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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ANTHONY N. KLING et al.,

Plaintiffs and Appellants,

v.

GABAI CONSTRUCTION, INC.,

Defendant and Respondent.

B235367

(Los Angeles County  
Super. Ct. No. SC098810)

APPEAL from a judgment of the Superior Court of the County of Los Angeles,  
Allan J. Goodman, Judge. Affirmed.

Law Offices of Steven J. Horn, Steven J. Horn for Plaintiffs and Appellants.

Northrup Schlueter, David S. Schlueter, Linda L. Northrup, and Mikita A. Weaver  
for Defendant and Respondent.

## INTRODUCTION

Plaintiffs and appellants (plaintiffs)<sup>1</sup> filed a Code of Civil Procedure section 473 motion (section 473 motion) to vacate a dismissal with prejudice of their complaint against defendant and respondent Gabai Construction, Inc. (Gabai). Following an evidentiary hearing, the trial court denied the section 473 motion.

On appeal, plaintiffs contend that the trial court abused its discretion in denying the section 473 motion because it ignored their testimony and documents demonstrating that their former attorney did not have their consent to dismiss their claims against Gabai. We hold that substantial evidence supports the trial court's finding that plaintiffs knowingly consented to their former attorney's dismissal of their action and that, as a result, the trial court did not abuse its discretion in denying the section 473 motion. We therefore affirm the order denying the section 473 motion.

## FACTUAL BACKGROUND<sup>2</sup>

In July 2008, plaintiffs filed a lawsuit against several defendants, claiming that a construction project next to their property caused subsidence damage to their property due to, inter alia, inadequate lateral support during excavation, inadequate backfilling, and inadequate shoring. In October 2008, plaintiffs amended their complaint to name Gabai as a defendant.

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<sup>1</sup> The plaintiffs named in the complaint are Anthony N. Kling, individually and as trustee of the Anthony N. Kling Trust of 1997; Mary J. Kling as trustee of the Family Trust under the Heywood F. and Mary J. Kling Living Revocable Trust dated July 28, 1987; and Kling Corporation.

<sup>2</sup> Based on the applicable standard of review discussed below, we state the facts from the evidentiary hearing on the section 473 motion that support the trial court's ruling and disregard conflicting evidence, such as plaintiffs' testimony that they did not authorize their former attorney to dismiss their action against Gabai. (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925-926.)

In March 2010, attorney Jeffrey Horowitz became plaintiffs' counsel of record in their lawsuit against Gabai and the other defendants. While he was representing them, he attended the deposition of Oscar Medrano on February 11, 2011. Medrano testified that Gabai had no involvement in the excavation work on the construction project in issue. Immediately after the Medrano deposition, Gabai's attorney approached Horowitz and demanded that plaintiffs dismiss their lawsuit against Gabai. Gabai's attorney threatened to bring a malicious prosecution action if plaintiffs did not dismiss Gabai.

Thereafter, on February 14, 2011, Gabai's attorney sent Horowitz an e-mail advising of his intent to appear ex parte to obtain an order setting a hearing on a motion for summary judgment to dismiss plaintiffs' complaint against Gabai. Horowitz advised Gabai's attorney that he would speak to plaintiffs about the demand to dismiss Gabai.

Horowitz thereafter spoke to plaintiffs about Gabai's demand, and they wanted Horowitz to obtain a declaration from Gabai's principal confirming that Gabai was not involved in the excavation and shoring work (the Gabai declaration). Horowitz's computerized telephone notes indicated that he spoke to plaintiff Anthony Kling by telephone on February 14, 2011, and discussed the dismissal demand, the Gabai declaration, and obtaining documents confirming Gabai was not involved in the excavation and shoring.

Horowitz asked Gabai's attorney for a declaration from Gabai's principal, and on February 15, 2011, Gabai's attorney forwarded an executed copy of the Gabai declaration. Horowitz forwarded a copy of that declaration to plaintiffs by mail that same day.

On February 16, 2011, Horowitz's office sent a copy of the Gabai declaration to plaintiffs by facsimile transmission. Horowitz also sent a letter to plaintiffs on February 16 forwarding a Code of Civil Procedure section 998 offer to compromise from certain defendants, including Gabai.

That same day, February 16, 2011, Horowitz had a telephone conversation with plaintiffs during which they advised him that they had read the Gabai declaration and that he had their authority to release Gabai from the lawsuit. Horowitz's telephone notes

from that call confirmed that it was “Ok to release Gabai.” Horowitz recorded in his telephone notes that during a subsequent telephone call on February 16, 2011, he spoke with Gabai’s attorney and informed him that plaintiffs had agreed to dismiss Gabai. Horowitz next sent an e-mail to Gabai’s attorney confirming that plaintiffs would dismiss Gabai for a waiver of costs. Gabai’s attorney responded by sending an e-mail to the other attorneys involved in the case advising that because plaintiffs had agreed to dismiss Gabai, the ex parte application scheduled for the next morning was being taken off calendar.

Later that evening, Horowitz sent plaintiffs a facsimile transmission confirming that they had given him authority to dismiss Gabai in exchange for a mutual waiver of fees and costs. “Sometime later,” plaintiffs replied to Horowitz in a facsimile transmission of a copy of Horowitz’s confirming facsimile with a hand written note which read, “And Gabai will sign [the] declaration today as represented[.] Tony for the [plaintiffs.]”

Based on the foregoing, Horowitz on the evening of February 16, 2011, transmitted to Gabai’s attorney a copy of an executed dismissal with prejudice of Gabai from the lawsuit by facsimile and e-mail. And Horowitz confirmed that fact in an e-mail to Gabai’s attorney.

On February 17, 2011, Gabai’s attorney sent Horowitz an e-mail confirming the settlement of plaintiffs’ claims against Gabai, withdrawing the section 998 offer from Gabai, and acknowledging receipt of the dismissal of plaintiffs’ claims against Gabai. Although the parties subsequently discussed and exchanged drafts of a more formal settlement agreement, according to Horowitz, as of February 16, 2011, there was an agreement between plaintiffs and Gabai to dismiss plaintiffs’ claims against Gabai in exchange for a mutual waiver of fees and costs. In approximately March 2011, plaintiffs terminated Horowitz’s representation of them.

## **PROCEDURAL BACKGROUND**

Gabai's attorney submitted the dismissal with prejudice of Gabai to the trial court's clerk for filing on February 21, 2011, but it was rejected by the clerk. In April 2011, Gabai's attorney filed a motion for an order allowing the filing of the Gabai dismissal. Plaintiffs opposed the motion, but the trial court granted it and ordered the dismissal filed nunc pro tunc as of February 22, 2011.

In May 2011, plaintiffs filed their section 473 motion to set aside the dismissal. The trial court held an evidentiary hearing on the motion and heard testimony from Horowitz, Gabai's attorney, and plaintiffs Anthony and Mary Kling. The trial court also admitted certain documentary exhibits.

The trial court thereafter ruled on the section 473 motion, and in its minute order dated July 7, 2011, stated as follows: "The Court has carefully considered the testimony offered by witnesses who testified on behalf of the parties. The testimony of Mr. Horowitz and the evidence presented by him and [Gabai's attorney] as to the events, particularly those of February 16, 2011, when [Gabai's attorney] and Mr. Horowitz discussed via telephone the dismissal of [Gabai's attorney's] clients is a key to resolving the credibility issues in this matter. There is substantial documentation to support their testimony on what occurred that date, and at what times. This testimony supports and validates Mr. Horowitz's testimony, which the Court finds to be credible, that he did in fact have conversations with his clients that date in which they did give consent to dismissal of [Gabai] . . . from this litigation. Among the false items in Mr. Kling's testimony was that his fax machine was not turned on in the late afternoon of February 16, 2011; viz, he testified that—for the reason that he did not routinely have his fax machine on and required someone to call him to turn it on so that he could receive the sender's intended fax—he could not have had notice that plaintiffs' lawyer was going to dismiss [Gabai] . . . . This testimony, among other critical points, is demonstrably false for multiple reasons, including that Mr. Horowitz's contemporaneous time records show the conversations and what took place in them (including that both clients were on the

phone, were informed and agreed to the dismissals on that date) and that Mr. Horowitz told Mr. Kling that the former would be faxing to the latter that same afternoon a confirmation which document is Exhibit 22 (and 23). It is only reasonable to conclude that, if Mr. Kling's fax machine otherwise would have been off (a doubtful proposition notwithstanding his incredible testimony), he would turn it on so that he could get the confirmation from counsel of this very important matter which counsel said he would be faxing soon (Exhibit 27-3). [¶] Mr. Kling claims that he did not get Exhibit 22 until the following weekend and did not return it until a few days after that, in connection with the site inspection on the following Tuesday. When he returned the document, he wrote a condition on it; this is set out as Exhibit 23. [¶] This testimony is false. [¶] An additional problem with Mr. Kling's testimony is that, when he wrote the conditions on Exhibit 22 and returned them to his lawyer as Exhibit 23, he [and his mother] had already agreed to the dismissal. His later addition of the conditions set out in his handwriting on Exhibit 23 were well after the agreement had been consummated—and they are ineffective. [¶] Mrs. Kling's testimony is similarly flawed; she did support her son, but not in a manner the Court finds to be credible. [¶] The motion is denied. The dismissal stands.”

## **DISCUSSION**

### **A. Standard of Review**

As Gabai points out, this appeal is governed by more than one standard of review. Although the trial court's denial of the section 473 motion is generally subject to an abuse of discretion standard, the trial court's underlying factual determinations, including its credibility determinations, are reviewed under a substantial evidence standard.

“In reviewing the evidence in support of a section 473 motion, we extend all legitimate and reasonable inferences to uphold the judgment. The disposition of such a motion rests largely in the discretion of the trial court, and its decision will not be disturbed on appeal unless there has been a clear abuse of discretion. Although precise

definition is difficult, it is generally accepted that the appropriate test of abuse of discretion is whether or not the trial court exceeded the bounds of reason, all of the circumstances before it being considered. (*In re Marriage of Carter* (1971) 19 Cal.App.3d 479, 494 [97 Cal.Rptr. 274]; *Troxell v. Troxell* (1965) 237 Cal.App.2d 147, 152 [46 Cal.Rptr. 723].) We have said that when two or more inferences can reasonably be deduced from the facts, a reviewing court lacks power to substitute its deductions for those of the trial court. (*Nestle v. City of Santa Monica* [, *supra*,] 6 Cal.3d [at p.] 925 [101 Cal.Rptr. 568, 496 P.2d 480]; *Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429 [45 P.2d 183].)” (*In re Marriage of Connolly* (1979) 23 Cal.3d 590, 597-598.)

“In resolving the issue of the sufficiency of the evidence, we are bound by the established rules of appellate review that all factual matters will be viewed most favorably to the prevailing party (*Leming v. Oilfields Trucking Co.* (1955) 44 Cal.2d 343, 346 [282 P.2d 23, 51 A.L.R.2d 107]; *Bancroft-Whitney Co. v. McHugh* (1913) 166 Cal. 140, 142 [134 P. 1157]; 6 Witkin, Cal. Procedure (2d ed. 1971) § 245, at p. 4236) and in support of the judgment (*Waller v. Brooks* (1968) 267 Cal.App.2d 389, 394 [72 Cal.Rptr. 228]). All issues of credibility are likewise within the province of the trier of fact. (*Estate of Teel* (1944) 25 Cal.2d 520, 526 [154 P.2d 384].) ‘In brief, the appellate court ordinarily looks only at the evidence supporting the successful party, and disregards the contrary showing.’ (6 Witkin, Cal. Procedure, *supra*, § 249, at p. 4241.) All conflicts, therefore, must be resolved in favor of the respondent. (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429 [45 P.2d 183].)” (*Nestle v. City of Santa Monica*, *supra*, 6 Cal.3d at pp. 925-926.)

## **B. Analysis**

Plaintiffs contend that their testimony and documents showed that they did not knowingly and freely consent to the dismissal of their claims against Gabai and that, at best, Gabai’s evidence merely demonstrated that Horowitz mistakenly believed that he had consent. According to plaintiffs, the trial court abused its discretion by summarily

rejecting their testimony and documents and considering Horowitz's state of mind on the consent issue instead of theirs.

Plaintiffs in their arguments on appeal urge us to reweigh the evidence presented at the section 473 motion, to resolve conflicts in that evidence, and to make independent credibility evaluations. Under the substantial evidence standard that governs our review of the trial court's factual determinations, we must view the evidence in a light most favorable to the trial court's ruling, and we cannot reweigh evidence, resolve conflicts in the evidence, or make independent credibility determinations. Here, the trial court resolved the conflicts in the evidence based largely on credibility determinations. It believed Horowitz and his corroborating documents, and it found plaintiffs' testimony not credible, findings we cannot disturb on appeal. Based on Horowitz's testimony and his corroborating documents, there was sufficient evidence to support a reasonable inference that Horowitz discussed Gabai's dismissal demand with plaintiffs and they expressly consented to dismiss Gabai from the lawsuit on February 16, 2011, consent which was confirmed in various contemporaneous writings. Given that knowing and express consent, it was reasonable for the trial court to conclude that Horowitz was authorized to execute and deliver on plaintiffs' behalf the dismissal with prejudice of plaintiffs' claims against Gabai.

Contrary to plaintiffs' assertion, the trial court did not disregard their evidence—it considered and rejected it as not credible. For example, Anthony Kling claimed that he did not receive the February 16, 2011, facsimile from Horowitz confirming plaintiffs' agreement to dismiss Gabai until several days later, at which time he sent back revisions he wanted to the Gabai declaration. But the trial court expressly found untrue Anthony Kling's denial of receipt of Horowitz's February 16 confirming facsimile, and based on that finding, concluded that plaintiffs had consented to the dismissal on February 16, well before Anthony Kling requested revisions to the Gabai declaration. Moreover, the requested revisions to the Gabai declaration did not appear material or change the substance of that declaration, which was to deny that Gabai had any involvement in the excavation and shoring work on the construction project.



The trial court did not, as plaintiffs contend, apply an incorrect standard of consent. It expressly found that plaintiffs gave Horowitz knowing consent, a finding that is supported by substantial evidence.

Because this appeal is based primarily on factual arguments that were resolved against plaintiffs by the trial court, we conclude under the applicable standards of review that the trial court did not abuse its discretion in denying the section 473 motion. We must therefore affirm that denial.

### **DISPOSITION**

The trial court's order denying the section 473 motion is affirmed. Gabai is awarded costs on appeal.

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MOSK, J.

We concur:

ARMSTRONG, Acting P. J.

KRIEGLER, J.