Filed 4/30/15 Breliant v. Boyd CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

GIANNA BRELIANT, Plaintiff and Appellant, v. WARREN BOYD et al., Defendants and Respondents.	B255908 (Los Angeles County Super. Ct. No. EC057245)

APPEAL from a judgment of the Superior Court of Los Angeles Country, Donna Fields Goldstein, Judge. Affirmed.

Arent Fox, Stephen G. Larson, Steven E. Bledsoe, and R.C. Harlan, for Plaintiff and Appellant.

Gravitas Law Group and David J. Scharf, for Defendants and Respondents.

Plaintiff Gianna Breliant appeals from a judgment of dismissal following the imposition of terminating sanctions against her for discovery violations, and from the denial of her motion for reconsideration and request for relief based on her former attorney's mistake and neglect. Finding no error, we affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

This case arises out of the death of plaintiff's daughter, Amy Breliant.[1] Plaintiff filed suit against Boyd, Commerce Resources International, Inc. and other defendants, not parties to this appeal, after Amy died of a heroin overdose while under the care of defendants. The facts underlying this case are set out in greater detail in our previous opinion, and we incorporate them here. (*Breliant v. Boyd* (Dec. 22, 2014, B251349) [nonpub. opn.].)

Defendant Boyd and his business entity, Commerce Resources International, Inc., demurred to plaintiff's third amended complaint. The trial court sustained the demurrer without leave as to the third, fourth, fifth, sixth, and seventh causes of action and directed plaintiff to file a fourth amended complaint clarifying her standing to pursue her first and second causes of action.

In January 2013, defendants served plaintiff with a request for production of documents, special interrogatories, and form interrogatories.[2] Though plaintiff served her responses in a timely manner, she objected to every special interrogatory and most of the discovery requests.[3] In May, plaintiff's attorney agreed to supplement plaintiff's responses and provide all responsive materials to defendants' requests for production.

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[1] Because plaintiff and her daughter share the same last name, we refer to the daughter by her first name; no disrespect is intended

[2] All references to dates are to the year 2013, unless otherwise noted.

[3] Plaintiff's actions and representations referenced in this opinion were made by plaintiff, by and through her attorneys, unless otherwise noted. (See *Bernstein v. Allstate Insurance Co.* (1981) 119 Cal.App.3d 449, 451 [generally, a party is bound by the acts and representations of her attorney] and Part I.B of this opinion.)

On June 11, defendants' attorney sent a letter to plaintiff's attorney demanding production of the responsive documents and supplemental responses to defendants' special interrogatories. After none were received, on June 24, defendants' attorney sent another demand to plaintiff's attorney by e-mail.

During discovery, plaintiff had produced Amy's cell phone to defendants. Defendants retained Setec Investigations to examine and copy data stored in the cell phone. Setec prepared a report listing the recovered phone calls and text messages. Based on the information recovered, Setec concluded the phone had been tampered with—someone had deleted records of calls and text messages from the phone before turning it over to defendants. This was apparent from several text messages which represented only one side of a conversation. During the deposition of Austin Roque, Amy's friend, he was shown a transcript of his text messages to Amy, and confirmed that Amy's text messages were missing from the transcripts.[4] Roque also stated that he observed Amy making calls to her drug dealer two days before her death, but there were no incoming or outgoing calls recorded on Amy's phone during that time period. Finally, Roque stated that after Amy's death, he spoke with plaintiff's private investigator, Steve Wynn, who showed him text message logs that reflected both Amy's and Roque's messages to each other. Based on this information, on June 24, defendants filed a motion for terminating sanctions on the basis of spoliation of evidence. The trial court denied the motion, citing insufficient evidence to show that plaintiff was responsible for deleting the messages from Amy's phone.

Meanwhile, the discovery dispute continued and defendants filed a motion to compel. When the matter was heard on August 7, the court ordered plaintiff to produce

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[4] For example, a series of text messages from Roque read as follows:

From:	**Date:**	**Time:**	**Message:**
Austin	9/13/2010	5:40:54pm	That was fun.
Austin	9/13/2010	5:44:50pm	I don't know if I could describe it in words. I'll try though.
Austin	9/13/2010	5:44:58pm	Wednesday I think.

all documents in response to the requests for production, and to do so by August 23. On August 21, plaintiff produced 14 boxes of unorganized, unlabeled documents; there was nothing to indicate which documents were responsive to particular requests. The bulk of the documents consisted of printouts of spam e-mails found in Amy's inbox. Only one of the 14 boxes contained documents other than these e-mails. The records produced were incomplete; pages were missing from invoices and bills, and no call logs were produced from the phone that Amy had been using at the time of her death. Further, the credit card statements were produced in such a manner that the second side of each page was for a different card and a different time period.

At the August 23 hearing, plaintiff's attorney argued the credit card statements had been issued in this manner. When the trial court rejected this explanation, plaintiff's attorney said the photocopying service he employed may have made a mistake. At the conclusion of the hearing, the court ordered plaintiff to produce, by September 6: (1) phone logs obtained by plaintiff's experts from Amy's cell phone, (2) medical records of Amy's prior drug treatments, (3) a printout of Amy's Facebook page, (4) credit card statements reflecting purchases for or by Amy, organized in sequential order, and (5) a complete record of Amy's Verizon phone statements. Regarding the 14 boxes of unorganized documents, the court ordered the parties to meet and confer to determine whether and how they should be reorganized, and to correct the production by September 27.

Attorneys for both parties met on August 30. Counsel for plaintiff agreed to reproduce the materials from its August 21 production in a more organized manner. Plaintiff's attorney also stated that, pursuant to the court order, he would produce other responsive documents in plaintiff's possession.

On September 11, the court held another discovery hearing and again ordered plaintiff to provide supplemental responses to special interrogatories Nos. 2 through 12 and form interrogatories Nos. 12.2 and 12.3. The court noted that it previously had ordered plaintiff to provide supplemental responses, and that plaintiff failed to do so. The

court then imposed $2,100 in sanctions against plaintiff's attorney, Mr. Balisok.

On September 12, September 20, and September 26, plaintiff produced documents which were incomplete or out of order. Still missing were Amy's phone logs, her complete Facebook records, and billing statements pertaining to the phone Amy was using at the time of her death.

On September 30, defendants filed their second motion for terminating sanctions based on plaintiff's repeated noncompliance with the court's discovery orders. Defendants argued that plaintiff was in violation of four court orders: (1) the August 7 order requiring plaintiff to produce Amy's phone logs, medical records, Facebook pages, credit card statements, and Verizon phone statements; (2) the August 23 order requiring plaintiff to produce the documents listed in its August 7 order; (3) another August 23 order requiring plaintiff to correct its August 21 production; and (4) a September 11 order requiring plaintiff to provide supplemental responses to form interrogatories Nos. 12.2 and 12.3 and special interrogatories Nos. 2 through 10. In its October 31 ruling, the trial court noted that plaintiff argued she had complied with the court orders, but "fail[ed] to provide facts under penalty of perjury" supporting her position. The court found that plaintiff, through her attorneys, had "engaged in numerous misuses of discovery by failing to serve timely responses," "fail[ed] to comply with the Court's discovery orders," and "produced incorrect telephone records." The court also noted plaintiff's admission that she had disobeyed a discovery order because she was "still redacting information from the credit card statements" and would submit them at a later time, without explaining "the continuous delay in complying with discovery." Finally, the court found no indication that plaintiff intended to comply with the trial court's orders. The court granted defendants' motion for terminating sanctions.

On November 12, through new counsel, plaintiff filed a motion for relief under Code of Civil Procedure sections 1008 and 473, subdivision (b),[5] purporting to assert new facts that required reconsideration of the order granting terminating sanctions, and

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[5] Subsequent statutory references are to the Code of Civil Procedure.

requesting relief on the basis of her former attorney's mistake, inadvertence or excusable neglect. The motion was denied on January 17, 2014. The trial court found no new facts supporting plaintiff's motion for reconsideration, and stated that plaintiff's deliberate failure to comply with the court's discovery orders is not a ground for relief under section 473, subdivision (b). Plaintiff filed a supplemental brief representing that, subsequent to the trial court's granting terminating sanctions, she had hired a new attorney and was attempting to comply with all previous discovery orders. Noting that "a party whose action has been dismissed for failure to comply with a discovery order cannot simply comply later and reconstitute the lawsuit," the trial court denied plaintiff's motion. Judgment was entered against plaintiff.

This timely appeal followed.

DISCUSSION

I

"The trial court has broad discretion in selecting discovery sanctions, subject to reversal only for abuse. [Citations.] The trial court should consider both the conduct being sanctioned and its effect on the party seeking discovery and, in choosing a sanction, should '"attempt[] to tailor the sanction to the harm caused by the withheld discovery."' [Citation.]" (*Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 992.) Misconduct of a party's attorney can also serve as grounds for terminating sanctions because, as we further discuss in Part II, it is the general rule that a party represented by counsel is bound by the acts of that attorney. (*Bernstein v. Allstate Insurance Co.*, *supra*, 119 Cal.App.3d at 451.) "'A decision to order terminating sanctions should not be made lightly. But where a violation is willful, preceded by a history of abuse, and the evidence shows that less severe sanctions would not produce compliance with the discovery rules, the trial court is justified in imposing the ultimate sanction.' [Citation.]" (*Doppes v. Bentley Motors, Inc.* at p. 992, fn. omitted.)

"When the trial court's exercise of its discretion relies on factual determinations, we examine the record for substantial evidence to support them. [Citations.] In this

regard, 'the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination [of the trier of fact] . . . .' [Citation.]" (*Los Defensores, Inc. v. Gomez* (2014) 223 Cal.App.4th 377, 390-391.)

Despite several discovery orders, verbal warnings from the court, and a monetary sanction imposed on Mr. Balisok, plaintiff continuously evaded her discovery obligations. (See *Los Defensores, Inc. v. Gomez*, *supra*, 223 Cal.App.4th at p. 390 [trial court is justified in imposing terminating sanctions when violation is "'willful, preceded by history of abuse,'" and less severe sanctions have proven ineffective].) Plaintiff was served with defendants' discovery requests in January 2013, but had not complied as of August 2013, when the trial court issued its first order. Even by December 2013, plaintiff had not produced the call and text message log of Amy's prepaid cell phone that plaintiff's investigator had shown Roque. Nevertheless, plaintiff's former attorney represented to the court, on multiple occasions, that "[n]othing has been withheld."

The court issued terminating sanctions based on plaintiff's failure to produce logs of phone calls and text messages from Amy's prepaid phone, credit card statements reflecting charges made by and for Amy, printouts of Amy's Facebook page, Verizon phone records for Amy's cell phone, and Amy's e-mails, as well as plaintiff's failure to provide supplemental responses to special interrogatories and form interrogatories. We address each in turn.

A. *Phone and Text Message Logs from Amy's Prepaid Cell Phone*

Plaintiff contends her failure to turn over all phone and text message logs of Amy's cell phone does not warrant terminating sanctions. We disagree. She notes that she turned over one phone log on October 23 and a second on December 13, which she admitted had been in her possession. These productions were unreasonably late; both were produced after defendants filed their motion for terminating sanctions and the second log was produced almost two months after the trial court's order granting terminating sanctions. These phone call and text message logs were critical to the

defendants' case for two reasons. First, the principal defense theory was that Amy sought out drugs on her own during the days leading up to her death, and the heroin that caused her overdose was purchased by her without defendants' knowledge. Second, although spoliation of evidence was not a stated ground for the court's order granting terminating sanctions, it was defendants' contention that plaintiff deleted certain calls and texts from Amy's phone before releasing it to defendants. At his deposition, Roque confirmed that a complete phone call and text message log was in the possession of plaintiff's investigator. This is substantial evidence to support the trial court's finding that plaintiff violated multiple discovery orders in failing to produce these phone logs in a timely manner.

B. *Credit Card Statements*

Plaintiff argues she "substantially complied" with the trial court's order requiring that she produce credit card statements pertaining to charges by and for Amy. There is substantial evidence in the record to conclude that, in addition to her failure to comply with the trial court's order, plaintiff also deliberately engaged in misuse of the discovery process with regard to the credit card statements. After the court's August 7 order, plaintiff produced 14 boxes of documents which were unlabeled, disorganized, and largely unresponsive to defendants' requests. The boxes contained mostly irrelevant printouts of Amy's spam e-mails. They included some credit card statements, but these materials were produced in a confusing and burdensome manner that stripped them of their usefulness. (See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2014) ¶ 8:1471.5, p. 8-27 [response to request for production must not be made in a way to "evade" discovery].) For example, the trial court examined a double-sided page that reflected a billing statement for a Visa Signature card on one side and an American Express card on the other. Additionally, each side encompassed a different billing period, one for September 9 through September 15 and the other for July 6 through July 23. Plaintiff produced more credit card statements on September 12. These, too, were out of order with pages missing. The first six pages of the document were "single pages of bills for different statements and different accounts," and the next

seven pages were "from the same bill but [were] completely out of order with many pages missing." At the hearing on terminating sanctions, plaintiff's attorney represented that there was nothing "substantive" missing from their production of credit card bills, although pages containing boilerplate language may have been omitted. The trial court expressed skepticism about counsel's representation, and ultimately counsel admitted he had not examined the missing pages and did not know their contents. Finally, the trial court noted plaintiff's admission that she was still in the process of redacting information from some credit card statements, providing evidence that plaintiff was personally delaying the discovery process. Substantial evidence exists to conclude that plaintiff violated the court's multiple orders by failing to produce credit card statements in a timely manner and misusing the discovery process.

C. *Amy's Facebook Page*

One of plaintiff's attorneys, Mr. Kazman, represented at the August 23 hearing that there were 68 inches of printouts from Amy's Facebook page. When the court ordered plaintiff to produce them, Mr. Kazman replied, "They got them. I'll show them." Plaintiff now contends the only Facebook-related discovery she had was what was found on Amy's laptop, which is "only a handful of Facebook posts." In her brief, plaintiff states Mr. Kazman's representation regarding the existence of 68 inches of Facebook material was a mistake. She fails to point to evidence in the record supporting this statement, as the only record citations are from plaintiff's subsequent motion for reconsideration. As such, we find no abuse of discretion in the trial court's finding as to plaintiff's obligations to produce Amy's Facebook records.

D. *Billing Records of Amy's Prepaid Phone*

Plaintiff argues that she was not able to comply with the court's order requiring that she produce billing records of Amy's prepaid phone because they are not within her possession, custody, or control. The record suggests otherwise. On August 23, the trial court ordered plaintiff to produce statements for Amy's phone from January 2010 to October 2010. Counsel for defendants clarified to the court that Amy had two phones

during that time period; her second phone was a prepaid cell phone, and the court ordered plaintiff to produce records for that phone. Rather than objecting on the ground that these statements were not in plaintiff's possession, plaintiff's counsel represented that they already had been produced. When the court ordered the plaintiff to produce Amy's phone statements up until the date of her death, plaintiff's counsel replied, "Her death, 9/21/2010. Phone Records. No problem with that." If these records were not in plaintiff's possession, it was her responsibility to inform the court of her inability to comply. (See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2014) ¶ 8:1473, p. 8-30.) Plaintiff points to nothing in the record that shows the trial court was placed on notice that these documents were not within plaintiff's possession or control.[6] Substantial evidence supports the trial court's finding that plaintiff failed to comply with multiple orders to turn over these records.

E. *Amy's E-mails*

Plaintiff contends she complied with the court's order requiring that she produce messages from Amy's e-mail accounts. We disagree. In August, she produced 13 boxes of printouts, mostly comprised of spam e-mails. After the court ordered that all of Amy's e-mails were to be produced "'electronically or in any manner that permits them to be reviewed in a reasonable manner,'" plaintiff argued she had complied because she had turned over Amy's computer for inspection. Defendants' attorney argued that, because Amy's e-mails were web-based, most messages would be accessible only through the actual website. Mr. Kazman stated during the August 23 hearing that he would provide defendants with the password to Amy's e-mail account. He failed to do so. If plaintiff did not know Amy's password, it was her responsibility to disclose that fact to the court.

F. *Responses to Form Interrogatories and Special Interrogatories*

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[6] To support her claim that the trial court knew these documents were not in plaintiff's possession or control, plaintiff makes two citations to the record—both referring to her motion for reconsideration, filed after the trial court had granted terminating sanctions. This is not indicative of the facts that were before the trial court when it made its order granting terminating sanctions.

Plaintiff admits that, through the fault of her attorney, she did not comply with the court's order to provide supplemental responses to special interrogatories Nos. 2 through 12 and form interrogatories Nos. 12.2 and 12.3. There was no abuse of discretion in the trial court's finding that plaintiff failed to comply with its discovery order.

II

On November 12, plaintiff filed a motion for reconsideration under section 1008 and a motion for relief from her counsel's inadvertence, mistake, or excusable neglect under section 473, subdivision (b). The trial court denied the motion and entered judgment for defendants.

A. *Motion for Reconsideration*

"Section 1008, subdivision (a) requires that a motion for reconsideration be based on new or different facts, circumstances, or law. A party seeking reconsideration also must provide a satisfactory explanation for the failure to produce the evidence at an earlier time. [Citation.] A trial court's ruling on a motion for reconsideration is reviewed under the abuse of discretion standard. [Citation.]" (*New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 212.)

In her brief, plaintiff argues six "new facts" that warranted reconsideration of terminating sanctions: that (1) prior to the motion for terminating sanctions, she believed she had produced all responsive phone records; (2) she produced call and text message logs on Amy's phone on October 23 and December 13; (3) the only source of Amy's e-mails in plaintiff's possession was Amy's laptop, which she produced to defendants; (4) she produced unredacted credit card statements to defendants on October 23 and produced them again in December "in an organized and easy to use format"; (5) Mr. Kazman's representation regarding the amount of Facebook printouts was a mistake; and (6) Amy's Facebook password was obtained and a digital copy of her account was given to Boyd in December 2013.

Plaintiff's prior production of phone records, her October 23 production of a phone and text message log, her production of Amy's e-mails and laptop, and her

production of unredacted credit card statements in October are not new facts. As a trial court "acts in excess of jurisdiction [if] it grants a motion to reconsider that is not based upon 'new or different facts, circumstances, or law,'" these facts cannot constitute bases for reconsideration. (*Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494, 1500; *New York Times Co. v. Superior Court*, *supra*, 135 Cal.App.4th at p. 213 ["it is still necessary that the party seeking [reconsideration] . . . offer some fact or circumstance not previously considered by the court"].)

Although Plaintiff does raise some new facts, she provides no reason for her failure to produce this evidence at an earlier time. (*Glade v. Glade* (1995) 38 Cal.App.4th 1441, 1457.) Notably, she states Mr. Kazman's misrepresentation regarding the existence of 68 pages of Facebook material was a result of his unfamiliarity with Facebook. But there is no explanation as to why Mr. Kazman's lack of familiarity with Facebook was not brought to the attention of the court earlier. (See *New York Times Co. v. Superior Court*, *supra*, 135 Cal.App.4th at pp. 212-213 [the moving party under section 1008 must show that it could not, "with reasonable diligence, have discovered or produced" the evidence beforehand].)

Furthermore, the alleged new facts plaintiff asserts must justify reconsideration. Evidence of plaintiff's subsequent compliance with the court's discovery orders is not the kind of new fact that will support reconsideration under section 1008. (*Forrest v. Department of Corporations* (2007) 150 Cal.App.4th 183, 203-204, disapproved on another ground in *Shalant v. Girardi* (2011) 51 Cal.4th 1164, 1172, fn. 3.) Thus, plaintiff's December productions of the phone and text message log, credit card statements, and Amy's Facebook password do not warrant reconsideration.

The trial court did not abuse its discretion in denying plaintiff's motion for reconsideration under section 1008.[7]

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[7] Plaintiff also argues the trial court abused its discretion because, when the plaintiff "demonstrated that [the] documents had all been produced, the trial court changed its reasoning." This contention is unsupported by the record. The "different" reasoning that

B. *Relief Due to Mistake, Inadvertence, or Excusable Neglect*

Generally, a party is deemed bound by the acts of her lawyer-agent. (*Bernstein v. Allstate Insurance Co.*, *supra*, 119 Cal.App.3d at p. 451.) A party who voluntarily chooses an attorney to represent her in an action cannot avoid the consequences of the acts or omissions of her chosen agent, since it would "allow litigants or their counsel to turn a deaf ear to the processes of the court with impunity." (*Ibid.*) There are narrow exceptions to this rule, and plaintiff claims that one such exception, under section 473, subdivision (b), applies to her case.

Section 473, subdivision (b) consists of a discretionary provision and a mandatory provision. On appeal, plaintiff does not rely on the discretionary provision of section 473, subdivision (b), but relies exclusively on the provision of the statute requiring a trial court to vacate its default or dismissal order under certain circumstances. That provision states that if an application for relief is made within six months of entry of judgment 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).)

The plain language of section 473 indicates the mandatory provision of subdivision (b) applies only if the moving party has suffered a dismissal or default judgment. The Third District in *Peltier v. McCloud River R.R. Co.* (1995) 34 Cal.App.4th 1809 (*Peltier*) construed the term "dismissal" to encompass only those which "occur through [a plaintiff's] failure to oppose a dismissal motion—the only [types

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plaintiff contends the court subsequently adopted—that plaintiff produced incorrect telephone records and admitted she ignored court orders to continue redacting information from credit card records—was part of the court's original ruling on defendants' motion for terminating sanctions.

of] dismissals which are procedurally equivalent to a default." (*Id.* at p. 1817.) This was done to "give effect to the legislative purpose of treating dismissed plaintiffs and defaulted defendants equally." (*Id.* at p. 1819.)

Following to the *Peltier* decision, California courts have been divided as to whether the mandatory relief provision applies in a context other than default or dismissal that is procedurally equivalent to default. A line of cases, broadly applying the "procedurally equivalent to a default" language of *Peltier*, has interpreted the statute in a way that would grant relief in *any* situation in which a party "has not had her day in court." (*In re Marriage of Hock & Gordon-Hock* (2000) 80 Cal.App.4th 1438, 1444; *Avila v. Chua* (1997) 57 Cal.App.4th 860.)

We have adopted and follow a narrower interpretation of the terms "dismissal" and "'default judgment'" under section 473, subdivision (b). (*Hossain v. Hossain* (2007) 157 Cal.App.4th 454, 458.) In *Hossain v. Hossain*, we held that a plaintiff's failure to file a timely opposition to defendant's motion to enforce a settlement agreement was not a default judgment. (*Id.* at p. 459.) We interpreted the statutory provision to apply 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.' [Citation.]" (*Id.* at p. 458.) Because terminating sanctions do not constitute a dismissal or default, plaintiff was not entitled to relief under the mandatory provision of section 473, subdivision (b).[8] (See *Noceti v. Whorton* (2014) 224 Cal.App.4th 1062, 1067-1068 [mandatory relief unavailable for attorney's failure to appear at trial after miscalendaring trial date]; *Henderson v. Pacific Gas & Electric Co.* (2010) 187 Cal.App.4th 215, 226-

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[8] The Fifth District recently reached a contrary conclusion in *Rodriguez v. Brill* (2015) 234 Cal.App.4th 715. Without referencing the current split of authority, *Rodriguez v. Brill* held that terminating sanctions imposed on a party based on discovery violations constitutes a "dismissal" under the meaning of section 473, subdivision (b). Because we adhere to our Division's prior opinion in *Hossain v. Hossain*, we respectfully disagree with our colleagues in the Fifth District.

229 [section 473, subdivision (b) relief not available for summary judgment]; *Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1417 [mandatory relief unavailable for attorney's failure to oppose summary judgment motion].)

More fundamentally, section 473 relief is not available where, as in this case, 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).) In *Jerry's Shell v. Equilon Enterprises, LLC* (2005) 134 Cal.App.4th 1058 (*Jerry's Shell*), evidence before the trial court established that appellants' attorneys regularly failed to respond to discovery when it was due, ignored respondents' attempts to meet and confer, and did not respond to a motion to compel. (*Id.* at p. 1073.) This resulted in "[appellants'] 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 . . . ." (*Ibid.*) In that case, appellant's attorney claimed she was suffering from medical issues and delegated her responsibility to another attorney and a law clerk, who failed to make timely filings and answer interrogatories. (*Id.* at p. 1065.) Affirming the trial court's denial of appellants' motion, the court explained, "[i]f 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 p. 1074.)

Plaintiff argues *Jerry's Shell* is distinguishable; we disagree. Like the attorneys in *Jerry's Shell*, plaintiff's attorneys in this case repeatedly failed to respond to discovery requests, made multiple misrepresentations to the court regarding their possession of discovery materials, and insisted that they had complied with defendants' requests, only to produce additional documents after receiving warnings from the court. In support of plaintiff's motion for relief, Mr. Balisok submitted a declaration stating that he honestly believed the court had not made a formal order at the August 23 hearing, implying

plaintiff was never ordered to produce documents. This sidesteps the fact that on August 7, the trial court specifically ordered plaintiff to produce "any documents that have been agreed to be produced . . . within 10 days. . . . Not 10 court days, 10 calendar days." Mr. Balisok's declaration also claims he failed to file supplemental answers to the special interrogatories and form interrogatories because his "focus was entirely upon the production of documents" and he was involved in other, time-consuming cases. The trial court rejected this explanation, concluding that "[p]laintiff and her counsel's conduct here demonstrates . . . purpose and intent in their failure to comply with multiple court orders." The court also noted, "after multiple hearings and orders as well as monetary sanctions in an effort to secure the Plaintiff's compliance with her discovery obligations, . . . counsel engaged in a strategy of delay rather than mistake, inadvertence, surprise or neglect." The trial court's finding has substantial support in the record. As such, plaintiff is not entitled to relief under section 473, subdivision (b) for her attorney's deliberate failure to adhere to the trial court's order. (*Jerry's Shell*, *supra*, 134 Cal.App.4th at p. 1074.) The trial court did not err in denying plaintiff's request for relief under section 473, subdivision (b).

III

Because our affirmance of the trial court's granting terminating sanctions disposes of the case against defendants, we do not address the merits of the trial court's sustaining of defendants' demurrer to plaintiff's third amended complaint.

DISPOSITION

The judgment is affirmed. Defendants are entitled to their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.