

Proposed Tentative

On January 29, 2024, plaintiff Rick Centner filed a complaint against defendants Gerald Finley, Kelly Hall, AAA Design and Construction, LLC, and Finfam, LLC, for breach of contract and fraud. On September 23, 2023, the parties entered into a written contract, which provided that plaintiff would purchase two real properties (4109 Woodland St, Santa Maria and 1230 Minarets, Ave. Clovis) “as part of an overall investment strategy.” As part of the strategy, plaintiff invested \$229,000 for the purchase of the two properties; plaintiff was to receive an equity interest in the properties and was to be fully repaid his initial investment. The contract was signed by defendant Finley on behalf of all other defendants. The \$229,000 repayment was scheduled to occur no later than January 2024, and to date no money has been repaid. No answer has been filed. On June 3, 2024, plaintiff’s counsel, Mr. Mathew Nash, appeared at the Case Management Conference (CMC). No defendants appeared. The next CMC was scheduled for September 23, 2024. On September 23, 2024, no parties appeared, and the court issued an Order to Show Cause re Dismissal based on plaintiff’s failure to appear. An order to show cause for failure to appear was mailed to plaintiff’s counsel, Mathew Nash, at the latter’s law office, on September 26, 2024, requiring appearance on December 16, 2024, before this court at 1:30 p.m. No one appeared on December 16, 2024, and the court dismissed the action without prejudice.

On April 2, 2025, plaintiff, with new counsel Charles Goff, submitted a motion to vacate the dismissal without prejudice entered on December 16, 2024. Plaintiff relies on Code of Civil Procedure section 473, subdivision (b), and claims the court should set aside the dismissal based on the attorney affidavit of fault submitted by Mathew Nash. Mr. Nash declares as follows: “I neglected to appear at the September 23, 2024, hearing and the December 16, 2023, hearing because of ongoing turmoil and distractions in my personal life. [¶] The dismissal of the case by the by the Court resulted solely from my neglect and is not in any way the fault of Mr. Centner.” Mr. Nash then declares as follows: “All the defendants in the case were served with the Summons and Complaint prior to the dismissal of the case and none of them have appeared.” “I respectfully request that the Court set aside and vacate the dismissal of the case entered on December 16, 2024, and permit Mr. Centner to proceed with entry of default judgments against the defendant and any other relief to which he is entitled.” No opposition has been filed as of this writing.

The court will outline the legal principles that frame the inquiry, and then address the merits of the motion.

A) Legal Background

Code of Civil Procedure section 473, subdivision (b) (all further statutory references are to this Code), which contains the mandatory relief provision at issue, provides as follows: “. . . . Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form and is accompanied by an attorney’s sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney’s mistake, inadvertence, surprise, or neglect. The court shall, whenever relief is granted based on an attorney’s affidavit of fault, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties” (§ 473, subd. (b); *Talbott v. Ghadimi* (2025) 109 Cal.App.5th 967 ___, [2025 WL 41513, at *5].) The California Supreme Court has described the mandatory provision as “a narrow exception to the discretionary relief provision for default judgments and dismissals” (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 257) that “will result in the entry of judgments.” (*Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 838; *Henderson v. Pacific Gas & Electric Co.* (2010) 187 Cal.App.4th 215, 228–229.)

An attorney attesting to his or her mistake, inadvertence, surprise or neglect provides a basis for mandatory relief. Accordingly, a party is entitled to mandatory relief under section 473(b), even when the attorney error is inexcusable, so long as the attorney affidavit of fault shows the error was the fault of the attorney rather than the client. (*Jimenez v. Chavez* (2023) 97 Cal.App.5th 50, 57–58; see *Hu v. Fant* (2002) 104 Cal.App.4th 61, 64; see *Rodriguez v. Superior Court* (2005) 127 Cal.App.4th 1027, 1033.) More recent cases have held that the mandatory provision does not require a showing of diligence. (*Younessi v. Woolf* (2016) 244 Cal.App.4th 1137, 1147.) The mandatory provision does require that the motion be “in proper form,” which encompasses the requirement that a proposed answer accompany the application. (*Carmel, Ltd. v. Tavoussi* (2009) 175 Cal.App.4th 393, 401; see also *Rodriguez v. Brill* (2015) 234 Cal.App.4th 715, 728.)

Finally, mandatory relief per section 473, subdivision (b) applies not only to defaults, but to requests to set aside a dismissal, as long as the dismissals are the functional equivalent of a default, i.e., those which deprive plaintiffs of their day in court without a contested court hearing. (See, e.g., *Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 618; see p. 619 [plaintiff is afforded mandatory relief when the dismissal fails to appear, and the failure to appear was the fault of counsel, citing *Peltier v. McCloud River R.R. Co.* (1995) 34 Cal.App.4th 1809, 1821 [“a dismissal may be entered where a plaintiff fails to appear. . . , and relief is afforded where that failure to appear is the fault of counsel”]; see *Noceti v. Whorton* (2014) 224

Cal.App.4th 1062, 1065-1066 [the word “dismissal” in the mandatory provision is interpreted narrowly to apply only when a plaintiff’s attorney fails to respond to a dismissal motion].)

B) Merits

The motion is timely pursuant to section 473, subdivision (b), as it was filed within six months of the dismissal. Further, the dismissal at issue is the functional equivalent of a default judgment (and thus falls within the parameters of the statutory provision at issue). It also appears the dismissal at issue was the direct result of attorney Mr. Nash’s error. A factual predicate has been established for mandatory relief.

Nevertheless, there is a significant procedural problem. On April 25, 2025, plaintiff’s counsel filed a number of proofs of service. Plaintiff’s counsel has corrected the deficiencies per California Rules of Court, rule 3.110(b); it appears all defendants were personally served with the summons and complain on May 30, 2024.

Plaintiff’s counsel also filed a proof of service addressing the present motion. While the present motion *was filed* with the court on April 2, 2025, the proof of service indicates plaintiff’s counsel *served* the present motion on defendants by mail on April 11, 2025. It is clear from the proof of service that today’s hearing is therefore untimely. Plaintiff was required to *file and serve* the motion at least 16 courts days before the hearing, with five (5) calendars days for service as the place of mailing and place of receipt are within California. Section 1005 could not be clearer about these requirements. (§ 1005, subd. (b) [“Unless otherwise or specifically provided by law, all moving and supporting papers must be served and at least 16 courts days before the hearing. . . . However, if the notice is served by mail, the required 16-day period of notice before hearing shall be increased by five calendar days if the place of mailing and the place of the address are within the State of California”].) Plaintiff’s counsel clearly failed to comply with them.

Because today’s hearing is untimely, the court will not address the merits of plaintiff’s motion to vacate dismissal pursuant to section 473, subdivision (b). The court continues the motion to June 10, 2025, to be heard at 8:30 a.m. in Department 2. The parties are directed to appear at the May 6, 2025, hearing to discuss these issues. If defendants do not appear, plaintiff’s counsel is directed to provide notice to defendants of today’s ruling and the continued hearing date. Defendants will have until noon on May 23, 2025, to file a response to the present motion to vacate dismissal, if they wish, and plaintiff has until noon on Monday, June 2, 2025, to file a reply, if desired. No other briefing is authorized.