the Court. On  
3 two prior occasions, he was expressly warned that such conduct was  
4 not permitted.

5 The Court dismissed Plaintiff's case at the hearing for  
6 failure to prosecute. A written order of dismissal followed on  
7 December 3, 2012. Docket No. 39. In that order, the Court noted  
8 that Mr. Riley's failure to appear for the case management  
9 conference violated the local rules as well as this Court's prior  
10 directives. Id. at 2.

11 On December 10, 2012, Plaintiff filed this motion to  
12 reinstate the case under Federal Rule of Civil Procedure 60(b)(1).  
13 Plaintiff contends that its failure to prosecute was the result of  
14 "excusable neglect" -- specifically, Mr. Riley's "negligence []  
15 with respect to interoffice communications," which led to his  
16 failure to appear at the case management conference. Pls.' Mot.  
17 6. Mr. Riley claims that he mistakenly believed that he had  
18 instructed his staff "to arrange for Mr. Beck's appearance in this  
19 specific case" prior to the hearing.<sup>1</sup> Declaration of Thomas P.  
20 Riley ¶ 6. He argues that the case should be reinstated because  
21 his error was not made in bad faith and because Plaintiff was not  
22 warned that dismissal was imminent.

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23 <sup>1</sup> This is not the first time that Mr. Riley has attributed  
24 "excusable neglect" to a staffing or other administrative error. See  
25 J&J Sports Prods., Inc. v. Looney, 2011 WL 6306660, at \*1 (N.D. Cal.)  
26 (noting that plaintiff's counsel missed a filing deadline due to "a  
27 staffing transition" in his office); J&J Sports Prods., Inc. v. Ramos,  
28 2012 WL 4575338, at \*2 (S.D. Cal.) (noting that plaintiff's counsel  
missed a filing deadline due to an "administrative oversight" and urging  
him "to undertake due effort to ensure that future administrative  
oversights are prevented").

DISCUSSION

1  
2 Federal Rule of Civil Procedure 60(b)(1) allows a court "to  
3 relieve a party or its legal representative from a final judgment,  
4 order, or proceeding for . . . mistake, inadvertence, surprise, or  
5 excusable neglect." Excusable neglect "encompasses situations in  
6 which the failure to comply with a filing deadline is attributable  
7 to negligence, and includes omissions caused by carelessness."  
8 Lemoge v. United States, 587 F.3d 1188, 1192 (9th Cir. 2009)  
9 (quoting Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd., 507  
10 U.S. 380, 388 (1993)) (internal quotation marks and formatting  
11 omitted)).

12 Here, the extent of Plaintiff counsel's neglect went beyond  
13 mere carelessness. As noted above, Mr. Riley sent another  
14 attorney to appear in his place at a case management conference  
15 even though the Court has warned him on multiple occasions that  
16 this is prohibited. Mr. Riley has also, according to Defendant,  
17 failed to respond to settlement offers and ignored numerous phone  
18 calls from Defendant, who is pro se. See Pl.'s Mot. 4-5. In  
19 short, Mr. Riley's conduct in this case has been egregious.

20 Nevertheless, the Ninth Circuit has held that a party must be  
21 warned before a court dismisses the case on its own motion for  
22 failure to prosecute. Hamilton v. Neptune Orient Lines, Ltd., 811  
23 F.2d 498, 500 (9th Cir. 1987). Although this Court has previously  
24 warned Mr. Riley in other cases that his conduct could result in a  
25 Rule 41(b) dismissal, it did not provide such a warning in this  
26 case. Accordingly, the Court must grant Plaintiff's motion and  
27 set aside the dismissal. Any future failures to comply with the  
28

1 local rules or this Court's orders will result in dismissal of the  
2 case.

3 CONCLUSION

4 For the reasons set forth above, the Court GRANTS Plaintiff's  
5 motion to reinstate the case (Docket No. 42). The Court's  
6 previous order dismissing the case for failure to prosecute  
7 (Docket No. 39) is VACATED. The Clerk shall reopen this file and  
8 set the following dates:

9	Deadline to add additional parties or claims:	5/3/2013
10	Disclosure of expert witnesses and reports:	5/17/2013
11	Date of next case management conference:	10/10/2013
12	Deadline to hear case-dispositive motions:	10/10/2013
13	Completion of fact discovery:	12/16/2013
14	Completion of expert discovery:	12/16/2013
15	Final pretrial conference to be held at 2:00 p.m.:	3/3/2014
16	One-day court trial to begin at 8:30 a.m.:	3/17/2014

17 In addition, a settlement conference will be held with either  
18 Magistrate Judge Ryu or Westmore by June 28, 2013.

19 The Court refers Defendant to the Legal Help Center, located  
20 inside the San Francisco federal courthouse at 450 Golden Gate  
21 Avenue, for advice or the appointment of volunteer counsel, if  
22 available. The Legal Help Center is reachable at (415) 782-9000  
23 x8657.

24 IT IS SO ORDERED.

25  
26 Dated: 4/8/2013

27   
28 CLAUDIA WILKEN  
United States District Judge