

1 Thomas J. Vandeveld III
2 California State Bar No. 145510
3 VANDEVELD LAW OFFICES
4 P.O. Box 1764
5 Bonita, CA 91908-1764
6 Phone: (619) 232-5299
7 Facsimile: (619) 475-6908

8 Attorneys for Plaintiff
9 KAREL SPIKES

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12 IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA
13 COUNTY OF SAN DIEGO, HALL OF JUSTICE
14

15 KAREL SPIKES,
16 Plaintiff,
17
18 v.
19 AHMED A. AWAD, et al,
20 Defendants.
21

Case No.: 37-2017-00047533-
CU-CR-CTL

Unlimited Civil

**OPPOSITION TO MOTION
TO SET ASIDE DEFAULT OR
DEFAULT JUDGMENT, IF
ENTERED**

Date: April 27, 2018
Time: 1:30 p.m.
Judge: Hon. Timothy Taylor
Court: Dept. C-72

22 Plaintiff, Karel Spikes, respectfully submits the following Opposition to
23 Motion to Set Aside Default Judgment filed by defendant Ahmed A. Awad
24 ("Awad").
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Opposition to Motion to
Set Aside Default Judgment

37-2017-00047533-CU-CR-CTL

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff filed this action on December 11, 2017. The complaint alleged disability discrimination at a marijuana dispensary either operated by Awad or operating on Awad's property with his permission. Awad has apparently operated several marijuana dispensaries or has allowed the same to be operated on property owned or controlled by him for the last several years.

This has resulted in actions brought against Awad by the City of San Diego to enjoin operation of unlicensed marijuana dispensaries. In fact, Awad stipulated to a permanent injunction in one case only to reopen another marijuana dispensary at the same location only a few years later. It appears that in all these matters, Mr. Awad represented himself. The Court may take judicial notice of the records in the matters of *City of San Diego v. Constitutional Wellness Center Cooperative, Inc.*, et al., San Diego Superior Court No. 37-2012-91213-CU-MC-CTL and *City of San Diego v. College Organix, et al.*, San Diego Superior Court No. 37-2015-00012784-CU-MC-CTL pursuant to Evidence Code § 452(d). See, Register of Actions Entry No. 23 in the 2012 case and Entry No. 65 in the 2015 case.

In the instant matter, Awad was served with a copy of the Summons and Complaint on December 24, 2017. Awad's default was entered on January 24, 2018 after he failed to answer within 30 days of being served. There is no allegation that Awad sought an extension of time to respond or was led by Plaintiff or his counsel to believe that any extension of time had been granted. Awad filed the instant motion to set aside the default on February 27, 2018.

In his declaration in support of his motion Awad avers that he mistakenly thought he was served on December 25, 2017. See, *Declaration of Ahmed Awad dated February 24, 2018*, ("Awad Declaration") attached to the motion to set aside at page 5, lls. 9-12. Awad alleges that "[b]ut for" this mistake he would have filed the Answer dated February 24, 2018, attached to his declaration as Exhibit "B."

Awad also claims that on January 26, 2018, he filed an "Application

1 Pursuant to Civil Code section 55.54" which he references as Exhibit "A" attached
2 to his declaration in support of his motion. See *Awad Declaration*, page 5, lls. 12-
3 14 and Exhibit "A". However, Awad's Exhibit "A" shows that he signed the
4 Application on January 30, 2018 and the document shows a clerk's filing stamp
5 dated January 31, 2018.

6 Awad also claims he is a small business owner and that Plaintiff is a "high
7 frequency ADA litigant."

8 LEGAL ARGUMENT

9 Awad does not dispute that he was properly served with the Summons and
10 Complaint in this matter on Christmas Eve, December 24, 2017. He was required to
11 respond to the complaint no later than Tuesday, January 23, 2018.¹

12 His excuse for not responding is that he mistakenly believed he was served
13 on Christmas Day. But for this mistake, he alleges, he would have filed an answer.
14 He proffers Exhibit "B" to his declaration as the answer he would have filed.
15 Exhibit "B" shows that it was signed by Awad on February 24, 2018.

16 As additional grounds to set aside the default, Awad asks the Court to
17 consider his claim that he is a small business and that Plaintiff is alleged to be a
18 "high frequency ADA litigant" and should have paid a higher filing fee.

19 The grounds asserted by Awad for setting aside the default do not have
20 merit. The veracity of the claims asserted in Awad's declaration is undermined by
21 its inherent lack of credibility and by the documents Awad submits in support of
22 those claims. Even assuming that all of Awad's statements are believed, he has not
23 shown causation nor sufficient excuse. It would be an abuse of discretion to grant
24 the motion.

25
26 ¹Judicial Council Summons form SUM-100 clearly states: "NOTICE! You have been
27 sued. The court may decide against you without your being heard unless you respond within 30
28 days. Read the information below. ¶ You have 30 CALENDAR DAYS after this summons and
legal papers are served on you to file a written response at this court and have a copy served on
the plaintiff. A letter or phone call will not protect you."

Legal Standard for Ruling on a Motion to Set Aside a Default

“[A] motion for relief from default under *Code of Civil Procedure* section 473 is addressed to the sound discretion of the trial court and . . . its ruling thereon will not be disturbed on appeal in the absence of a clear showing of abuse of discretion.” *Transit Ads, Inc. v. Tanner Motor Livery, Ltd.* (1969) 270 Cal. App. 2d 275, 278. “The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles.” *Id.* “Discretion is abused in granting relief from default if the moving party's supporting affidavit or declaration fails to set forth facts sufficient to constitute grounds for relief.” *Id.* at p. 280. See also, *Aheroni v. Maxwell*, (1988) 205 Cal. App. 3d 284, 292.

The judicial policy favoring trial on the merits must give way when a moving party's declaration in support of relief from default is insufficient. *Elms v. Elms*, (1946) 72 Cal. App. 2d 508, 513. Careful review of “declarations in support of such a motion may disclose inexcusable carelessness by silence as well as by facts affirmatively set forth.” *Transit Ads, Inc.*, *supra*, at p. 281.

A court must carefully scrutinize a party's affidavits or declarations filed in support of motions for relief from default to ascertain whether they set forth, *with adequate particularity*, grounds for relief. “When inexcusable neglect is condoned even tacitly by the courts, they themselves unwittingly become instruments undermining the orderly process of the law.” *Carroll v. Abbot Laboratories, Inc.*, (1982) 32 Cal. 3d. 892, 900.

While *section 473* should be liberally construed, it is the moving party's burden to show mistake, inadvertence or neglect, all of which must be of a type which is excusable. *Luz v. Lopez*, (1960) 55 Cal. 2d 54, 62. The moving party bears the burden of showing good cause for relief from a default. *Tunis v. Barrow*, (1986) 184 Cal. App. 3d 1069, 1079-1080. Denial of a motion to vacate a default is proper where the moving party's declaration does not sustain this burden. *Id.* Awad's

1 declaration does not stand up to careful scrutiny.

2 **A. AWAD'S ARGUMENTS LACK MERIT**

3 Although Awad's evidence and argument regarding his claimed status as a
4 small business owner and his contention that Plaintiff is a "high frequency ADA
5 litigant" is irrelevant to the determination of this motion, Plaintiff will dispose of
6 these arguments first and only because Awad has raised these issues.

7 **1. Awad's Status as a Small Business Owner, If True, Is Irrelevant**

8 Awad asks that, in making its determination of his motion, the Court
9 consider his claim that he is a small business owner with gross annual income of
10 less than \$400,000 and he employs fewer than five people. Awad does not support
11 this claim with any evidence other than his declaration. Importantly, Awad does not
12 present any legal authority that these facts entitle him to have his default set aside.
13 None of these facts are relevant in the abstract to any issue in a motion under Code
14 of Civil Procedure section 473.

15 **2. Plaintiff is not a High Frequency Litigant with Respect to This Case**

16 Awad also asks the Court to consider his claim that the plaintiff is a high
17 frequency ADA litigant and should be required to pay the additional fee set out in
18 C.C.P. § 425.55. Aside from being irrelevant to this motion, this is simply not true.

19 Under §425.55(b)(1) a high frequency litigant is defined as a "plaintiff who
20 has filed 10 or more complaints alleging a construction-related accessibility
21 violation within the 12-month period immediately preceding the filing of the
22 current complaint alleging a construction-related accessibility violation."

23 The current action was filed on December 11, 2017. Awad's Exhibit "C"
24 shows only five (5) cases filed by Mr. Spikes before the instant case was filed. As
25 with his "small business owner" argument, Awad has failed to provide any legal
26 authority that his claim that Plaintiff is a high frequency ADA litigant is grounds
27 for setting aside his default, even if true.

28 **3. Defendant's Marijuana Business Is Still Open and Not Closed As**

1 **Awad States In Exhibit “B”**

2 Awad asserts that the marijuana dispensary is not open to the public and has
3 been ordered closed for the last three months. *Awad Proposed Answer, Exhibit B*
4 *attached to Awad Declaration, paragraphs 3.a. and 4.A.* To the extent the Court is
5 inclined to consider these allegations, Plaintiff submits the Declaration of Thomas
6 J. Vandeveld III In Support of Opposition to Motion to Set Aside Default
7 (“Vandeveld Declaration”). As of March 6, 2018, the marijuana business was still
8 open to the public and still conducting business. *Vandeveld Declaration,*
9 *paragraph 3.* In addition, the condition of the parking lot is the same as it was on
10 December 1, 2017. There is no accessible handicap parking. *Vandeveld*
11 *Declaration, paragraph 4.*

12 It also does not appear from the online Register of Actions for the San Diego
13 Superior Court that any eviction proceedings have been brought by Awad, despite
14 his claim in paragraph 4.A. of Awad’s Exhibit “B”.

15 **4. Defendant Has Not Made a *Prima Facie* Showing That His Default**
16 **Was Entered as a Result of Excusable Mistake**

17 **A. Awad’s Claim of “Mistake” is Inherently Not Credible**

18 Awad seeks to have his default set aside primarily on the grounds that he
19 made a “mistake” as to the date he was personally served. He declares: “I believed
20 that I was served on December 25, 2017 but in fact I was served late December 24,
21 2017.² I believed that I was served on Christmas Day as it was clearly the day that
22 we celebrate Christmas.”

23 Awad’s argument is unintelligible. First, he does not specify the “we” to
24 whom he refers when he says “we celebrate Christmas.” It could be him and his
25 wife, or his brother, or the rest his family, or a friend, or it could be the entire
26 Christian world in the abstract. It is impossible to know from his declaration.

27

28 ²Awad was personally served at 12:55 p.m. December 24, 2017 (not “late” on that date as
he claims). (See Proof of Service on file herein as Register of Actions, entry 9, paragraph 5.a.).

1 Second, he does not explain why *anyone* celebrating Christmas on Christmas Day
2 would cause him to believe he was served with the summons and complaint on that
3 day.

4 If Awad (or anyone else) “clearly” celebrates Christmas on December 25, it
5 follows that December 24 is “clearly” not the day Awad (or anyone else) celebrates
6 Christmas. If Awad was served when he was *not* celebrating Christmas, then he
7 very likely would remember the circumstances of when he was served - he was not
8 celebrating Christmas. If he had been personally served while in the midst of
9 celebrating Christmas on December 25 he almost certainly would have remembered
10 *that* and there would have been no confusion as to the date he was served. Awad’s
11 claim of mistake is not credible.

12 **B. Awad’s Claim that He Filed a Proposed Application**
13 **Pursuant to Civil Code Section 55.54 On January 26, 2018 Is**
14 **Not Credible**

15 As support for the claim in his declaration at paragraph 1 that he filed an
16 Application Pursuant to Civil Code Section 55.54 on January 26, 2018, Awad
17 provides Exhibit “A” attached to his declaration. Unfortunately for Awad, this
18 document shows his signature date as January 30, 2018. It also shows a clerk’s
19 filed stamp of January 31, 2018. Awad has not shown that he incorrectly dated the
20 the document with a date four days after he purportedly signed it. Nor has he
21 claimed that the clerk of the court was remiss in its duties by placing a stamped
22 filed date on the document five days after Awad allegedly filed it. There would be
23 no reason for Awad to misdate the document when he signed it.

24 There also would be no reason that the clerk would falsely or incorrectly
25 stamp the document with a date five days after it was allegedly filed. Awad has not
26 explained how on January 26 he filed a document with his signature date as
27 January 30, 2018, and a clerk’s file-stamp date of January 31, 2018.

28 The clerk of the court performs a ministerial duty in date stamping filed
documents. In the impartial performance of that duty there is no reason a clerk
would stamp a false date on a filed document. Based on this, it is clear from the

1 documentary evidence that Awad did not file any response to the complaint until
2 January 31, 2018 - 8 days after it was due.³

3 This false statement under penalty of perjury undermines the credibility of all
4 of the statements in his declaration.

5 Awad's proffer of Exhibit "D" to his declaration is also suspect. Awad has
6 been careful not to include a copy of the back of the check which would enable the
7 Court to determine when and if it was ever actually received by the clerk. In
8 addition, there is no notation of the front of the check as to the case number to
9 which it is to be applied.

10
11 **C. Also Not Credible Is Awad's Claim that "But For" His**
12 **Mistake He Would Have Filed the Proposed Answer**
Attached to His Motion as Exhibit "B"

13 Awad claims that "but for" his mistake regarding the date he was served, he
14 would have filed the answer attached to his declaration as Exhibit "B." Awad
15 Declaration, paragraph 2. This is not credible. The answer he claims he would have
16 filed shows a signature date of February 24, 2018. Awad does not explain why the
17 answer he would have filed would be dated February 24, 2018.

18 **D. Awad Has Not Shown How His Alleged "Mistake" Led To**
19 **His Default**

20 Awad has not proffered a legally justifiable excuse for not filing a timely
21 response.⁴ Simple carelessness, inadvertence, or neglect will not justify relief from
22 default. January 26, 2018, was too late to file a response to the complaint if Awad
23 had been served on Christmas as he allegedly believed.

24 "It is the duty of every party desiring to resist an action or to participate in a
25 judicial proceeding to take timely and adequate steps to retain counsel or to
26 act in his own person to avoid an undesirable judgment. Unless in arranging
for his defense he shows that he has exercised such reasonable diligence as a
man of ordinary prudence usually bestows upon important business his

27 ³Or 7 days late if Awad's claim of mistake is to be believed.

28 ⁴If Awad had been served on Christmas Day his response would have been due on
January 24, 2018. He did nothing, by his own admission, until January 26.

1 motion for relief under *section 473* will be denied. (italics in original,
2 citation omitted) Courts neither act as guardians for incompetent parties nor
3 for those who are grossly careless of their own affairs. All must be governed
4 by the rules in force, universally applied according to the showing made. The
5 law frowns upon setting aside default judgments resulting from inexcusable
6 neglect of the complainant. The only occasion for the application of *section*
7 *473* is where a party is unexpectedly placed in a situation to his injury
8 without fault or negligence of his own and against which ordinary prudence
9 could not have guarded. Neither inadvertence nor neglect will warrant
10 judicial relief unless it may reasonably be classified as of the excusable
11 variety upon a sufficient showing." *Elms, supra* at p. 513.

12 Awad's declaration discloses inexcusable neglect.

13 **1. Plaintiff's Diligence In Seeking Entry of Default Is A Not**
14 **Sufficient Basis For Setting it Aside**

15 The fact that Plaintiff filed his Request for Entry of Default promptly after
16 Awad's failure to answer within 30 days does not justify setting aside the default. It
17 is the express policy of the courts to require plaintiffs to promptly seek default
18 upon failure to answer. See, California Rules of Court, Rule 3.110(g).

19 San Diego Superior Court Local Rules, Rule 2.1.7. states:

20 "If a defendant does not make a general appearance within the time provided
21 by statute, or makes an unsuccessful motion to quash, stay, or dismiss the
22 action on the grounds of inconvenient forum or improper court, and
23 thereafter fails to plead within the time provided by statute or in these rules,
24 the plaintiff *must request entry of default forthwith*." [emphasis added].

25 Plaintiff has complied with the Local Rules mandate of immediately seeking
26 entry of default. Nothing in the law requires a plaintiff to wait a week or a single
27 day before seeking entry of default. Indeed, a plaintiff may be sanctioned for not
28 seeking entry of default promptly. See, C.R.C. Rule 3.110(g). But, even if plaintiff
had delayed an extra week in requesting the default the result here would be the
same.⁵

A defendant cannot ignore a summons and have his default set aside simply
because he asks the Court to do so. While Awad's predicament may draw
sympathy, this is not a basis for relief from default. See, *Transit Ads, Inc., supra*, at

⁵A delay of seven days to January 30 would not have changed the result based on Awad's
Exhibit "A" which shows his response was not filed until January 31, 2018 - after he had
admittedly received Plaintiff's Request for Entry of Default.

1 p. 286 (discretion in granting relief is not *ex gratia*).

2 The motion is devoid of facts which would justify exercise of the Court's
3 discretion. Awad has not shown that his "mistake" caused his default to be entered.
4 It would be an abuse of discretion to grant the motion on the showing made here.

5 **CONCLUSION**

6 For the reasons set forth above, plaintiff Karel Spikes respectfully requests
7 the Court deny the motion to set the default aside.

8 Respectfully submitted,

9 DATED: April 9, 2018

VANDEVELD LAW OFFICES

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11 THOMAS J. VANDEVELD, III
12 Attorney for Plaintiff, Karel Spikes
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4 P.O. Box 1764
5 Bonita, CA 91908-1764
6 Phone: (619) 232-5299
7 Facsimile: (619) 475-6908

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego

04/10/2018 at 08:16:00 AM

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8 Attorneys for Plaintiff
9 KAREL SPIKES

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IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO, HALL OF JUSTICE

KAREL SPIKES,
Plaintiff,
v.
AHMED A. AWAD, et al,
Defendants.

Case No.: 37-2017-00047533-
CU-CR-CTL

**DECLARATION OF THOMAS
J. VANDEVELD III IN
OPPOSITION TO MOTION
TO SET ASIDE DEFAULT
OR DEFAULT JUDGMENT**

Date: April 27, 2018
Time: 1:30 p.m.
Judge: Hon. Timothy Taylor
Court: Dept. C-72

I, the undersigned, do hereby declare and state:

1. I am an attorney licensed to practice before all of the courts of the State of California and represent the plaintiff, Karel Spikes, in the above-captioned matter. I have personal knowledge of the facts set forth below and if called to testify could testify competently to the truth of the facts asserted, except for those facts alleged on information and belief and those facts I believe to be true.

2. On March 6, 2018, after reading Exhibits "A" and "B" attached to the Declaration of Ahmed Awad dated February 24, 2018 in support of his motion to set aside his default, I drove to the location at 9215 Birch St., Spring Valley, CA

1 which I had previously visited on December 1, 2017, before the complaint in the
2 instant matter was filed. The building is a commercial structure located in an
3 industrial type area.

4 3. Although Awad states under penalty of perjury in his proposed
5 verified answer (Exhibit "B") at paragraph 3.a. that the facility is not open to the
6 public the truth is that the location is still open for business. At paragraph 4(A)
7 Awad avers that the business has been ordered closed for three months. My visit to
8 the site showed otherwise. On March 6, 2018, there was still a sign with green
9 highlights stating "FlavRx" using a color green which, from my experience in
10 filing these cases against other dispensary locations, is symbolic of a marijuana
11 dispensary. There was virtually no difference at the site from the date of my
12 previous visit which was on December 1, 2017. On both occasions here were
13 several cars parked in the enclosed parking lot serving the business and people
14 were going in and out of the business.

15 4. Awad's statement under penalty of perjury that all violations have
16 been corrected or will be corrected within 30 days of being served with the
17 complaint is also not true. There have been no changes to the parking lot.

18 5. I also reviewed the records of the Superior Court for the County of
19 San Diego. Despite Mr. Awad's claim that he has recently instituted eviction
20 proceedings, (Exhibit "B" paragraph 4.A) I could find no record of such
21 proceedings in the court files. It appears that Awad's claim is simply not true.

22 6. Mr. Awad's contention in paragraph 3.d.(2) of Exhibit "A" that, with
23 respect to this case, Mr. Spikes is a high frequency litigant as defined in Code of
24 Civil Procedure section 425.55(b) is also not true.

25 7. Prior to the filing and service of the instant motion I had never
26 communicated with Mr. Awad, nor any attorney on his behalf. Mr. Awad never
27 requested an extension of time to answer or otherwise respond to the Summons and
28 Complaint.

1 I declare under penalty of perjury under the laws of the State of California
2 that the foregoing is true and correct.

3
4 Date: April 9, 2018


Thomas J. Vandeveld III