

Shannon Armstrong, OSB No. 060113
ShannonArmstrong@MarkowitzHerbold.com
Kristin M. Asai, OSB No. 103286
KristinAsai@MarkowitzHerbold.com
MARKOWITZ HERBOLD PC
Suite 3000 Pacwest Center
1211 SW Fifth Avenue
Portland, OR 97204
Tel: (503) 295-3085
Fax: (503) 323-9105

Attorneys for Defendant

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION**

DALLAS BUYERS CLUB, LLC,

Case No. 3:15-cv-00730-AC

Plaintiff,

v.

**MOTION TO SET ASIDE ENTRY OF
DEFAULT AND DEFAULT JUDGMENT**

CALEB SCOTT,
a/k/a KALEB SCOTT,

Pursuant to Fed. R. Civ. P. 55(c) and 60(b)

Oral Argument Requested

Defendant.

CERTIFICATE PURSUANT TO LR 7.1

Pursuant to Local Rule 7.1, counsel representing the parties conferred by telephone and email regarding the subject of this motion, and have been unable to resolve this dispute.

Defendant requests oral argument pursuant to L.R. 7-1(d) on this motion. Defendant anticipates that a total of 30 minutes will be required for oral argument. Official court reporting services are requested.

MOTION

Pursuant to Fed. R. Civ. P. 55(c) and 60(b), defendant Kaleb Scott (“Scott”) hereby moves this Court for an order setting aside the entry of default (Dkt. 26) and default judgment (Dkt. 41). Good cause exists to set aside the default because Scott was never served, did not receive notice that the default would be entered, and has a meritorious defense to this lawsuit. Accordingly, justice requires that the default be set aside.

MEMORANDUM IN SUPPORT OF MOTION

INTRODUCTION

Plaintiff Dallas Buyers Club, LLC (“DBC”) is attempting to take advantage of Scott, a young man in an unfortunate situation. Counsel for DBC spoke with Scott in October 2015 to purportedly investigate whether he engaged in any improper downloading of DBC’s movie. (Decl. of Kaleb Scott in Supp. of Def.’s Mot. to Set Aside Default (“Scott Decl.”) ¶ 2.) Scott denied that he was involved, and hoped the issue was resolved. (*Id.*) Not so.

Six months later, in April 2016, Scott learned for the first time that he was involved in this lawsuit and a judgment had been entered against him. (*Id.* ¶ 5.) Scott, however, was never served in this case, which is a prerequisite for entry of default. (*See id.* ¶ 3.) In addition, Scott never received notice of the proceedings in this case because he had not lived in or visited the residence where he was purportedly receiving notices until April 2016, four months after DBC moved for a default. (*Id.* ¶ 4; Dkt. 28.) Once Scott received notice, Scott’s appointed counsel immediately contacted DBC to seek to set aside the default, but DBC refused—even after Scott provided the precise information that DBC requested. (Decl. of Kristin Asai in Supp. of Def.’s Mot. to Set Aside Default (“Asai Decl.”) ¶ 5, Ex. 3.) Scott has acted diligently since he received notice of this lawsuit, and allowing a default to remain would significantly prejudice Scott and preclude him from defending himself on the merits.

BACKGROUND

I. DBC files this action and attempts to serve Scott months later.

DBC filed the present lawsuit on April 30, 2015. (Dkt. 1.) DBC's original complaint named a Doe IP address, and it sought three extensions totaling 135 days to identify the defendant and amend its complaint. (Dkt. 7, 12, 14.) As part of its third motion for extension, DBC represented to the Court that following a deposition of the internet subscriber, DBC "believes that the alleged infringer is very likely an individual who was a roommate of the subscriber during the times of confirmed infringement." (Dkt. 14.) On October 7, 2015, DBC filed its First Amended Complaint naming Scott. (Dkt. 16.)

Scott recalls speaking to someone on his mobile phone in October 2015 regarding whether Scott had any information about illegal downloading through the internet or BitTorrent at his former apartment. (Scott Decl. ¶ 2.) Scott said no, denied any involvement, and told the unknown person that he and his roommate used an "open" wireless internet connection. (*Id.*) The unknown person said that Scott answered all of his questions, and he would figure out what to do next. (*Id.*)

According to the original affidavit of service filed by DBC on November 5, 2015 ("Original Affidavit"), a process server from Malstrom's Process Serving Co. received a copy of the complaint on August 25, 2015, and served Scott at an address on Kingwood Avenue in Salem, Oregon ("Salem Address") on October 13, 2015 at 2:45 p.m. (Dkt. 20.) The Original Affidavit describes the person served as a 28 year-old Caucasian female, 5'11, 200 pounds, with brown hair. (*Id.*)

II. DBC obtains a default against Scott.

On December 2, 2015, DBC filed a notice of default, and then moved for entry of default. (Dkt. 21.) DBC mailed a copy of its motion for default to the Salem Address on January 6, 2016. (Dkt. 25.)

This Court entered an order of default on January 7, 2016, and ordered DBC to send a copy of the order to Scott. (Dkt. 26.) Counsel for DBC mailed a copy of the order to the Salem

Address on January 20, 2016. (Dkt. 27.) On February 23, 2016, DBC moved for default judgment seeking \$7,500 and a permanent injunction, and mailed a copy of its motion to the Salem Address. (Dkt. 28, 30.)

On March 11, 2016, this Court appointed Markowitz Herbold as pro bono counsel for Scott. (Dkt. 31.) Markowitz Herbold reached out to DBC's counsel to obtain any contact information for Scott. (Asai Decl. ¶ 2.) Counsel for DBC provided the Salem Address, but stated they had no telephone or email contact information for Scott. (*Id.* ¶ 2, Ex. 2.) Markowitz Herbold tried to contact Scott through the Salem Address, but was unsuccessful, and moved to withdraw as counsel for Scott. (Dkt. 35, 36.) After granting the motion to withdraw, this Court entered a default judgment against Scott for \$5,000 while he was unrepresented. (Dkt. 41.)

III. Scott learns about this action and immediately contacts counsel.

On April 29, 2016, Scott contacted Markowitz Herbold to respond to the communications from that office. (Asai Decl. ¶ 3.) Scott had been away from the Salem Address since January 2016, and just received his mail. (Scott Decl. ¶ 4.) Scott had no idea that a lawsuit had been filed against him, and was unaware that a default judgment had been entered in this case. (*Id.* ¶ 5.) As a result, Markowitz Herbold immediately contacted the Court to seek reappointment as counsel for Scott. (Asai Decl. ¶ 3.)

After being reappointed, counsel for Scott contacted DBC's counsel to explain the situation. (Asai Decl. ¶ 4.) Among other things, Scott's counsel explained that Scott was not served as recited in the Original Affidavit because he is not female. (*Id.*) Counsel for DBC responded that DBC "would agree the default is properly set aside" if Scott provided an affidavit or declaration stating that: (1) he was never personally served with the complaint and summons; (2) he was not at the Salem Address until just recently and only recently received notice of this action; (3) he was not aware of this action prior to the entry of the default judgment against him; and (4) he does not know anything about BitTorrent and has never used BitTorrent. (Asai Decl., Ex. 3 at 2.)

On May 4, 2016, Scott provided the requested declaration to DBC. (*Id.*, Ex. 3 at 1-5.) However, instead of stipulating to set aside the default as counsel had agreed, DBC filed an amended affidavit of service on May 9, 2016 (“Amended Affidavit”). (Dkt. 51.) In the Amended Affidavit, the process server changed the time of service to 6:45 p.m. (from 2:45 p.m.) and the gender to male (from female). (*Id.*) DBC did not provide any explanation for the changes in the Amended Affidavit, and refused to set aside the default. (Asai Decl. ¶ 5.)

ARGUMENT

Justice requires that the default and default judgment be set aside in this case. Scott never received notice of this lawsuit, DBC’s motion to obtain a default, or the entry of the default judgment. As soon as Scott received his mail, he acted diligently to contact counsel and find out what to do. In addition, Scott is not responsible for the conduct alleged by DBC, so allowing the default judgment to remain will significantly prejudice Scott and prevent him from raising a meritorious defense.

I. Good cause exists to set aside the default.

Scott has good cause to set aside the default because he was not served with process in this case and timely responded to the lawsuit once he received notice. Pursuant to Rule 55(c), a district court may set aside the entry of default upon a showing of good cause. *Brandt v. Am. Bankers Ins. Co. of Fla.*, 653 F.3d 1108, 1111 (9th Cir. 2011). After a court has entered a default judgment, relief is governed by Rule 60(b), which permits a court to relieve a party from judgment based on mistake, inadvertence, surprise, excusable neglect, fraud, or “any other reason that justifies relief.” *Id.*; Fed. R. Civ. P. 60(b).

Under both rules, a court considers three factors to determine whether good cause justifies relief from the default or default judgment: (1) whether culpable conduct of the defendant led to the default; (2) whether the defendant has a meritorious defense; and (3) whether the plaintiff will be prejudiced. *Brandt*, 653 F.3d at 1111 (citing *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984)). Because deciding what constitutes “excusable neglect” is an equitable determination, a court should take “account of all relevant circumstances surrounding the party’s

omission.” *Brandt*, 653 F.3d at 1111 (citation omitted). In addition, any doubt should be resolved in favor of setting aside the default so that cases may be decided on their merits.

O’Connor v. State of Nev., 27 F.3d 357, 364 (9th Cir. 1994).

A. Scott’s failure to respond was not culpable because he had no notice of the lawsuit.

Scott acted diligently once he learned about this action, so his conduct should not preclude this Court from setting aside the default. When analyzing the culpability factor, “[o]nly intentional conduct is sufficiently culpable to deny a motion to set aside default.” *FOC Fin. Ltd. P’ship v. Nat’l City Commercial Capital Corp.*, 612 F. Supp. 2d 1080, 1082-83 (D. Ariz. 2009).

Here, Scott was unaware of this lawsuit or DBC’s intent to seek a default until months after it had been entered. (*See* Scott Decl. ¶ 5.) Scott had not been living at the Salem Address since before DBC filed its motion for entry of default, so he did not receive any of the mailed notices about the litigation. (*Id.* ¶ 4.) When Scott returned to the Salem Address, he immediately contacted his appointed counsel to find out what was going on, and then learned, for the first time, about the default. (*See id.* ¶ 5; Asai Decl. ¶ 3.) Scott never intended to violate the Court’s rules or procedures. (Scott Decl. ¶ 7.) In addition, Scott’s appointed counsel did not have the opportunity to assist Scott prior to the entry of the default judgment because she could not get in touch with Scott through the Salem Address provided by DBC’s counsel. (*See* Asai Decl. ¶ 2.) Accordingly, this Court should find that Scott’s neglect is excusable, and not the result of intentional misconduct.

B. Scott denies liability and has a meritorious defense.

Scott is not liable for the misconduct alleged in the complaint, so allowing the default to remain would prevent him from raising a meritorious defense. To demonstrate some showing of a meritorious defense, a defendant need only “present specific facts that would constitute a defense.” *FOC Fin. Ltd. P’ship*, 612 F. Supp. 2d at 1084 (citation omitted).

Here, Scott denies that he engaged in the alleged infringement, and affirms he has never used BitTorrent. (Scott Decl. ¶ 6.) Indeed, contrary to DBC’s counsel’s representation to this

Court (Dkt. 14), the subscriber (who was Scott's former roommate) denies that Scott had any involvement in the allegedly infringing conduct. (Rodgers Decl. ¶ 3.) In his deposition, Scott's roommate told counsel for DBC that Scott did not know anything about the alleged infringement, that they had an "open network" without a password for their internet, and that he did not know anyone at his apartment who watched the allegedly downloaded movie and TV titles identified by DBC's counsel. (*Id.*, Ex. 1 at 10:4-9, 11:23-13:5, 15:22-16:24, 18:18-20.) Accordingly, Scott has a meritorious defense against the misconduct alleged by DBC and should be given the opportunity to litigate this action on the merits.

C. DBC will not be prejudiced by setting aside the default.

To prevent setting aside default, prejudice to the plaintiff "must result in greater harm than simply delaying resolution of the case," and must hinder the plaintiff's ability to pursue its claim. *FOC Fin. Ltd. P'ship*, 612 F. Supp. 2d at 1084 (citation omitted). "[M]erely being forced to litigate on the merits cannot be considered prejudicial for purposes of lifting a default judgment." *Id.*; see also *Bateman v. U.S. Postal Service*, 231 F.3d 1220, 1225 (9th Cir. 2000) (noting that the loss of a quick victory is insufficient to justify denial of relief from a judgment).

If the default is set aside, DBC will suffer no prejudice beyond litigating this case on the merits. Setting aside the default and default judgment will prevent DBC from obtaining an easy victory against an unrepresented party, but that is insufficient to deny relief. Only seven months have passed since the time DBC first named Scott as a defendant, so no significant delay will occur. In addition, DBC has not identified any specific prejudice that would result from setting aside the default.

All three factors weigh in favor of setting aside the default and deciding this case on the merits. Scott is ready and willing to litigate this lawsuit. This Court should therefore grant Scott's motion to set aside the default and default judgment in this case.

///

///

///

CONCLUSION

For the reasons set forth above, Scott respectfully requests that this Court set aside the default and default judgment so this case may be decided on its merits.

DATED this 27th day of May, 2016.

MARKOWITZ HERBOLD PC

By: *s/ Shannon Armstrong*

Shannon Armstrong, OSB No. 060113

Kristin M. Asai, OSB No. 103286

(503) 295-3085

Of Attorneys for Defendant

534273