

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Ewing v. DME Capital, LLC

No. 24-cv-0692-AGS-JLB (S.D. Cal. July 11, 2025) · No. 24-cv-0692-AGS-JLB · Decided July 11, 2025

SUMMARY

The United States District Court for the Southern District of California grants DME Capital, LLC's motion to set aside a default judgment under Federal Rule of Civil Procedure 60(b)(1), finding no prejudice, a potentially meritorious defense, and insufficiently culpable conduct. The court denies DME's motion to dismiss for improper service and denies related requests for Rule 11 sanctions and judicial notice as moot.

CASE DETAILS

COURT	United States District Court for the Southern District of California
WRITING FOR THE COURT	Andrew G. Schopler
JURISDICTION	United States District Court for the Southern District of California
DECIDED	July 11, 2025
DOCKET	24-cv-0692-AGS-JLB
DISPOSITION	other
PROCEDURAL POSTURE	After the Clerk entered default and the Court entered default judgment against DME Capital, DME moved under Federal Rule of Civil Procedure 60(b)(1) to set aside the default judgment and moved to dismiss for lack of personal jurisdiction based on allegedly defective service. DME also sought Rule 11 sanctions.
STANDARD OF REVIEW	Relief from default judgment under Rule 60(b)(1) is evaluated under the Ninth Circuit's three-factor excusable-neglect test: prejudice to the plaintiff, existence of a meritorious defense, and culpable conduct causing the default. Service-of-process defects are evaluated under Federal Rule of Civil Procedure 4, construed flexibly so long as the defendant received sufficient notice.
PRECEDENTIAL VALUE	unknown

TOPICS

- default judgment
- default
- service of process
- personal jurisdiction
- sanctions

PRACTICE AREAS

civil procedure

consumer protection

commercial litigation

QUESTIONS PRESENTED

1. Whether DME established excusable neglect and good cause warranting relief from the default judgment under Federal Rule of Civil Procedure 60(b)(1).
2. Whether the summons and service were defective because Ewing handwritten DME's name and address on the summons and because the listed address was that of DME's registered agent rather than DME itself.
3. Whether DME was entitled to Rule 11 sanctions based on the alleged service defect.

HOLDINGS

1. The default judgment should be set aside because all three relevant factors—lack of prejudice to Ewing, DME's showing of a potentially meritorious defense, and absence of culpable conduct—weighed in favor of relief under Rule 60(b)(1).
2. DME satisfied the meritorious-defense requirement by alleging that the calls were not made by DME or an associated person or entity, or that Ewing consented to the calls.
3. The summons was valid even though Ewing handwritten DME's name and address in blank spaces provided for that purpose.
4. Service was sufficient even though the summons listed the address of DME's registered agent because the registered agent transmitted the summons and complaint to DME, giving DME sufficient notice.

KEY QUOTATIONS

“ “[D]efault judgments are ordinarily disfavored” since “[c]ases should be decided upon their merits whenever reasonably possible.” ” (at 1)

“ “The three elements of a TCPA claim are: (1) the defendant called a cellular telephone number; (2) using an automatic telephone dialing system; (3) without the recipient’s prior express consent.” ” (at 2)

“ “Rule 4 is a flexible rule that should be liberally construed so long as a party receives sufficient notice of the complaint.” ” (at 4)

“Put simply, the summons was valid even though Ewing handwrote DME’s information into the blank space that the Clerk of Court left on the form for that purpose.” (at 4)

FACTUAL BACKGROUND

Ewing alleged that DME repeatedly contacted him without permission in violation of the TCPA and other statutes. DME did not respond to the complaint, resulting in entry of default and default judgment. DME later asserted that it mistakenly believed it was not required to respond, that the summons was confusing and inaccurate, and that it had potential defenses concerning whether the calls were associated with DME and

whether Ewing had consented. DME also claimed that the summons contained a handwritten address belonging to its registered agent, which transmitted the summons and complaint to DME personnel.

PROCEDURAL HISTORY

Anton Ewing sued DME Capital, LLC, alleging violations of the Telephone Consumer Protection Act and other statutes based on repeated unsolicited contacts. DME failed to respond, the Clerk entered default, and the Court entered default judgment. The Court granted DME's motion to set aside the default judgment, denied its motion to dismiss for improper service, denied its related Rule 11 sanctions motion, and denied a judicial-notice request as moot.

DISPOSITION

other

CASES CITED

- Eitel v. McCool, 782 F.2d 1470, 1472 (9th Cir. 1986)
- Brandt v. American Bankers Ins. Co. of Fla., 653 F.3d 1108, 1111 (9th Cir. 2011)
- United States v. Signed Pers. Check No. 730 of Yubran S. Mesle, 615 F.3d 1085, 1091 (9th Cir. 2010)
- TCI Grp. Life Ins. Plan v. Knoebber, 244 F.3d 691, 696-701 (9th Cir. 2001)
- Egelhoff v. Egelhoff, a minor, by and through her natural parent, Breiner, et al., Egelhoff v. Egelhoff ex rel. Breiner, 532 U.S. 141 (2001)
- Falk v. Allen, 739 F.2d 461, 463 (9th Cir. 1984)
- United States v. Aguilar, 782 F.3d 1101, 1107 (9th Cir. 2015)
- Meyer v. Portfolio Recovery Assocs., LLC, 707 F.3d 1036, 1043 (9th Cir. 2012)
- Aussieker v. Lee, No. 2:19-cv-00365-JAM-CKD PS, 2021 WL 352438, at *4 (E.D. Cal. Feb. 2, 2021)
- Beecher v. Wallace, 381 F.2d 372, 373 (9th Cir. 1967)
- Pathak v. Exotic Meat Mkt., Inc., No. 2:16-cv-00368-JAD-VCF, 2016 WL 3219869, at *1 (D. Nev. June 6, 2016)
- Graham v. CNN Inc., No. 2:21-cv-07417-MCS-AGR, 2021 U.S. Dist. LEXIS 249927, at *2-3 (C.D. Cal. Dec. 30, 2021)
- Kingvision Pay-Per-View Ltd. v. Lake Alice Bar, 168 F.3d 347, 350 (9th Cir. 1999)
- Direct Mail Specialists, Inc. v. Eclat Computerized Tech., Inc., 840 F.2d 685, 688-90 (9th Cir. 1988)

OPINION

Ewing v. DME Capital, LLC

PER CURIAM.

1 UNITED STATES DISTRICT COURT

2 SOUTHERN DISTRICT OF CALIFORNIA

3 Anton EWING, Case No.: 24-cv-0692-AGS-JLB 4 Plaintiff,

ORDER GRANTING DEFENDANT'S
5 v. MOTION TO SET ASIDE DEFAULT
JUDGMENT AND DENYING
6 DME CAPITAL, LLC,
DEFENDANT'S MOTION TO

7 Defendant. DISMISS THE COMPLAINT (ECF 9) 8 9 Plaintiff Anton Ewing sued defendant
DME Capital, LLC, for violating the 10 Telephone Consumer Protection Act and other statutes,
alleging that DME repeatedly 11 contacted Ewing without permission. DME never responded, the
Clerk entered default, and 12 this Court granted default judgment against DME. DME now moves
to set aside the default 13 judgment and dismiss the complaint.

14 DISCUSSION

15 A. Motion to Set Aside Default Judgment 16 “[D]efault judgments are ordinarily disfavored”
since “[c]ases should be decided 17 upon their merits whenever reasonably possible.” *Eitel v.*
McCool, 782 F.2d 1470, 1472 18 (9th Cir. 1986). To that end, the “court may relieve a party . . .
from a final judgment” for 19 “mistake, inadvertence, surprise, or excusable neglect,” so long as
the moving party 20 requested it within “a year” of the default judgment. Fed. R. Civ. P. 60(b)(1).
DME filed 21 this motion well within the one-year deadline (see ECF 8; ECF 9), and it asserts that
there 22 is “good cause” to set aside the default judgment because of its “excusable neglect.” 23
(ECF 9, at 8.) 24 When “a defendant seeks relief under Rule 60(b)(1) based upon ‘excusable
neglect,’ 25 the court” weighs three factors: “(1) whether the plaintiff will be prejudiced, (2)
whether 26 the defendant has a meritorious defense, and (3) whether culpable conduct of the
defendant 27 led to the default.” *Brandt v. American Bankers Ins. Co. of Fla.*, 653 F.3d 1108, 1111
28 (9th Cir. 2011). If “any one of these factors” favors the nonmoving party, then there is 1
“sufficient reason for the district court to refuse to set aside the default.” *United States v. 2 Signed*
Pers. Check No. 730 of Yubran S. Mesle, 615 F.3d 1085, 1091 (9th Cir. 2010). 3 “[T]he party
seeking to vacate a default judgment bears the burden of demonstrating that 4 these factors favor
vacating the judgment.” *TCI Grp. Life Ins. Plan v. Knoebber*, 244 F.3d 5 691, 696 (9th Cir. 2001),
overruled on other grounds by *Egelhoff v. Egelhoff ex rel. 6 Breiner*, 532 U.S. 141 (2001). All
factors weigh in DME’s favor. 7 First, there is no indication of any prejudice to Ewing. “The
standard” for prejudice 8 “is whether [plaintiff’s] ability to pursue his claim will be hindered.”
Falk v. Allen, 9 739 F.2d 461, 463 (9th Cir. 1984). And “the setting aside of a judgment must result
in 10 greater harm than simply delaying resolution of the case.” *TCI Grp.*, 244 F.3d at 701. 11
“[M]erely being forced to litigate on the merits” or “incurring costs in litigating the default” 12
“cannot be considered prejudicial for the purposes of lifting default judgment.” *Id.* Ewing 13 has
not identified any potential “harm,” and there appears to be nothing “greater” than the 14 potential
for delayed case resolution, merits litigation, and additional litigation cost here. 15 See *id.* So this
factor weighs in favor of setting aside the default judgment. 16 Turning to the next factor, “[a]ll
that is necessary to satisfy the ‘meritorious defense’ 17 requirement is to allege sufficient facts

that, if true, would constitute a defense.” 18 *United States v. Aguilar*, 782 F.3d 1101, 1107 (9th Cir. 2015). This “burden . . . is not 19 extraordinarily heavy.” *TCI Grp.*, 244 F.3d at 700. DME’s proffered merits defense is that 20 the complaint is “factually erroneous” and does not meet the required elements of a 21 Telephone Consumer Protection Act claim. (ECF 9, at 16–17.) 22 “The three elements of a TCPA claim are: (1) the defendant called a cellular 23 telephone number; (2) using an automatic telephone dialing system; (3) without the 24 recipient’s prior express consent.” *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 25 1036, 1043 (9th Cir. 2012) (citing 47 U.S.C. § 227(a)(1)). DME contends that the calls 26 either “did not come from any person or entity associated . . . with DME” or that it had 27 “consent” for any call it did place. (ECF 9, at 16.) If true, these defenses “would defeat one 28 element of the TCPA claim,” see *Aussieker v. Lee*, No. 2:19-cv-00365-JAM-CKD PS, 2021 1 WL 352438, at *4 (E.D. Cal. Feb. 2, 2021), so this factor also weighs in favor of reversing 2 the default and proceeding to the merits. 3 Finally, the defense’s conduct is insufficiently “culpable,” as the Ninth Circuit 4 defines that term in this context. A defendant’s conduct is “culpable if he has received 5 actual or constructive notice of the filing of the action and intentionally failed to answer.” 6 *TCI Grp.*, 244 F.3d at 697 (quotations omitted). At first blush, it might seem that “a litigant 7 who receives a pleading, reads and understands it, and takes no steps to meet the deadline 8 for filing a responsive pleading”—as DME did here—“acted intentionally in failing to 9 answer,” and is thus “culpable.” See *id.* But “culpability” involves “not simply 10 nonappearance following receipt of notice of the action, but rather conduct which hindered 11 judicial proceedings.” *Id.* at 698. 12 DME’s actions fall short of that blameworthy threshold. DME is a “small brokerage 13 firm[] with no legal department” that “has never been a party to a TCPA lawsuit or 14 otherwise been sued in federal court.” (ECF 9, at 3, 15; ECF 9-3, at 2–3.) It erroneously 15 “believed that it was not obligated to respond” to what it deemed a “confusing, 16 factually[] inaccurate and legally[] baseless summons,” and thus failed to timely act on this 17 lawsuit. (See ECF 9, at 15.) Once DME understood that it must respond—that is, after the 18 default judgment—DME “promptly retained legal counsel and filed this motion.” (*Id.*) 19 DME’s conduct was unwise—one should not sit idly when served with a 20 court-issued summons—but the conduct was “not necessarily” culpable. See *TCI Grp.*, 21 244 F.3d at 697–98. There is no evidence to suggest, for example, that DME engaged in 22 “frequent chats with [its] lawyers during the period for answer[] and filed false affidavits 23 claiming [it] had not been served.” See *id.* at 698 (citing *Kingvision Pay-Per-View Ltd. v. 24 Lake Alice Bar*, 168 F.3d 347, 350 (9th Cir. 1999)). Nor did DME’s ignorance involve 25 service upon “a lawyer” who was “presumably . . . well aware of the dangers of ignoring 26 service of process.” *Id.* (quoting *Direct Mail Specialists, Inc. v. Eclat Computerized Tech., 27 Inc.*, 840 F.2d 685, 690 (9th Cir. 1988)). So, it appears that DME had no “intention to take 28 1 advantage of the opposing party” nor to “interfere with judicial decisionmaking,” and it 2 thus has not acted “culpabl[y].” See *id.* at 697. 3 There is good cause to set aside the default judgment. 4 B. Motion to Dismiss 5 DME also moves to dismiss the case entirely because, it argues, this Court “lacked 6 personal

jurisdiction over DME” when it granted the default judgment against it on account 7 of a “defective” summons and service. (ECF 9, at 7–8.) Specifically, it asserts that (1) the 8 summons “was improperly modified by Plaintiff,” and (2) the “listed . . . address” is not 9 DME’s and thus the summons “was not directed to DME.” (Id. at 8–9.) And, proper 10 “service of process” of the summons “is an indispensable prerequisite to the court’s 11 jurisdiction to proceed.” *Beecher v. Wallace*, 381 F.2d 372, 373 (9th Cir. 1967). Under the 12 Federal Rules, moreover, a “properly completed” summons must be “directed to the 13 defendant.” Fed. R. Civ. P. 4(a)(1)(B) & (b). The summons here met those requirements, 14 though, so DME’s arguments fail. 15 1. Handwriting on the Summons 16 DME first argues that a summons is only “properly completed” if the “Clerk of 17 Court” issues it with the defendant’s “name and address.” (ECF 9, at 12.) So, DME claims, 18 the fact that Ewing “handwrote” DME’s name and an address on the summons renders it 19 “invalid as a matter of law.” (Id. at 12–13.) Not so. 20 True, if a plaintiff presents a “properly completed” summons, the “clerk must sign, 21 seal, and issue it to the plaintiff for service on the defendant.” Fed. R. Civ. P. 4(b). But the 22 rule does not discuss whether this process can be completed in a different order. For 23 unrepresented litigants in this district, the Clerk of Court leaves a blank space for the pro se 24 plaintiff to fill in the defendant’s address—as occurred here. (See ECF 9-4, at 2.) And those 25 litigants may “type[], print[] by hand, or writ[e]” other parts of their pleadings. See 26 Southern District of California Pro Se Complaint Packet, at 1 (2025). DME provides no 27 authority suggesting that this procedure is improper, and the authorities that it relies on for 28 support are distinguishable. 1 In DME’s preferred cases, the plaintiff altered the name that the Clerk had previously 2 printed and issued on the summons. See *Pathak v. Exotic Meat Mkt., Inc.*,

3 No. 2:16-cv-00368-JAD-VCF, 2016 WL 3219869, at *1 (D. Nev. June 6, 2016) (holding 4 that there was no “legal service of process” because “the summons was improperly altered” 5 with the original defendant’s name “crossed out” and another name handwritten underneath 6 in its place); *Graham v. CNN Inc.*, No. 2:21-cv-07417-MCS-AGR, 2021 U.S. Dist. LEXIS 7 249927, at *2–3 (C.D. Cal. Dec. 30, 2021) (ruling that defendant was not “served properly” 8 because plaintiff “altered the summons originally issued by the Clerk” by changing “the 9 party to whom the summons was issued”). By contrast, plaintiff here complied with the 10 local rules in completing the summons and didn’t change any preprinted information 11 provided by the Clerk. In other words, DME relies on authorities in which the plaintiff 12 defied the Clerk’s issuing intent, but here plaintiff honored the Clerk’s intent. 13 Put simply, the summons was valid even though Ewing handwrote DME’s 14 information into the blank space that the Clerk of Court left on the form for that purpose. 15 There is nothing in the Federal Rules nor the caselaw suggesting that the Southern 16 District’s local policy allowing for this procedure is unlawful. 17 2. Improper Address 18 DME next contends that the summons “listed an address not associated with DME” 19 and thus was not “directed to” DME, as Rule 4 requires. (ECF 9, at 12); see Fed. R. 20 Civ. P. 4(a)(1)(B) (mandating that a summons “be directed to the defendant”). But 21 “Rule 4 is a flexible

rule that should be liberally construed so long as a party receives sufficient notice of the complaint.” Direct Mail Specialists, 840 F.2d at 688. And DME admits that the “address” “on the summons” belongs to DME’s “registered agent,” which “transmitted the service of process,” including a “copy of the Summons and Complaint,” to DME’s “Senior Finance Specialist.” (ECF 9, at 9; ECF 9-3, at 2–3.) So DME received sufficient “notice of the complaint” for the service here to satisfy this “liberally construed” rule. See Direct Mail Specialists, 840 F.2d at 688; see also Fed. R. Civ. P. 4(h)(1)(B) 1 ((permitting a party to serve a “corporation,” “partnership,” or “other unincorporated 2 || association” “by delivering a copy of the summons and of the complaint to a[n] . . . agent’). 3 DME’s dismissal arguments fail.

4 CONCLUSION

5 Thus, DME’s motion to set aside the default judgment for good cause is 6 || GRANTED, and its motion to dismiss for improper service is DENIED. DME’s related 7 ||motion for Rule 11 sanctions for improper service is also denied. The judicial-notice 8 ||request involved material unnecessary for the Court’s decision (see ECF 9-5), so that 9 || request is denied as moot. 10 || Dated: July 11, 2025 i 4 — 12 Hon. Andrew G. Schopler B United States District Judge 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28