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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

VALENSI ROSE, PLC, Plaintiff and Respondent, v. RYAN HOWE, Defendant and Appellant.	B282630 (Los Angeles County Super. Ct. No. SC122559)

APPEAL from an order of the Superior Court of Los Angeles County, Nancy L. Newman, Judge. Affirmed.

Law Office of Nancy Undem and Nancy K. Undem for Defendant and Appellant.

Valensi Rose and M. Laurie Murphy for Plaintiff and Respondent.

Defendant Ryan Howe appeals from an order denying his motion to set aside the judgment entered after an uncontested trial. When Howe, then representing himself, did not appear at trial, the trial court conducted the trial in his absence and awarded judgment in favor of Valensi Rose, PLC. More than three months after the trial, Howe sought discretionary relief from the judgment under Code of Civil Procedure section 473, subdivision (b),[1] on the basis Howe's absence was due to an automobile accident the morning of trial. The trial court denied Howe's motion, finding he had not been diligent in seeking relief.

On appeal, Howe contends the trial court abused its discretion in denying his motion. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Valensi Rose's Complaint and the Trial*

Valensi Rose initiated this action on May 15, 2014. The complaint alleged causes of action for common count, account stated, and breach of contract against Howe for professional services rendered, and sought $221,817.06 in compensatory damages.[2] The complaint attached a September 5, 2007 written agreement between Valensi Rose and Howe, setting forth the terms under which Valensi Rose would provide legal services to Howe "in connection with certain legal matters pertaining to

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[1] All further undesignated statutory references are to the Code of Civil Procedure.

[2] The complaint also alleged each cause of action against Mark Davis, Howe's business partner. Those claims are not at issue in this appeal.

Whitsett Hill Entertainment Corporation and its subsidiaries." The agreement was signed by Howe.

Trial was set for November 7, 2016. On the morning of the trial, Howe filed an ex parte application to dismiss the action or continue the trial based on Valensi Rose's failure to join Whitsett Hill Entertainment Corporation (Whitsett Hill) and its subsidiaries as indispensable parties because the legal work was allegedly performed for Whitsett Hill, not Howe. The application also based the request for a continuance on the inability of Howe's counsel, Nancy Undem, to appear at trial due to a physical disability. According to Undem, she substituted into the case at least six weeks earlier, but had an inherited genetic disorder that prevented her from defending Howe at trial. The trial court denied Howe's application. On the same day Howe filed a substitution of counsel, substituting himself in for Undem. He did not appear at trial. The court found Howe had adequate notice of the trial, and it proceeded to conduct the trial in his absence.

Valensi Rose presented oral and documentary evidence at the trial. The trial court rendered judgment in favor of Valensi Rose. On November 11, 2016 Valensi Rose served Howe by mail with a proposed judgment against Howe in the amount of $278,531.77. The court received the proposed judgment on November 14, 2016 and entered judgment on December 14, 2016. The court clerk mailed notice of entry of judgment to Howe on December 22, 2016.[3]

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[3] On our own motion, we augment the record to include the trial court's November 7, 2016 minute order and the December 22, 2016 notice of entry of judgment. (See Cal. Rules of Court, rule 8.155(a)(1)(A).)

B. *Howe's Motion to Set Aside Judgment*

On February 21, 2017 Howe filed a motion for discretionary relief from judgment under section 473, subdivision (b). Howe attached a declaration in which he stated he was on his way to the courthouse the morning of November 7, 2016 when he became "involved in a major car accident" that prevented him from appearing at trial. Because his car was towed from the scene of the accident with his cellular phone inside, he was unable to call the court. Following the accident, Howe went to the hospital for treatment, and was given medication for his pain, which caused him to fall asleep. But for the accident, Howe would have appeared at trial to cross-examine witnesses and introduce evidence showing Valensi Rose did not perform work for Howe individually, and Howe had no personal responsibility for the legal work performed for Whitsett Hill.

Howe also noted in his declaration that on January 4, 2017 he obtained the earliest reservation date available for a hearing on his motion, which was November 7, 2017. On January 25, 2017 he advanced the hearing to March 15, 2017. Howe argued his failure to appear at trial was due to excusable neglect and inadvertence as a result of the accident and its aftermath, and requested the trial court set aside the judgment and order a new trial.

Valensi Rose opposed the motion, arguing Howe's motion was effectively a motion for a new trial, which was untimely under section 659 because it was not filed within 15 days of the mailing of notice of entry of judgment. Valensi Rose also argued Howe's motion was defective because he had not signed his declaration under penalty of perjury or proffered any evidence of

the accident, such as a police report or record of his hospital admission. Finally, Valensi Rose argued Howe's motion was not brought within a reasonable time under section 473, subdivision (b), because he had notice of the judgment since November 7, 2016. In a declaration in support of its opposition, Valensi Rose noted Jules Federman had been present at the trial on behalf of Howe and took notes throughout the trial.[4]

In his reply, Howe submitted a second declaration signed under penalty of perjury, in which he restated the events surrounding the automobile accident. Howe also filed a declaration by Federman confirming he had filed Howe's ex parte application and substitution of counsel documents on the morning of trial. Federman also confirmed he took notes during the trial and spoke to Howe that evening. Howe attached as an exhibit to his reply what appears to be a Santa Barbara Police Department traffic collision report, a towing report, and a record of his hospital admission, all dated November 7, 2016. The traffic collision and towing reports indicated Howe had been arrested following the accident for suspicion of driving under the influence in violation of Vehicle Code section 23152, former subdivision (e). In contradiction to Howe's declaration, which stated he was admitted to the hospital for "examination and treatment," the attached hospital records indicated Howe was brought to the hospital in police custody for a blood alcohol test and remained in police custody at discharge.

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[4] According to Valensi Rose's attorney, Federman was a paralegal for the attorney who represented Howe before Undem, and on November 7, 2016 Federman filed both the ex parte application and substitution of counsel.

Valensi Rose filed objections to Howe's reply evidence. It pointed out Howe had failed to disclose his arrest for driving under the influence in his declaration, and noted the inconsistency between Howe's declaration and the hospital report. Valensi Rose also objected to the traffic collision report based on redactions to several paragraphs in the report.

On March 15, 2017, after conducting a hearing, the trial court denied Howe's motion. The court adopted its tentative ruling, which stated, "a party's involvement in [a] car accident that prevented him or her from defending himself would generally be considered excusable neglect, mistake, or inadvertence such that this event is sufficient to set aside a judgment." However, Howe's statements in his initial declaration were not made under penalty of perjury, he failed to authenticate the evidence attached to his reply, the evidence showed he was arrested for driving under the influence, and Valensi Rose did not have an opportunity to respond to Howe's reply evidence. The trial court concluded, "[M]ore importantly, the court notes that neither the moving papers nor the reply provide any explanation for why Defendant Howe waited months after trial and after the entry of judgment to bring this accident to the court's attention and file this motion. Based on the foregoing, the court does not believe that Defendant Howe acted diligently in seeking relief and therefore is not entitled to relief."

Howe timely appealed.[5]

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[5] On July 7, 2017 we denied Valensi Rose's June 21, 2017 motion to dismiss the appeal as untimely.

DISCUSSION

A. *Standard of Review*

"'A ruling on a motion for discretionary relief under section 473 shall not be disturbed on appeal absent a clear showing of [an] abuse'" of discretion. (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 257; accord, *Austin v. Los Angeles Unified School Dist.* (2016) 244 Cal.App.4th 918, 929.) Under this standard, "we may reverse only if we conclude the trial court's decision is '"so irrational or arbitrary that no reasonable person could agree with it."'" (*Mechling v. Asbestos Defendants* (2018) 29 Cal.App.5th 1241, 1249 [affirming grant of equitable relief from default judgment]; accord, *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773.) "That a different decision could have been reached is not sufficient because we cannot substitute our discretion for that of the trial court. The trial court's ruling must be beyond the bounds of reason for us to reverse it." (*Mechling*, at p. 1249; accord, *Avant! Corp. v. Superior Court* (2000) 79 Cal.App.4th 876, 881-882.) However, as Howe contends, we recognize there is a public policy favoring a trial on the merits. (See *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 978, 985 [granting equitable relief from default judgment due to defendants' failure to pay entirety of filing fee for answer based on incorrect information from clerk's office]; *Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 694, 701-703 [trial court abused its discretion in denying motion under § 473, subd. (b) for relief from default judgment entered after defendant's insurer failed to file answer].)

B. *The Trial Court Did Not Abuse Its Discretion in Finding Howe Was Not Diligent in Seeking Relief from the Judgment*

As a threshold matter, we have serious doubts Howe properly sought relief from the judgment under section 473, subdivision (b), instead of filing a timely notice of his intention to move for a new trial. Howe could have moved for a new trial on the basis the automobile collision was an "[a]ccident or surprise, which ordinary prudence could not have guarded against." (§ 657, subd. (3); see *Smith v. Smith* (1904) 145 Cal. 615, 618 [self-represented litigant's failure to appear at trial due to sickness was "providential accident . . . for which the Code provides a new trial may be granted"].) As a motion for a new trial, Howe's motion was untimely because section 659, subdivision (a), requires a party intending to move for a new trial to file a notice of his or her intention to move for a new trial "[a]fter the decision is rendered and before the entry of judgment" or "[w]ithin 15 days of the date of mailing notice of entry of judgment . . . , or service upon him or her by any party of written notice of entry of judgment . . . ." Further, "section 473, subdivision (b) cannot extend the time in which a party must move for a new trial, since this time limit is considered jurisdictional." (*Maynard v. Brandon* (2005) 36 Cal.4th 364, 372; accord, *Kisling v. Otani* (1962) 201 Cal.App.2d 62, 68 [§ 473 "does not override" the jurisdictional deadline set by § 659].)[6]

Even if Howe properly sought relief under section 473, subdivision (b), the trial court did not abuse its discretion in

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[6] Because Valensi Rose does not raise this argument on appeal, we address whether the trial court abused its discretion in denying Howe's motion under section 473, subdivision (b).

finding he had not been diligent in seeking relief. Section 473, subdivision (b), provides, "The court may, upon any terms as may be just, relieve a party . . . from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief . . . shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken." "[R]elief is not warranted unless the moving party demonstrates diligence in seeking it." (*Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1420-1421 [affirming denial of discretionary relief under § 473, subd. (b), where appellant "waited to file his motion until more than three months" after notice of entry of judgment]; accord, *Younessi v. Woolf* (2016) 244 Cal.App.4th 1137, 1145 ["Given the absence of evidence explaining the seven-week delay in seeking to set aside the dismissal, the diligence requirement was not satisfied."].) Whether a party has acted diligently is a question of fact for the trial court, and depends on all of the circumstances of the particular case. (*Minick v. City of Petaluma* (2016) 3 Cal.App.5th 15, 33; *Younessi*, at p. 1145.)

Here, the trial court determined Howe had failed to show he acted with diligence because Howe did not "provide any explanation for why [he] waited months after trial and after the entry of judgment to bring [the car] accident to the court's attention and file this motion." Howe contends the trial court abused its discretion by failing to consider the diligence he showed by reserving the earliest possible hearing date for his motion 13 days after the court clerk mailed notice of the entry of judgment, and then advancing the hearing date on the court reservation system several days later. We conclude otherwise.

Under section 473, subdivision (b), it is the application for relief that "shall be made within a reasonable time," not a reservation for a hearing on the application. Howe knew the trial was set for November 7, 2016, as evidenced by his attempt to continue the trial that morning. He does not dispute he learned that evening the trial court had rendered judgment for Valensi Rose following the trial. Indeed, the declaration of Federman submitted by Howe confirms that the evening of the trial Howe spoke with Federman, who was present throughout the day's trial. The court's November 7, 2016 minute order reflected the court had rendered judgment for Valensi Rose against Howe. Further, on November 11, 2016 Valensi Rose mailed a proposed judgment to Howe.

Contrary to Howe's position, nothing prevented him from immediately filing a motion for relief following the trial court's November 7, 2016 decision.[7] Further, after Howe made his hearing reservation following the December 22, 2016 notice of entry of judgment, Howe waited another two months, until February 21, 2017, to file his motion. Had Howe filed his motion earlier, both he and Valensi Rose would have had an opportunity to file an ex parte application to advance the hearing date. Howe's delay prejudiced Valensi Rose by delaying any possible retrial had the trial court granted Howe's motion.

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[7] To the extent Howe contends he was required to wait for the December 14, 2016 notice of entry of judgment before filing his motion, section 473, subdivision (b), provides for relief "from a judgment, dismissal, order, or other proceeding taken against" a party. Howe therefore could have moved immediately for relief from the trial court's November 7, 2016 finding against him as an order or proceeding taken against him.

Howe relies on *Minick v. City of Petaluma, supra*, 3 Cal.App.5th 15, to argue a motion made within seven to 10 weeks after entry of judgment is brought within a reasonable time under section 473, subdivision (b). But *Minick* involved a trial court *granting* a motion for relief from judgment, not denying one. (*Minick*, at pp. 33-34 ["In granting relief from judgment, the trial court implicitly found that Minick filed his motion 'within a reasonable time.' . . . [¶] Numerous courts have found no abuse of discretion in granting relief where the section 473 motions at issue were filed seven to 10 weeks after entry of judgment."].) Here, by contrast, the question is whether the trial court abused its discretion by determining Howe had not shown diligence. The trial court found a lack of diligence in that Howe provided no explanation for why he waited over three months after trial and nearly two months after notice of entry of judgment to bring the fact of his car accident to the court's attention. We conclude this ruling was not "beyond the bounds of reason," and was therefore not an abuse of discretion.[8] (*Mechling v. Asbestos Defendants, supra*, 29 Cal.App.5th at p. 1249.)

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[8] Because we conclude the trial court did not abuse its discretion in denying Howe's motion for lack of diligence, we do not reach his arguments that the trial court improperly based its denial of the motion on his failure initially to provide a declaration under penalty of perjury, his failure to authenticate the exhibits to his reply, and his failure to provide Valensi Rose an opportunity to respond to his reply evidence.

DISPOSITION

The order is affirmed. Valensi Rose's request for sanctions on appeal is denied. Valensi Rose is to recover its costs on appeal.[9]

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

SEGAL, J.

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[9] While we do not find merit in Howe's arguments, they are not so frivolous as to warrant the imposition of sanctions on appeal. "'[A]n appeal should be held to be frivolous only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit.'" (*Citizens for Amending Proposition L v. City of Pomona* (2018) 28 Cal.App.5th 1159, 1194-1195 [denying motion for sanctions on appeal where issues were "arguable"], quoting *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) Accordingly, Valensi Rose's request for sanctions on appeal is denied.