



Alerts

California Court Affirms Ethical and Statutory Obligation to Warn Opposing Counsel of Intent to Seek Default

October 25, 2022

Lawyers for the Profession®

Shapell Social Rental Properties, LLC v. Chico's Fas, Inc., No. G060411, 2022 Cal. App. LEXIS 854 (Ct. App. Oct. 17, 2022)

Brief Summary

In an unlawful detainer action, the plaintiff obtained a default judgment against the defendant by intentionally not serving the complaint and summons on the defendant's counsel or its registered agent. The plaintiff also did not communicate to the defendant its intent to seek a default and entry of default judgment before requesting one. The trial court entered an order of default and denied the defendant's motion to vacate that order. On appeal, the court found that the plaintiff effected service in a way that was intentionally and precisely calculated to create a strong possibility of default. The appellate court reversed and remanded.

Complete Summary

Defendant, Chico's FAS Inc. (CFI), is a national chain of retail stores that sells women's clothing. In May of 2015, CFI and Shapell Social Rental Properties (Shapell) entered into a lease for property in Laguna Niguel, California. In the midst of the COVID-19 lockdown, CFI did not pay rent for April through June 2020. From July through December 2020, CFI paid Shapell half of the monthly rent due and resumed paying the full monthly rent in January of 2021.

In August of 2020, Shapell served a formal notice of default to CFI. In October, Shapell served CFI with a formal 10-day notice to pay rent or vacate the premises. Both notices were sent to CFI's corporate office in Fort Meyers, Florida.

On October 22, 2020, the law firm of Foley & Mansfield (Foley) sent a letter to Shapell advising Shapell that it had been retained by CFI and requested Shapell to direct all communications concerning CFI's lease to the firm via email. In November of 2020, despite Foley's request, Shapell filed a summons and unlawful detainer complaint, which was personally served on a CFI store associate in its Laguna Niguel location. Shapell then mailed copies of that complaint to the same location. It did not serve the complaint and summons on

Attorneys

Terrence P. McAvoy

Michael Zhang

Service Areas

Counselors for the Profession

Lawyers for the Profession®

Litigators for the Profession®



CFI's registered agent for service in California and did not mail any copies to CFI's counsel nor its corporate offices.

On December 11, 2020, without first notifying CFI's counsel of its intent to do so, Shapell filed a request for entry of default and default judgment and again mailed that request to the Laguna Niguel store address. On December 22, 2020, the trial court entered a judgment by default. CFI was first advised of the judgment on December 30, 2020, and immediately contacted its counsel, who began negotiations with Shapell regarding the dispute.

In March 2021, CFI filed a motion to set aside the default judgment. The trial court denied CFI's motion. CFI appealed. The appellate court found that the trial court abused its discretion by denying CFI's motion to set aside the default judgment because Shapell's counsel had breached its ethical and statutory obligations to notify CFI of Shapell's intent to request entry of default and default judgment. That obligation was set forth clearly by a panel of the same court three years earlier in *Lasalle v. Vogel*, 36 Cal. App. 5th 127, 248 Cal. Rptr. 3d 263 (2019). That panel had held that "[I]t 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." Notably, the *LaSalle* court held that that duty takes precedence over the obligation to zealously represent a client. A party pursuing default with "unseemly haste" also creates a legal issue because the ethical obligation is further reinforced by the statutory policy. See Cal. Civ. Proc. Code § 583.130 (all parties shall cooperate in bringing the action to trial or other disposition). On the issue of cooperation, the *LaSalle* court held that "quiet speed and unreasonable deadlines do not qualify as 'cooperation' and cannot be accepted by the courts."

Foley had provided notice to Shapell on October 22, 2020 that it represented CFI. Shapell did not deny knowing who was representing CFI when it filed the complaint and subsequent request for default, and it did not deny failing to warn CFI's counsel of those filings. The appellate court also noted that it would have been easy for Shapell to mail copies of those pleadings to either CFI's corporate office or its registered agent for services in California, but it did not do so. The court found that as members of a profession and officers of the court, Shapell's counsel had the responsibility to treat opposing counsel with dignity, courtesy, and integrity, all of which were conspicuously lacking in this case. More troubling than the ethical and statutory violations was Shapell and its counsel's refusal to acknowledge that it owed any duty to notify CFI of its intent to seek default.

The court also noted that Shapell gained nothing from its counsel's breach of ethics and lack of courtesy. Instead, after much time and expenditure of attorney fees, the default judgment is being reversed, the parties are back to square one, and Shapell faces the prospect of CFI regaining possession and/or recovering monetary restitution.

Significantly, the appellate court directed that on remand—in the interest of justice—the Presiding Judge of the Orange County Superior Court shall assign the case to a different judge.

Significance

The Court of Appeals of California unequivocally affirmed its previously espoused position that professional courtesy is both an ethical and a statutory obligation. In the instance where a party is seeking a default judgment, the obligation to warn opposing counsel of that intent takes precedence over an attorney's obligation to zealously represent a client.