

GRANADA v PRIETOS ROOF REMOVAL, INC., et al.

21CV45760

DEFENDANT'S MOTION TO SET ASIDE DEFAULT

Plaintiff's complaint seeks damages for breach of contract, violation of state contractors board, and negligence..

The Complaint was filed December 27, 2021, and service effected on defendant Prietos' designated agent for service Claudia Rivas) on 1/07/2022. As defendant correctly points out, the amended complaint filed on 3/11/2022 was never served on Prietos; however, the Court concurs that the amended complaint did not amend in any way that would materially affect defendant Prieto. Therefore the Court reads *Paterra v Hansen* (2021) 64 CalApp 5th 507 as allowing a reasonable assumption that Prieto had chosen a course of action to allow a default to be entered. (*id.*, at 529-530.) Defendant's Motion to Set Aside Default was filed on November 29, 2023.

While California Code of Civil Procedure ("CCP") Section 473.5 authorizes the court to set aside a default or default judgment on such terms as may be just and to allow the defendant to defend the action on a finding that the defendant's motion to set aside the default or default judgment was made within the period permitted by CCP § 473.5(a), the Court also concurs with the position of the Opposition that the present motion is untimely under CCP Section 473, finding it was filed significantly beyond the six months allowed by statute. While an argument can be made that the six months did not start until the default judgment, the Court again is persuaded by the position of the opposition that this interpretation would place form over substance. Prieto had a six month window within which to seek relief from the default; by the time of the judgment, the default was well in place and the judgment was in essence an administrative act.

Based on the foregoing, defendant's Motion to Set Aside Default is **DENIED**.

The Clerk shall provide notice of this Ruling to the parties forthwith. Plaintiff to submit a formal order pursuant to Rule of Court 3.1312 in conformity with this ruling.

WELLS FARGO BANK, N.A. v DAVIS

23CF14230

PLAINTIFF'S MOTION TO DEEM MATTERS ADMITTED

This action seeks breach of contract and common counts damages based on alleged nonpayment of a credit card account. Plaintiff served Requests for Admission on February 6, 2024; defendant has never responded.

If the propounding party believes that the responses to Requests for Admission are deficient in some respect or that any objections are without merit or are unaccompanied by a proper response, they may make a motion to compel further responses under Code of Civil Procedure (CCP) § 2033.290. (See *Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, 636; *Tobin v. Oris* (1992) 3 Cal.App.4th 814, 829, fn. 25.) Appropriate sanctions may include an order deeming matters admitted (CCP Section 2033.290(e)).

Defendant failed to timely respond to the requests for admission, respond to plaintiff's meet-and-confer efforts, or respond to the present motion. The Court finds this wanton disregard for the discovery process warrants the sanction of deeming all requests admitted.

Based on the foregoing, Plaintiff's Motion to Deem Matters Admitted is **GRANTED**.

The Clerk shall provide notice of this Ruling to the parties forthwith. The Court intends to sign the Order submitted by plaintiff.

JOHN A. VOS, TRUSTEE OF THE VOS FAMILY TRUST

DATED 8/31/2011 v EVANS

23CV46959

**DEFENDANTS' MOTION TO SET ASIDE DEFAULT;
PLAINTIFFS' MOTION FOR INTERLOCUTORY JUDGMENT OF
PARTITION AND APPOINTMENT OF REFEREE**

This action seeks partition of the real property located at 10777 Walker Trail, Lost City, CA 95222, Calaveras County Assessor's Parcel Numbers 050-008-053-000, 050-021-018-000, 050-007-008-000, 050-007-009-000, 050-007-010-000, 050-007-011-000 (the "Property"). Defendants move to set aside their defaults; Plaintiffs seek an interlocutory judgment of partition and appointment of a referee.

DEFENDANT'S MOTION TO SET ASIDE DEFAULT:

Defendants seek to set aside their defaults pursuant to California Code of Civil Procedure ("CCP") Sections 473 (b) and 473.5 based on inadvertence, mistake, surprise, and/or excusable neglect, citing communications between counsel that reference ongoing settlement discussions and statements that are open to interpretation as reflecting a nascent agreement to set aside defaults if further proceedings proved necessary.

CCP provisions authorize the court to set aside a default or default judgment on such terms as may be just and to allow the defendant to defend the action on a finding that the defendant's motion to set aside the default or default judgment was made within the period permitted by CCP § 473.5(a), and that defendant's lack of actual notice of the action in time to defend was not caused by his or her avoidance of service of summons or inexcusable neglect. Here, the present motion was filed roughly 4 ½ months after the defaults were entered, therefore in a timely manner. The Court may, on any just terms, vacate the entry of default that resulted from mistake, inadvertence, surprise, or neglect, if that error was excusable. (*Zemora v Clayborn Contracting Group* (2002) 28 Cal 4th 249, 258.) Further, the relief becomes mandatory when attributable to an attorney's mistake, inadvertence, surprise, or neglect. (*Lorenz v Commercial Acceptance Insurance* (1995) 40 CalApp4th 981, 989-990; the party is entitled to this relief even if the attorney's actions were inexcusable (*Rodriguez v Brill* (2015) 234 CalApp715, 723). Here, attorney Robert Enos' declaration accepts responsibility and provides that his actions were excusable.

Based on the foregoing, Defendants' Motion to Set Aside Default is **GRANTED** and the proposed Answer and Cross-Complaint are ordered filed.

PLAINTIFFS' MOTION FOR INTERLOCUTORY JUDGMENT AND APPOINTMENT OF REFEREE:

This motion seeks to resolve the co-ownership dispute by entering an interlocutory judgment of partition and appointing attorney Matthew L. Taylor, Esq. as referee to market and partition the Property.

In support of the motion, plaintiffs cite various subsections of CCP Sections 872. Defendants' opposition can be largely characterized as equitable in nature.

The Court is persuaded – as defendants concede – that partition will inevitably occur to resolve this dispute. Additionally, the Court notes no argument has been raised in opposition to plaintiffs' proposed ownership interests based upon title, or to the qualifications and unbiased nature of proposed referee Matthew Taylor, Esq. The substantive opposition addresses the manner of partition.

The Court is satisfied that an interlocutory judgment of partition, including determination of ownership, and appointment of a referee, is appropriate, while establishing further proceedings to determine the manner of partition and valuation, as well as attorney's fees and costs.

Based on the foregoing, Plaintiffs' Motion for Interlocutory Judgment is **Mostly GRANTED**. The Court Orders that the Property shall be partitioned, the Ownership Interests are as detailed at page 8, lines 4 through 14 of Plaintiffs' Memorandum of Points and Authorities contained in the Motion, and attorney Matthew L. Taylor is appointed as referee. The manner of partition and valuation of the property, as well as attorney's fees and costs associated with the referee's efforts, will be determined at a later date based upon a properly noticed motion to affirm the referee's report and in consideration of any opposition thereto.

The Clerk shall provide notice of these Rulings to the parties forthwith. Defendants to submit a formal order pursuant to Rule of Court 3.1312 in conformity with this ruling on the Motion to Set Aside Default; Plaintiffs to submit a formal order pursuant to Rule of Court 3.1312 in conformity with this ruling on the Motion for Interlocutory Judgment.