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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

OLEG VIDOV et al.,

Plaintiffs and Appellants,

v.

BLUE CROSS OF CALIFORNIA,

Defendant and Respondent.

B268948

(Los Angeles County  
Super. Ct. No. BC 563678)

APPEAL from an order of the Superior Court of Los Angeles  
County, William Fahey, Judge. Reversed.

Law Office of Stephen White and Stephen Edward White for  
Plaintiffs and Appellants.

Reed Smith, Kenneth M. Smersfelt, Amir Shlesinger, Raagini  
Shah and Kasey J. Curtis for Defendant and Respondent.

Plaintiffs and appellants Oleg Vidov and Joan Borsten Vidov (Vidovs) challenge the trial court's denial of their motion for relief from dismissal of their lawsuit against defendant and respondent Blue Cross of California (Blue Cross). The Vidovs filed an untimely opposition to Blue Cross's demurrer, which the trial court refused to consider prior to granting the demurrer. The Vidovs contend that the trial court was required to grant the Vidovs relief from default pursuant to Code of Civil Procedure section 473, subdivision (b).<sup>1</sup> We reverse.

### **FACTS AND PRIOR PROCEEDINGS**

The Vidovs are the former owners of Malibu Beach Recovery Center LLC (the recovery center), a treatment facility for patients recovering from alcohol and drug addiction. In 2014, they sold the recovery center, but the Vidovs allege that they retained the right to payment of certain receivables that Blue Cross owed to the recovery center. When Blue Cross paid at a lower rate than the Vidovs believed was required, the Vidovs filed suit.

Blue Cross demurred, contending, among other arguments, that the Vidovs had failed to document the assignment of receivables or to specifically allege the terms of the assignment, and that the Vidovs had therefore failed to show they had standing. At a case management conference on April 24, 2015, the trial court ordered the Vidovs to produce the purchase agreement that included the assignment of payment of receivables, no later than June 5. When the Vidovs failed to do so by June 15, 2015, Blue Cross filed a new demurrer to the Vidovs' amended complaint.

The Vidovs failed to file an opposition to Blue Cross's demurrer by the August 7 deadline. On August 19, one day before the scheduled hearing on the demurrer, the Vidovs filed an

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<sup>1</sup> Subsequent statutory references are to the Code of Civil Procedure.

opposition to the demurrer, along with an ex parte motion for relief from late filing. In that ex parte motion, the Vidovs' attorney asserted that the failure to meet the deadline had been his fault, and not the fault of his clients. On the same date, the Vidovs filed their opposition to the demurrer. Blue Cross opposed the Vidovs' motion for relief from late filing and filed a reply to the Vidovs' opposition to the demurrer.

The trial court held its hearing on the demurrer on August 20, as scheduled. On August 26, the court sustained the demurrer and dismissed the case with prejudice on two separate bases. First, the court found that the Vidovs had not made a sufficient showing for discretionary relief from late filing of their opposition, and that there was no basis for mandatory relief from a late filing while the case had not yet been dismissed. Second, the court granted the demurrer on the merits. Although the court did not take into account the Vidovs' late-filed opposition, the court noted that it "permitted [the Vidovs' attorney] to give extensive oral argument at the hearing." The court found that the attorney "was unable to give any persuasive reason for [the Vidovs'] failure to comply with the order to produce the assignment agreement." In consequence, the court found that the Vidovs had failed to show that they had standing in the case. The court concluded that the Vidovs' attorney "did not address the remainder of [Blue Cross's] arguments at the hearing, including that there is no cause of action for negligent false promises, [that] fraud must be pled with specificity and [that Blue Cross] had no duty to [the Vidovs]. Nor did [the attorney] proffer any additional facts which could be alleged if leave to amend were granted."

The day after the court filed its order, the Vidovs produced the purchase agreement, including the provision regarding the assignment of receivables. The Vidovs then filed a new motion for mandatory relief from dismissal, which the trial court again denied.

## **DISCUSSION**

Pursuant to section 473, subdivision (b), when an attorney's negligence in failing to file a timely pleading results in a default, default judgment, or dismissal against his client, the trial court is required to grant a party relief from the default or dismissal. The Vidovs contend that they were entitled to relief under this provision for their attorney's untimely filing of their opposition to Blue Cross's demurrer. We agree.

### **I. Jurisdiction**

Before we discuss the merits of this case, we must address a jurisdictional issue. Blue Cross contends that the Vidovs failed to file a timely notice of appeal to challenge the trial court's grant of the demurrer and dismissal of the case. We agree, but that does not dispose of the case because the Vidovs did file a timely notice of appeal to the trial court's order denying the Vidovs' motion for relief under section 473, subdivision (b). Because we reverse the trial court on the latter point, the trial court will be required to set a new hearing to reconsider its decision on the demurrer.

The trial court entered its order dismissing the case on August 27, 2015. Blue Cross served notice of the entry of the order of dismissal on September 1, 2015. The Vidovs filed a motion to set aside the judgment of dismissal on September 10, 2015. Pursuant to California Rules of Court, rule 8.108(c)(2), the deadline for the Vidovs to file their notice of appeal of the judgment of dismissal was 90 days after they filed their motion to set aside the judgment, or in this case, December 9, 2015. The Vidovs did not file their notice of appeal until Wednesday, December 14, 2015.

But the Vidovs appealed not only from the grant of the demurrer, but also from the trial court's order denying their motion under section 473, subdivision (b), for relief from late filing. An order denying relief under section 473 is appealable as a special

order made after final judgment. (*Generale Bank Nederland v. Eyes of the Beholder Ltd.* (1998) 61 Cal.App.4th 1384, 1394.) The Vidovs filed their appeal on December 14, 2015, less than 60 days after the trial court denied their motion under section 473, subdivision (b). For that reason, we must consider on the merits the portion of the Vidovs' appeal challenging the denial of their motion for mandatory relief under section 473, subdivision (b).

## **II. The Petition for Mandatory Relief from Late Filing**

Section 473, subdivision (b) allows, and in some cases requires, the trial court to provide parties relief from their attorney's failure to file pleadings on a timely basis. Under the discretionary portion of this subdivision, "[t]he 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." In his ex parte application for relief from late filing, the Vidovs' attorney explained that "the computer [he had] been using broke on Friday, August 14, 2015." As he acknowledged, however, the opposition to Blue Cross's demurrer was already overdue by August 14. The Vidovs' attorney has provided no explanation for his failure to file the opposition by August 7, and in a declaration to the trial court, he admitted that the failure was the result of his own "inexcusable neglect."

On appeal, therefore, the Vidovs rely on a separate portion of section 473, subdivision (b), pursuant to which relief is mandatory. This provision states that, "[n]otwithstanding 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.” (§ 473, subd. (b), *italics added*.) The Vidovs contend that their motion for relief meets the requirements of this provision, and that the trial court was therefore required to grant them relief from their default.

There is no indication in the record that the failure to file a timely opposition was the fault of anyone other than the Vidovs’ attorney. The only question, therefore, is whether the trial court’s grant of Blue Cross’s demurrer is a “resulting . . . dismissal” for purposes of section 473, subdivision (b).

The mandatory relief provision of section 473, subdivision (b), does not apply to every dismissal. The most thorough analysis of the application of the mandatory relief provision appears in *English v. IKON Business Solutions, Inc.* (2001) 94 Cal.App.4th 130 (*English*). In that case, the court explained that, prior to 1992, mandatory relief was available only in cases of defaults and default judgments. (*Id.* at pp. 139-140.) “In 1992, at the urging of the State Bar, the Legislature . . . amended section 473(b) . . . to give plaintiffs some of the mandatory relief that had been available to defendants . . . . [Citations.] The impetus behind this change was the State Bar’s conclusion ‘that it is illogical and arbitrary to allow mandatory relief for defendants when a default judgment has been entered against them due to defense counsel’s mistakes and to not provide comparable relief to plaintiffs whose cases are dismissed for the same reason.’” [Citation.] By inserting the word ‘dismissal’ into the mandatory provision of the statute, the Legislature now required the courts to vacate any ‘resulting default’ or ‘resulting default judgment or dismissal’ when the other requirements of the mandatory provision were met.” (*Id.* at p. 140.)

In light of this legislative history, the court in *English* concluded that with the 1992 amendment, “the Legislature ‘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.’” (*English, supra*, 94 Cal.App.4th at p. 145.) Thus, most courts addressing this issue have held that a plaintiff who fails to file an opposition to the defendant’s motion for summary judgment is not eligible for mandatory relief from late filing.<sup>2</sup> (See, e.g., *id.* at p. 138; *Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1415-1417.) As the court reasoned in *English*, “the word ‘dismissal’ cannot reasonably be construed to encompass a judgment to which a court has determined the defendant is entitled as a matter of law based on undisputed facts before the court.” (*English, supra*, 94 Cal.App.4th at p. 149.)

Blue Cross contends that, by this reasoning, the Vidovs are not entitled to relief because the trial court’s grant of the demurrer was not procedurally equivalent to a default. Blue Cross points out that the trial court stated that it granted the demurrer on the merits. “The purpose of [the mandatory relief provision] ‘was to alleviate the hardship on parties who *lose their day in court* due solely to an inexcusable failure to act on the part of their attorneys.’” (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 257.) Blue Cross points out that the trial court allowed the Vidovs to argue the merits of their opposition at oral argument, and that the Vidovs therefore were not deprived of their day in court.

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<sup>2</sup> A minority of cases have held that mandatory relief is available in cases of failure to file an opposition to a motion for summary judgment. (See, e.g., *Avila v. Chua* (1997) 57 Cal.App.4th 860, 868, disapproved of by *The Urban Wildlands Group, Inc. v. City of Los Angeles* (2017) 10 Cal.App.5th 993, 1000.)

We disagree. If mandatory relief under section 473, subdivision (b) is not available following the plaintiff's failure to file a timely opposition to a demurrer, we cannot imagine what would qualify as a "resulting . . . dismissal" under that statute. Moreover, although the trial court stated that it decided the motion on the merits and after hearing oral argument from the Vidovs, the court's ruling indicates that the court did not consider several of the Vidovs' arguments. For example, the trial court stated that at oral argument, the Vidovs failed to respond to Blue Cross's argument "that there is no cause of action for negligent false promises." In their opposition to the demurrer, the Vidovs argued that they had mislabeled the cause of action, and that they had stated a claim for negligent misrepresentation. Furthermore, although the court stated in its order that the Vidovs had failed to show that they had standing to sue, the court did not explain why the Vidovs were required to produce the assignment agreement in order to prove that they had standing. Courts have held that " 'a plaintiff may plead the legal effect of the contract rather than its precise language.' " (*Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 402.) In this case, although the Vidovs failed to produce a copy of the assignment agreement until after the case had been dismissed, they quoted specific language assigning them the right to the receivables. This should have been sufficient to establish standing for purposes of a demurrer.<sup>3</sup> (See *Qualified*

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<sup>3</sup> Our holding on this issue does not excuse the Vidovs for refusing to comply with a court order to produce the assignment agreement until the day after the trial court dismissed the case. On appeal, the Vidovs argue that they should not have had to produce the agreement because to do so would compromise their own financial privacy, as well as that of the buyers of the recovery center. But a confidentiality agreement was in place regarding the production of documents in the case, and it is impossible to imagine



*Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 752 [“A demurrer lies for lack of standing when the defect appears *on the face of the pleading or from judicially noticeable matters.*”])

Thus, although the trial court stated that it considered the merits of the Vidovs’ arguments, the text of the court’s order shows that the dismissal was functionally the same as a default. Because there is no indication in the record that the trial court considered the arguments the Vidovs made in their opposition to the demurrer, we cannot conclude that they had “their day in court” on the opposition. (*Zamora v. Clayborn Contracting Group, Inc., supra*, 28 Cal.4th at p. 257.) The trial court erred by denying the Vidovs’ motion for mandatory relief from late filing under section 473, subdivision (b).

### DISPOSITION

The judgment of the trial court is reversed. Appellants are awarded their costs on appeal.

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ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

LUI, J.

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that the Vidovs could have continued to a decision on the merits in the case without producing the only document that they contend gives them standing to recover from Blue Cross.