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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

RAMIRO BURGOS et al., Plaintiffs and Appellants, v. HLR WRIGHT ROAD, LLC, Defendant and Respondent.	B236015 (Los Angeles County Super. Ct. No. BC424242)

APPEAL from an order of the Superior Court of Los Angeles County, Zaven V. Sinanian, Judge. Reversed.

John C. Torjesen for Plaintiffs and Appellants.

Stephanie S. Bang for Defendant and Respondent.

The demurrer of HLR Wright Road, LLC to the first amended complaint of Ramiro Burgos, Alicia Burgos and Robert Nagel was sustained with leave to amend as to two causes of action and without leave to amend as to the other four. When no second amended complaint was timely filed, HLR Wright Road submitted a proposed order of dismissal, which the court signed; and a judgment of dismissal was entered. Thereafter, the Burgoses and Nagel moved to set aside the judgment pursuant to Code of Civil Procedure section 473, subdivision (b),[1] on the ground of attorney fault. The court denied the motion. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

In October 2009 the Burgoses, husband and wife, and Nagel sued a number of individuals and entities for fraud and related causes of action arising out of a failed real estate venture. HLR Wright Road, which had been substituted for a fictitiously named Doe defendant in May 2010, demurred to all six causes of action. On November 9, 2010 the trial court sustained the demurrer, granting the Burgoses and Nagel leave to amend two of their causes of action and denying leave to amend the others.

The Burgoses and Nagel failed to amend the complaint. On December 10, 2010 without moving to dismiss the complaint pursuant to section 581, subdivision (f), HLR Wright Road filed a proposed order of dismissal. The order of dismissal was signed by the trial court on December 15, 2010. A judgment of dismissal was entered on February 28, 2011.

On May 19, 2011 the Burgoses and Nagel moved to set aside the dismissal pursuant to section 473, subdivision (b), due to attorney mistake, inadvertence, surprise or neglect, and to permit the filing of a second amended complaint, which was attached to the moving papers. The motion included a declaration from John C. Torjesen, their attorney, stating, "For the past several years, the undersigned has had only minimal hours available to work at my law practice because of both professional duties as a volunteer bar association officer that I agreed to undertake, and as a result of severe debilitation

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[1] Statutory references are to the Code of Civil Procedure.

illness to family members who became my personal direct responsibility. [¶] These stressors affected my personal and family life extensively and also impacted my emotional health and professional and personal functioning capability. [¶] I have since been putting my office back together . . . , but this case with sophisticated claims of fraud, along with changes in my office personnel, resulted in my office dropping or failing to recognize the due date for filing the amended complaint after the initial demurrer by defendant in this case. [¶] These circumstances then led to this office's failure to timely file a Second Amended Complaint and defendant obtaining a dismissal and judgment of dismissal in this case." Mr. Torjesen further asserted he was "solely responsible for the lapses in handling [the] case" that led to the dismissal.

At the hearing the trial court indicated it was inclined to deny the motion because the Torjesen declaration had only "vague claims . . . which [were] insufficient to show that the dismissal and judgment was entered as a result of counsel's mistake, inadvertence, surprise or neglect." Mr. Torjesen argued he had used generalities in his declaration because the details implicated the privacy rights of a third party. Nevertheless, he explained he had become fully responsible for the care of a family member who had suffered sudden onset dementia and "[i]t was completely distracting, it was emotionally wrenching." Mr. Torjesen also explained he went through a marital dissolution as soon as circumstances with the family member had stabilized. The court denied the motion.

DISCUSSION

1. *Governing Law*

Section 473, subdivision (b), provides for both discretionary and mandatory relief.[2] Under the discretionary relief provision, on a showing of "mistake, inadvertence,

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[2] Section 473, subdivision (b), states, "The 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. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application

surprise, or excusable neglect," the trial court may allow relief from a "judgment, dismissal, order, or other proceeding taken against" a party based on its evaluation of the nature of the mistake or error alleged and the justification proffered for the conduct that occurred. Under the mandatory relief provision, on the other hand, upon a showing by attorney declaration of "mistake, inadvertence, surprise, or neglect," the trial court shall vacate any "resulting default judgment or dismissal entered." (§ 473, subd. (b).) "The range of attorney conduct for which relief can be granted in the mandatory provision is broader than that in the discretionary provision, and includes 'inexcusable' neglect. But the range of adverse litigation results from which relief can be granted is narrower. Mandatory relief only extends to *vacating* a default which will result in the entry of a default judgment, a default judgment, or an *entered* dismissal." (*Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 616, italics in original (*Leader*).)

"'Enacted in 1988, the attorney affidavit provision of section 473 originally applied only to defaults. Its purpose was "to relieve the innocent client of the burden of the attorney's fault, to impose the burden on the erring attorney, and to avoid precipitating more litigation in the form of malpractice suits."'" (*Generale Bank Nederland v. Eyes of the Beholder Ltd.* (1998) 61 Cal.App.4th 1384, 1396.) In 1992 the Legislature extended the relief available for attorney fault to include relief from

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shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken. . . . No affidavit or declaration of merits shall be required of the moving party. Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect. The court shall, whenever relief is granted based on an attorney's affidavit of fault, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties. However, this section shall not lengthen the time within which an action shall be brought to trial pursuant to Section 583.310."

dismissals. "'The State Bar, which sponsored the amendment, argued that "'it is illogical and arbitrary to allow mandatory relief for defendants when a default judgment has been entered . . . and not to provide comparable relief to plaintiffs whose cases are dismissed for the same reason.'"'" (*Ibid*.) Although the statute refers generally to "dismissals," most appellate courts, examining the language and history of the statute, have concluded the Legislature intended the word "dismissal" to have a limited meaning in the context of the mandatory relief portion of section 473, subdivision (b). (E.g., *English v. IKON Business Solutions, Inc.* (2001) 94 Cal.App.4th 130, 148; *Leader*, *supra*, 89 Cal.App.4th at p. 618.) Accordingly, mandatory relief has been restricted to those dismissals that are "procedurally equivalent to a default" and, in particular, when the plaintiff's counsel failed to oppose the motion to dismiss. (*Peltier v. McCloud River R.R. Co.* (1995) 34 Cal.App.4th 1809, 1817 ["when the Legislature incorporated dismissals into section 473 it intended to reach only those dismissals which occur through failure to oppose a dismissal motion—the only dismissals which are procedurally equivalent to a default"]; *Jerry's Shell v. Equilon Enterprises, LLC* (2005) 134 Cal.App.4th 1058, 1070 ["'[A] default judgment is entered when a defendant fails to appear, and, under section 473, relief is afforded where the failure to appear is the fault of counsel. Similarly, under our view of the statute, a dismissal may be entered where a plaintiff fails to appear in opposition to a dismissal motion, and relief is afforded where the failure to appear is the fault of counsel.'"].)

2. *The Trial Court Erred in Denying Relief Under Section 473, Subdivision (b)*

The declaration submitted by the Burgoses and Nagel's trial counsel, even without considering the additional detail provided at the hearing on the motion for relief from the judgment of dismissal, was sufficient to show attorney fault. Mr. Torjesen explained certain personal and family stressors had affected his professional functioning, which led to his failure to recognize the deadline for filing the amended complaint; and he accepted full responsibility for that lapse. As discussed, to be entitled to mandatory relief, the

attorney's neglect or mistake need not be excusable. On appeal HLR Wright Road does not contend otherwise.[3]

Nonetheless, HLR Wright Road argues the dismissal entered in this case is not of the type subject to mandatory relief under section 473, subdivision (b), citing *Leader, supra,* 89 Cal.App.4th 603. To be sure, in *Leader* our colleagues in Division Two of this court held the mandatory relief provision is inapplicable to "discretionary dismissals based on the failure to file an amended complaint after a demurrer has been sustained with leave to amend" (*id*. at p. 620), but added the important qualification, "at least where, as here, the dismissal was entered after a hearing on noticed motions which required the court to evaluate the reasons for delay in determining how to exercise its discretion." (*Ibid*.) As the *Leader* court explained, "[R]elief is not allowed where, as here, the statutes governing the exercise of the court's discretion in the rulings leading to the dismissal require the court to evaluate the reasons for delay, and counsel's neglect did not prevent the plaintiffs from presenting those reasons." (*Id*. at p. 617.) The determinative question is whether the plaintiffs' attorney's conduct deprived them of their "day in court"—"the opportunity to appear and present evidence and argument in opposition to the motion to dismiss." (*Id*. at p. 621.)

Unlike the situation in *Leader, supra,* 89 Cal.App.4th 603, the Burgoses and Nagel had no opportunity to present argument in opposition to HLR Wright Road's proposed order to dismiss the action, which was submitted to the court without a motion, as

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[3] It also appears Mr. Torjesen's reasons for failing to timely file a second amended complaint satisfy the standard for excusable neglect. (See *Generale Bank Nederland v. Eyes of the Beholder Ltd., supra*, 61 Cal.App.4th at p. 1399 [neglect is excusable if "'a reasonably prudent person under the same or similar circumstances' might have made the same error"].) However, the Burgoses and Nagel only sought mandatory relief under section 473, subdivision (b), not discretionary relief. (See *366-386 Geary St., L.P. v. Superior Court* (1990) 219 Cal.App.3d 1186, 1199-1200 [generally only grounds specified in notice of motion may be considered by trial court]; *Luri v. Greenwald* (2003) 107 Cal.App.4th 1119, 1125 ["[s]pecification of issues is no less necessary when a motion invokes section 473 than when a motion is made pursuant to any other statute"].)

specified by section 581, subdivision (f)(2),[4] or ex parte application, as authorized by California Rules of Court, rule 3.3120(h).[5] The court then signed the order without a hearing or an evaluation of the reasons the amended complaint had not been filed.

HLR Wright Road insists the procedure it used was appropriate, citing the Supreme Court's decision in *Saddlemire v. Stockton Savings etc. Soc.* (1904) 144 Cal. 650, 655-656, for the proposition a defendant is entitled to have a dismissal entered without further notice to the plaintiff after the court has sustained a demurrer with leave to amend and the plaintiff has failed to file an amended pleading. *Saddlemire*, however, was decided before language was added to section 581 authorizing the court to enter a dismissal only after a motion requesting that relief had been filed. (See Stats. 1933, ch. 744, § 88, p. 1869 [amending former § 581(3)].) This language has been construed to permit dismissal upon the filing of an ex parte application. (See *Sadler v. Turner* (1986) 186 Cal.App.3d 245, 250; *Wilburn v. Oakland Hospital* (1989) 213 Cal.App.3d 1107, 1110; Cal. Rules of Court, rule 3.1320(h).) Nevertheless, the informal notice requirement for ex parte applications pursuant to California Rules of Court, rule 3.1203 is applicable. (*Datig v. Dove Books, Inc.* (1999) 73 Cal.App.4th 964, 977-978 & fns. 11-13; see generally Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2012) ¶ 7:150a, p. 7(I)-62.)

The validity of the procedure HLR Wright Road employed, however, is beside the point. Whether or not the trial court erred in entering the dismissal without a motion or

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[4] Section 581, subdivision (f)(2), provides the trial court may dismiss the complaint as to a particular defendant "after a demurrer to the complaint is sustained with leave to amend, the plaintiff fails to amend it within the time allowed by the court and either party moves for dismissal."

[5] Rule 3.1320(h) provides, "A motion to dismiss the entire action and for entry of judgment after expiration of the time to amend following the sustaining of a demurrer may be made by ex parte application to the court under Code of Civil Procedure section 581(f)(2)."

ex parte application and accompanying notice,[6] however informal, the Burgoses and Nagel had no opportunity to appear and present evidence and argument in opposition to the requested dismissal. Dismissal of their action based on their attorney's failure to file an amended pleading under these circumstances, therefore, was the procedural equivalent of a default; and mandatory relief under section 473, subdivision (b), was available. It was error for the court to deny their timely request to set aside the judgment of dismissal.

DISPOSITION

The order denying relief under section 473, subdivision (b), is reversed, and the cause remanded for further proceedings not inconsistent with this opinion. The Burgoses and Nagel are to recover their costs on appeal.

PERLUSS, P. J.

We concur:

WOODS, J.

JACKSON, J.

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6 At oral argument HLR Wright Road argued it gave the Burgoses more notice than required for an ex parte application by serving them with the proposed order of dismissal six days before the court signed it. Even if the validity of the procedure HLR Wright Road had used was relevant, the mere filing of the order of dismissal with the court was not equivalent to a properly filed ex parte application for relief, which must include a memorandum and a declaration regarding notice. (See rules 3.1201, 3.1204 [declaration must state name of party informed of notice, any response, whether opposition is expected or "[t]hat the applicant in good faith attempted to inform the opposing party but was unable to do so, specifying the efforts made to inform the opposing party; or . . . for reasons specified, the applicant should not be required to inform the opposing party"].)