Filed 11/28/18 Bag Fund, LLC v. Sand Canyon Corp. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

BAG FUND, LLC, Plaintiff and Respondent, v. SAND CANYON CORPORATION, Defendant and Appellant.	B282579 Los Angeles County Super. Ct. No. BC614245

APPEAL from an order of the Superior Court of Los Angeles County, Elizabeth R. Feffer, Judge. Reversed with directions.

Brooks Bauer and Bruce T. Bauer for Defendant and Appellant.

Barry G. Coleman; Law Offices of Vincent J. Quigg and Edith J. Walters for Plaintiff and Respondent.

INTRODUCTION

Defendant Sand Canyon Corporation appeals from an order denying its motion to set aside a default judgment under the mandatory relief provision of Code of Civil Procedure section 473, subdivision (b).[1] In denying the motion, the trial court found it was "a deliberate decision by Defendant's counsel" that led to Sand Canyon's default, not counsel's good faith mistake, inadvertence or neglect. Although supported by substantial evidence, we conclude the court's finding, which squarely placed the blame for default on Sand Canyon's *attorney*, was not a valid basis to deny Sand Canyon mandatory relief under section 473, subdivision (b). We reverse.

FACTS AND PROCEDURAL BACKGROUND

On March 18, 2016, plaintiff Bag Fund, LLC filed a complaint against Sand Canyon and two other defendants, seeking declaratory relief regarding the priority of Bag Fund's judgment lien on certain real property. Years earlier, Sand Canyon had recorded a deed of trust against the property to secure a loan made to one of the other defendants.[2]

---

[1] Statutory references are to the Code of Civil Procedure unless otherwise designated.

[2] According to Bag Fund's complaint, in November 2005, its predecessor by assignment, L&J Assets, obtained a judgment against Danny Bitar for approximately $30,000. After L&J recorded an abstract of judgment, Bitar transferred certain real property to Nicholas Nahas. L&J filed an action for fraudulent conveyance against Bitar and Nahas, and the parties eventually agreed to a stipulation for entry of judgment. The stipulation included the original judgment against Bitar, and the parties agreed it would relate back to the earlier lawsuit. Subsequently, in March 2006, Sand Canyon made a loan to Nahas secured by a

Sand Canyon failed to respond to the complaint, and, on April 27, 2016, the trial court entered an order of default. On August 24, 2016, the court vacated the default, after the parties submitted a stipulation to set it aside.

Sand Canyon again failed to respond to Bag Fund's complaint, and, on October 19, 2016, the trial court again entered an order of default. On February 21, 2017, the court entered a default judgment against Sand Canyon.

On March 23, 2017, Sand Canyon moved to set aside the default judgment under the mandatory relief provision of section 473, subdivision (b). In support, Sand Canyon's attorney, Bruce Bauer, submitted a sworn declaration, stating in pertinent part:

- "[Before and after Bag Fund filed its complaint], I corresponded with Bag Fund's counsel with regard to my assertion that this action was not merited against [Sand Canyon]."
- "[O]n October 24, 2016, I held a discussion with Mr. Coleman [Bag Fund's counsel] regarding [Sand Canyon's] assertions. In that conversation, Mr. Coleman had requested our position vis-à-vis the merits of the underlying matter and [stated] that if we could provide that information that we would be dismissed from this matter."
- "I confirmed our conversation in my email of October 26, 2016 . . . . In that email, I plainly laid

---

deed of trust on the real property that was the subject of the fraudulent conveyance suit. By the time Bag Fund filed its March 2016 complaint in this action, Bitar's debt on the 2005 judgment had allegedly grown to approximately $65,600.

out the case that this matter had no merit whatever as against [Sand Canyon] based on the factors detailed therein."

- "Mr. Coleman responded in an email, dated October 26, 2016, that he wanted statutory authority in support of [Sand Canyon's] positions."
- "I responded to Mr. Coleman's email with my email of December 1, 2016, which provided statutory and case authority in support of [Sand Canyon's positions]."
- "I then followed up my December 1, 2016 email with a telephone message with Mr. Coleman in which I indicated that this matter would be at an end. I confirmed that I had left such a message with Mr. Coleman in my email of December 1, 2016."
- "Based on the presentation of the above, I believed that Plaintiff was, and is, not proceeding against [Sand Canyon] in good faith in this matter. The entry of default judgment of the Defendant [Sand Canyon] in this matter was due to my fault, mistake and neglect."

With the declaration, Bauer submitted his email communications with Coleman, setting forth Sand Canyon's position on the merits of the case, and Bauer's ongoing demand to dismiss Sand Canyon from the action.[3] In his October 26, 2016 email, Coleman rejected Bauer's demand, writing: "This is to correct your conception of our conversation. I did not, repeat, did not state that upon providing this information that you would be

[3] The declaration also included a copy of Sand Canyon's proposed answer.

dismissed. I requested that you provide [me] with some authority supporting your position as that might have some bearing on the matter. However, I do see that you have provided your versions of the facts but I do not see any case or statutory authority supporting your position." Bauer reiterated Sand Canyon's contentions in his December 1, 2016 email. The email concluded: "As indicated above, there is NO merit whatsoever to your clients' claims in this matter, and most certainly not against our client. Please confirm that you will be dismissing us from this matter immediately." (Bold and underline omitted.) Coleman did not respond to Bauer's December 2016 email.

Bag Fund opposed the motion, arguing Sand Canyon's failure to answer the complaint was part of a series of "carefully calculated litigation delay strategies" that Sand Canyon's counsel was "now disingenuously trying to pass off as neglect." In view of the email exchange, Bag Fund maintained it defied "reason or logic" to think "Defendant's counsel actually had a good faith belief" Bag Fund would abandon its claims. To underscore the point, Bag Fund emphasized that Bauer's purported " 'good faith' belief" apparently continued after the default judgment was entered on February 21, 2017, and "until the filing of the Abstract of Judgment on March 17, 2017."

Bauer submitted a supplemental declaration in reply to Bag Fund's opposition. In addition to reiterating the contentions set forth in his email communications, Bauer offered additional justification for his failure to file a responsive pleading: "My approach is, and has always been, to resolve matters outside of litigation where counsel can meet and confer on topics. I corresponded repeatedly with Bag Fund's counsel with regard [to] these attempts . . . . He indicated he would dismiss this action

against [Sand Canyon] based on my presentation of authority. I never have received anything that contradicted my recitation of the facts or the authority that I presented. . . . It is disingenuous now, then, for Plaintiff's counsel to assert that I operated in bad faith in this matter or attempted to obtain tactical advantage in this matter."

The trial court denied the motion, largely agreeing with Bag Fund that Bauer could not have had a " 'good faith belief' " that Bag Fund would abandon its claim. Adopting Bag Fund's reasoning regarding Bauer's silence following entry of the default judgment, the court found: "Defendant's inaction in this matter weighs against [its] counsel's credibility that the default judgment was entered as a result of mistake, inadvertence, surprise, or neglect. Rather, it appears to have been a deliberate decision by Defendant's counsel." Because the court found Bauer consciously and deliberately failed to answer the complaint, it concluded the prerequisites for mandatory relief under section 473, subdivision (b) were not met.[4] This appeal followed.

DISCUSSION

"Section 473, subdivision (b), authorizes the trial court to relieve a party from a default judgment entered because of the party's or his or her attorney's mistake, inadvertence, surprise, or

---

[4] The trial court also concluded the motion was untimely, because Sand Canyon filed it more than six month after "the entry of default." As Bag Fund acknowledges on appeal, that basis for denying the motion was erroneous, because the six-month period for seeking relief under the mandatory provision of section 473, subdivision (b) runs from the date of the " 'resulting default *judgment* or dismissal.' " (*Sugasawara v. Newland* (1994) 27 Cal.App.4th 294, 297, italics added.)

neglect. The section provides for both mandatory and discretionary relief." (*Carmel, Ltd. v. Tavoussi* (2009) 175 Cal.App.4th 393, 399 (*Carmel*).) Mandatory relief is available "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 . . . , unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." (§ 473, subd. (b).)

If the prerequisites for applying the mandatory relief provision exist, the trial court does not have discretion to refuse relief. (*Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 612.) Thus, to the extent relief is premised on undisputed facts, or the claim of error presents an issue of statutory interpretation, we assess the matter as a pure question of law subject to de novo review. (*Carmel, supra,* 175 Cal.App.4th at p. 399; *Martin Potts & Associates, Inc. v. Corsair, LLC* (2016) 244 Cal.App.4th 432, 437 (*Martin Potts*).) In contrast, "[w]here the facts are in dispute as to whether or not the prerequisites of the mandatory relief provision . . . have been met, we review the record to determine whether substantial evidence supports the trial court's findings." (*Carmel,* at p. 399; *Martin Potts,* at p. 437.)

The issue presented in this case does not implicate disputed facts. For purposes of this appeal, we may assume substantial evidence supports both the trial court's credibility determination, and the court's factual finding that the failure to answer was not accidental or inadvertent, but rather the result of "a deliberate decision by Defendant's counsel." But even if we accept these two

findings, we still must determine whether deliberate and inexcusable inaction by a defaulted party's counsel might still constitute "mistake, inadvertence, surprise, or neglect" under the mandatory relief provision of section 473, subdivision (b). In view of the purposes underlying the mandatory relief provision, we conclude that where the fault for a deliberate decision rests entirely with the attorney, and not the client, the statutory prerequisite is met, and the client is entitled to relief from default.

We begin with the trial court's credibility determination. As explained in its written ruling, given Bauer's delay and inaction in addressing the default judgment, the court doubted he truly believed in "good faith" that Bag Fund had abandoned its claim. But contrary to the court's apparent reasoning, it has long been recognized that an attorney's good faith or reasonable mistake is *not* a prerequisite for mandatory relief under section 473, subdivision (b). As the court explained in *Martin Potts*, the discretionary and mandatory relief provisions differ in several important respects, including that "the mandatory relief provision is broader in scope insofar as it is available for *inexcusable neglect* [citation], while discretionary relief is reserved for '*excusable* neglect.' " (*Martin Potts, supra,* 244 Cal.App.4th at p. 438, first italics added; accord, *Metropolitan Service Corp. v. Casa de Palms, Ltd.* (1995) 31 Cal.App.4th 1481, 1486-1487 (*Metropolitan*) [enactment of the mandatory relief provision introduced an "entirely different" standard than the traditional discretionary rule; under mandatory provision, the court must "grant relief if the attorney admits neglect, even if the

neglect was *inexcusable*"].)[5] Thus, it makes no difference that the trial court disbelieved Bauer's excuse, because even if Bauer lacked a "good faith" basis to suppose Bag Fund would abandon its claim, this still would not preclude *his client* from receiving mandatory relief under section 473, subdivision (b). (See *Metropolitan,* at p. 1487 [explaining "[t]he purpose of this law is to relieve the innocent client of the burden of the attorney's fault," and concluding "[t]he two reasons given by the trial court here (two-month delay in seeking relief and inexcusable attorney neglect) are not valid grounds for denying a motion for mandatory relief"].)

The finding that Sand Canyon's inaction resulted from "a deliberate decision by Defendant's counsel" is likewise insufficient to deny the client mandatory relief under section 473, subdivision (b). *Solv-All v. Superior Court* (2005) 131 Cal.App.4th 1003 (*Solv-All*) is instructive. The defendants in *Solv-All* sought relief under the mandatory provision after failing to respond to the plaintiff's complaint. In his declaration of fault, the defendants' attorney admitted "the failure to answer was not accidental or inadvertent, but was the calculated result of his mistaken" belief that the plaintiff intended to continue settlement negotiations. (*Solv-All,* at p. 1009; see also *id.* at p. 1006.) As here, the plaintiff argued "a *deliberate action* by counsel cannot constitute 'mistake, inadvertence, surprise, or neglect' " (*id.* at p. 1009), and the trial court agreed, reasoning,

---

[5] As the *Martin Potts* court further explained, leniency for inexcusable neglect "comes with a price—namely, the duty to pay 'reasonable compensatory legal fees and costs to opposing counsel or parties' " under the mandatory relief provision. (*Martin Potts*, at p. 438; § 473, subd. (b).)

" '[t]he decision not to answer appears to have been a conscious one to save money rather than a result of negligence, excusable or otherwise' " (*id.* at p. 1007). After "examining and considering the purposes behind the 'attorney fault' provisions," the *Solv-All* court reversed. (*Id.* at p. 1009.)

The *Solv-All* court explained the mandatory relief provision was "clearly designed to fill [a] gap" in the prior law, under which "a litigant who suffered a default or default judgment due to inexcusable attorney error could only obtain relief if he or she could persuade the court that counsel's behavior amounted to 'total abandonment' of the client." (*Solv-All, supra,* 131 Cal.App.4th at p. 1009.) In extending relief to those litigants who suffered a default due to attorney error that was " 'simply inexcusable,' " but not a total abandonment, the new provision's "purpose was threefold: to relieve the innocent client of the consequences of the attorney's fault; to place the burden on counsel; and to discourage additional litigation in the form of malpractice actions by the defaulted client against the errant attorney." (*Ibid.*)

To carry out these legislative purposes effectively, the *Solv-All* court held the mandatory relief provision's " 'neglect' " language must be interpreted to "cover both inadvertent and *deliberate* acts or omissions." (*Solv-All, supra,* 131 Cal.App.4th at p. 1010, italics added.) The court reasoned this broader interpretation was compelled because, "[f]rom the client's point of view, it doesn't matter a whit whether the default was due to gross carelessness or bad strategy; either way, the client is the one stuck with the judgment resulting from the attorney's error. In both cases, it is the attorney's 'neglect' to carry out his duty to his client that causes the problem. In both cases, the client

should be entitled to relief if the attorney admits that the inaction was his responsibility." (*Ibid.*)

In adopting this broad definition, the *Solv-All* court acknowledged that "if the client is involved in misconduct or neglect, the statutory condition that the default must be 'caused' by attorney neglect is not satisfied." (*Solv-All, supra,* 131 Cal.App.4th at p. 1010.) But, while past cases had invoked that rule to "refuse to grant relief based on the client's personal responsibility," the *Solv-All* court held those cases were "not controlling," because there was "*no evidence*" in the record before it "that [the defendants] were aware of counsel's decision to delay filing an answer, or that they suggested or agreed that he should do so." (*Id*. at pp. 1010-1011; cf. *Todd v. Thrifty Corp*. (1995) 34 Cal.App.4th 986, 990-992 [trial court found, on sufficient evidence, the client was factually responsible, in part due to unexplained "personal problems"]; *Johnson v. Pratt & Whitney Canada, Inc.* (1994) 28 Cal.App.4th 613, 622-623 [client "implicated" in unsatisfactory discovery responses, which included covering up existence of documents]; *Lang v. Hochman* (2000) 77 Cal.App.4th 1225, 1248 ["a party can rely on the mandatory provision of section 473 only if the party is totally innocent of any wrongdoing and the attorney was the *sole* cause of the default or dismissal"].)

As in *Solv-All*, there is no evidence in the record here that Sand Canyon was aware of, or that it agreed to, Bauer's decision not to respond to the complaint. On the contrary, Bauer's declarations and his email exchanges with Bag Fund's counsel at most suggest Bauer believed he could persuade Bag Fund to dismiss Sand Canyon from the case if he presented opposing counsel with a compelling argument for dismissal. Bauer

reaffirmed this decision was his alone in his supplemental declaration, explaining, "My approach is, and has always been, to resolve matters outside of litigation where counsel can meet and confer on topics. I corresponded repeatedly with Bag Fund's counsel with regard [to] these attempts." Critically, although the trial court doubted that Bauer truly believed in "good faith" that his efforts had been successful, the court did not find Sand Canyon was complicit in its attorney's unreasonable assessment or strategy. (Cf. *Behm v. Clear View Technologies* (2015) 241 Cal.App.4th 1, 15-16 [affirming denial of mandatory relief where attorney's "prior statements attributed the delay in producing the discovery request to his clients"].) Rather, the court found the cause of the default was "a deliberate decision *by Defendant's counsel*." (Italics added.) Absent evidence that Sand Canyon was also to blame for Bauer's decision, we agree with *Solv-All*, and conclude the trial court's finding was not a valid ground to deny mandatory relief under section 473, subdivision (b).

Bag Fund does not dispute that Bauer was solely responsible for Sand Canyon's default. It nevertheless argues the trial court's finding was sufficient to deny relief, because Bauer's inaction was not only deliberate, but reflected "calculated delay tactics that in this case proved ultimately unsuccessful." Bag Fund does not disclose what success it thinks Bauer hoped to achieve by these delay tactics, and the cases it cites to support its contention do not persuade us that Sand Canyon should be denied relief for its attorney's admitted fault.

Bag Fund cites *Del Junco v. Hufnagel* (2007) 150 Cal.App.4th 789 and *Jerry's Shell v. Equilon Enterprises, LLC* (2005) 134 Cal.App.4th 1058 (*Equilon*) to support its contention that "no protection of Section 473(b) is afforded to the party when

counsel tries to disguise a tactical decision under the guise of a mistake or inadvertence." *Del Junco* dealt with the trial court's jurisdiction to strike an answer and enter default as a sanction for a litigant's defiance of discovery orders. (*Del Junco,* at pp. 799-800.) The case is inapposite: in no part of the partially published opinion did the court address the circumstances under which a party can be denied mandatory relief under section 473, subdivision (b).

Equilon did consider the scope of section 473's mandatory relief provision, but the facts in that case are crucially different from those presented by the current record. The case addressed a truly remarkable pattern of discovery abuses by a group of plaintiffs and their attorneys, culminating in the imposition of terminating sanctions. The plaintiffs in *Equilon* failed to respond to discovery requests, then failed to respond to defense counsel's letter inquiring about overdue responses, then failed to respond to a motion to compel. (*Equilon, supra,* 134 Cal.App.4th at pp. 1061-1062.) A discovery referee granted the motion, ordered responses to be made " 'without objection,' " and imposed monetary sanctions against the plaintiffs. (*Id.* at p. 1062.) As the responses came due under the discovery order, plaintiffs' counsel again asked defense counsel for more time, but then failed to serve any responses by the extended deadline. (*Ibid.*) The defendants filed a second motion to compel, which the plaintiffs did not oppose. The court granted the motion, imposed additional monetary sanctions, and warned that if the plaintiffs " 'do not comply with this Order, the Court will be inclined to grant terminating sanctions.' " (*Id.* at pp. 1062-1063.) Some of the plaintiffs then responded, but the responses were incomplete and contained general objections in defiance of the discovery

order. (*Id.* at p. 1063.) After receiving no response to a letter regarding these deficiencies, the defendant moved for terminating sanctions. (*Ibid.*) The plaintiffs filed no written opposition, although plaintiffs' counsel appeared at the hearing. (*Id.* at p. 1064.) Upon learning the court intended to grant terminating sanctions, plaintiffs' counsel protested that " 'responses were provided last week; but I know that—I'll have to bring some other sort of motion to get that set aside.' " (*Ibid.*)

The *Equilon* plaintiffs moved to set aside the dismissal under section 473's mandatory relief provision. In her attorney declaration of fault, plaintiffs' counsel gave an implausible account of delegated work, sudden hospitalizations, and law clerks who sent out the wrong documents over a period of several months. (*Equilon, supra,* 134 Cal.App.4th at pp. 1064-1065.) The defendant refuted counsel's account with a declaration she filed in a different proceeding, in which plaintiffs' counsel attested to the same health problems and hospitalizations, but on dates months earlier than those set forth in her current declaration. (*Id.* at pp. 1065-1066.) The trial court denied the section 473 motion, and the reviewing court affirmed, concluding mandatory relief was not available if an " 'intentional strategic decision' caused the default or dismissal." (*Id.* at p. 1073.) The appellate court explained: "While calling [counsel's] practice a 'strategy' is perhaps too generous a term, there is no question that it resulted in the attorneys having considerable supplemental time to respond to discovery not available to practitioners who follow the rules, while generally risking nothing more severe than an order compelling responses that should have been provided months earlier or an issue sanction on a topic that might never have been proven at trial. When the

ultimate sanction of dismissal inevitably reared its head, appellants' counsel's obvious plan was to claim attorney fault and revive the claims through a section 473(b) motion for relief. If we were to hold that counsel's actions were subject to automatic, mandatory relief, we would be rewarding and encouraging this wholly improper conduct. A party cannot justly be permitted to seek relief under section 473(b) from sanctions imposed for deliberate failure to respond to discovery or oppose discovery motions." (*Id*. at pp. 1073-1074, fn. omitted.)

Without directly confronting the central holding of *Solv-All*—that a client should not be punished vicariously with default, even where his or her attorney's conduct is deliberate (*Solv-All, supra,* 131 Cal.App.4th at p. 1010)—the *Equilon* court sought to distinguish the case on the ground that "the attorney [in *Solv-All*] *was* mistaken about whether plaintiff expected a response to the complaint given that settlement discussions were underway, even if his decision not to file an answer can be seen as deliberate or intentional." (*Equilon, supra,* 134 Cal.App.4th at p. 1074.) The court held the same could not be said for the plaintiffs' counsel, who could "point to no such mistake about the need to respond to discovery or the need to oppose the motion for sanctions." (*Ibid*.)

Equilon is distinguishable, both as to the matter it identified to distinguish *Solv-All* and with respect to the facts that compelled the court to find counsel acted upon an intentional strategy of misconduct that should not be condoned by automatic relief. As in *Solv-All*, and as distinct from *Equilon*, the record here shows that while Bauer deliberately failed to respond to the complaint on behalf of Sand Canyon, he did so based upon the mistaken, albeit unwarranted, belief that he could resolve the matter outside of litigation by meeting and conferring with Bag

Fund's counsel. Bauer's failure to confirm Bag Fund's intentions after his final December 2016 email was undoubtedly neglectful, but, from his innocent client's perspective, this is the sort of attorney neglect and inaction that section 473's mandatory relief provision is intended to address. (See *Solv-All, supra,* 131 Cal.App.4th at p. 1010; *Metropolitan, supra,* 31 Cal.App.4th at p. 1487.)

As for Bag Fund's charge that Bauer intentionally allowed Sand Canyon to default as part of some calculated strategy of delay, we can find no evidence in the record to suggest such a nefarious plan. As noted, Bag Fund has not identified what strategic advantage it believes Bauer hoped to obtain by his supposed delay tactics, and we are at a loss to discern what possible goal Bauer might have had, apart from the obvious one of obtaining an agreement for his client's dismissal by convincing Bag Fund's counsel that the claims against Sand Canyon lacked merit. But if the goal was to obtain a dismissal without liability, allowing a default to be taken against his client was surely antithetical to that purpose, especially when Bauer had arguments that he apparently believed would defeat Sand Canyon's claim on the merits. Unlike *Equilon*, where the court found the plaintiffs' attorney's tactics allowed her to have "considerable supplemental time to respond to discovery not available to practitioners who follow the rules" (*Equilon, supra,* 134 Cal.App.4th at p. 1073), here, Bauer's only apparent purpose was to save money for his client by settling the matter outside of litigation. He was unsuccessful in that purpose and, as the trial court found, he clearly can be faulted for deliberately failing to respond to the complaint. But even that inexcusable inaction is not a valid basis to deny his client mandatory relief under section

473, subdivision (b). (See *Solv-All, supra,* 131 Cal.App.4th at p. 1010; *Metropolitan, supra,* 31 Cal.App.4th at p. 1487.)

DISPOSITION

The order is reversed. The trial court is directed to (1) vacate its order denying relief, (2) enter a new order granting relief from the default and default judgment, and (3) hold new proceedings at which the parties may argue the issue of sanctions and compensatory expenses. Sand Canyon Corporation is entitled to its costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

EDMON, P. J.

DHANIDINA, J.