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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

HENRY FRANCO, Plaintiff and Respondent, v. WALTER FRANCO et al., Defendants and Appellants.	B234298 (Los Angeles County Super. Ct. No. YC062177)

APPEAL from a judgment of the Superior Court of Los Angeles County. Cary Nishimoto, Judge. Reversed.

Schiffer & Buus, Eric M. Schiffer, Leslie F. Vandale for Defendants and Appellants.

Smith Law, Michael Smith for Plaintiff and Respondent.

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Defendants Walter Franco, Sandra Franco, and Carpet Pros, Inc. appeal the default judgment entered in favor of plaintiff Henry Franco. Defendants also seek review of the trial court's orders denying their motions to vacate the entry of default and to quash service of process. Because we determine that defendants' motion to vacate entry of default ought to have been granted, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

In April 2010, plaintiff sued his brother Walter Franco, his sister-in-law Sandra Franco and Carpet Pros, Inc., a California corporation, for Labor Code violations and wrongful termination of employment. According to the complaint, from September 2005 until July 23, 2009, plaintiff worked as a warehouseman at Carpet Pros' warehouses from 7:00 a.m. to 7:00 p.m. Monday through Saturday 52 weeks a year. He also worked as an apartment manager and handyman at four apartment buildings owned by the Francos from 7:00 p.m. until 10:00 p.m. Monday through Saturday and from 8:00 a.m. to 10:00 p.m. on Sundays during the same time period. Plaintiff was paid $400 per week, less than that required by California's minimum wage and overtime laws. Based on the foregoing allegations, plaintiff claimed that he was "entitled to recover from Defendants, and each of them, pursuant to California [Labor] Code § 1194, the unpaid balance of the full amount of minimum wages and overtime to which he is entitled, which Plaintiff alleges to total $110,000.00, plus interest at the legal rate until paid, which at the time of this filing is approximately $17,206." Plaintiff also alleged that he was entitled to receive $16,764 based on defendants' refusal to permit lunch and rest breaks pursuant to Labor Code section 226.7, subdivision (a); liquidated damages of $127,210 pursuant to Labor Code section 1194.2 for failure to pay the minimum wage; and waiting time penalties of $5,280 pursuant to Labor Code section 203. Thus, the complaint's prayer for relief requested compensatory damages totaling $276,460. Plaintiff also requested $500,000 in punitive damages (based on defendants' "exceptionally egregious" conduct in taking advantage of a familial relationship of trust), attorney fees and costs of suit.

On its face, the complaint is problematic. For instance, plaintiff's claim that he worked 104 hours each and every week for nearly four years, never receiving a day off or taking a lunch or rest break, is inherently incredible. Indeed, the complaint does not actually state that plaintiff worked 104 hours a week, but that he was "assigned" to work those hours. The significance of this phraseology, if any, is not explained. In addition, the complaint contains no allegations to explain why the corporation would be liable for the wages due from the individual defendants, or why the Francos would be liable for the wages due from Carpet Pros. Plaintiff simply treats the two individuals and the corporation as a single employer, and aggregates the wages due from two discrete jobs for purposes of computing the overtime compensation due.

Moreover, while the complaint alleges very specific amounts of damages for each alleged Labor Code violation, it does not indicate how plaintiff arrived at those figures. For example, neither the minimum wage, nor the overtime rate, nor the interest rate used to calculate plaintiff's damages is specified. And it appears that plaintiff calculated his liquidated damages for the minimum wage violation by simply doubling his compensatory damages for his combined minimum wage and overtime claims. However, Labor Code section 1194.2 specifically states that liquidated damages awarded thereunder may not include overtime compensation. Similarly, Labor Code section 203 provides a so-called "waiting time" penalty of 30 days additional wages if an employer does not pay within 72 hours of discharge the wages then owed to the employee, while Labor Code section 226.7 entitles an employee to "one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided." Plaintiff claims entitlement to $5,280 in waiting time penalties and $16,764 for missed breaks, but fails to explain the computational basis of these numbers.

According to plaintiff's proof of service, defendants' answer to the complaint was due on June 23, 2010. Two days later, on June 25, 2010, plaintiff filed a Request for Entry of Default, asking the court to enter judgment in the amount of $282,815, consisting of $276,460 in compensatory damages, plus costs of $355 and attorney fees of $6,000. The clerk entered the default on that date.

Immediately upon learning of the entry of default, defendants directed their counsel to seek to set it aside.[1] On August 3, 2010, less than six weeks after default was entered and well within the six-month timeframe set forth in Code of Civil Procedure section 473, subdivision (b), defendants moved to vacate the entry of default. In their supporting papers, they explained that "One of the Defendants, Walter Franco, returned to his place of business on June 1, 2010 after a long absence from his office. On his desk was a copy of the Plaintiff's Summons and Complaint. The Plaintiff filed for a default judgment against the Defendants on June 25, 2010, which was 5 days before the Defendants' 30 day deadline to submit an Answer to the Complaint." Thus, defendants mistakenly believed that the 30-day period in which they had to answer the complaint commenced to run when they first had actual notice of the lawsuit, regardless of the service date specified in the proof of service. Because they first learned of the action on June 1, 2010, they mistakenly concluded that they had until July 1, 2010 to file their answer. It was this mistake which resulted in entry of default.

Plaintiff opposed the motion. He did not, however, argue that defendants did not make a mistake, or that their mistake did not excuse their failure to answer the complaint. Instead, plaintiff's counsel, Michael Smith, filed a declaration repudiating defendants' account of service of the summons and complaint. He explained that he personally served the summons and complaint on Mr. and Mrs. Franco on May 24, 2010, and that their representations that they were out of the office on that date were untrue. Thus, in opposition to the motion to vacate, plaintiff argued only that defendants had been properly served. This was not, however, a motion to quash based on lack of service, but a motion to vacate a default, based on defendants' mistaken understanding of the date their answer was due.

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[1] In the usual case, a litigant in the position in which the defendants found themselves – in default a very short time after their answer was due – would have simply made arrangements with plaintiff's counsel to set aside the default and answer the complaint. The record does not reveal whether defendants' counsel made this request and if so, how plaintiff's counsel responded.

Walter Franco appeared in pro. per. at the October 18, 2010 hearing on the motion to vacate; Carpet Pros and Mrs. Franco neither appeared nor were represented. The trial court inquired if Mr. Franco had assistance in preparing the motion. Mr. Franco responded that he did, and that he spoke with his attorney over the phone, but could not afford to have him appear at the hearing. The court stated, "All right. Well, the technical problem is that I can't do anything about that. The tentative ruling is going to have to stand unless you have – counsel has some issue." The court denied the motion. A subsequent motion for reconsideration was also denied.

On October 29, 2010, plaintiff submitted his Request for Court Judgment, which included (1) an amended statement of damages which increased the amount of damages sought to $342,016.12, including $86,380.08[2] in damages for lost earnings; (2) his declaration, which essentially repeated the factual allegations of the complaint; (3) his attorney's declaration, which essentially repeated the wrongful termination and Labor Code wage and penalty claims of the complaint; and (4) a chart which plaintiff's declaration describes as "a spreadsheet showing that the amount of my unpaid minimum wages and overtime within the three years statute of limitations totals $118,660.52, based upon my actual hours worked for defendants during my employment." While plaintiff describes this exhibit as a "spreadsheet," suggesting that it reveals the figures used to calculate his claims, it is not. Rather, the chart simply shows "104" as the "actual hours worked, weekly" and "$1,155" as the "wages lawfully earned" each week during 2007, without indicating what number or numbers were multiplied by 104 or a portion thereof to arrive at $1,155.

The trial court initially rejected plaintiff's prove-up package; it requested "more detailed evidence to corroborate the hours worked and wages earned including time

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[2] Again, the source of this number is a mystery. At the time of his declaration, plaintiff had been unemployed for 15 months. As an unskilled laborer at a time when the unemployment rate exceeded 10 percent, any employment he could get would presumably pay the minimum wage of $8 an hour, in which case (assuming a full-time job) he would have lost earnings of $20,800 during his 15 months of unemployment.

sheets, pay stubs, bank account statement etc." In response, plaintiff submitted check stubs which indicated that Carpet Pros issued him a check each week during the relevant period in the amount of $400. While these materials were evidence that Carpet Pros employed plaintiff at a wage of $400 per week, no evidence (other than plaintiff's declaration) was submitted to establish that plaintiff had actually worked from 7:00 o'clock in the morning until 10:00 o'clock at night (except for Sundays, when he did not have to report to work until 8:00 a.m.), without any meal or rest breaks, seven days a week for approximately 200 consecutive weeks. The trial court nevertheless entered a default judgment in favor of plaintiff in the amount of $342,371.12.

On May 12, 2011, after having retained new counsel, defendants filed a Motion to Quash and Set Aside Default on the basis of defective service of process. The motion was supported by the declaration of each of the Francos which explained that they had been in Lake Havasu, Arizona the last week of May 2010, and specifically on the date the summons and complaint were purportedly served on them. Mrs. Franco's credit card statements reflecting charges originating in Lake Havasu during that week accompanied her declaration. The motion was denied on June 14, 2011.

Defendants timely appealed the denial of the motion to quash, the default judgment, and the denial of the motion to vacate, which is reviewable upon appeal of the default judgment. (*Jade K. v. Viguri* (1989) 210 Cal.App.3d 1459, 1465-1466.)

DISCUSSION

Defendants maintain that the trial court abused its discretion in denying their motion to vacate entry of default, filed in good faith shortly after default was entered. We concur, as we explain.

Code of Civil Procedure section 473 "permits the trial court to 'relieve a party . . . from a judgment, order, or other proceeding taken against him or her through his or her

mistake, inadvertence, surprise or excusable neglect.'[3] A motion seeking such relief lies within the sound discretion of the trial court, and the trial court's decision will not be overturned absent an abuse of discretion. (*Weitz v. Yankosky* (1966) 63 Cal.2d 849, 854; *Martin v. Cook* (1977) 68 Cal.App.3d 799, 807.) However, the trial court's discretion 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."' (*Ibid.; Bailey v. Taaffe* (1866) 29 Cal. 423, 424.)" (*Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233.)

Code of Civil Procedure section 473 "is often applied liberally where the party in default moves promptly to seek relief, and the party opposing the motion will not suffer prejudice if relief is granted. (*Berri v. Rogero* (1914) 168 Cal. 736, 740; see also *Nilsson v. City of Los Angeles* (1967) 249 Cal.App.2d 976 [applying former Gov. Code, § 912, subd. (b)(1) repealed 1965, now § 946.6, subd. (c)(1)].) In such situations 'very slight evidence will be required to justify a court in setting aside the default.' (*Berri v. Rogero, supra*, 168 Cal. at p. 740; *Carbondale Machine Co. v. Eyraud* (1928) 94 Cal.App. 356, 360.)" (*Elston v. City of Turlock*, *supra*, 38 Cal.3d at p. 233, fn. omitted.)

"Moreover, because the law strongly favors trial and disposition on the merits, any doubts in applying [Code of Civil Procedure] section 473 must be resolved in favor of the party seeking relief from default [citations]. Therefore, a trial court order denying relief is scrutinized more carefully than an order permitting trial on the merits. (*Brill v. Fox* (1931) 211 Cal. 739, 743–744; *Flores v. Board of Supervisors* [(1970)] 13 Cal.App.3d [480,] 483.)" (*Elston v. City of Turlock*, *supra*, 38 Cal.3d at p. 233.) The party seeking section 473 relief must show that he acted in good faith, and that the default was the result of his mistake, inadvertence, surprise or excusable neglect. (*Price v. Hibbs* (1964)

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[3] "Section 473 provides in relevant part as follows: 'The court may, upon such terms as may be just, relieve a party or his or her legal representative from a judgment, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise or excusable neglect. Application for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein, . . . and must be made within a reasonable time . . . .'"

225 Cal.App.2d 209, 217.) The burden of showing the trial court's abuse of discretion is upon the party seeking to reverse the order denying relief from default. (*Kessler v. Hay* (1962) 211 Cal.App.2d 164; *Schreiber v. Duncan* (1952) 111 Cal.App.2d 261, 264; *H. A. Pulaski, Inc. v. Abbey Contractor Specialties, Inc*. (1969) 268 Cal.App.2d 883, 886.)

As the court in *Davis v. Thayer* (1980) 113 Cal.App.3d 892 explained, "Section 587 of the Code of Civil Procedure requires that an application for entry of default include, '. . . an affidavit stating that a copy of such application has been mailed to the defendant's attorney of record or, if none, to the defendant at his last known address . . . .' This section, enacted in 1969, was designed to prevent the taking of the default of an unwary litigant, to minimize the possibility that a default might be taken of one who intended to defend on the merits, and to reduce the incidence of motions for relief under Code of Civil Procedure section 473 or under the equity power of the court. [Citations.]" (*Id*. at pp. 907-908.) Thus, reviewing courts have affirmed the denial of a defendant's motion to set aside a default when the defendant disregarded the notice served pursuant to section 587. (*Ibid*. [five month delay]; *Stafford v. Mach* (1998) 64 Cal.App.4th 1174 [six month delay]; *Schenkel v. Resnik* (1994) 27 Cal.App.4th Supp. 1 [18 month delay]; see also *Martin v. Taylor* (1968) 267 Cal.App.2d 112 [six month delay in bringing motion]; *Fidelity Federal Sav. and Loan Ass'n of Glendale v. Long* (1959) 175 Cal.App.2d 149 [same].)

Here, defendants did not disregard the notice of entry of default. Rather, upon receipt of notice of the clerk's entry of default, which had been filed a mere two days after their answer was due, defendants were dogged in their attempts to set aside the default and defend this lawsuit. They immediately retained counsel to file the appropriate motion, making it clear that their failure to answer the complaint did not reflect an intention not to defend the action. They moved to set aside the default within six weeks of its entry. The motion was based on defendants' good faith but mistaken belief that they had until June 30, 2010 to answer the complaint, and were therefore surprised to receive the notice of default before their time to answer had passed. While a layman's mistake of the law does not ordinarily excuse his or her lack of compliance, the mistake

in calculating the due date of the answer was apparently shared by defendants' attorney, as evidenced by the contents of the motion itself. Furthermore, plaintiff would have suffered no detriment were the default to be set aside; he had not yet obtained a default judgment, or indeed, even applied for one.

In sum, we have found no case in which the appellate court has affirmed the trial court's refusal to set aside a default made within weeks of the entry of default and based on the defendant's good faith mistake in calculating the time in which his or her answer was due. Consequently, we conclude that the defendants presented a meritorious motion to vacate the default.

DISPOSITION

The entry of default is vacated and the default judgment is reversed. Defendants have 30 days to answer the complaint. Defendants are to recover costs on appeal.

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ARMSTRONG, Acting P. J.

We concur:

MOSK, J.

KRIEGLER, J.