Filed 12/12/17 Marriage of Mitchell CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re the Marriage of PAULA and RODGER MITCHELL.	B271143
PAULA MITCHELL, Appellant, v. RODGER MITCHELL, Respondent.	(Los Angeles County Super. Ct. No. VD076423)

APPEAL from the post-judgment orders of the Superior Court of Los Angeles County, Robert Higa, Judge. Reversed.

Von Esch Law Group, Amy M. Von Esch and Jennifer M. Porche for Appellant.

Hagan & Associates, Kara J. Hagan and Timothy P. Seeger for Respondent.

INTRODUCTION

Petitioner Paula Mitchell appeals from the order of the trial court setting aside the default and default judgment of dissolution taken against her husband, respondent Rodger Mitchell. (Code Civ. Proc., § 473, subd. (b).)[1] Paula's appeal also challenges the court's subsequent order denying her motion for reconsideration. (§ 1008.) We hold that the trial court lacked jurisdiction to grant statutory relief under section 473 and Rodger did not seek relief under the relevant provisions of the Family Code. Accordingly, we reverse both orders.

FACTUAL AND PROCEDURAL BACKGROUND

Evaluating the record according to the rules of appellate review (*Gonzalez v. Rebollo* (2014) 226 Cal.App.4th 969, 976 ["appellate court is limited to considering matters in the record of the trial proceedings; matters not presented by the record cannot be considered on the suggestion of the parties in their briefs"]), it shows that the following occurred:

1. *The petition for dissolution and Rodger's first default*

a. ***2011***

In July 2011, Paula filed a petition for dissolution of her marriage to Rodger and served him in September 2011.

b. ***2013***

In February 2013, Paula obtained a default against Rodger. Three months later, Rodger's attorney, Cara J. Hagan, notified Paula's former counsel that Rodger wanted to set aside the

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

default. The parties stipulated to set aside the default in July 2013. When the trial court signed the stipulation, it *ordered Rodger to file and serve* "*any responsive pleadings no later than 7-15-2013*." (Italics added.) Rodger did not file his answer to the petition for dissolution by that date.

2. *Rodger's second default and the judgment for dissolution*

a. ***2014***

On June 2, 2014, nearly a year after Rodger's response was due, Paula's former counsel notified attorney Hagan by letter that if Rodger did not file his response to the petition for dissolution by June 10, 2014, Paula would file another request to enter Rodger's default on June 11, 2014. Rodger did not file a response.

On June 11, 2014, the trial court entered Rodger's second default. On June 18, 2014, the court mailed Paula's request to enter the second default to Rodger at the home in La Mirada where he was living, which was community property (the home).

b. ***2015***

Attorney Amy Von Esch substituted into this case as Paula's counsel in April 2015. In September 2015, Paula obtained a judgment of dissolution. In relevant part, the judgment assigned each party one-half of the proceeds from the sale of the home. The judgment allowed Rodger to remain in the home and pay Paula $2,300 per month in rent and ordered the sale of the home within 60 days of the judgment.

Hagan twice wrote to Von Esch in October 2015 requesting a stipulation from Paula to set aside the second default judgment. Von Esch replied that she was unwilling to talk to Hagan – who

was not Rodger's attorney of record – until Hagan substituted into the case.

On November 20, 2015, Paula moved ex parte for an order giving a real estate agent access to the home in preparation to sell it.

3. *Rodger's motion to set aside the default*

Also on November 20, 2015, at the ex parte hearing, some 17 months after entry of the second default, Rodger submitted to the court a motion to set aside the default and default judgment pursuant to the discretionary provision of section 473, subdivision (b). The motion did not include a proposed responsive pleading in violation of section 473, subdivision (b) and was procedurally improper under the local rules. In support, Hagan filed her attorney declaration that did not describe attorney fault; instead it questioned whether the trial court had authority to enter the default.

The trial court denied Paula's motion for a real estate agent's entry and granted Rodger's motion to set aside the second default and default judgment.

4. *Paula's reconsideration motion*

Paula moved for reconsideration. Von Esch's attached declaration described the legal and procedural infirmities of Rodger's motion to set aside the default judgment, including that the trial court had directed Paula to respond to Rodger's set-aside motion immediately upon receiving it for the first time in open court.

At the February 2016 hearing on Paula's reconsideration motion, the trial court acknowledged that the motion was "right on a lot of those points." Although the court had intended to

grant reconsideration, it decided to deny the motion because by that time Rodger had filed his response to the petition for dissolution. The court stated, "[t]he law does not favor a default." "[T]hey want to contest it, I'm going to allow them to contest it. I'm not going to let it go by default." "And you can appeal that if you want. I should be interested in what they say if they're going to say I shouldn't let them contest it, even if they want to."

Paula timely appealed.[2]

CONTENTION

Paula contends that the trial court abused its discretion in setting aside the default and default judgment and erred in denying her reconsideration motion.

DISCUSSION

1. *The trial court had no jurisdiction to grant Rodger statutory relief.*

A default and default judgment entered against a party through that party's "mistake, inadvertence, surprise, or excusable neglect" may be set aside under the discretionary provision of section 473, subdivision (b),[3] but only if the motion is

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[2] An order setting aside a judgment is appealable as a postjudgment order. (*Younessi v. Woolf* (2016) 244 Cal.App.4th 1137, 1142-1143.)

[3] Section 473, subdivision (b) reads in relevant part: "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment . . . or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief *shall* be accompanied by a copy of the answer or other pleading proposed to be filed therein, *otherwise the application*

made *within six months after entry of the default*. (*Manson, Iver & York v. Black* (2009) 176 Cal.App.4th 36, 42.) Rodger moved to set aside the default under section 473, subdivision (b) *17 months* after its entry, with the result that the trial court had no power to give him statutory relief. This is so, irrespective of Rodger's failure to demonstrate mistake, inadvertence, surprise or excusable neglect because the six-month period is jurisdictional. (*Manson, Iver & York v. Black*, at p. 42; 3 Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2017) ¶ 16:57, p. 16-21; *Arambula v. Union Carbide Corp*. (2005) 128 Cal.App.4th 333, 344 [court has no authority to grant relief when a party fails to comply with statute's time limits].) [4]

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shall not be granted, and shall be made within a reasonable time, *in no case exceeding six months, after the judgment,* . . . or proceeding was taken. . . . 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." (Italics added.)

[4] Rodger could not rely on section 473.5, which provides a two-year window to set aside a default or default judgment when a default or default judgment has been entered because service of summons did not result in actual notice to a party in time to defend the action. Rodger had actual notice of the service of

Another reason the trial court was precluded from granting Rodger's set-aside motion was that section 473, subdivision (b) requires that "[a]pplication for this relief *shall be* accompanied by a copy of the answer or other pleading proposed to be filed therein, *otherwise the application shall not be granted*." (§ 473, subd. (b), italics added.) Rodger did not include with his motion a copy of his proposed answer to the petition for dissolution. Nor did Rodger substantially comply with the proposed answer requirement. (See *Carmel, Ltd. v. Tavoussi* (2009) 175 Cal.App.4th 393, 402-403 [although proposed answer was not attached to the set-aside motion, requirement was substantially satisfied because answer was made available at the hearing on the set-aside motion].) Rodger did not file his answer until December 18, 2015, *a month after the court ruled on his set-aside motion*.

Rodger did not seek relief under the mandatory provision of subdivision (b) of section 473 and Hagan's attached declaration nowhere mentions fault. Thus, the trial court was not obligated to consider availability of relief under the mandatory provision. (*Luri v. Greenwald* (2003) 107 Cal.App.4th 1119, 1125-1126 [motion must specify grounds upon which relief is sought whether under the discretionary provision or the mandatory provision for attorney fault].)

2. *Rodger is not entitled to equitable relief*.

Generally, "[a]fter six months from entry of default, a trial court may . . . vacate a default on equitable grounds even if statutory relief is unavailable. [Citation.]" (*Rappleyea v.*

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process. (*Sporn v. Home Depot USA, Inc*. (2005) 126 Cal.App.4th 1294, 1299-1300.)

Campbell (1994) 8 Cal.4th 975, 981.) However, "traditional 'equitable' set-aside relief is *statutorily-preempted* with regard to . . . post-1992 *marital property division or support judgments* [citations]." (3 Hogoboom & King, *supra*, ¶¶ 16:80 & 16:101, at pp. 16-26, 16-30, citing Fam. Code § 2120 et seq.; see also, *In re Marriage of Zimmerman* (2010) 183 Cal.App.4th 900, 910.) "[A]s to such judgments[,] all prior law on 'equitable' set-aside relief is *preempted*. [Citations.]" (*In re Marriage of Georgiou & Leslie* (2013) 218 Cal.App.4th 561, 571.) "Family Code section 2122 specifies 'the *exclusive grounds* and time limits for an action or motion to set aside a marital dissolution judgment' [citation], after the six-month deadline under Code of Civil Procedure section 473 has passed [citation]." (*In re Marriage of Kieturakis* (2006) 138 Cal.App.4th 56, 87, italics added, quoting from *In re Marriage of Rosevear* (1998) 65 Cal.App.4th 673, 684 & Fam. Code, § 2121, subd. (a).) Rodger's set-aside motion did not mention any of the six exclusive grounds enumerated in Family Code section 2122, let alone make the necessary showing thereunder. Hence, he did not seek relief under the Family Code.[5]

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[5] Family Code section 2122 reads: "The grounds and time limits for a motion to set aside a judgment, or any part or parts thereof, are governed by this section and shall be one of the following:

"(a) Actual fraud where the defrauded party was kept in ignorance or in some other manner was fraudulently prevented from fully participating in the proceeding. An action or motion based on fraud shall be brought within one year after the date on which the complaining party either did discover, or should have discovered, the fraud.

We are mindful that " ' "appellate courts have always been and are favorably disposed toward such action upon the part of the trial courts as will permit, rather than prevent, the adjudication of legal controversies upon their merits." ' [Citation.]" (*Carmel, Ltd. v. Tavoussi*, *supra*, 175 Cal.App.4th at p. 402.) However, "[f]inal is final, and liberality has its limits." (*Grappo v. McMills* (2017) 11 Cal.App.5th 996, 1022 (dis. opn. of Stewart, J.).) Rodger's set-aside motion was procedurally deficient and untimely under section 473, subdivision (b), and his motion did not seek relief under the relevant provisions of the Family Code. Accordingly, the trial court had no authority to set

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"(b) Perjury. An action or motion based on perjury in the preliminary or final declaration of disclosure, the waiver of the final declaration of disclosure, or in the current income and expense statement shall be brought within one year after the date on which the complaining party either did discover, or should have discovered, the perjury.

"(c) Duress. An action or motion based upon duress shall be brought within two years after the date of entry of judgment.

"(d) Mental incapacity. An action or motion based on mental incapacity shall be brought within two years after the date of entry of judgment.

"(e) As to *stipulated or uncontested judgments* or that part of a judgment stipulated to by the parties, mistake, either mutual or unilateral, whether mistake of law or mistake of fact. An action or motion based on mistake shall be brought within one year after the date of entry of judgment.

"(f) Failure to comply with the disclosure requirements of Chapter 9 (commencing with Section 2100). An action or motion based on failure to comply with the disclosure requirements shall be brought within one year after the date on which the complaining party either discovered, or should have discovered, the failure to comply." (Italics added.)

aside the default and default judgment. As the result of our holding, we need not address Paula's challenge to the order denying her motion for reconsideration (§ 1008).

DISPOSITION

The orders setting aside the default and default judgment and denying the motion for reconsideration are reversed. Appellant to recover costs on appeal.

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DHANIDINA, J.*

We concur:

EDMON, P. J.

LAVIN, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.