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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

UNITED GRAND CORPORATION, Plaintiff and Appellant, v. MARCIE STOLLOF, Defendant and Respondent.	B270076 (Los Angeles County Super. Ct. No. BC554172)

APPEAL from orders of the Superior Court of Los Angeles County, Michelle Rosenblatt, Judge. Affirmed.

Cyrus Sanai for Plaintiff and Appellant.

Law Office of D. Joshua Staub and D. Joshua Staub for Defendant and Respondent.

* * * * * *

Appellant United Grand Corporation appeals from the trial court's order vacating a default judgment against respondent Marcie Stollof, and the trial court's denial of a motion to vacate that order. We affirm.

BACKGROUND

1. The court enters default judgments against respondent and Malibu Hillbillies

Appellant brought an action against respondent and a limited liability company of which she was a member, Malibu Hillbillies, seeking unpaid rent for a repudiated lease. The trial court, the Honorable Michelle R. Rosenblatt, sitting in Department 40, entered default judgment against respondent on February 11, 2015, and against Malibu Hillbillies on April 13, 2015.

Respondent and Malibu Hillbillies each moved to vacate their default judgments under Code of Civil Procedure section 473, subdivision (b).[1] Both motions were supported by affidavits from David Cohen, an attorney licensed in Maryland, in which Cohen stated the defaults were due to his mistake, inadvertence, surprise, or neglect.

Appellant filed a combined opposition to both motions. Appellant argued that Cohen's affidavits were insufficient because they did not establish that Cohen's conduct was the proximate cause of the defaults. Appellant also expressed doubt about the veracity of the affidavits and requested permission to conduct discovery of respondent, her sister, Cohen, and Eric Halvorson, a California attorney who had represented respondent

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[1] All further statutory references are to the Code of Civil Procedure.

and Malibu Hillbillies. Appellant presented evidence that at the time of the defaults Cohen represented only respondent, and not Malibu Hillbillies.

On October 2, 2015, the trial court issued an order denying Malibu Hillbillies' motion to vacate, finding that Cohen's affidavit claiming that he represented Malibu Hillbillies at the time of the default was not credible given the evidence appellant had presented.

The court continued the hearing on respondent's motion to vacate to December 24, 2015. The court orally granted permission for appellant to take discovery of Halvorson, limited to the topic of the dates of his representation of respondent. The court confirmed this permission in a written order on November 6, 2015.

2. Malibu Hillbillies files an appeal

On November 20, 2015, Malibu Hillbillies filed an appeal from the denial of its motion to vacate default.[2] On December 4, 2015, appellant brought an ex parte application to stay the hearing on respondent's motion to vacate. Appellant argued that Malibu Hillbillies' notice of appeal encompassed the entire October 2 order, and thus both the Malibu Hillbillies proceedings and the proceedings involving respondent were automatically stayed. Appellant also requested that the court, sitting in Department 40, transfer to itself the postjudgment motions being heard in Department 44, where appellant had moved to disqualify the judge under section 170.6.

The court issued a minute order on December 4, 2015, stating, "The ex parte application is denied. The case is no longer

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[2] This court affirmed the default judgment on January 19, 2017.

before this court [in Department 40]. It is assigned to Department 44 where [appellant]'s Code of Civil Procedure Section 170.6 [motion] is pending."

On December 17, 2015, appellant filed a "Supplementary Submission Regarding Motion to Vacate Filed by [Respondent]." Appellant stated that, based on the court's December 4 minute order, "which states clearly that there is nothing before this Court," and the "automatic stay" effected by Malibu Hillbillies' appeal, "[appellant] will not be filing any substantive response or appearing [at the December 24, 2015 hearing on respondent's motion to vacate] absent further order or communications from this Court."

That same day, appellant filed and served a "Notice of Entry of Order," attaching the December 4 minute order. In the notice, appellant stated: "Notice is hereby provided that based on this order there are no proceedings [before] Judge Rosenblatt [in Department 40], as the October 2, 2015 order continuing the motion to vacate the default and default judgment filed by [respondent] is automatically stayed due to the notice of appeal of this order filed by [respondent]'s counsel on November 20, 2015.[3] [¶] Based on the forgoing order, [appellant] is not submitting any further documents in respect of the motion to vacate default filed by [respondent] and will not appear in court on December 24, 2015 as . . . there are no proceedings in this case before Judge Rosenblatt due to the automatic stay."

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3 Although the same attorney represented both respondent and Malibu Hillbillies in the trial court proceedings, the November 20, 2015, notice of appeal was filed on behalf of Malibu Hillbillies, not respondent.

The next day, respondent filed and served an objection to appellant's "Notice of Entry of Order," arguing that the notice misstated the court's minute order and that Malibu Hillbillies' notice of appeal did not stay the proceedings as to respondent.

3. The trial court grants respondent's motion to vacate

Judge Rosenblatt heard respondent's motion to vacate in Department 40 on December 24, 2015. Appellant did not file any additional documents in advance of the hearing and did not appear.[4] The court granted respondent's motion to vacate default. The court stated that Malibu Hillbillies' appeal did not stay respondent's case, and that appellant had "no authority to take [respondent]'s motion off calendar." The court explained that appellant's December 4 ex parte application concerned both prejudgment and postjudgment matters, and "it appears the Court['s December 4 minute order] may have given [appellant] the mistaken impression that it was not going to complete the hearing that it started on October 2, 2015. However, [appellant] is mistaken. The motion to vacate and set aside default judgment began in Department 40 and [Department 40] will rule on the motion. It is the post-judgment judgment debtor matters that are handled by a different department of this Court (Department 44)."

The court found that Cohen's affidavit of fault was sufficient as to respondent, and that further discovery on the subject "would [not] generate dispositive information."

On January 5, 2016, appellant moved to vacate the court's December 24 order. Appellant again argued that the proceedings involving respondent were automatically stayed by Malibu

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[4] Appellant never deposed Halvorson.

Hillbillies' appeal, and therefore any subsequent proceedings were void and should be set aside under section 473, subdivision (d). Appellant also claimed it was misled by the court's December 4 order and discussions with a clerk that same day suggesting no motions were pending before the court. Appellant asked for relief under section 473, subdivision (b), on the basis of "surprise."

On January 28, 2016, the court issued a lengthy ruling denying appellant's motion. The court rejected the argument that respondent's proceedings were stayed by virtue of being encompassed by Malibu Hillbillies' appeal, as that appeal did not involve any final rulings or appealable orders regarding respondent, and resolution of respondent's motion to vacate would not affect the Malibu Hillbillies appeal. The court also denied relief under section 473, subdivision (b), stating that a reasonable attorney would have made further efforts to confirm whether the hearing was going forward rather than not appearing. Finally, the court stated that there was no further evidence appellant could have presented that would change the court's decision to vacate default.

Appellant timely appealed.[5]

DISCUSSION

1. Automatic stay

Appellant contends the trial court erred in not staying the proceedings concerning respondent while the appeal filed by Malibu Hillbillies was pending. We reject this argument.

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[5] An order granting a motion to vacate a default judgment is appealable as an order after final judgment. (§ 663a, subd. (e); *County of Stanislaus v. Johnson* (1996) 43 Cal.App.4th 832, 834.)

Under section 916, "the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order." (§ 916, subd. (a).) " 'The [automatic stay] prevents the trial court from rendering an appeal futile by altering the appealed judgment or order by conducting other proceedings that may affect it.' " (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 189.) " '[W]hether a matter is "embraced" in or "affected" by a judgment [or order] within the meaning of [section 916] depends on whether postjudgment [or postorder] proceedings on the matter would have any effect on the "effectiveness" of the appeal.' [Citation.] 'If so, the proceedings are stayed; if not, the proceedings are permitted.' " (*Ibid.*)

Here, the court's October 2, 2015 order declined to vacate the default judgment against Malibu Hillbillies, thus keeping that final judgment in place. The order made no final determinations regarding respondent, instead continuing the hearing on her motion to vacate and, as clarified by the November 6 order, permitting limited discovery. Thus, the only possible issue on appeal was the default judgment against Malibu Hillbillies. Whatever "matters" were "embraced therein or affected thereby" (§ 916, subd. (a)) would pertain to Malibu Hillbillies only, as no judgment had been rendered against respondent. Subsequent proceedings against respondent would have no effect on the default judgment against Malibu Hillbillies, an entirely different defendant, and thus posed no risk to render the appeal futile.

Respondent, citing *Elsea v. Saberi* (1992) 4 Cal.App.4th 625 (*Elsea*), argues a stay is justified because of "a commonality of issues" between the proceedings against Malibu Hillbillies and the proceedings against respondent. *Elsea* is distinguishable, however. In that case, defendants in a personal injury action had appealed from a denial of their motion to vacate a default judgment against them. (*Id.* at p. 628.) While that appeal was pending, their liability insurer successfully moved in the trial court to intervene and vacate the default judgment insofar as it applied to the insurer. (*Ibid.*) The Court of Appeal reversed the order vacating the default judgment against the insurer, finding the order violated section 916. (*Elsea*, at pp. 629, 631.) "Because the trial court's ruling on [the insurer's] section 473 motion affected enforcement of the default judgment, it impacted on the effectiveness of the pending appeal and therefore was in excess of the court's jurisdiction." (*Id.* at p. 629.) Among the appellate court's concerns was the fact that the basis of the insurer's motion to vacate was the same basis asserted in the defendants' motion—in other words, the trial court was considering that basis as to the insurer at the same time the appellate court was considering that basis as to the defendants. (*Id.* at p. 630.)

The crucial difference between *Elsea* and the case here is the appeal and invalid subsequent proceedings in *Elsea* all involved a single default judgment against multiple parties. The insurer's efforts were directed against the same judgment that was the subject of the defendants' pending appeal. Thus, any rulings in the trial court concerning the insurer could affect the appealed judgment. Here, in contrast, only Malibu Hillbillies was subject to the default judgment being reviewed on appeal. Respondent's proceedings concerned an entirely different default

judgment entered solely against her. Thus, any court action regarding respondent's default judgment would not impact the default judgment on appeal, even if, as appellant argues, some of the same issues might arise in both proceedings. There was no automatic stay.[6]

2. Sufficiency of affidavit of fault

Appellant claims the trial court erred in finding Cohen's affidavit of fault sufficient for purposes of section 473, subdivision (b). Specifically, appellant argues that the affidavit did not establish that Cohen's actions were a proximate cause of respondent's default. We reject this argument.

Under section 473, subdivision (b), a court must vacate a default judgment against a party if that party files a timely application for relief "accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect . . . , unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." The affidavit need not come from an attorney licensed in California, or a party's attorney of record in the case in which the default judgment was entered; "the statute only requires the affidavit be executed by an attorney who represents the client and whose mistake, inadvertence, surprise

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[6] We reject appellant's assertion that Malibu Hillbillies' appeal encompassed the order granting limited discovery as to respondent. First, Malibu Hillbillies would have no standing to appeal an order entered against a different party (*Rebney v. Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1128), and second, " 'it is firmly established that orders relating to . . . discovery are not appealable' " (*NewLife Sciences, LLC v. Weinstock* (2011) 197 Cal.App.4th 676, 689, quoting *Southern Pacific Co. v. Oppenheimer* (1960) 54 Cal.2d 784, 786).

or neglect in fact caused the client's default or dismissal." (*SJP Limited Partnership v. City of Los Angeles* (2006) 136 Cal.App.4th 511, 518; see *Rodrigues v. Superior Court* (2005) 127 Cal.App.4th 1027, 1037.)

We review a court's decision to grant a motion to vacate a default judgment under section 473 for abuse of discretion. (*Austin v. Los Angeles Unified School Dist.* (2016) 244 Cal.App.4th 918, 929.) In conducting our review, we must accept the trial court's factual findings so long as they are supported by substantial evidence. (*Falahati v. Kondo* (2005) 127 Cal.App.4th 823, 828.) "Because the law favors disposing of cases on their merits, 'any doubts in applying section 473 must be resolved in favor of the party seeking relief from default [citations].' " (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 980 (*Rappleyea*).)

Here, there is no dispute that respondent submitted a timely application for relief with an affidavit by an attorney representing her at the time of the default. Cohen's affidavit stated that he was representing respondent in relation to her dispute with appellant, and that the default judgment was "entered through my mistake, inadvertence, surprise or neglect. I should have ascertained the validity of service [of the summons and complaint], and the deadline to file a response to the complaint in this case, and timely communicated with California counsel to do so, or obtained the documents, and reviewed the pertinent statutes on my own to do so. In the alternative, I should have asked [appellant's counsel] for an extension of the time to respond to the complaint to have additional time to perform those tasks. As a result, I failed to ascertain, and communicate to [respondent] the date that she needed to respond to the complaint, and to see to it that she timely responded to the

complaint." On its face, this affidavit provides substantial evidence that Cohen's errors were responsible for respondent's default.

Appellant argues that because Cohen was not licensed to practice law in California, and "could not act without the assistance of [a] California attorney," "there is nothing he could have done . . . that . . . would have prevented the default." In other words, because Cohen could not, for example, file a demurrer or answer or otherwise appear on respondent's behalf without the aid of a California attorney, appellant claims Cohen could not have been responsible for the default.

We disagree. Even without a California license, Cohen could have performed the tasks he lists in his affidavit, including researching respondent's obligations following receipt of the complaint, coordinating with California counsel, and ensuring that respondent filed a timely response. While those actions would not necessarily have prevented the default (respondent may have rejected the advice, or California counsel may have made additional errors), the absence of those actions all but guaranteed it. "[A] lawyer's negligence need not be the only proximate cause of a client's injury so long as there is causation in fact." (*Milton v. Perceptual Development Corp.* (1997) 53 Cal.App.4th 861, 867 (*Milton*).) Here, while Cohen's conduct was not necessarily the only cause of the default, it was certainly a proximate cause.

Appellant raises several additional arguments, all of which lack merit. Appellant quibbles that Cohen never actually stated in his affidavit that he failed to perform the actions he listed, only that he "should have done" them. Appellant claims this is a "legal contention, not a statement of fact." Obviously, a

statement that one should have done something necessarily implies that he did not do that thing. The meaning of Cohen's affidavit is clear.

Appellant also disputes the facts in Cohen's declaration, claiming for example that Cohen did not have to ascertain the validity of service or determine the deadline for answering the complaint because appellant provided that information to him. These contentions fail for two reasons. First, Cohen having certain information makes him no less culpable for the default if, as he asserted, he did not act on that information to assist respondent in responding to the complaint. Second, when reviewing for substantial evidence, we " 'accept[] the evidence most favorable to the order as true and discard[] the unfavorable evidence as not having sufficient verity to be accepted by the trier of fact.' " (*In re Michael G.* (2012) 203 Cal.App.4th 580, 595.) Thus, to the extent appellant's factual contentions contradict the trial court's ruling, we must disregard them.

Lastly, appellant claims that an attorney affidavit of fault is only sufficient if it demonstrates the attorney committed malpractice, citing *Milton, supra*, 53 Cal.App.4th at page 867. *Milton* says no such thing. That case merely holds that the definition of proximate causation is the same for both malpractice and attorney fault under section 473, subdivision (b). (*Milton*, at p. 867.) Section 473, subdivision (b) requires only "mistake, inadvertence, surprise, or neglect," which is sufficiently demonstrated by Cohen's affidavit.

3. Order granting limited discovery

Appellant claims the court abused its discretion in denying its request to conduct broader discovery regarding Cohen's affidavit of fault. We disagree.

As stated above, the law favors addressing cases on the merits, and courts are directed to resolve doubts in applying section 473 " 'in favor of the party seeking relief from default.' " (*Rappleyea, supra*, 8 Cal.4th 975 at p. 980.) It follows that when a defaulting party appears in court with a plausible attorney affidavit satisfying the requirements of section 473, subdivision (b), a court need not unduly delay the proceedings in order to look for reasons to maintain the default judgment. Appellant concedes it has located "no case law addressing the question of discovery against a defendant and her attorney who file a suspicious [section 473, subdivision (b)] motion." This is unsurprising, as we would expect courts in most circumstances simply to move on to the merits and not dwell on the default, just as the court did in this case. Given the strong policy towards hearing cases on the merits, we find no abuse of discretion in this decision.

Appellant argues that additional discovery was necessary to determine if there was a causal link between Cohen's actions and the default, given that Cohen was unlicensed in California and would have needed "the intervention or cooperation of a third party" to prevent the default. As discussed above, Cohen's affidavit sufficiently established causation, regardless of his licensure, so further discovery on this point was unnecessary.

Appellant also argues that in this case more inquiry was warranted because the court had found "that Cohen was a liar," referring to the court's conclusion that Cohen's affidavit claiming to represent Malibu Hillbillies was not credible. We reject appellant's characterization of the court's ruling. Regardless, given the policy favoring addressing cases on the merits, the court was within its discretion not to delve further.

4. Relief based on surprise

Appellant claims its counsel filed no additional papers and missed the hearing on the order to vacate respondent's default judgment because of "surprise." Appellant argues the court therefore should have granted relief under section 473, subdivision (b), and set aside the order vacating the default judgment. We reject this argument.

Section 473, subdivision (b) states 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." As this language makes clear, the court has the discretion to grant this relief, but is not required to do so.

The record does not support appellant's claim of surprise. Appellant's purported confusion stemmed from the trial court's December 4, 2015 order regarding appellant's ex parte application. Appellant requested that the court stay the proceedings and transfer to itself in Department 40 the postjudgment motions then pending in Department 44. The court's order stated that the ex parte application was denied, and that the case was no longer before the court and was assigned to Department 44.

It was not unreasonable for appellant to be puzzled by the order, given the relief requested. However, we reject appellant's contention that "the only way to rationally read [the court]'s order was that a stay was denied as moot because there was nothing going on [before it], and that [the court] denied the motion to transfer the matters pending in Department 44 to [itself]." The order did not address the stay at all, much less

provide any reason for denying it; instead, it appeared to address only appellant's request to transfer postjudgment motions from Department 44 to Department 40. The rational reading would have been that the court had not expressly ruled on the stay request, and instead had only denied the transfer request.

If appellant was confused by the order, counsel should have asked for specific clarification from the court, or appeared at the hearing as a precaution.[7] Instead, appellant announced in two separate filings its own interpretation of the order, including in a notice of entry of order that should have simply contained "the exact terms of the court's order as entered." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2016) ¶ 9:320.2, p. 9(I)-141.) Appellant refused to take further action unless directed otherwise by the court. Even after respondent had objected to appellant's interpretation and disputed that a stay was in place, thus indicating respondent's intent to proceed, appellant declined to file any further documents and did not appear at the hearing. This is not

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[7] According to a declaration from appellant's counsel, he consulted a "temporary clerk of the Court" on the same day the court issued the order, and the clerk confirmed a "hand-written order . . . stat[ing] that all proceedings were transferred to Department 44," and that "nothing was pending in Department 40." There is no indication, however, that appellant's counsel specifically inquired about the request for a stay, or about the pending motion to vacate respondent's default judgment, as opposed to the postjudgment motions appellant had requested be transferred from Department 44. Nor did appellant make any additional inquiries, including after respondent had made clear her intention to proceed. We find this minimal and unspecific investigation insufficient to excuse appellant not appearing for the hearing on the motion to vacate.

excusable error: we agree with the trial court that "[e]ven a small amount of caution would have led a reasonable attorney to appear and protect his client's interests." The court did not abuse its discretion in denying appellant's request for relief.

5. Issue preclusion

Appellant argues that this court's affirmance of the default judgment against Malibu Hillbillies should prevent us from vacating the default judgment against respondent, because respondent would otherwise "fil[e] . . . an answer that denies allegations admitted by the limited liability company in which [respondent] is the sole member. This is barred by issue preclusion, which does not allow relitigation of facts admitted by a party to the litigation or its privity." Appellant provides no authority for the proposition that respondent should be bound by the admissions of another party, based on "privity" or otherwise. Nor will we rule on the validity of an answer a party has not yet filed. We decline to address this argument.

DISPOSITION

We affirm both the order vacating the default judgment against respondent and the denial of the motion to vacate that order. Respondent is entitled to costs on appeal.[8]

FLIER, J.

WE CONCUR:

BIGELOW, P. J. RUBIN, J.

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[8] We have considered respondent's motion to dismiss the appeal as moot, filed April 14, 2017, as well as the opposition and reply. The motion is denied.