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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION SEVEN

HERBERT CERNA,

Plaintiff and Respondent,

v.

ESPERANZA MOLINA, as Trustee, et al.,

Defendants and Appellants.

B265272

(Los Angeles County  
Super. Ct. No. BC494638)

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

Law Offices of Monica R. Molina and Monica R. Molina for Defendants  
and Appellants.

Law Offices of Jacob Emrani, Jacob Emrani and Timothy P. Mitchell for  
Plaintiff and Respondent.

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## **INTRODUCTION**

This action arises out of an alleged assault of Herbert Cerna on property owned by Esperanza Molina, as Trustee of the Esperanza Molina Trust. Cerna sued Esperanza Molina, as well as Eugene Molina, Guillermo Molina, and Molina Financial Services, Inc. (collectively defendants). Cerna settled the lawsuit and dismissed it.

During the litigation, the trial court ordered monetary sanctions against defendants and their attorney, Monica Molina, in connection with certain discovery motions. Three months after Cerna dismissed his action, defendants and Monica Molina filed a motion to vacate the trial court's orders imposing sanctions. The court denied the motion on the ground that it did not have jurisdiction. Defendants and Monica Molina appeal from the order denying the motion to vacate the sanctions orders. Because the trial court correctly determined that it lacked jurisdiction to vacate the sanctions orders, we affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

The trial court held two hearings on discovery motions filed by Cerna, one on November 14, 2013 and one on March 18, 2014. The motions sought an order compelling defendants to provide responses to written discovery and awarding monetary sanctions. Although defendants and Monica Molina later claimed they did not receive notice of the hearings, an attorney appeared for them at the November 14, 2013 hearing. The court granted Cerna's motions and ordered defendants and Monica Molina to pay \$4,675 and \$1,840 in sanctions. By December 15, 2014, the trial date, Cerna had settled with Esperanza Molina. On January 28, 2015 Cerna dismissed "all parties and all causes of action" without prejudice.

On April 29, 2015 defendants and Monica Molina filed a motion pursuant to Code of Civil Procedure section 473, subdivision (d), and section 1008, subdivision (a),<sup>1</sup> to

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<sup>1</sup> Undesignated statutory references are to the Code of Civil Procedure.

vacate the court's November 14, 2013 and March 18, 2014 orders imposing monetary sanctions.<sup>2</sup> Defendants and Monica Molina argued that the sanctions orders were void because Cerna did not give proper notice of the hearings on the discovery motions.

On June 18, 2015 the trial court denied the motion to vacate the sanctions orders for lack of jurisdiction. The court noted that, because Cerna had dismissed the entire action on January 28, 2015, the court no longer had jurisdiction. Defendants and Monica Molina timely appealed from the court's denial of their motion to set aside the sanctions orders.<sup>3</sup>

## DISCUSSION

### A. *Applicable Law and Standard of Review*

A plaintiff "may dismiss his or her complaint . . . as to any defendant or defendants, with or without prejudice prior to the actual commencement of trial." (§ 581, subd. (c); see *Law Offices of Andrew L. Ellis v. Yang* (2009) 178 Cal.App.4th 869, 876.) "Upon the proper filing of a request to voluntarily dismiss a matter, the trial court loses jurisdiction to act in the case." (*Law Offices of Andrew L. Ellis v. Yang, supra*, at p. 876; see *Gogri v. Jack In The Box Inc.* (2008) 166 Cal.App.4th 255, 261 ["voluntary dismissal of an entire action deprives the court of both subject matter and personal jurisdiction"].)

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<sup>2</sup> Section 473, subdivision (d), provides: "The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order." Section 1008, subdivision (a), provides in relevant part: "When an application for an order has been made to a judge, or to a court, and refused in whole or in part, or granted, or granted conditionally, or on terms, any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order."

<sup>3</sup> Defendants and Monica Molina did not appeal from or otherwise seek review of the two orders imposing monetary sanctions, nor do they argue that the court abused its discretion in awarding sanctions against them.

Although a voluntary dismissal normally divests the trial court of jurisdiction, section 473, subdivision (d), provides that a trial court may set aside a judgment or order at any time, but only if the judgment or order is void on its face. (See *Ramos v. Homeward Residential, Inc.* (2014) 223 Cal.App.4th 1434, 1440; *Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 495-496.) “““It is well settled that a judgment or order which is void on its face, and which requires only an inspection of the judgment-roll or record to show its invalidity, may be set aside on motion, at any time after its entry, by the court which rendered the judgment or made the order.””” (*Tearlach Resources Limited v. Western States International, Inc.* (2013) 219 Cal.App.4th 773, 779.)

“Where the evidence is not in dispute, a [trial court’s] determination of subject matter jurisdiction is a legal question subject to de novo review.” (*Dial 800 v. Fesbinder* (2004) 118 Cal.App.4th 32, 42.) Similarly, “the trial court’s application of section 581 to undisputed facts is a question of law,” which we also review de novo. (*Gogri v. Jack In The Box Inc., supra*, 166 Cal.App.4th at p. 262.)

**B.     *The Trial Court Did Not Have Jurisdiction To Rule on Defendants’ Motion To Set Aside the Sanctions Orders***

It is undisputed that defendants and Monica Molina did not file their motion to vacate until after Cerna had voluntarily dismissed the entire action. For this reason, the trial court correctly denied the motion to vacate because the court did not have jurisdiction. (See *Law Offices of Andrew L. Ellis v. Yang, supra*, 178 Cal.App.4th at p. 876; *Gogri v. Jack In The Box Inc., supra*, 166 Cal.App.4th at p. 261.)

Defendants and Monica Molina make three arguments that the trial court had jurisdiction to rule on their motion to vacate, even though Cerna had previously dismissed the entire action. None of them has merit.

Defendants and Monica Molina first argue that the trial court erred in concluding it lacked jurisdiction to rule on the motion to vacate the orders imposing monetary sanctions because Cerna’s dismissal was not voluntary. They assert Cerna did not

“voluntarily” dismiss the case because the court ordered him to file the dismissal. The record does not support their argument.

On December 15, 2014 Cerna advised the court that he had settled with Esperanza Molina. Upon hearing this, the court ordered Cerna to file a request for dismissal of the remaining defendants, “to be filed this date.” Six weeks later, on January 28, 2015, Cerna filed a “Request for Dismissal” form, checking the boxes for dismissal “without prejudice” and dismissal of the “[e]ntire action of all parties and all causes of action.” The record does not contain any indication that Cerna objected to the court’s order that he dismiss the remaining defendants, that he did so against his will, or that he was still proceeding against any of the defendants. The only evidence in the record is that Cerna voluntarily dismissed the action. The court did not enter an order of dismissal or state on the record that it was dismissing the case or any defendant. Indeed, it appears that the court simply followed the procedure in California Rules of Court, rule 3.1385(b), which requires a party to dismiss the case within 45 days of settlement. (See Cal. Rules of Court, rule 3.1385(b).) Defendants and Monica Molina cite no authority for their contention that the court’s order requiring Cerna to dismiss the remaining defendants after Cerna explained the case had settled made his voluntary dismissal involuntary. Moreover, defendants and Molina have not cited any authority stating that an involuntary dismissal deprives the court of jurisdiction any less than a voluntary dismissal does. (See *In re Estate of Garrett* (2008) 159 Cal.App.4th 831, 840 [involuntary dismissal for failure to prosecute deprived the court of jurisdiction].)

Defendants’ and Monica Molina’s second argument is that the court had jurisdiction to rule on their motion to vacate the sanctions orders because, under section 473, subdivision (d), a court may set aside a void order at any time, and the sanctions orders are void because defendants and Monica Molina did not receive notice of the hearings on the motions. Defendants and Monica Molina, however, did not show they were entitled to relief under section 473, subdivision (d).

Under section 473, subdivision (d), the court may set aside a void order at any time, but only if the invalidity of the order is apparent from an examination of the

judgment roll or the record, as opposed to examination of extrinsic evidence. (See *Tearlach Resources Limited v. Western States International, Inc.*, *supra*, 219 Cal.App.4th at p. 779 [court may set aside at any time a ““judgment or order which is void on its face, and which requires only an inspection of the judgment-roll or record to show its invalidity””].) The record on appeal does not include Cerna’s discovery motions, defendants’ oppositions to those motions, the proofs of service accompanying the motions, the transcripts of the hearings on the motions, or the orders granting the motions and the requests for sanctions. We may, however, take judicial notice of the proofs of service attached to the motions (Evid. Code, § 452, subd. (d)), and they reflect proper service by mail on Monica Molina, counsel of record for defendants. Defendants and Monica Molina have failed (indeed, have not even tried) to rebut the presumption, created by the filing of a statutorily valid proof of service, that service was proper. (See *American Exp. Centurion Bank v. Zara* (2011) 199 Cal.App.4th 383, 390 [“filing of proof of service that complies with the applicable statutory requirements creates a rebuttable presumption of proper service”]; accord, *Lebel v. Mai* (2012) 210 Cal.App.4th 1154, 1163; *Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1441-1442].) In any event, even if counsel for Cerna did not give proper notice of the hearings on the discovery motions (see, e.g., *Sole Energy Co. v. Hodges* (2005) 128 Cal.App.4th 199, 208), any defect in notice is not apparent from the record. Therefore, the trial court did not have authority to set aside the sanctions orders under section 473, subdivision (d). (See *Cruz v. Fagor America, Inc.*, *supra*, 146 Cal.App.4th at p. 496 [trial court has no authority under section 473, subdivision (d), to set aside a judgment that is not void on its face].)

The final argument by defendants and Monica Molina is that they could not have challenged the sanctions orders any earlier, such as by filing a motion for reconsideration under section 1008, subdivision (a), because counsel for Cerna delayed giving notice of the sanctions orders. They contend they could not have filed a timely motion for reconsideration pursuant to section 1008, subdivision (a), because counsel for Cerna did not file a notice of entry of the sanctions orders until December 9, 2014, more than a year

after the first monetary sanctions order and more than eight months after the second monetary sanctions order.

Even after counsel for Cerna served notice of entry of the sanctions orders on December 3, 2014, however, defendants and Monica Molina did not file a motion for reconsideration within the 10 days required by section 1008, subdivision (a), or before Cerna dismissed this action on January 28, 2015, despite having time to do so. They waited until April 29, 2015, more than four months after counsel for Cerna gave notice of the orders, to file their motion to vacate. Thus, as the trial court stated, even if the court had jurisdiction to hear defendants' motion to vacate, the court would have denied the motion as untimely.<sup>4</sup>

### **DISPOSITION**

The order is affirmed. Cerna is to recover his costs on appeal.

SEGAL, J.

We concur:

PERLUSS, P. J.

GARNETT, J.\*

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<sup>4</sup> Not only did defendants and Monica Molina fail to file a timely motion under section 1008, subdivision (a), for reconsideration of the orders granting the discovery motions and awarding sanctions, they failed to move to vacate the dismissal or the sanctions orders under section 473, subdivision (b). Section 473, subdivision (b), allows a party to file a motion to vacate an order for mistake, inadvertence, surprise, or excusable neglect within six months of the order.

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