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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

WILLIAM MUNNS, Plaintiff and Appellant, v. SHAHROOZ ABOOTALEBI, Defendant and Respondent.	B261911 (Los Angeles County Super. Ct. No. LC095901)

APPEAL from an order of the Superior Court of Los Angeles County, Frank J. Johnson, Judge. Affirmed.

William Munns, in pro. per., for Plaintiff and Appellant.

Gibbs Giden Locher Turner Senet & Wittbrodt, Gary E. Scalabrini and Philip C. Zvonicek, for Defendant and Respondent.

I. INTRODUCTION

Plaintiff, William Munns, appeals from an order denying his motion for mandatory relief made pursuant to Code of Civil Procedure section 473, subdivision (b).[1] Plaintiff made the motion after the trial court dismissed the case without prejudice after he failed to appear at a mandatory settlement conference. Plaintiff argues he is entitled to have the dismissal set aside because he satisfies the requirements for mandatory relief under section 473, subdivision (b). However, plaintiff admits the trial court found the motion was not properly served on counsel for defendant, Shahrooz Abootalebi. Plaintiff argues the evidence is insufficient to support a finding of lack of service of the motion to set aside the dismissal and this appeal should proceed as an uncontested matter. We disagree. Based upon the record provided, substantial evidence supports the trial court's finding that the motion to set aside the dismissal was not served on defendant. And we conclude this appeal should not under any circumstances proceed as an uncontested matter. We thus affirm the order of dismissal.

II. BACKGROUND

On December 28, 2011, plaintiff and his wife, Jaklin Derderian Munns, filed a complaint against defendant for: general negligence; premises liability; negligence per

[1] Further statutory references are to the Code of Civil Procedure unless otherwise specified.

se; breach of warranty of habitability; retaliatory eviction; and contract breach. (Ms. Munns has not appealed.) Plaintiffs rented a residence in Woodland Hills from defendant from March 2001 to October 2010. Plaintiffs allege they suffered various health problems because the residence had mold which was caused by water intrusion. On February 21, 2012, defendant filed an answer denying the allegations and asserting five affirmative defenses.

On June 18, 2012, defendant moved to compel responses to his special interrogatories and document production demand. Plaintiffs did not oppose the motions. In addition, plaintiffs' attorney did not appear at the hearing on the motions to compel responses to defendant's special interrogatories and document production demand. On September 7, 2012, the trial court ordered plaintiff to respond to defendant's special interrogatories and document production demand. Defendant was awarded $990 in monetary sanctions against plaintiffs and their attorney. On October 17, 2012, defendant moved for terminating sanctions because plaintiffs failed to comply with the September 7, 2012 order to answer interrogatories and respond to his production demand. Again, plaintiffs did not file an opposition to the motion. Plaintiffs' counsel appeared at the November 19, 2012 hearing and served defendant's attorney with the interrogatory answers and production demand response. Defendant's motion for a terminating sanction was denied. But defendant was awarded another $990 imposed monetary sanctions.

A mandatory settlement conference was held on January 23, 2013. Plaintiffs did not file a settlement conference statement as required by the trial court's local rules. (Super. Ct. L.A. County, Local Rules, rule 3.25, subd. (e).) In addition, plaintiffs and

their counsel failed to appear at the mandatory settlement conference. This likewise was a violation of the local rules. (Super. Ct. L.A. County, Local Rules, rule 3.25, subd. (d).) At the conference, the trial court granted defendant's oral dismissal motion. The case was dismissed without prejudice.

On July 22, 2013, plaintiffs moved to aside the January 23, 2013 dismissal. Plaintiffs argued the dismissal should be set aside because their attorney mistakenly calendared the mandatory settlement conference for January 25 instead of January 23, 2013. In support of their motion, plaintiffs filed the declaration of their attorney, Brian T. McKibbin, who admitted his mistake. Mr. McKibbin stated he inadvertently entered the mandatory settlement conference date in his calendar for January 25, 2013, and advised plaintiffs it was scheduled for that date. Plaintiffs filed their motion 180 days after entry of the order dismissing their case. A proof of service was attached to the motion to set aside the dismissal showing it was served by mail on defendant's attorney, Robert A. Walker.

Prior to November 5, 2013 hearing, Mr. Walker filed a declaration on October 21, 2013. Mr. Walker's declaration states his office did not receive plaintiffs' motion to set aside the dismissal within the six-month period. Mr. Walker was unaware of the motion to set aside the dismissal until he received two e-mails directly from plaintiff on September 24, 2013. On September 25, 2013, Mr. Walker sent a letter to Mr. McKibbin. Mr. Walker's September 25, 2013 letter states in part: "I received an email directly from your client which seems to indicate that some kind of motion was filed with the court. Since I have no indication that you are no longer representing him, I have not responded

to his email. I have also not received a copy of any such motion. I would appreciate it if you would clarify the status of this." Mr. McKibbin did not respond to Mr. Walker's September 25, 2013 letter. On October 4, 2013, Mr. Walker sent a second letter to Mr. McKibbin requesting a copy of any motion to set aside the dismissal. Again, Mr. McKibbin did not respond to Mr. Walker's letter. Eventually, plaintiff sent an incomplete copy of the motion to set aside the dismissal to Mr. Walker. The motion was unsigned and failed to indicate when it had been filed. Mr. Walker finally received plaintiffs' motion when he sent an attorney service to the trial court to make a copy of it. The proof of service attached to the motion to set aside the dismissal states Mr. McKibbin served it and related documents by mail on Mr. Walker's office. Mr. Walker denied his office ever received the motion as described in the proof of service.

At the scheduled November 5, 2013 hearing, the case was reassigned to the Van Nuys courthouse. On December 15, 2014, plaintiffs filed an ex parte application for substitution of counsel to allow them to appear in propria persona. At the December 15, 2014 hearing, the trial court granted plaintiffs' ex parte application for substitution of counsel. The trial court denied plaintiffs' motion to set aside the January 23, 2013 dismissal order. The December 15, 2014 minute order states, "It appears to the Court that the motion was not properly served and the missing pleading has not been attached." The trial court also ruled plaintiffs did not present sufficient evidence to grant the relief requested.

III. DISCUSSION

A. Mandatory Relief Under Section 473, Subdivision (b) and Standards of Review

Plaintiff argues it was error to deny his motion to set aside the dismissal. Plaintiff contends he is entitled to mandatory relief under section 473, subdivision (b). We consider only the mandatory relief provision because plaintiff does not challenge the ruling under the section 473, subdivision (b) discretionary relief provisions.

The mandatory relief provision of section 473, subdivision (b) only extends to vacating a: default which will result in the entry of a default judgment; a default judgment; or an entered dismissal. (*Wagner v. Wagner* (2008) 162 Cal.App.4th 249, 259; *Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 615.) Section 473, subdivision (b) provides in part: "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. . . ." In *Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 257, our Supreme

Court explained, "The purpose of this provision 'was to alleviate the hardship on parties who *lose their day in court* due solely to an inexcusable failure to act on the part of their attorneys.'" (Accord, *Henderson v. Pacific Gas & Electric Co.* (2010) 187 Cal.App.4th 215, 226.) The applicability of the mandatory relief provision of section 473, subdivision (b) is a question of law subject to de novo review. (*Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1418; *Leader v. Health Industries of America, Inc.*, *supra*, 89 Cal.App.4th at p. 612.) But we review a default order or dismissal for substantial evidence when an appeal involves factual determinations that affect a party's entitlement to mandatory relief. (*Huh v. Wang, supra,*158 Cal.App.4th at p. 1418; *Benedict v. Danner Press* (2001) 87 Cal.App.4th 923, 928.)

Where findings of fact are challenged on appeal, we determine whether there is any substantial evidence, contradicted or uncontradicted, to support the findings below. (*Pope v. Babick* (2014) 229 Cal.App.4th 1238, 1245; *Robertson v. Fleetwood Travel Trailers of California, Inc.* (2006) 144 Cal.App.4th 785, 798.) We do not reweigh evidence, reassess the credibility of witnesses or resolve conflicts in the evidence. (*Pope v. Babick, supra*, 229 Cal.App.4th at p. 1246; *Lorenz v. Commercial Acceptance Ins. Co.* (1995) 40 Cal.App.4th 981, 998.) A party challenging the sufficiency of the evidence has the burden of showing error. (*Pope v. Babick, supra*, 229 Cal.App.4th at p. 1246; *Whiteley v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635, 678.)

B. Based Upon the Record Provided, Substantial Evidence Supports the Order Denying the Motion to Set Aside the Dismissal

There is substantial evidence which supports the order refusing to set aside the dismissal. Plaintiff concedes the trial could found the motion was not properly served on defendant. The December 15, 2014 minute order states, "It appears to the Court that the motion was not properly served . . . ." Plaintiff argues the word "appears" is a discretionary appraisal and not a proven fact. He asserts the trial court heard only one side of the story from defendant's attorney who claimed service was defective. Plaintiff contends there is insufficient evidence to conclusively determine whether defendant's counsel was served the motion by mail. We disagree.

The record provided contains substantial evidence which supports the trial court's improper service finding. In his declaration, Mr. Walker stated his office did not receive plaintiffs' motion to set aside the dismissal within the six-month period. Although the proof of service stated defendant's counsel was served by mail, Mr. Walker's office did not receive the motion and related documents. This under oath showing constitutes substantial evidence Mr. Walker was unaware of the motion until receiving two e-mails directly from plaintiff on September 24, 2013. And by September 24, 2013, the six-month period in which to file a motion for mandatory relief from default based upon the neglect of counsel had expired.

An application for relief under section 473, subdivision (b) requires both the filing of a notice of motion and service upon the adverse party within the six-month period.

(*Arambula v. Union Carbide Corp.* (2005) 128 Cal.App.4th 333, 341 (*Arambula*).) As held in the context of a section 473, subdivision (b) motion for relief from default by the Second Appellate District, Division Three in *Arambula, supra,* 128 Cal.App.4th at page 341, "[A]bsent service on the adverse party, there is no '*application*' for relief." (See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2015) ¶ 5:369, p. 5-104.) Our Division Three colleagues explained: "Section 1003 states, 'An application for an order is a motion.' Section 1005.5 states that a motion is deemed to be made on the grounds stated in the written notice of motion upon filing and service of the notice of motion. Section 1005.5, enacted in 1953, abrogated the former rule that a motion was made only upon oral presentation of a request to the court. (*Ensher, Alexander & Barsoom v. Ensher* (1964) 225 Cal.App.2d 318, 324-325; *Milstein v. Sartain* (1943) 56 Cal.App.2d 924, 930-931 [stating the former rule].) In light of sections 1003 and 1005.5, we conclude that an application for relief under section 473, subdivision (b), is a motion and that an application for relief under the statute is deemed to be made *upon filing in court of a notice of motion and service of the notice of motion on the adverse party.* (*Garcia v. Gallo* (1959) 176 Cal.App.2d 658, 669.)" (*Arambula, supra,* 128 Cal.App.4th at p. 341, fn. omitted.) The omitted footnote in *Arambula* cites to section 1005.5 which states in part, "A motion upon all the grounds stated in *the written notice thereof is deemed to have been made and to be pending before the court for all purposes, upon the due service and filing of the notice of motion,* but this shall not deprive a party of a hearing of the motion to which he is otherwise entitled." (Italics added.) Therefore, absent service on the adverse party, there is no "*application*" for

relief. Here, based upon the limited record presented, the evidence demonstrates that plaintiffs failed to serve the motion to set aside the dismissal on the defendant at any time during the six-month period. Thus, based upon the record presented, the motion is untimely and the trial court had no authority to grant the requested relief. (*Arambula, supra,* 128 Cal.App.4th at p. 341.)

C. Plaintiff's Extension of Time Argument

In the reply brief, plaintiff asserts defendant's application for an extension of time to file respondent's brief is defective. Thus, he argues the present appeal should proceed as if though no respondent's brief was filed. On September 11, 2015, we granted defendant an extension of time to file the respondent's brief. Plaintiff argues the application for extension of time to file the respondent's brief failed to comply with rule 8.60(f)(1) of the California Rules of Court.[2] He argues we should strike the respondent's brief and deem his appeal to be unopposed. In the alternative, plaintiff argues if we excuse defendant's defective "service," we must treat the parties the same. Thus, plaintiff argues we should find the lack of timely service of the motion to set aside the dismissal was harmless. Plaintiff's contentions are without merit.

Rule 8.60(f)(1) states: "(1) In a civil case, counsel must deliver to his or her client or clients a copy of any stipulation or application to extend time that counsel files. Counsel must attach evidence of such delivery to the stipulation or application, or certify

[2] Further references to rules are to the California Rules of Court.

in the stipulation or application that the copy has been delivered." We have reviewed the application for extension of time to file the respondent's brief filed on September 11, 2015. Plaintiff is correct that the proof of service fails to indicate it was served on defendant. When this was brought to our attention when we began preparing for oral argument, we ordered defense counsel to comply with rule 8.60(f)(1). Defense counsel had previously complied with rule 8.60(f)(1) in connection with a stipulation entered into with plaintiff to extend time to file the respondent's brief.

However, there is no relationship between the 6-month period of limitation set forth in section 473, subdivision (b) and rule 8.60(f)(1). The section 473, subdivision (b) 6-month limitation period is jurisdictional and may not be extended under our circumstances. (*Manson, Iver & York v. Black* (2009) 176 Cal.App.4th 36, 42; *Stevenson v. Turner* (1979) 94 Cal.App.3d 315, 318.) By contrast, other than the failure to timely file a notice of appeal, a default on appeal of any kind may be set aside. (Rule 8.60(d); see *Conservatorship of Townsend* (2014) 231 Cal.App.4th 691, 703.) And the failure to oppose any motion, as occurred here, may be deemed to be consent to allow it to be granted. (Rule 8.54(c); see *People v. Zarazua* (2009) 179 Cal.App.4th 1054, 1065.) Further, the failure to have served the application for extension of time has now been cured. The jurisdictional effect of an untimely motion for relief from default is unrelated to the failure on appeal to serve a client with an extension of time motion. And even if the appeal proceeded as a default, we would independently evaluate plaintiff's contentions and reach the exact same conclusions as we have here. (*Smith v. Smith*

(2012) 208 Cal.App.4th 1074, 1077-1078; *D.H. Williams Construction, Inc. v. Clovis Unified School Dist.* (2007) 146 Cal.App.4th 757, 763.)

IV. DISPOSITION

The December 15, 2014 dismissal order is affirmed. Defendant, Shahrooz Abootalebi, shall recover costs on appeal from plaintiff, William Munns.

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TURNER, P. J.

We concur:

KRIEGLER, J.

BAKER, J.