Filed 9/5/18 DACM Project Management, Inc. v. Cade CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

DACM PROJECT MANAGEMENT, INC., et al., Plaintiffs and Respondents, v. SHERRY HACKNEY CADE, Defendant and Appellant.	B276814 (Los Angeles County Super. Ct. No. BC534890)

Appeal from a judgment and an order of the Superior Court of Los Angeles County, Rafael A. Ongkeko, Judge. Reversed with directions.

John L. Dodd & Associates, John L. Dodd, and Benjamin Ekenes for Defendant and Appellant.

Law Office of Richard A. Grossman and Richard A. Grossman for Plaintiffs and Respondents.

Defendant Sherry Hackney Cade appeals from a default judgment entered in favor of plaintiffs DACM Property Management, Inc. (DACM) and Deborah Dugan in the amount of $2,501,072. We agree with defendant that the court erred in denying her motion to set aside her default and therefore reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

DACM manages construction projects. Dugan is its sole shareholder and officer.

On February 6, 2013, DACM obtained a stipulated judgment in the amount of $505,030 against defendant's husband, Alan Cade (Alan).[1] Alan thereafter executed an interspousal transfer grant deed transferring to defendant his community interest in their residence. Around the same time, Alan commenced a marital dissolution proceeding against defendant.

In August 2013, DACM sued Alan and the defendant to set aside the interspousal deed as a fraudulent transfer. The trial court granted that relief in 2015, which we affirmed in an unpublished opinion. (*DACM Project Management, Inc. v. Cade* (Feb. 28, 2018, B265906) [nonpub. opn.].)

In January 2014, about six months after filing the fraudulent transfer lawsuit, plaintiffs commenced the lawsuit underlying this appeal by filing a complaint against defendant for causes of action described as: (1) libel; (2) slander; (3) eavesdropping on or recording confidential communications; (4) wrongful disclosure of telegraphic or telephonic communications; (5) false light; (6) intentional interference with prospective economic relations; and (7) intentional infliction of emotional distress. On the third and fourth causes of action, plaintiffs

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[1] We refer to Alan Cade by his first name to avoid confusion. We intend no disrespect.

requested "damages in the sum of three times the amount of [p]laintiffs' actual damages to be adduced according to proof or $5,000 per violation, whichever is greater." On the remaining claims, plaintiffs sought $10 million in damages. Plaintiffs also sought injunctive relief and punitive damages.

The complaint was based in part on allegations that defendant had published defamatory statements concerning plaintiffs on Internet websites, recorded confidential settlement discussions between Dugan and Alan, and disclosed to third parties certain text messages that Dugan had sent to Alan.

Plaintiffs served defendant with the summons and complaint on February 13, 2014.

On March 6, 2014, defendant, representing herself in propria persona, filed a motion to strike the complaint under California's anti-SLAPP statute (Code Civ. Proc., § 425.16),[2] which the court denied on May 2, 2014. The court did not specify a particular date by when defendant was required to answer the complaint.

On May 23, 2014, defendant requested, and plaintiffs' counsel granted, an extension of time until June 16, 2014, to answer the complaint.

On June 25, 2014, defendant appeared at a case management conference. At that time, plaintiffs' counsel informed defendant that he had not received her answer and that plaintiffs would soon request her default.

Plaintiffs filed a request for entry of default against defendant on August 14, 2014, which the court denied on procedural grounds.

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[2] Unless otherwise specified, statutory references are to the Code of Civil Procedure.

On September 10, plaintiffs filed a second request for entry of default, which the court clerk entered that day.

On March 10, 2015, defendant filed, in propria persona, a motion to set aside the default under section 473, subdivision (b), on grounds of inadvertence, surprise, mistake, or excusable neglect. She supported the motion with her declaration in which she stated the following: In March 2014, Alan physically attacked her, requiring treatment in a hospital emergency room; as a result of the injuries, she had to wear a sling for her right arm; in April 2014, she had applied for and obtained a restraining order against Alan; in the spring of 2014, she developed adhesive capsulitis in her right shoulder; she has a life-threatening genetic blood disorder that requires daily injections of medicine and, while "trying to defend" herself in three lawsuits, she "started to skip injections," which caused "fatigue, paleness and weight gain"; and, beginning in September 2014, after defendant's health insurance was cancelled, she stopped taking the injections, which made the fatigue "debilitating."

In their opposition to the motion, plaintiffs requested that the motion be denied or, in the alternative, that defendant be ordered to pay plaintiffs reasonable attorney fees in the amount of $2,000, "a penalty of $1,000[,] or any other amount the court determines to be just and proper."

The court denied defendant's motion on April 21, 2014, because defendant had failed to demonstrate mistake, inadvertence, surprise, or excusable neglect. The court explained that defendant "claims she was unable to defend herself due to her injuries, but it is not disputed that she was actively litigating this *and other cases* during the time she had to file an answer, including the extension of time." (Boldface omitted.) The court added that "[b]ased on [defendant's] declaration,

which is not reliably clear in detail, dates, or causal effect on her default, her health problems did not begin to impact her ability to litigate until late summer of 2014. At the hearing, [defendant] conceded that waiting to file this motion until the six-month deadline was a conscious decision, knowing it would be harder to get relief after the six-month date." The court further stated that "[a]s a procedural matter," defendant's motion "fails because she did not file a copy of her proposed answer."

Plaintiffs submitted an application to enter default judgment against defendant in October 2015. The court granted the application on April 26, 2016, and entered judgment against defendant in the amount of $2,501,072. The court also enjoined defendant from, among other actions, publishing particular defamatory statements, recordings, and text messages.

On June 14, 2016, defendant filed a motion to set aside the default judgment, which the court denied on July 8.

Defendant timely appealed from the default judgment and from the July 8, 2016 order denying her motion to vacate the default judgment.

DISCUSSION

Defendant contends that the trial court erred in denying her motion to set aside the entry of her default.[3] We agree.

Under section 473, subdivision (b), "a court has discretion to relieve a party 'from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence,

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[3] Although the order denying defendant's motion to set aside the default is not appealable, defendant may challenge that order on appeal from the resulting default judgment. (See *First American Title Co.* v. *Mirzaian* (2003) 108 Cal.App.4th 956, 960.)

surprise, or excusable neglect.' " (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 979.) Although the lack of prejudice to the plaintiff is not required to establish a right to relief, "[i]f granting relief will not prejudice the [plaintiff] (other than losing the advantage of the default), 'the original negligence in allowing the default to be taken will be excused on a weak showing.' " (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2018) ¶ 5:362, p. 5-106 (Weil & Brown), quoting *Aldrich v. San Fernando Valley Lumber Co., Inc.* (1985) 170 Cal.App.3d 725, 740.)

The trial court's discretion in granting or denying relief under section 473 "is not unlimited and must be ' "exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." ' " (*Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233.) Because "the law strongly favors trial and disposition on the merits, any doubts in applying section 473 must be resolved in favor of the party seeking relief from default." (*Elston v. City of Turlock*, *supra*, 38 Cal.3d at p. 233.)

In light of the policy favoring disposition of disputes on the merits, we scrutinize an order denying relief under section 473 "more carefully than an order permitting trial on the merits." (*Elston v. City of Turlock*, *supra*, 38 Cal.3d at p. 233.) To the extent this scrutiny conflicts with the general rule of deference to the trial court's exercise of discretion, "the policy favoring trial on the merits prevails." (*Id.* at p. 235.) "Reversal is particularly appropriate where relieving the default will not seriously prejudice the opposing party." (*Ibid.*)

Here, defendant was served with the summons and complaint on February 13, 2014. During the relevant time frame, defendant was involved in her divorce proceeding—including obtaining a restraining order against Alan—and defending the previously-filed fraudulent conveyance action. As the trial court observed, defendant "was

actively litigating this and other cases during the time she had to file an answer." (Boldface and italics omitted.) The defendant's litigation activity apparently suggested to the trial court that defendant's health issues were not so debilitating that she was still able to actively litigate, and thus did not excuse her failure to answer in this case. Defendant's active litigation in propria persona on three pending matters while dealing with physical injuries and other health issues, however, also suggests that the cumulative effect and burden made it more likely that she would make a mistake or neglect a filing date. Although pro se litigants are generally bound by the same rules as other litigants (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246-1247) and "mere self-representation is not a ground for exceptionally lenient treatment" (*Rappleyea v. Campbell*, *supra*, 8 Cal.4th at p. 984), the court may consider the party's lack of representation (*ibid.*; *Pete v. Henderson* (1954) 124 Cal.App.2d 487, 491; cf. *Harding v. Collazo* (1986) 177 Cal.App.3d 1044, 1055 [court has a duty "to see that a cause is not defeated by the mere inadvertence of a lay litigant"]). Here, where it appears that defendant herself, not counsel, was dealing with the various litigation matters facing her, such consideration is appropriate.

As defendant contends, just because she "was capable of engaging in *some* litigation," does not mean that she was "capable of fulfilling *all* required tasks during the time period." Although the court's interpretation of defendant's litigation activity is plausible, so is the alternative explanation. In the context of a motion for relief from default and in light of the strong policy favoring trial on the merits, the court should have resolved doubts on this point in favor of granting defendant relief from default.

The policy favoring trial on the merits should also have shaped the court's interpretation of defendant's declaration as to the timing

of her health problems. It is true, as the court stated, that the declaration is "not reliably clear in detail, dates, or causal effect on her default." The court, however, construed the ambiguity against defendant when it interpreted her declaration to mean that "her health problems did not begin to impact her ability to litigate until late summer of 2014." Although defendant referred to September 2014 as the month when her insurer cancelled her health insurance, which led to her stopping her medical injections altogether, a fair reading of her declaration also indicates that she had "started to skip injections" sometime earlier, which caused fatigue, among other symptoms. Defendant also states that she suffered injuries as a result of Alan's attack in March 2014 and developed adhesive capsulitis beginning in late spring 2014. The problems with her right arm apparently required her to wear a sling, which affected her ability to defend against the lawsuits. Although plaintiffs raise doubts as to whether or to what extent defendant's health problems actually prevented her from filing an answer to the complaint, such doubts should have been resolved in favor of granting relief.

The court also relied on defendant's "procedural" failure to file a copy of her proposed answer. Section 473, subdivision (b) provides that an application for relief under that statute "shall be accompanied by a copy of the answer or other pleading proposed to be filed." This requirement was added to section 473 in 1917 to support what was then a judicially-imposed requirement that the party seeking relief provide an affidavit of merit establishing a prima facie defense to the complaint. (*Bailey v. Taaffe* (1866) 29 Cal. 422, 425-426; *First Small Business Inv. Co. v. Sistim, Inc.* (1970) 12 Cal.App.3d 645, 649-650.) The requirements were criticized by courts and the State Bar, and in 1981, the Legislature abrogated the affidavit of merit requirement. (*Uriarte v. United States Pipe & Foundry Co.* (1996) 51 Cal.App.4th

780, 789; Stats. 1981, ch. 122, § 2, p. 863; Sen. Com. on Judiciary, com. on Sen. Bill No. 357 (1981-1982 Reg. Sess.) [the affidavit of merit requirement is " 'a trap for unwary lawyers and litigants' . . . that serves no useful purpose"].) Although the requirement that a proposed answer accompany the motion for relief remains, its "only purpose . . . is to require defendant to show good faith and a readiness to respond if the motion is granted." (Weil & Brown, *supra*, ¶ 5:387.2, p. 5-112.) As both sides acknowledge, substantial compliance with this requirement, such as filing the answer at the hearing on the motion, is sufficient. (See *Sousa v. Capital Co.* (1963) 220 Cal.App.2d 744, 760; *County of Stanislaus v. Johnson* (1996) 43 Cal.App.4th 832, 838.)

Here, the court stated: "At the hearing, [defendant] explained that she had the proposed answer, but decided to withhold its filing" for strategic reasons. Although the court's order is not perfectly clear, it suggests that defendant had a proposed answer with her at the hearing on the motion. Indeed, there is nothing in our record to suggest that defendant did not have a proposed answer with her at the hearing or that the trial court had requested a copy of the answer at that time. Under these circumstances, it appears she could have, and presumably would have, filed her answer if the court had granted her motion for relief. (See *Job v. Farrington* (1989) 209 Cal.App.3d 338, 341 [the "moving party may not file an answer until the court has ruled on the motion for relief"].) Under these circumstances and in light of the "readiness to respond" purpose of the requirement, defendants' prior failure to file the proposed answer does not support the denial of her motion. Moreover, to ensure that there is no further delay in filing the answer, our reversal of the judgment is conditioned upon defendant's prompt filing of her answer.

In their briefs on appeal, both sides discuss whether defendant filed her motion within a reasonable time, as required by section 473, subdivision (b), where defendant filed the motion six months after the entry of default. Although the trial court noted this requirement and discussed facts relevant to this issue, it did not make any express finding as to whether the motion was filed within a reasonable time. Even if we infer from the court's ruling a finding that the motion was not filed within a reasonable time, we would reject that determination. Although defendant's declaration is, as discussed above, not perfectly clear as to the timing of health issues that may have delayed or interfered with her ability to file the motion, it is sufficient to establish that the filing of the motion within the six-month statutory deadline was reasonable. To the extent the trial court may have concluded otherwise, the conclusion is inconsistent with the strong policy favoring trial on the merits, and must be rejected.

Lastly—but significantly—plaintiffs have made no showing that they would be prejudiced by setting aside the default; they do not point to any witnesses or evidence that would be unavailable if their claims were decided on the merits. In contrast to the lack of prejudice to the plaintiffs, defendant faces a $2.5 million judgment imposed without any scrutiny by defendant of the merits of plaintiffs' claims. Although it may be that plaintiffs will prove their claims and be entitled to recover a substantial sum from defendant, that result, we conclude, must be determined upon due consideration of the evidence and the applicable law.[4]

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[4] Because we reverse the entry of default, we need not address the parties' arguments concerning the sufficiency of the allegations and evidence supporting the default judgment. For the guidance of the parties and the court, however, we note that we agree

Because the trial court denied defendant's motion to set aside the default, it did not reach plaintiffs' alternative request that defendant pay their attorney fees in the amount of $2,000, or pay another amount that is "just and proper." We agree with plaintiffs that the court has the authority and the discretion to order such relief under section 473, subdivisions (b) and (c). Under section 473, subdivision (b), the court may impose "any terms as may be just," which courts have construed as authorizing an award of attorney fees to the non-moving party as a condition to setting aside the default. (See *Vanderkous v. Conley* (2010) 188 Cal.App.4th 111, 118-119; Weil & Brown, *supra*, ¶ 5:404, p. 5-115.) Under subdivision (c)(1) of section 473, the court, in granting relief from dismissal, may "[i]mpose a penalty of no greater than one thousand dollars ($1,000) upon an offending attorney or party," or "[g]rant other relief as is appropriate." (§ 473, subd. (c)(1)(A) & (C).) After remand, the court shall have the opportunity to exercise its discretion to impose the terms, penalty, or other relief authorized under section 473.

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with defendant that plaintiffs have failed to state a cause of action for violation of Penal Code section 637 because that statute, which prohibits the disclosure of "telegraphic or telephonic" messages by persons not a party to the communication, does not apply to the disclosure of text messages as alleged in plaintiffs' complaint.

DISPOSITION

The judgment and the entry of default are conditionally reversed. Upon remand, the court shall direct that defendant file her answer to the complaint no later than 10 days after service upon her of notice of such direction. If defendant fails to do so, the court shall reinstate the entry of default nunc pro tunc and reinstate the judgment. The court shall also exercise its discretion with respect to plaintiffs' request for an award of their attorney fees or other relief.

The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur.

JOHNSON, J.

BENDIX, J.