

**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

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 22 sufficient notice of the complaint.” *Direct Mail Specialists*, 840 F.2d at 688. And DME 23 admits that the “address” “on the summons” belongs to DME’s “registered agent,” which 24 “transmitted the service of process,” including a “copy of the Summons and Complaint,” 25 to DME’s “Senior Finance Specialist.” (ECF 9, at 9; ECF 9-3, at 2–3.) So DME received 26 sufficient “notice of the complaint” for the service here to satisfy this “liberally construed” 27 rule. See *Direct Mail Specialists*, 840 F.2d at 688; see also Fed. R. Civ. P. 4(h)(1)(B) 28 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