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October 22, 2018

The Supreme Court of California
Earl Warren Building
350 McAllister Street
San Francisco, CA 94102

Re: *Darryl Cotton, Petitioner v. City of San Diego, Respondent*
Petition for Review Filed August 28, 2018
California Supreme Court Case No. S250895
Petitioner's Informal Reply to Respondent's Informal Response

Dear Honorable Presiding Justice and Associate Justices:

Petitioner/Appellant Darryl Cotton ("Petitioner") respectfully submits this informal reply to the informal response by Respondent/Defendant City of San Diego ("City") dated October 18, 2018 to Petitioner's Petition for Review (the "Petition") as requested by Jorge E. Navarrete, Clerk and Executive Officer of the Supreme Court on October 11, 2018 (the "Response").

Brief Summary of the Facts Upon Which the Petition is Premised

The facts surrounding dismissal of Petitioner's appeal by the Fourth Appellate District, Division One, as set forth in the Petition are straightforward and uncomplicated.

Petitioner filed the appeal as a self-represented litigant. He attempted in good faith with due diligence to properly perfect the record on appeal, but ultimately failed to do so given his unfamiliarity with the appellate process, as well as other mitigating factors as discussed in the Petition, and his default was taken in mid-July 2018. Ten days before dismissal of the appeal, his counsel ("Counsel") in a related lower court action substituted into the appellate case. Amidst the flurry of other deadlines in the related lower court case, Counsel worked diligently to draft and finalize the Motion to Set Aside the Default. However, one of the PDF files was corrupted and could not be uploaded to TrueFiling for filing and service. Counsel's paralegal recreated the document in Word, converted the document to PDF and uploaded it to TrueFiling; unfortunately, the filing was rendered untimely because the upload was completed 14 minutes past the deadline. Thereafter, Petitioner's Counsel timely filed the instant Petition for Review with this Court.

In its Response, the arguments put forth by the City are specious and clearly unsupported by the facts of this case or the case law to which it cites in support thereof. Moreover, the City failed to comply with this Court's request that it "address all issues raised in the petition for review." Most poignantly, the City failed to refute Petitioner's argument that public policy favors resolution of appeals on their merits. The City's failure to respond to this argument reflects its knowledge that, if the underlying appeal were addressed on the merits, it would result in this action being remanded and judgment entered in favor of Petitioner.

A. Respondent's Arguments Are Unsupported by Facts or Evidence.

Petitioner respectfully submits that all of the City's factual and legal arguments presented in its Response fail to address the issues raised in the Petition and, as such, they are wholly insufficient to support the City's contention that the Petition "does not set forth appropriate legal justification to obtain relief from dismissal under Code of Civil Procedure section 473(b)."

Moreover, the majority of the City's Response is nothing more than inferences, innuendo, conjecture and conclusory allegations drawn by its counsel concerning his perceptions of certain events, circumstances and even speculates as to Petitioner's thoughts and reasoning. No factual or evidentiary support therefor exists – nor can it exist – based on the undisputed underlying facts.

The most notable example of the City's factually unsupported arguments is its contention that Petitioner is not entitled to the requested relief because he acted "strategically" in purposely making certain "choices" and "decisions" with full knowledge that his alleged "choices and decisions" ultimately would result in dismissal of his appeal. This argument – that Petitioner, or any other reasonable individual for that matter, would choose to pursue such a "strategy" knowing that doing so would require an appeal to the Supreme Court of California for relief, in order to avoid catastrophic loss and damage – defies logic and simple reasonableness.

B. Respondent Admits It Lacks Sufficient Knowledge to Oppose the Factors Required To Determine Whether Good Cause Exists to Set Aside the Dismissal Pursuant to CCP §473(b).

Although the City cites, summarizes and references various factual allegations from the Petition, it failed to present any arguments in opposition based upon those allegations. The City disingenuously attempts to misdirect the primary basis of the Petition – the 14-minute delay caused by a technical glitch – to a contributing factor; namely, Counsel's attempt to meet numerous deadlines required by the trial court in Petitioner's related matter.

Regarding the related matter, the City concludes that because it is not a party to that case, it cannot specifically address the time sensitive obligations that contributed to Counsel being unable to timely file the Motion to Set Aside. Thus, by its own direct admission, the City admits it has no knowledge of, nor does it present any evidence to support the conclusion that Petitioner has not met the burden required pursuant to CCP §473(b).

C. The City's Legal Argument Is Misplaced and Facially Flawed.

The City raises one legal argument in its Response: Counsel, a solo-practitioner, being very busy in multiple matters in the related case – *Geraci v. Cotton, et al.*, filed in the San Diego County Superior Court on May 21, 2017 as Case No. 37-00010073-CU-BC-CTL, ("Geraci Case") is not entitled to relief pursuant to CCP §437(b) because "[b]eing busy and experiencing stress in meeting deadlines in the practice of law alone is not excusable neglect or inadvertence." (Emphasis added.)

To support its argument, the City cites *Ambrose v. Michelin North America, Inc.* (2005) 134 Cal.App.4th 1350, 1355 in which "counsel unsuccessfully argued the stresses of a busy practice, to hurry to meet deadlines and obligations of other pending litigation." In *Ambrose*, the Plaintiff appealed trial the court's denial of his oral request to continue the hearing on a summary judgment motion.

The Appellate Court found, *inter alia*, that Appellant's counsel failed to properly request a continuance of the hearing due to time-sensitive obligations in other cases did not constitute excusable neglect under the reasonable person standard, because the *Appellant did not argue "that the mistake was caused by a glitch in office machinery or an error by clerical staff."* Rather [Appellant] points to the 'stresses of a busy law practice,' the 'hurry to meet the deadline,' and 'several concurrent obligations due to the other pending litigation.'" *Ambrose, supra*, at 1354-1355.

In other words, the City's reliance on *Ambrose* is wholly misplaced and actually leads to the opposite conclusion than that which the City proposes. Here, as clearly argued in the Petition, the primary mitigating factor was a computer glitch causing the upload of the Motion to Set Aside Default being submitted 14 minutes past the deadline. Additionally, unlike counsel in *Ambrose*, *all* of the matters upon which Counsel was working on were Petitioner's cases arising from the same set of facts and circumstances underlying this Petition and action.

The City cites a second case in support of its opposition, *Martin v. Taylor* (1968) 267 Cal.App.2nd 112, 117, that held "the 'usual press of business' is not a legitimate excuse, because '[t]o accept this as a legal justification for the failure to comply with the statute would be to discourage diligence in the prosecution of appeals and establish a precedent that might lead to vexatious delays."

Like *Ambrose*, *Martin* likewise can be distinguished and actually provides support for Petitioner's position that he meets the burden required pursuant to CCP §473:

Section 473 provides that application for relief from default "'must be made within a reasonable time, in no case exceeding six months' after such judgment is taken. It occasionally has been mistakenly assumed that if a motion for relief from default made within the six months' maximum allowed the sole question before the court is whether the movant's failure to appear in the action within the time required was due to his mistake, inadvertence, surprise or excusable neglect, as provided in section 473. However, there is an additional burden to be met by the moving party, as pointed out in *Smith v. Pelton Water Wheel Co.*, 151 Cal. 394, wherein the Supreme Court said, at page 397 [citation]: "Under this statute, in addition to being made within the six months' period, the application must be made within a *'reasonable time'*, and what is a reasonable time in any case

depends upon the circumstances of that particular case."

Martin, supra, at 113-114 (emphasis added).

In *Martin*, counsel for defendants failed to file an answer to the complaint within 30 days, and thereafter waited to move to set aside his clients' default until three days before the expiration of the six-month period pursuant to CCP §473. In his declaration filed in support of his motion to set aside the default, counsel stated that he failed to do so because his law partner was vacationing in Europe, "which caused the inevitable backlog of clientele appointments to arise...." *Id.* at 117. The trial court's denial of counsel's motion to set aside the default was upheld on appeal.

In stark contrast to *Martin*, Petitioner – unlike the defendants' counsel in *Martin* – was not dilatory and did not delay. To the contrary, he acted promptly, diligently and in good faith to meet the deadlines associated with the appeal and to perfect the record on appeal; however, his efforts as a *pro per* were unsuccessful and his default was entered.

After retaining Counsel to set aside the default, Counsel drafted the motion with the expectation that it would be timely filed – and but for the computer glitch with uploading the motion for filing – it would have been timely filed instead of 14 minutes late. Thereafter, Counsel promptly filed the instant Petition.

When the foregoing cases are reviewed and analyzed in their entirety and proper context, as opposed to the cherry-picked snippets proffered by the City, it is clear that they are neither applicable to the facts and merits of the Petition, nor do they support the City's assertions that the relief requested in the Petition is unwarranted.

D. The Petition is Meritorious.

As set forth in the Petition, the Motion to Set Aside is not frivolous and, as such, should be addressed such that the underlying appeal may be decided on the merits. In the City's informal response, its counsel made not one single argument related to the merits of the appeal. The City's silence on this issue speaks volumes, such that it reasonably leads one to draw only one of two conclusions: (1) either the City is aware that this case *is* meritorious and should be decided accordingly, or (2) it cannot find any viable ground upon which to argue that this case should not be decided on the merits.


As argued in the Petition, "[i]f default is not set aside, Petitioner will be injured in that he will not be able to proceed against Respondent despite a related appeal which, if won, will likely impute liability to the City of San Diego for their violation of Petitioner's Constitutional right in the processing of a Conditional Use Permit on real property owned by Petitioner." If the underlying action lacked merit, the City easily could have argued accordingly in its Response; however, it *chose* not to.

Counsel believes the City failed to do so because, as a matter of law, the undisputed facts require that the underlying matter be adjudicated in Petitioner's favor. Currently, Petitioner's case against the City in the federal court is currently stayed, and any argument against the merits related to the issues presented in that case could result in the City further exposing itself to liability because, as could later be proven, the City knew any such arguments put forth lacked probable cause and were made knowing they would perpetuate a miscarriage of justice. Thus, the City's silence is understandable, albeit ethically questionable.

As set forth in the Petition and self-evident, Counsel clearly intended to timely file the Motion to Set Aside Default, but was thwarted by a computer glitch. Ultimately, particularly in light of the City's facially deficient Response, allowing a default based on a 14-minute delay due to inadvertence would result in a miscarriage of justice. The underlying case should be decided on the merits, not a procedural technicality that deprives Petitioner of the opportunity to have his day in court.

Dated: October 22, 2018

THE LAW OFFICE OF JACOB AUSTIN

By 

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