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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

SUNG J. LEE,

Plaintiff and Respondent,

v.

HAE DUK KIM,

Defendant and Appellant.

B237391

(Los Angeles County
Super. Ct. No. BC 407761)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Elizabeth A. White, Judge. Affirmed.

Law Offices of James B. Kropff, James B. Kropff; Law Offices of Eun J.
Kwon, and Eun J. Kwon for Appellant.

Henry M. Lee & Associates, Henry M. Lee, and Robert Myong for
Respondent.

INTRODUCTION

This appeal presents a single issue: whether the mandatory relief from default or a default judgment provided by Code of Civil Procedure section 473, subdivision (b) for attorney fault applies to an attorney's failure to appear for trial.¹ Appellant Hae Duk Kim contends the trial court erred in denying her motion to vacate and set aside a judgment for respondent Sung J. Lee under section 473, subdivision (b), entered after her attorney failed to appear for a duly noticed trial. We affirm.²

FACTUAL AND PROCEDURAL HISTORY

On February 17, 2009, respondent filed a complaint against appellant and Wien Bakery, LLC. Appellant is the shareholder and officer of the bakery. The defendants filed an answer April 10, 2008. Appellant subsequently retained attorney Robert Y. Lee, and The Lee Firm to defend the case.

The trial court initially set a July 15, 2010 trial date, but granted a continuance to August 31, 2010. The matter was then trailed for jury trial to September 13, 2010. On that date, attorney Lee filed a bankruptcy petition on behalf of the bakery, which had the effect of staying the trial. The court then granted a request to continue the trial to November 29, 2010, in order for respondent to obtain relief from the bankruptcy stay. Appellant's attorney was present and waived notice. Respondent was successful in getting the stay lifted on

¹ All further statutory citations are to the Code of Civil Procedure.

² In the court below, appellant also moved for relief from the judgment under the discretionary provision of section 473, subdivision (b) and under the trial court's general equitable powers. Appellant does not argue that the trial court abused its discretion in denying relief on those grounds, and any argument is therefore forfeited. In any event, we would find no abuse of discretion.

November 16, 2010, and the bakery's ex parte motion to reinstate the stay was denied November 23, 2010.

On November 29, 2010, the case was called for trial. Because there was no appearance for defendants, the court stated that "the matter will proceed as a prove-up." Respondent testified and produced documentary evidence. Judgment against appellant was entered December 28, 2010.

On June 28, 2011, appellant moved to vacate the judgment pursuant to the mandatory provision of section 473, subdivision (b), based on her attorney's failure to appear for trial. She submitted no attorney affidavit, but a month later, attorney Lee filed an affidavit of fault in support of the motion. Following a hearing and additional briefing, the court denied the motion, finding "the judgment was not caused by an event of 'default' but rather by a failure of the defendant to appear at trial after being served with notice of trial . . . and waiving notice of the continued date for trial." Appellant timely appealed the denial of the motion to vacate and set aside the judgment.

DISCUSSION

Under section 473, subdivision (b), a party is entitled to mandatory relief from a default judgment for attorney fault. It provides that "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," "the court shall" "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." (§ 473, subd. (b); *Hossain v. Hossain* (2007) 157 Cal.App.4th 454

(*Hossain*).) In *Hossain*, this court held the mandatory relief provision “does not apply to an attorney’s failure to timely file opposition and a cross-motion to a motion to enforce a settlement.” (*Hossain*, at p. 456.) As we explained, the failure to timely file an opposition and a cross-motion is not a “default,” and does not result in a “default judgment.” Rather, ““the mandatory provision of section 473(b) applies to a “default” entered by the clerk (or the court) when a defendant fails to answer a complaint, not to every “omission” or “failure” in the course of an action that might be characterized as a “default” under the more general meaning of the word.”” (*Id.* at p. 458, quoting *English v. Ikon Business Solutions, Inc.* (2001) 94 Cal.App.4th 130, 143, fn. omitted [mandatory provision of § 473, subd. (b) does not apply to summary judgments].) Accordingly, “the mandatory provision of section 473(b) does not apply to a judgment entered after an uncontested trial in a defendant’s absence because such a judgment is neither a ‘default,’ a ‘default judgment’ nor a ‘dismissal’ within the meaning of section 473(b).” (*Vandermoon v. Sanwong* (2006) 142 Cal.App.4th 315, 317.)

We respectfully disagree with the court in *In re Marriage of Hock & Gordon-Hock* (2000) 80 Cal.App.4th 1438, 1440 (*Hock*), which held to the contrary, finding that judgment entered after an attorney’s failure to appear at trial was the “procedural equivalent of a default.” (*Id.* at p. 1443.) *Hock* relied in part on this court’s decision in *Yeap v. Leake* (1997) 60 Cal.App.4th 591 (*Yeap*), but in *Hossain*, we expressly rejected the majority’s reasoning in *Yeap*, as well as that of *Hock*. (*Hossain, supra*, 157 Cal.App.4th at pp. 457-458.) We see no reason to reconsider our decision.

Here, appellant’s attorney appeared after an answer to the complaint was filed. He was present when the trial date was continued to November 29, 2010, and waived further notice. After an uncontested trial, the trial court issued and

entered a judgment. These circumstances do not bring this case within the mandatory relief provision of section 473, subdivision (b). No default was entered by the clerk, and the resulting judgment was not a default judgment. Accordingly, we affirm the trial court's order denying the motion to vacate and set aside the judgment.

DISPOSITION

The judgment is affirmed. Respondent is awarded his costs on appeal.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.