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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

DALTON REALTY LLC, Plaintiff and Respondent, v. DONALD LECHUGA, Defendant and Appellant.	B287901 (Los Angeles County Super. Ct. No. KC069347)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dan T. Oki, Judge. Affirmed.

Edward G. McLee for Defendant and Appellant.

Law Offices of Steven P. Chang, Steven P. Chang and Heidi M. Cheng for Plaintiff and Respondent.

In its request for a default judgment and the proposed judgment form, plaintiff Dalton Realty requested compensatory damages from defendant Donald Lechuga rather than the specific performance of a contract for the sale of real property. The court signed the proposed judgment but later vacated the judgment at Dalton Realty's request once Dalton Realty discovered its error. Lechuga challenges the court's power to vacate its judgment and argues in the alternative that the court should have vacated his default when it vacated the judgment. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2017 Dalton Realty LLC sued Donald Lechuga for breach of a contract for the sale of real estate. Dalton Realty alleged in its complaint that it had timely tendered the agreed-upon initial payments of $130,000 required by the parties' escrow instructions and that it had performed all other obligations required by the parties' agreement, but that Lechuga failed to convey title and close escrow on the property for more than two years. Dalton Realty also alleged that the escrow instructions provided that if Lechuga failed to close as Dalton Realty "is ready and intended to close escrow on the date as agreed upon, [Lechuga] agrees to pay [Dalton Realty] interest at [the] rate of 12.00% per annum on $130,000.00 until close of escrow."

Under its cause of action for breach of contract, Dalton Realty contended that as a result of Lechuga's breach it had sustained "monetary damages in an amount to be proven at trial, including but not limited to its initial payments of at least $130,000, the right to the possession, use and enjoyment of the Property, and other incidental and consequential damages according to proof." Dalton Realty sought specific performance of the contract in a separate cause of action. In the prayer for relief,

Dalton Realty requested compensatory damages according to proof; monetary damages "due to legal and professional costs incurred"; an order compelling specific performance "pursuant to the terms of the Escrow Instructions including delivery of perfect title to Plaintiff and interest of 10% per annum on $130,000.00 from date of breach until close of escrow"; prejudgment interest; attorney fees, costs, and litigation expenses; and any other relief the court deemed proper.

Lechuga failed to respond to the complaint, and on July 6, 2017, Dalton Realty requested that the court enter Lechuga's default. The court entered the default the same day.

On August 15, 2017, Dalton Realty requested that the court enter a default judgment against Lechuga. Dalton Realty used the CIV-100 form for its application for default judgment. This form provides spaces for applicants to enter the details of the requested judgment. Under Item 2.a., "Demand of complaint," Dalton Realty entered $130,000. Under Item 2.c., "Interest," Dalton Realty entered $28,246.66. Dalton Realty specified $525.00 in costs, listed attorney fees as remaining to be determined, and stated that the total amount of damages was $158,771.66. Additionally, Dalton Realty stated that in its complaint it demanded daily damages in the amount of $35.62 per day beginning July 31, 2015. The application did not request specific enforcement of the contract.

The amounts Dalton Realty listed in the application for default judgment corresponded with the amounts it specified on the proposed judgment it submitted to the trial court. The proposed judgment did not include an order for specific performance.

Dalton Realty supported its application for default with the declaration of Shaiwkuen Chen, also known as Richard Chen, the authorized representative of Dalton Realty. Chen described the terms of the real property sale agreement and the escrow instructions, and he detailed both its compliance with the requirements of the parties' agreement and Lechuga's failure to deliver title to the property. Chen stated, "As a proximate result of Defendant's breach of its agreement with Plaintiff as alleged above, Plaintiff has sustained monetary damages in an amount according to proof, including but not limited to its initial payments of at least $130,000, the right to the possession, use an[d] enjoyment of the Property, and other incidental and consequential damages according to proof." Chen stated that Dalton Realty had no adequate legal remedy because monetary damages are presumptively inadequate for breach of an agreement to transfer real property. He asserted that Dalton Realty's damages could not be adequately remedied at law unless the court ordered Lechuga to perform under the real estate contract and deliver title to the property to Dalton Realty.

In the final concluding paragraph of the declaration, Chen stated that Dalton Realty "demands judgment as follows: [¶] a. For an Order compelling specific performance pursuant to the terms of the Escrow Instructions including delivery of perfect title to Plaintiff and interest of 10% per annum on $130,000.00 awarded as credit already paid from the date of breach until close of escrow, equating to daily interest of $35.62 at a total of 793 days through October 1, 2017 (the anticipated day for entry of judgment; [¶] b. The difference between the prejudgment interest awarded above, and Plaintiff to deposit additional fund[s] to Culture Escrow within 30 days of the full purchase

price of $240,000; [¶] c. Escrow is ordered to transfer title upon receipt of [the] full purchase price comprising of [*sic*] the original $130,000.00 deposit, prejudgment interest awarded herein, and additional deposit by Plaintiff for the remaining balance; [¶] b.[*sic*] For attorney's fees, costs, and litigation expenses incurred herein; [¶] c.[*sic*] For all other relief that as the Court may deem just and proper."

On August 15, 2017, the court signed the judgment form submitted by Dalton Realty.

On November 1, 2017, Dalton Realty filed a motion requesting amendment of the judgment to order specific performance of the contract rather than compensatory damages. According to Dalton Realty, "the Judgment submitted with the default judgment package mistakenly includes an award of damages in the amount of $130,000.00" when Dalton Realty actually wanted specific performance of the contract and the $130,000 to be awarded as credit already paid for the property. Dalton Realty characterized the issue as "a drafting error on the part of Plaintiff's . . . counsel which was not realized until after the Judgment was entered." In its notice of motion, Dalton Realty asked the court to amend the judgment pursuant to "Code of Civil Procedure section 473 and the inherent power of the court"; in its memorandum of points and authorities it relied more specifically on Code of Civil Procedure[1] section 473, subdivision (d) and the court's inherent power.

Lechuga understood Dalton Realty's motion for amendment of the judgment to be seeking relief pursuant to section 473, subdivisions (b) and (d), and the inherent power of the court. He

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[1] Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

argued in opposition to Dalton Realty's motion that relief was unavailable to Dalton Realty on any of these three grounds. In its reply brief, Dalton Realty argued that Lechuga, as a defaulting defendant, was not entitled to challenge the motion and that his opposition should be stricken. Dalton Realty urged the court that its "Amended Judg[]ment proposed herewith corrects the previous judgment entered by reflecting the intent of the court and the relief sought by Plaintiff in this action."

On November 28, 2017, the court conducted a hearing on Dalton Realty's motion at which both parties appeared and argued. The record does not include a transcript from this hearing. At the close of the hearing, the court adopted its tentative ruling, vacated the judgment, and set a default prove-up hearing for January 12, 2018.

In the tentative order adopted by the trial court, the court set forth section 473, subdivision (d) [the court's power to correct clerical error in a judgment] and section 187 [the court's ability to adopt suitable processes and modes of proceedings], and then discussed various decisions concerning the correction of clerical error in a judgment. The court continued, "Here, judgment was entered in plaintiff's favor for $130,000.00, as requested in the proposed judgment. Plaintiff's complaint, however, included a cause of action for specific performance and sought such a remedy in its prayer. Plaintiff's authorized representative, Shaiwkuen Chen ("Chen"), moreover, specifically requested specific performance in his declaration provided in support of plaintiff's default prove-up packet . . . ." After quoting from Chen's declaration, the court concluded, "Plaintiff, then, intended that the $130,000.00 be awarded as credit already paid from the date of breach until close o[f] escrow, not for a return of the funds.

With that said, a higher standard of evidence is required to obtain a default judgment affecting title to or possession of land. Accordingly, the motion is granted, *to the extent that* the court vacates its 8/15/17 judgment and sets the matter for a default prove-up hearing."

In December 2017, Lechuga filed a motion seeking to set aside his default pursuant to section 473, subdivision (b), on the ground that the default was entered against him through his mistake, inadvertence, or excusable neglect. Dalton Realty opposed the motion.

The court heard Lechuga's motion for relief from default and held the default prove-up hearing on January 12, 2018. No reporter's transcript has been provided. The court first denied Lechuga's motion on the ground that he had not established mistake, inadvertence, or excusable neglect; and then it conducted the prove-up hearing, receiving oral testimony from Chen and exhibits from Dalton Realty. The court entered a default judgment against Lechuga ordering specific performance of the real estate contract, with Dalton Realty receiving credit for the $130,000 it had previously paid toward the property. Dalton Realty was ordered to deposit the remaining funds due into escrow; the escrow company was authorized to close escrow and transfer the property; and Lechuga was ordered to execute any necessary documents to facilitate the closing of escrow within 10 days of being presented with them. Lechuga appeals.

DISCUSSION

I. Change in Judgment

Although the court appears to have based its decision to vacate the default judgment on its statutory and inherent power

to correct clerical errors in its rulings, its findings reveal that the court was not correcting a clerical error in its ruling to ensure that the judgment as recorded conformed to the judgment it had actually rendered. To the contrary, the court had entered judgment as requested in the proposed judgment presented by Dalton Realty. Neither the inherent power of the court to correct clerical errors nor its statutory power to correct clerical errors in section 473, subdivision (d) authorizes substantive changes to a signed judgment expressing the exercise of judicial discretion. (See *In re Candelario* (1970) 3 Cal.3d 702, 705 [as "[a]ny attempt by a court, under the guise of correcting clerical error, to 'revise its deliberately exercised judicial discretion' is not permitted," "[a]n amendment that substantially modifies the original judgment or materially alters the rights of the parties, may not be made by the court under its authority to correct clerical error . . . unless the record clearly demonstrates that the error was not the result of the exercise of judicial discretion"]; *In re Marriage of Kaufman* (1980) 101 Cal.App.3d 147, 151 ["When a signed judgment does not express the express judicial intention of the court, the signing of the judgment involves clerical rather than judicial error"]; §473, subd. (d) [court may "correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed"].) Moreover, we are aware of no authority, nor have the parties identified any, that considers vacating a judgment and scheduling a new prove-up hearing to be within the scope of amending a judgment as entered to conform it to the judgment previously made by the court.

This, however, does not establish that the court lacked the authority to vacate the judgment. "'No rule of decision is better or more firmly established by authority, nor one resting upon a

sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.' [Citation.]" (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19.)

Section 473, subdivision (b) provides that "[t]he court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." While the statute refers to a proceeding "taken against" a party, it has long been held that a party in whose favor a judgment has been rendered may also obtain relief from the judgment. (*Brackett v. Banegas* (1893) 99 Cal. 623, 625 ["a party in whose favor judgment has been rendered is entitled to relief the same as though the judgment had been rendered against him; . . . the statute is intended to be remedial, and should receive a liberal interpretation"].) This relief, moreover, is not limited to involuntary judgments or dismissals: "California courts have consistently held that parties may obtain relief from judgments, dismissals, or stipulations voluntarily entered into pursuant to a voluntary agreement through the discretionary relief provision of section 473." (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 255 (*Zamora*).)

At our request, the parties submitted supplemental briefing concerning whether the court's ruling could be affirmed as an exercise of its authority under section 473, subdivision (b). Dalton Realty, which in the trial court had cited counsel's

inadvertent drafting mistake as the factual basis for its request for relief but had not discussed section 473, subdivision (b) in its moving papers, argued in its supplemental briefing that the court's judgment should be affirmed under section 473, subdivision (b). Lechuga had argued in the trial court that section 473, subdivision (b) was inapplicable because Dalton Realty had obtained a judgment in its favor. In his supplemental briefing he acknowledged that a party in whose favor judgment is rendered may also be entitled to relief under section 473, subdivision (b), and instead he argued that Dalton Realty had not submitted sufficiently detailed declarations to the trial court to permit determination of whether relief under section 473, subdivision (b) was warranted.

We conclude that it was not an abuse of discretion for the trial court to vacate the judgment and set a new default prove-up hearing. Discretionary relief under section 473, subdivision (b) is available on the basis of attorney error when "the attorney's mistake or inadvertence was excusable"; that is, when "'"a reasonably prudent person under the same or similar circumstances" might have made the same error.'" [Citation.] In other words, the discretionary relief provision of section 473 only permits relief from attorney error 'fairly imputable to the client, i.e., mistakes anyone could have made.' [Citation.]" (*Zamora*, *supra*, 28 Cal.4th at p. 258, italics omitted.) Drafting errors are the quintessential excusable mistakes anyone could make: the error here in filling out the judgment form is akin to inadvertently substituting the word "against" for the phrase "in favor of" in an offer to compromise, as occurred in *Zamora*. (*Id*. at p. 259.) The California Supreme Court explained in that case, "The erroneous substitution of the word 'against' for the

phrase 'in favor of' is a clerical or ministerial mistake that could have been made by anybody. While counsel's failure to review the document before sending it out was imprudent, we cannot say that his imprudence rendered the mistake inexcusable under the circumstances. Indeed, appellate courts have routinely affirmed orders vacating judgments based on analogous mistakes made by an attorney or his or her staff. For example, courts have set aside judgments where: (1) The attorney mistakenly checked the 'with prejudice' box instead of the 'without prejudice' box (see *Romadka v. Hoge* (1991) 232 Cal.App.3d 1231, 1237 . . .); (2) an associate misinterpreted the instructions of the lead attorney and gave incorrect information at a hearing (see *Bergloff v. Reynolds* (1960) 181 Cal.App.2d 349, 358-359 . . .); and (3) the attorney's secretary lost the answer to be filed (see *Alderman v. Jacobs* (1954) 128 Cal.App.2d 273, 275-276 . . .)." (*Zamora*, at p. 259.)

The court's findings demonstrate that the court accepted as true the representation by Dalton Realty's counsel that counsel had made an inadvertent drafting error when completing the proposed judgment form, resulting in a request for relief that was inconsistent with the client's desired relief and with the relief sought in the declaration supporting the request for judgment. Further, the court could not have found that granting the opportunity for a new default prove-up hearing was proper without believing that it was in the interest of justice to vacate the judgment so that the court could rule upon Dalton Realty's intended request for relief. The record supports the trial court's conclusions. Dalton Realty appears to have been diligent in seeking relief, filing its application within 80 days after the entry of judgment and well within the six-month period for relief

established by section 473, subdivision (b).[2] (§ 473, subd. (b) [the party must seek relief "within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken"].) Lechuga suffered no apparent prejudice from the vacation of the judgment; his default on the complaint having already been entered, he had no right to participate in the litigation. (*Garcia v. Politis* (2011) 192 Cal.App.4th 1474, 1479.) Dalton Realty, however, would have been severely prejudiced if bound by the unintended judgment for money damages, as it is "presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation." (Civ. Code, § 3387.) The court did not abuse its discretion when it vacated the judgment and set the matter for a new prove-up hearing.

II. Impact of the Vacation of Judgment on Lechuga's Default

Lechuga argues that if the trial court had the power to vacate the judgment, then Dalton Realty's motion seeking to change the judgment was the equivalent of an amendment of the complaint and should, therefore, have opened his default. This contention has no merit.

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[2] Dalton Realty states in its respondent's brief that the error was discovered on October 29, 2017, three days before its motion for relief was filed, but it provides no citation to the record to support this assertion, and we have found no support for this statement in the record. A reviewing court may not give any consideration to alleged facts that are outside the record on appeal. (*CIT Group/Equipment Financing, Inc. v. Super DVD, Inc.* (2004) 115 Cal.App.4th 537, 539, fn. 1.)

"It is settled by a long line of decisions that where, after the default of a defendant has been entered, a complaint is amended in matter of substance as distinguished from mere matter of form, the amendment opens the default, and unless the amended pleading be served on the defaulting defendant, no judgment can properly be entered on the default. [Citations.] The reason for this rule is plain. A defendant is entitled to opportunity to be heard upon the allegations of the complaint on which judgment is sought against him. His default on the original complaint is limited in its effect to that complaint; and, if by amendment a matter of substance is added, he should be given the opportunity to contest the same before any judgment is given against him on account thereof." (*Cole v. Roebling Const. Co.* (1909) 156 Cal. 443, 446.) Here, the court's order vacating the judgment and setting a new default prove-up hearing did not amend the complaint or alter the litigation in an equivalent manner. Dalton Realty sought specific performance as well as damages in the operative complaint. Lechuga defaulted on that complaint: He had received the opportunity to contest the allegations in the complaint, and he had chosen not to do so. As Dalton Realty did not demand any relief not requested in the operative complaint, its request to change the judgment did not operate to open Lechuga's default.

III. Lechuga's Motion to Set Aside Default

After the trial court set aside the judgment and set a new default prove-up hearing, Lechuga moved to set aside his default under section 473, subdivision (b) on the grounds of mistake, inadvertence, and/or excusable neglect. In support of his motion, Lechuga declared that this was his first time being sued, and he lacked familiarity with court processes. He acknowledged that he

had been served with the summons and complaint, as well as receiving notice of a case management conference set for October 13, 2017. Lechuga also acknowledged that the notice warned him that it did not exempt him from filing a responsive pleading, but he declared that he did not know what that meant. According to Lechuga, he telephoned the court in June 2017 and confirmed that "the case was set for October 13, 2017." He understood from that call that he should appear in court on that day. Lechuga declared, "I intended to go to that hearing to explain my side of the case to the judge. I first met with my attorney on October 12, 2017, seeking help for the October 13 hearing. He explained to me that the case was over by default and there would be no court proceeding on October 13." Lechuga stated that his default was caused by his "mistake in not understanding the court process and my inadvertence and neglect to contact an attorney earlier to file a timely response to the Complaint." Lechuga attached a proposed answer to his motion.

The court denied Lechuga's motion to set aside his default on the ground that Lechuga's reasons for his default did not constitute mistake, inadvertence, or excusable neglect under section 473, subdivision (b). Lechuga argues that this was an abuse of discretion. He contrasts the court's grant of relief to Dalton Realty based on the assertion of inadvertent drafting error with the "very strict" interpretation of section 473, subdivision (b) employed by the court when ruling on his motion, and he also relies on the policy of the law favoring a hearing on the merits of the case.

We review the court's decision for an abuse of discretion (*Zamora*, *supra*, 28 Cal.4th at p. 257) and find none here. "Mistake is not a ground for relief under section 473, subdivision

(b), when 'the court finds that the "mistake" is simply the result of professional incompetence, general ignorance of the law, or unjustifiable negligence in discovering the law . . . .' [Citation.]" (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1206 (*Hearn*).) "[A]s for inadvertence or neglect, '[t]o warrant relief under section 473 a litigant's neglect must have been such as might have been the act of a reasonably prudent person under the same circumstances. The inadvertence contemplated by the statute does not mean mere inadvertence in the abstract. If it is wholly inexcusable it does not justify relief. [Citations.] It is the duty of every party desiring to resist an action or to participate in a judicial proceeding to take timely and adequate steps to retain counsel or to act in his own person to avoid an undesirable judgment. Unless in arranging for his defense he shows that he has exercised such reasonable diligence as a man of ordinary prudence usually bestows upon important business his motion for relief under section 473 will be denied. [Citation.] Courts neither act as guardians for incompetent parties nor for those who are grossly careless of their own affairs . . . . The only occasion for the application of section 473 is where a party is unexpectedly placed in a situation to his injury without fault or negligence of his own and against which ordinary prudence could not have guarded.' [Citation.]" (*Ibid.*)

Lechuga disregarded the express advisement on the summons that he must respond to the complaint in writing within 30 days; took no action for months besides confirming the date of the case management conference, even when served with notice of the request for entry of default and notice of request for entry of a default judgment; and failed to contact an attorney until October with respect to a complaint he had defaulted upon

by July. Lacking familiarity with the legal process and neglecting to consult an attorney do not make excusable the choice to take no action on a summons and complaint. "The trial court could reasonably conclude that the default judgment was not the result of any mistake, inadvertence, surprise or excusable neglect on the part of appellant, but rather, was the consequence of appellant's failure to take reasonably prudent steps to avoid entry of judgment." (*Hearn*, *supra*, 177 Cal.App.4th at pp. 1206-1207.)

DISPOSITION

The judgment is affirmed. Respondent shall recover its costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

SEGAL, J.