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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

KEITH TROY, Plaintiff and Appellant, v. G. DE COHEN, INC. et al., Defendants and Respondents.	B287180 consolidated with No. B292359 (Los Angeles County Super. Ct. No. BC612093)

APPEAL from orders of the Superior Court of Los Angeles County, Edward B. Moreton, Judge. The order dated November 17, 2017 is reversed; the appeal of the order dated July 31, 2018 is dismissed.

Keith Troy in pro. per., for Plaintiff and Appellant.

William Boon for Defendant and Respondent.

Plaintiff and appellant Keith Troy obtained entry of default and default judgment against defendants and respondents Geraldine De Cohen and G. De Cohen, Inc. One year after entry of default, and four months after entry of default judgment, defendants moved to set aside both orders under the discretionary relief provision of Code of Civil Procedure section 473, subdivision (b) (section 473(b)).[1] The court granted the motion, and plaintiff appealed (No. B287180).

While plaintiff's appeal was pending, he filed in the trial court a motion to vacate as void the order setting aside the default and default judgment. The trial court denied the motion. It held that it lacked jurisdiction due to the pending appeal and indicated it would deny the motion in any event as an untimely request for reconsideration. Plaintiff filed a second appeal from that order (No. B292359). We consolidated the appeals for all purposes.

We agree with plaintiff that the trial court erred in setting aside the default and default judgment. The jurisdictional six-month period in which motions for discretionary relief from default under section 473(b) must be filed begins to run upon entry of default, not entry of default judgment. Defendants' request to set aside default was made long past the six-month deadline; the court accordingly lacked jurisdiction to consider it. The motion was timely to the extent it also sought to set aside the default judgment, but setting aside a default judgment while the default remains valid is an idle act that provides no effective relief.

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

We reject defendants' arguments that the set-aside order should be affirmed because it could have been properly issued under section 473.5, subdivision (a) or the trial court's inherent equitable discretion. Defendants' own evidence demonstrates that section 473.5, subdivision (a) does not provide a valid basis for relief, and the court specifically rejected defendants' proposed findings based on its equitable discretion. The order setting aside the default and default judgment is reversed. The appeal from the order denying plaintiff's motion to vacate is dismissed as moot.

BACKGROUND

On February 26, 2016, plaintiff, acting in propria persona, filed a 140-page, 822-paragraph complaint against defendants and numerous other parties not involved in the instant appeal. The complaint alleged that plaintiff had an oral agreement with other parties to rent a room in a Los Angeles house owned by G. De Cohen, Inc., of which De Cohen is the principal. The rental relationship quickly soured and ultimately ended when plaintiff was locked out of the premises. The complaint asserted 21 causes of action against various parties, including defendants, and sought nearly $500,000 in damages against defendants.

On April 1, 2016, plaintiff filed proofs of service representing that the complaint and summons were served on defendants.

On May 13, 2016, plaintiff filed a request for entry of default. The request was denied on May 23, 2016. Plaintiff later refiled the request and ultimately obtained entry of default against G. De Cohen, Inc. on September 12, 2016 and against De Cohen on September 27, 2016.

Plaintiff subsequently requested entry of default judgment. The trial court denied his request without prejudice on February 8, 2017, due to deficiencies in his proof of damages.

Plaintiff filed a second request for default judgment on May 30, 2017.[2] After holding a prove-up hearing the same day, the trial court entered default judgment against defendants and other parties in the amount of $67,185.00. Liability was joint and several. Plaintiff served defendants with notice of the default judgment on June 14, 2017.

On August 15, 2017, plaintiff obtained a writ of execution against defendants and the other liable parties. Plaintiff asserts that he used the writ of execution to "levy bank account(s)" belonging to De Cohen and to obtain liens on real property she owned.

On September 29, 2017, one year after entry of default and four months after entry of default judgment, defendants jointly filed a single motion to set aside the default and default judgment under section 473(b). In their supporting memorandum, defendants represented that relief was "sought on the grounds of mistake, inadvertence, surprise, and excusable neglect." They argued that defendant De Cohen, "an elderly woman who has no previously [*sic*] experience with the legal system," was not personally served with the summons and complaint and "was advised by someone[3] who represented that they had extensive

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[2] It is unclear why the request for entry of default judgment was not filed until May 30, 2017. The proof of service indicates that defendants were served with the relevant documents on May 8, 2017.

[3] In an accompanying declaration, De Cohen identified the "someone" as "a Mr. Jeff Anderson." She stated that other parties sued by plaintiff put her in contact with Anderson. De

experience with the legal system that she did not have to worry about the lawsuit and that she didn't need to do anything because she was not properly served." Notably, defendants did not attach an attorney affidavit of fault or seek relief under the mandatory prong of section 473(b). Defendants also did not mention section 473.5 or the court's inherent equitable discretion as bases to set aside the default and default judgment. Defendants separately requested stay of the writ of execution, which the court granted over plaintiff's objection on October 5, 2017.

Plaintiff filed an opposition to the motion to set aside. The court heard and granted the motion on November 3, 2017. In its minute order, it explained: "Defendant De Cohen has made sufficient showing of mistake. The motion was made within six months of entry of the default judgment. California law favors resolution of cases on the merits." The court signed and filed defendants' proposed order the same day; that order did not provide additional explanation but stated that the ruling was made "pursuant to CCP § 473(b)."

Plaintiff timely appealed the ruling. While that appeal was pending, plaintiff on May 1, 2018 filed a motion to vacate the set aside order as void because defendants' section 473(b) motion had not been timely filed. Defendants opposed the motion to vacate, characterizing it as an improper motion for reconsideration. Ignoring plaintiff's timeliness argument, they also contended that the trial court "clearly had ample basis" to grant the motion pursuant to its inherent equitable powers.

Cohen also asserted that the other parties advised her "that I did not need to worry about the matter," because they had been the ones who had personal dealings with plaintiff.

The court heard and denied plaintiff's motion to vacate on July 19, 2018. In its order after hearing, which defendants prepared, the court explained that it "lacks jurisdiction to grant the Motion due to Plaintiff's pending appeal of the Court's prior Order to Vacate the Default and Default Judgments entered against said defendants." The court further stated that even if it had jurisdiction, it would deny the motion as an untimely and improper motion for reconsideration.

However, the court struck the following paragraph defendants included in their proposed order: "At the November 3, 2017 hearing on Defendants' Motion to Vacate Defaults and Default Judgments, the Court determined under its inherent equity power to grant relief from said defaults and default judgments finding that they were procured by extrinsic fraud or mistake, and that Defendants established excusable neglect which resulted in the entry of the defaults and default judgments. The defendants demonstrated that they have a meritorious case; that they had a satisfactory excuse for not presenting a defense to the original action; and the defendants demonstrated diligence in seeking to set aside the defaults and default judgments once they had been discovered."

Plaintiff timely appealed the order denying his motion to vacate. We later granted his request to consolidate his two appeals for all purposes.

DISCUSSION

The purpose of section 473(b) is to promote the determination of actions on their merits. (*Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 839.) To that end, it offers two avenues, one discretionary and one mandatory, for parties to obtain relief

from defaults, default judgments, and other orders. The discretionary relief portion of section 473(b) is at issue here.[4] It provides that the trial 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 shall not be granted, and shall be made in a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken." (§ 473, subd. (b).) As the use of the word "may" suggests, the trial court has considerable discretion to award relief under this provision. We review its decision for abuse of that discretion. ((*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 980-981 (*Rappleyea*).)

The discretionary portion of section 473(b) is intended to be "broad in scope." (*Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses,* LLC, *supra*, 61 Cal.4th at p. 838.) Unlike the mandatory provision, which is more narrowly construed (see

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[4] The mandatory relief portion provides: "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." No attorney affidavit was filed here.

Jackson v. Kaiser Foundation Hospitals, Inc. (2019) 32 Cal.App.5th 166, 174-175), the discretionary provision may afford relief from a wide variety of "orders" or "proceedings." The price of that breadth, however, is the strict requirement that a motion for relief must be filed "in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken." (§ 473, subd. (b).) "This six-month time limitation is jurisdictional; the court has no power to grant relief under section 473 once the time has lapsed." (*Austin v. Los Angeles Unified School District* (2016) 244 Cal.App.4th 918, 928.) The time begins to run when the order or proceeding in question "was taken." For purposes of this provision, a default is considered its own proceeding—which means a request to set aside a default must be made within six months of its entry. As explained in a leading treatise, "The motion for discretionary relief must be filed within 6 months after the clerk's entry of default. The motion is ineffective if filed thereafter, even if it is within 6 months after entry of the default *judgment* (these are separate procedures)." (Weil et al., Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2018) ¶ 5:279; see also *Pulte Homes Corp. v. Williams Mechanical, Inc.* (2016) 2 Cal.App.5th 267, 273 [holding that the trial court "could not set aside the default" under section 473(b) where the motion "was filed less than six months after entry of default judgment, but more than six months after entry of default"]; *Rappleyea*, *supra*, 8 Cal.4th at p. 980 ["more than six months had elapsed from the entry of default, and hence relief under section 473 was unavailable"].)

The court entered default against defendants in September 2016. They did not file their section 473(b) motion until September 2017, a year later and six months beyond the six-

month deadline. The court accordingly was without power to grant relief from default under section 473(b). And with the default undisturbed, it would be futile for the trial court to set aside the default judgment; plaintiff could simply reapply for entry of default judgment. (See *Pulte Homes Corp. v. Williams Mechanical, Inc.*, *supra*, 2 Cal.App.5th at p. 273; see also *Sugasawara v. Newland* (1994) 27 Cal.App.4th 294, 297 ["Unless the default itself is vacated, little is gained by vacating the default judgment."] Weil et al., Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2018) ¶¶ 5:413-5:414.1.) Granting discretionary relief in the absence of jurisdiction to do so is an abuse of discretion, as is granting futile relief.

Defendants argue—with support from *Rappleyea*, *supra*, 8 Cal.4th at p. 981—that the set-aside order should be upheld where "there is another ground on which the court could properly have denied the motion to set aside the default." "The question is one of the court's equitable power. If the court could properly refuse to invoke that power to vacate the order, its ruling and ensuing judgment must be sustained." (*Rappleyea*, *supra*, 8 Cal.4th at p. 981.) This proposition also implicates fundamental principles of appellate review: we presume a judgment or order is correct unless the appellant shows otherwise (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564), and "[w]e are required to uphold the ruling if it is correct on any basis, regardless of whether such basis was actually invoked." (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32.) Defendants contend the court properly could have granted relief under section 473.5, subdivision (a) or its inherent equitable powers. Neither basis is supported by the record.

Section 473.5, subdivision (a) provides: "When service of a summons has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered against him or her in the action, he or she may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the action. The notice of motion shall be served and filed within a reasonable time, but in no event exceeding the earlier of: (i) two years after entry of a default judgment against him or her; or (ii) 180 days after service on him or her of a written notice that the default or default judgment has been entered." Defendants' motion to set aside may have been timely under this provision. But De Cohen's declarations demonstrate that she had actual notice of the summons and complaint in time to respond; she attributed her failure to do so to bad advice. In one declaration, she averred, "I became aware of the litigation when I was contacted by representatives from [other parties named in the complaint] and advised that a lawsuit had been filed against all of us by Mr. Troy. However, they advised me that I did not need to worry about the matter. . . . I told the man that documents had been left with my daughter at one of my business addresses but he told me this was not proper service and I shouldn't worry or do anything. . . . Had I not made such a mistake, I would have responded to Mr. Troy's complaint and I would have established in court that I have in no way damaged Mr. Troy and he should have no recovery against me." In another, she stated, "I told the [*sic*] Mr. Anderson that documents had been left with my daughter at one of my business addresses but he told me this was not proper service and I shouldn't worry or do anything." In light of De Cohen's admissions that she had actual notice of the action, section 473.5,

subdivision (a) does not provide a valid basis for relief.

The record also demonstrates that the court did not rely upon its broad equitable powers to set aside the default and default judgment. In defendants' proposed order relating to plaintiff's motion to vacate, they included the language "the Court determined under its inherent equity power to grant relief from said defaults and default judgments," and proposed further findings relevant to the exercise of the court's equity power. The court struck all the proposed language when it issued the order. While we indulge all intendments and presumptions in support of an order on matters as to which the record is silent (*Denham v. Superior Court*, *supra*, 2 Cal.3d at p. 564), we do not presume findings a trial court expressly rejected. After a default judgment has been obtained, "equitable relief may be given only in exceptional circumstances," due to the strong public policy in favor of the finality of judgments. (*Rappleyea*, *supra*, 8 Cal.4th at pp. 981-982.) The trial court found that De Cohen made a mistake, but rejected defendants' proposed findings relevant to a finding of exceptional circumstances. "When the record clearly demonstrates what the trial court did, we will not presume it did something different." (*Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 39 Cal.App.4th 1379, 1384.)

The order to set aside is reversed. In light of this decision, plaintiff's appeal of the order denying his motion to vacate is moot.

DISPOSITION

The set-aside order dated November 3, 2017 is reversed. Plaintiff's appeal of the order dated July 31, 2018 is dismissed as moot. The parties are to bear their own costs of appeal.

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COLLINS, J.

We concur:

MANELLA, P. J.

CURREY, J.