Filed 2/25/15 Eith v. Deutsche Bank National Trust CA2/6

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

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| FELIPA RICHLAND EITH,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>DEUTSCHE BANK NATIONAL TRUST CO., as Trustee, etc.,<br><br>Defendant and Respondent. | 2d Civil No. B251378<br>(Super. Ct. No. 56-2011-00407601-CU-OR-VTA)<br>(Ventura County) |

Plaintiff in an action contesting a mortgage foreclosure has summary judgment taken against her when her counsel fails to appear at the hearing and to file written opposition. Plaintiff moved for relief under Code of Civil Procedure[1] section 473, subdivision (b). The trial court denied the motion. We affirm.

FACTS

Felipa Richland Eith sued Deutsche Bank National Trust Company and others (collectively the Bank) to prevent wrongful foreclosure of a trust deed secured by Eith's residence. She also obtained a preliminary injunction to prevent foreclosure.

On March 27, 2013, the Bank filed motions for summary judgment and to dissolve the injunction. Hearing on the motions was set for June 10, 2013. Pursuant to

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

section 437c, subdivision (b)(2), written opposition to the motion for summary judgment was due 14 days prior to the hearing, or by May 24, 2013.

Eith did not file written opposition by May 24, 2013. Instead, on May 24, 2013, she made an ex parte motion to continue the hearing to June 17 and to extend the time for filing written opposition.

A hearing on Eith's ex parte motion was held on May 29, 2013. The trial court granted Eith's motion to continue the hearing until June 17. The notice of ruling on the motion also states, however, that the court denied Eith's request for an extension of time to file opposition beyond May 24, that date having already passed.

For an unknown reason, the court clerk issued notices that the hearing on the Bank's motions for summary judgment and to dissolve the injunction was continued to June 27, 2013. The notices were dated May 24, 2013, and mailed May 28, prior to the hearing on Eith's ex parte motion for a continuance. The court's docket stated that the hearing was "Rescheduled" to June 17.

The Bank appeared at the hearing on it motions for summary judgment and to dissolve the injunction on June 17, 2013. Eith neither appeared at the hearing nor had she filed written opposition to the motion for summary judgment. The trial court granted the Bank's motions based on Eith's failure to appear or file written opposition. Judgment was entered in favor of the Bank.

Thereafter, Eith's then counsel made a motion to vacate the judgment pursuant to section 473, subdivision (b). In support of the motion, Eith's counsel declared: On June 3, 2013 Eith informed him that she had received notice the hearing on the bank's motions had been continued to June 27, 2013; the court's docket reflected the hearing had been continued to that date; counsel believed the hearing had been continued to that date; counsel also believed from the court's statements at the hearing on his ex parte motion that he would have more time beyond May 24 in which to file written opposition to the bank's motion; counsel planned to file written opposition by June 19; his failure to appear at the June 17 hearing was due to surprise and excusable neglect. The trial court denied Eith's motion to vacate the judgment.

## DISCUSSION

### I.

Eith contends the trial court abused it discretion in refusing to grant relief under the discretionary portion of section 473, subdivision (b).

Section 473, subdivision (b) states in part: "The court may . . . 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."

To determine whether a mistake or inadvertence is excusable, the court inquires whether a reasonably prudent person might have made the same mistake under similar circumstances. (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 258.) Conduct falling below the professional standard of care, however, is not excusable. (*Ibid.*)

Here Eith's counsel neither appeared for the hearing on the Bank's motions nor filed a written opposition to the motion for summary judgment. Given the clerk's notice that the hearing had been continued to June 27, 2013, it is understandable Eith's counsel did not appear on June 17. If failure to appear at the June 17 hearing was the only basis for denying Eith's motion for relief from default, reversal might be appropriate. But Eith's failure to file written opposition to the motion for summary judgment compels affirmance.

Eith claims that remarks made by the trial court at the hearing on her ex parte request for a continuance led her counsel to believe he would have more time to file formal opposition. But Eith points to nothing in the record beyond her counsel's declaration to support that claim. We must presume the trial court found counsel's declaration was not credible. (See *GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 872 [We discard evidence unfavorable to the prevailing party as lacking sufficient verity].) In fact, the notice of ruling on Eith's motion for an extension of time reflects that the trial court expressly denied her more time beyond May 24, 2013, in which to file written opposition.

Even assuming Eith's counsel believed the hearing was continued to June 27, 2013, and in spite of the court's express ruling to the contrary, believed that time for filing written opposition was extended accordingly, Eith would not be helped. Under such circumstances, the last day for filing written opposition would have been June 13, 2013. Eith has never filed timely written opposition, not in time for the original hearing date, nor in time for the June 27 continued hearing date.

The trial court did not abuse its discretion in refusing relief under section 473.

II.

Edith contends the trial court erred in refusing mandatory relief under section 473, subdivision (b).

Section 473, subdivision (b) states in part: "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."

There is a split of authority on the question whether the mandatory provision of section 473, subdivision (b) applies to the entry of summary judgment. In *Avila v. Chua* (1997) 57 Cal.App.4th 860, 868, the court held that relief was proper because the case is directly analogous to a default judgment. The majority of more recent cases hold, however, that mandatory relief does not apply to summary judgments. (See *Las Vegas Land & Development Co. v. Wilkie Way* (2013) 219 Cal.App.4th 1086, 1091 and cases cited therein.)

We agree with the more recent cases. A summary judgment is neither a "'default judgment'" nor a "'dismissal.'" (*Las Vegas Land & Development Co. v. Wilkie*

*Way, supra*, 219 Cal.App.4th at p. 1091.) "'A "default judgment" within the meaning of section 473 [subdivision] (b) is a judgment entered after the defendant has failed to answer the complaint and the defendant's default has been entered. . . . [¶] A summary judgment does not result from a defendant's failure to answer the complaint.' [Citation.] [¶] 'A similar conclusion follows with regard to the word "dismissal." . . . [¶] "[I]n the context of pleadings and motions, a dismissal is the withdrawal of an application for judicial relief by the party seeking such relief, or the removal of the application by a court." [Citation.] A summary judgment is not "the removal . . . by a court" "of an application for judicial relief." . . .' [Citation.] Accordingly, the mandatory provision does not encompass summary judgments.'" (*Id.*, at pp. 1091-1092; *English v. IKON Business Solutions, Inc.* (2001) 94 Cal.App.4th 130, 143-144.)

The judgment (order) is affirmed. Costs are awarded to respondent.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Vincent J. O'Neill, Judge

Superior Court County of Ventura

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Morris Polich & Purdy, Jens B. Koepke for Plaintiff and Appellant.

Wright, Finlay & Zak, Jonathan M. Zak, Marvin B. Adviento for Defendant and Respondent.