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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

JUDITH DOLAN, as Trustee, etc. et al., Plaintiffs and Respondents, v. RAYMOND B. ARROWOOD, Defendant and Appellant.	B272440 (Los Angeles County Super. Ct. No. BC477954)

APPEAL from a judgment of the Superior Court of Los Angeles County, Holly E. Kendig, Judge. Affirmed.

John Fu for Defendant and Appellant.

M.K. Hagemann, Michael K. Hagemann, Clay R. Wilkinson for Plaintiffs and Respondents.

INTRODUCTION

Plaintiffs and respondents Judith Dolan, as Trustee of the Judith Dolan Revocable Living Trust, and others[1] brought an action against a number of defendants,[2] including Raymond B. Arrowood, for losses resulting from real estate construction loans that went bad. When defendant failed to respond to the first amended complaint, plaintiffs obtained his default. Over two and one-half years later, defendant moved to set aside the default. We are advised the trial court denied his motion. The record demonstrates a default judgment was entered against defendant on March 28, 2016. Defendant appeals, but has provided an inadequate record for our review. We affirm.

BACKGROUND

On February 27, 2012, plaintiffs filed a first amended complaint. Defendant was served by substituted service on April 18, 2013. On Monday, May 20, 2013, defendant, representing himself, filed a "motion to dismiss." A hearing date of September 13, 2013, was handwritten on the caption page. The motion was

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1 The other plaintiffs are: Sharon Mathes as Trustee of the Brauner Family Trust 10/28/97 and the Brauner Family Trust "B" 10/28/97; Robin Mochan and Sheryl Johnson as Co-Trustees of the Scott Family Trust 4/17/96; Esther Condon; Howard Feigenbaum and Barbara Feigenbaum as Co-Trustees of the Feigenbaum Family Trust; Philip Hays and Ann Hays as Co-Trustees of the Hays Family Trust; Lewis Rader and Carol Rader as Co-Trustees of the Lewis S. Rader and Carol J. Rader Revocable Trust dated 12/11/2007; Allan Locke; and Daniel N. Karsch.

2 No other defendant is a party to this appeal.

not accompanied by a proof of service. The record does not include court minutes for September 13, 2013. Defendant's default was entered May 30, 2013.

On January 25, 2016, the date set for trial as to non-defaulting parties, defendant—now represented by counsel—filed an ex parte application to set aside the default and to continue the trial date or sever him from the current proceedings. His declaration in support of the ex parte application indicated he appeared in court on September 13, 2013 and "learned" his motion to dismiss had been taken off calendar. He added he checked the superior court website in December 2015, and "learned" trial was scheduled for the following month. Despite these efforts, he stated under penalty of perjury he was advised of the default only after he retained an attorney, i.e., in late 2015 or early 2016. The declaration did not address why he did not learn of the entry of default earlier. The trial court denied the application.

Defendant then filed a noticed motion to set aside the default. The parties agree the trial court denied the motion at the hearing on March 21, 2016, but there is no minute order, reporter's transcript, or suitable substitute for a reporter's transcript to document what occurred during the hearing.

On March 28, 2016, the trial court entered judgment in plaintiffs' favor against numerous parties, including defendant. As to defendant, the judgment was by default. It holds him jointly and severally liable with other defendants in the amount of $1,295,057.54. Defendant timely noticed an appeal from the default judgment.

DISCUSSION

Defendant argues the trial court erred in denying his motion to set aside the default because he demonstrated mistake, inadvertence, or excusable neglect under Code of Civil Procedure section 473 (section 473). Alternatively, he argues the motion should have been granted on equitable grounds. Plaintiffs respond, in part, that defendant has not provided an adequate record and thus has forfeited his arguments on appeal. We agree with plaintiffs.

Whether under section 473 or on equitable grounds, a trial court's decision to deny relief to a defaulting defendant is affirmed unless the trial court abused its discretion. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981 (*Rappleyea*).) As reviewing courts do not presume error, the appellant has the responsibility to provide an adequate record to determine whether the trial court abused its discretion. (*Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 447.) Unless we have the opportunity to review the trial court's reasoning, we have no basis to conclude there was an abuse of discretion. (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 136.) Defendant failed to include a reporter's transcript or suitable substitute of the hearing on defendant's motion or the trial court's minute order denying the motion. Defendants forfeited his appellate arguments. (*Wagner v. Wagner* (2008) 162 Cal.App.4th 249, 259.)

The authorities upon which defendant relies provide no assistance. In *Colburn Biological Institute v. DeBold* (1936) 6 Cal.2d 631, no party sought section 473 relief. *Colburn* involved a motion in the reviewing court to dismiss an appeal based on the appellant's failure "to serve and file her proposed bill of exceptions within the time provided by [statute]." (*Id.* at p. 633.)

After the respondent complained in the trial court of the delay, the trial court certified the appellate record. The respondent complained the trial court lost jurisdiction to certify the appellate record when the appellant allowed the time to lapse. The Supreme court disagreed: "[I]t is well settled that certification of the record by the trial judge is the equivalent of relief from default under section 473 of the Code of Civil Procedure and within the exercise of the sound discretion of the trial court." (*Id.* at p. 634.)

In *Rappleyea, supra,* 8 Cal.4th 975, before the entry of default, the defendants contacted the court clerk to confirm the amount of the filing fee. The court clerk provided incorrect information, and the defendants' otherwise timely answer was rejected. (*Id.* at p. 978.) The error was quickly discovered, however, and the defendants' answer was thereafter filed, albeit eight days late. In the interim, however, the defendants' default had been entered. (*Id.* at p. 979.) The defendants, representing themselves, were in contact with the plaintiff's counsel who affirmatively misrepresented the relief available to them under section 473. (*Ibid.*)

The trial court denied defendants' motion for section 473 relief, and a divided Court of Appeal affirmed. (*Rappleyea, supra,* 8 Cal.4th at p. 980.) By 4-3, a divided Supreme Court reversed. The majority noted "mere self-representation is not a ground for exceptionally lenient treatment [and] . . . the rules of civil procedure must apply equally to parties represented by counsel and those who forgo attorney representation." (*Id.* at pp. 984-985.)

Nevertheless, the error by the court clerk, compounded by the plaintiff's counsel's misrepresentation of the law, persuaded

the majority that the trial court abused its discretion in denying section 473 relief. (*Rappleyea, supra,* 8 Cal.4th at p. 984.) By contrast, in this case, there was no alleged error by the court clerk or claimed misrepresentation by plaintiff's counsel. Defendant timely filed a demurrer, but it was not accompanied by a proof of service. Accordingly, it could not be heard. In the meantime, plaintiffs' counsel requested defendant's default. There is no suggestion defendant, or anyone on his behalf, contacted plaintiffs' counsel at any time. Instead, defendant, although acknowledging he checked the court's file, waited more than two years to move to set aside the default. The trial court did not abuse its discretion in denying relief.

DISPOSITION

The judgment is affirmed. Plaintiffs are awarded their costs on appeal.

DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.