

Don't Seek Default Without Notifying Opposing Counsel

Tim Kowal October 26, 2022



If you have served a summons and complaint and the defendant has not answered, don't get too excited. Attorneys have a duty—an ethical duty, and a statutory duty—to warn opposing counsel before requesting default. ([LaSalle v. Vogel \(2019\) 36 Cal.App.5th 127, 137 \(LaSalle\).](#))

But the plaintiff's attorney in *Shapell Social Rental Properties, LLC v. Chico's Fas, Inc.* (D4d3 Oct. 17, 2022 no. G060411) ___ Cal.Rptr.3d ___ didn't do that. Far from it. Instead, counsel "calculated to keep [the defendant] in the dark" to obtain a default judgment.

The Court of Appeal said the trial court's failure to grant the motion to set aside the default was "inexplicable," and on remand, disqualified the trial judge from hearing the case further.

The plaintiff-landlord here filed an unlawful-detainer action to evict a commercial tenant in Laguna Niguel that operates a chain of retail stores. The tenant had paid some but not all rent during the earlier months of the pandemic, and the landlord acted aggressively to collect. The tenant's law firm asked that all communications be directed to its attention.

But when the landlord served the summons and complaint, it did not serve the tenant's attorneys. Instead, the landlord served a low-level employee at the retail store. Service was made at 5:00 p.m. the Friday before the Thanksgiving holiday. And although the landlord had been in communication with the tenant's attorneys for over two months, the landlord never notified counsel about the complaint.

The trial court entered default judgment, and denied the defendant's motion to set aside the default judgment.

Failing to notify defendant's counsel of an intention to seek default violates ethical and statutory duties.

Attorneys have a statutory duty to notify defendants of an intent to seek default. [Code of Civil Procedure section 583.130](#) states the "policy favoring trial or other disposition of an action on the merits are generally to be preferred over the policy that requires dismissal for failure to proceed with reasonable diligence in the prosecution of an action in construing the provisions of this chapter."

In *LaSalle*, applying section 583.130, the court held that "it is now well acknowledged that an attorney has an ethical obligation to warn opposing counsel that the attorney is about to take an adversary's default." (*LaSalle, supra*, 36 Cal.App.5th at p. 135.) As members of a profession and officers of the court, counsel had the responsibility to treat opposing counsel with " 'dignity, courtesy, and integrity.' " (Id. at p. 134.)

Here, the plaintiff's first and most deadly mistake was not notifying defendant's counsel about the complaint or the intent to seek default. But things got worse from there. The court took a dim view of the fact that the plaintiff served the complaint on an employee "at a most inconvenient time: after 5:00 p.m. on the Friday the week before the Thanksgiving holiday."

The court concluded that plaintiff's acted "in a manner precisely calculated to keep [the defendant] in the dark about what was going on and to produce a substantial possibility of a default." The facts supporting this conclusion, the court said, were not subject to dispute. So the trial court had no discretion to refuse to grant the defendant's motion to set aside the default judgment. (The court said that the trial court's denial of the motion was "inexplicabl[e].")

Practice Tip: In appellate briefs, and especially at oral argument, attorneys would be well-advised to cede ground that cannot be won. Here, the landlord's counsel earned no points with the Court of Appeal. The court noted that counsel's "refusal ... to acknowledge any duty to notify counsel for CFI before taking its default is even more troubling." The landlord's appellate brief "ignores its counsel's breach of ethics altogether...without once acknowledging the black-letter rule that an attorney has both an ethical and a statutory obligation to warn opposing counsel of an impending default."

The court went on: "Even at oral argument, counsel for Shapell neither accepted responsibility, nor acknowledged its trial counsel's violation of the ethical and statutory duties confirmed by *LaSalle*."

Ceding ground on these issues would not have changed the result. But it might have softened the harsh tenor of the opinion, and it quite likely would have spared the appellate attorneys from being singled out in the opinion.

The tenant may be entitled to restitution, even though the issue of possession was moot.

Driving the dagger even deeper into the landlord, the court noted that the tenant may seek an award of restitution against the landlord.

The landlord filed a motion to dismiss the appeal on the ground that the tenant had already given up possession, so there was nothing left to fight about. The Court of

Appeal disagreed. For one thing, the landlord was also seeking damages, so that issue was not moot.

But of more procedural interest, the court noted that the tenant may still seek restitution. The restitution statute, Code of Civil Procedure section 908, provides that a person whose property has been taken under a judgment “ ‘ “is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable.” ’ ” (*Gunderson v. Wall* (2011) 196 Cal.App.4th 1060, 1064.)

Restitution may include restoring possession to an evicted tenant. (*Old National Financial Services, Inc. v. Seibert* (1987) 194 Cal.App.3d 460.) The court acknowledged that this outcome in unlawful detainer cases is rare. But rare does not mean never.

And even if restoring possession is not appropriate, the successful appellant may still seek restitution in money damages. (*Beach Break Equities, LLC v. Lowell* (2016) 6 Cal.App.5th 847, 854.) “[E]ven without an order from the reviewing court, the party prevailing on appeal may seek restitutionary relief through a motion in the remanded matter, rather than by filing a new cross-complaint or filing an independent action.” (*Ibid.*)

So bookmark ***Shapell Socal*** and consider restitutionary remedies if you are an appellant.

This article was originally published on the website of Thomas Vogele & Associates, APC.

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