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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

IRENE HANSON, Plaintiff and Appellant, v. AL AGUIRRE, Defendant and Respondent.	B296734 (Los Angeles County Super. Ct. No. KC068764)

APPEAL from an order of the Superior Court of Los Angeles County, Peter A. Hernandez, Judge. Reversed.

Peter Borenstein for Plaintiff and Appellant.

Luis E. Lopez for Defendant and Respondent.

Appellant Irene Hanson appeals the trial court's order granting respondent Al Aguirre's motion to vacate the judgment in favor of Hanson. Aguirre's motion, brought under Code of Civil Procedure section 473, subdivision (b),[1] was based on a claim of excusable neglect in failing to oppose Hanson's motion for summary judgment, which Aguirre claimed he never received. Hanson contends the trial court abused its discretion in granting Aguirre's motion for relief because: (1) Aguirre failed to present substantial evidence of his diligence in seeking relief; (2) he presented no admissible evidence of his excusable neglect; and (3) he did not attach his proposed pleading as required by the statute. We conclude the trial court abused its discretion in finding Aguirre acted diligently in seeking relief despite Aguirre's unexplained five-month delay in bringing the motion following notice of entry of judgment. Thus, we reverse the trial court's order granting the motion to vacate the judgment, without reaching the other issues raised on appeal.

FACTUAL AND PROCEDURAL BACKGROUND

On September 29, 2016, Hanson filed a civil action in Los Angeles Superior Court against Aguirre alleging causes of action for breach of contract, intentional misrepresentation, negligent misrepresentation, and breach of the covenant of good faith and fair dealing. Hanson alleged Aguirre had failed to perform under a January 2014 oral agreement which provided that Aguirre would draft city-approved blueprints for a property in Pomona that Hanson sought to restore. Hanson paid Aguirre $3,500 in advance for this work.

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[1] Further undesignated statutory references are to the Code of Civil Procedure.

Aguirre was personally served with the summons and complaint at his business address on Kansas Avenue in Riverside. Proceeding in propria persona, Aguirre filed an answer, generally denying the claims. Over the course of two years, Hanson served documents pertaining to the litigation to Aguirre's Kansas Avenue address. Aguirre was sanctioned three times for failing to respond to discovery requests.

On June 1, 2018, Hanson filed a motion for summary judgment (MSJ). The proof of service indicated service was by mail addressed to Aguirre's Kansas Avenue address. Aguirre did not file an opposition to the motion. At the August 20, 2018 hearing on the MSJ, the court granted Hanson's unopposed motion. The order granting summary judgment, signed by the court, stated that "judgment is entered" in favor of Hanson, and ordered that Aguirre pay $49,600 in damages to Hanson. The next day, a copy of the order was served by mail to Aguirre's Kansas Avenue address. Aguirre acknowledges receiving a copy of the signed order entering judgment against him.

Nearly five months later, on January 10, 2019, Aguirre filed a motion to vacate the judgment through his newly hired counsel. Aguirre argued that the court should grant him discretionary relief under section 473, subdivision (b) based on his "excusable neglect and surprise." Aguirre attached two declarations, not sworn under penalty of perjury, in support of his motion. Aguirre's declaration asserted that he never received the pleadings filed in connection with the MSJ, and the first time he learned about the MSJ was when he received the order granting summary judgment. He also declared there was a criminal case in Riverside "against an individual who stole checks payable to [Aguirre's] business from the mail," the mailboxes were pried

open on several occasions, and "mail ha[d] been stolen from various tenants." The second declaration, by Aguirre's bookkeeper, Alicia Burk, declared there had been "[o]ngoing" issues with mail theft at the Kansas Avenue address by "persons who pried open or otherwise gained access" to the mailboxes, and fellow tenants had reported they suspected their mail had been stolen over the last few months. In addition, Aguirre's counsel submitted an "affidavit of merits" disputing each of Hanson's underlying claims.

Hanson opposed the motion to vacate the judgment. She argued that Aguirre's motion was procedurally deficient because there was no attached opposition to the MSJ, which violated the requirement of section 473, subdivision (b) that the proposed pleading be attached to the motion to vacate the judgment. Hanson also argued that Aguirre had failed to meet his evidentiary burden of showing excusable neglect because the supporting declarations were "vague, not credible, and obviously self-serving." Because Aguirre had previously ignored other documents mailed to his Kansas Avenue address, such as the discovery requests Hanson had served, Hanson contended Aguirre's claim of mail theft was not credible. Hanson also argued that Aguirre was not diligent in seeking relief from the judgment because he had waited five months after being served with a copy of the signed order granting the MSJ to file his motion.

The declaration of Peter Borenstein, Hanson's counsel, supporting the opposition to the motion to vacate the judgment asserted the following facts: On September 5, 2018, two months after the court granted summary judgment, Borenstein mailed Aguirre a letter notifying him of the judgment and offering the

possibility of a payment plan to satisfy the judgment. Aguirre did not respond. On October 9, Borenstein filed an Application and Order for Appearance and Examination setting a date for a debtor's examination, which he served on Aguirre. On November 12, Borenstein applied for an abstract of judgment against Aguirre, which the clerk issued on November 20. On November 19, Borenstein conducted the debtor's examination of Aguirre, and Borenstein offered to wait until January 2019 to begin enforcing the judgment. Aguirre never reported suspicions of mail theft or indicated that he had not received the MSJ. On December 3, 2018, Borenstein filed a judgment lien against Aguirre with the California Secretary of State. On December 13, he recorded the abstract of judgment. Finally, on January 7, 2019, Borenstein filed and served a Memorandum of Costs After Judgment, Acknowledgment of Credit, and Declaration of Accrued Interest.

Following the March 13, 2019 hearing on Aguirre's motion to vacate the judgment, the court granted Aguirre's motion. The court found Aguirre was not dilatory in seeking relief because he timely filed the motion within the six-month statutory window, noting: "Summary judgment was granted on August 20, 2018 and the motion was filed five months later on January 10, 2019." The court also found that despite the requirement in section 473, subdivision (b) that a copy of the answer or other pleading proposed to be filed be attached to the motion, which Aguirre failed to do, " '[t]he plain object of the provision [requiring a copy of the answer or other pleading] was simply to require the delinquent party . . . to show his good faith and readiness.' [Citation.] As a result, the Court finds that defendant's motion, along with his declaration, requesting an opportunity to respond

to the summary judgment motion by the Court's timeline will not delay the proceeding anymore than necessary. [¶] Further, plaintiff has not shown that she will suffer any prejudice or that injustice will result from a trial on the merits. [Citation.]" The court ruled that Aguirre had "demonstrated excusable neglect or mistake" in failing to oppose the MSJ and ordered Aguirre to file his opposition to the MSJ within 20 days. Aguirre complied.

Hanson timely appealed the order granting the motion to vacate the judgment.[2]

DISCUSSION

Hanson seeks reversal of the order granting Aguirre relief under section 473, subdivision (b). She contends the trial court abused its discretion by granting Aguirre relief from summary judgment because Aguirre waited almost five months to file his

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[2] We requested supplemental briefs addressing the appealability of the order granting the motion to vacate the judgment because no separate judgment was issued entering summary judgment. An appeal may be taken following an order granting summary judgment only after the court enters a judgment. (See § 904.1, subd. (a)(2) [order made after a judgment that is appealable under § 904.1, subd. (a)(1) is itself appealable].) Here, it appears the court intended to enter judgment in favor of Hanson and dispose of the issues raised by Hanson's complaint when it stated in its written order that "judgment is entered in favor of Plaintiff and against Defendant." Thus, we construe the order granting summary judgment to be a final, appealable judgment, and the order granting the motion to vacate the judgment as an order after judgment under section 904.1, subdivision (a)(2). (See *Swain v. California Casualty Ins. Co.* (2002) 99 Cal.App.4th 1, 5—6 [where it is clear the trial court intended to enter judgment, but it did not take all of the necessary steps to do so, a reviewing court may construe an order granting summary judgment to be a final, appealable judgment].)

motion to vacate the judgment, without any explanation for the delay. We agree.

I. Section 473 and Standard of Review

Section 473, subdivision (b) invokes the trial court's power to grant a party discretionary relief "from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." (§ 473, subd. (b).) The statute provides: "Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken." (*Ibid.*)

A trial court's order granting discretionary relief under section 473, subdivision (b) " ' "shall not be disturbed on appeal absent a clear showing of abuse." ' [Citation.] The scope of the trial court's discretion under section 473 is broad [citation] and its factual findings in the exercise of that discretion are entitled to deference [citations]." (*Minick v. City of Petaluma* (2016) 3 Cal.App.5th 15, 24 (*Minick*).) "However, the trial court's discretion is not unlimited and must be ' "exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." ' [Citations.]" (*Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233, superseded by statute on other grounds as stated in *Tackett v. City of Huntington Beach* (1994) 22 Cal.App.4th 60, 64–65.)

"A trial court abuses its discretion when it applies the wrong legal standards applicable to the issue at hand." (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 85.) " '[A]ll exercises of legal discretion must be grounded in reasoned

judgment and guided by legal principles and policies appropriate to the particular matter at issue.' " (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.)

II. Aguirre Was Not Diligent In Seeking Relief

The trial court found Aguirre was not dilatory in seeking relief because he timely filed the motion within the six-month statutory window. However, the court disregarded the additional requirement that application for relief be made "within a reasonable time."

Section 473, subdivision (b) requires that any application for discretionary relief "be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken." (§ 473, subd. (b).) Thus, a moving party has the threshold burden to "show *diligence* in making the motion after discovery of the default." (*Kendall v. Barker* (1988) 197 Cal.App.3d 619, 625; see also *Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1421 [the "critical triggering event for seeking relief from *the judgment* was notice of its entry"].) The six months provided by the statute "represents the outside limit 'of the court's jurisdiction to grant relief,' " and the " ' "reasonable time" ' " requirement stands as an additional, " ' "independent consideration." ' " (*Huh v. Wang*, at p. 1422 [citing *Benjamin v. Dalmo Mfg. Co.* (1948) 31 Cal.2d 523, 530 (*Benjamin*)].)

What constitutes a "reasonable time" to move for relief depends upon the particular circumstances of the case, but it is well-established that "[a] delay is unreasonable as a matter of law . . . when it exceeds three months and there is no evidence to explain the delay." (*Minick*, *supra*, 3 Cal.App.5th at p. 34 [citing *Benjamin*, *supra*, 31 Cal.2d at p. 532]; see also *Stafford v. Mach* (1998) 64 Cal.App.4th 1174, 1184 [reversing trial court's order

granting relief from default judgment and finding abuse of discretion where inadequate explanation was provided for four-month delay: "three-month unofficial 'standard' " established in *Benjamin* "remains true today"]; *Huh v. Wang*, *supra*, 158 Cal.App.4th at pp. 1421—1422 [no abuse of discretion in denying relief where appellant delayed more than three months in moving for relief without explanation]; cf. *Waite v. Southern Pacific Co.* (1923) 192 Cal. 467, 471 [reversing order denying relief and finding five-month delay in seeking relief was adequately explained by "defendant . . . acting upon its honest belief that the state court had no jurisdiction of the action"].) In general, "the longer the delay in bringing the motion, the more substantial the justification for the delay must be in order for relief to be appropriately granted" under section 473, subdivision (b). (*Stafford v. Mach*, at p. 1185.)

In *Benjamin*, the defendant corporation "furnished no explanation in the trial court, either by affidavit or testimony" for its delay of more than three months in setting aside a default judgment. (*Benjamin*, *supra*, 31 Cal.2d at p. 528.) Our Supreme Court reversed the order setting aside the judgment, observing: "Courts do not relieve litigants from the effects of mere carelessness. Defendant has not cited, nor has independent research disclosed, any case in which a court has set aside a default where, in making application therefor, there has been an unexplained delay of anything approaching three months after full knowledge of the entry of the default. On the contrary, the proper procedure appears to involve the presentation of some explanation, by affidavit or testimony, of any extended delay, and the court then determines whether such explanation may be deemed sufficient to justify the granting of the relief sought."

(*Id.* at p. 529; see also *Stafford v. Mach*, *supra*, 64 Cal.App.4th at p. 1181 ["the reason for the delay must be substantial and must justify or excuse the delay"].)

Here, as in *Benjamin*, Aguirre did not present any evidence in the trial court explaining his five-month delay in seeking relief. It is undisputed that Aguirre was served on August 21, 2018 with the order reflecting the granting of the MSJ and the entry of judgment. Aguirre does not deny that he received that order, which put him on notice of the need for section 473, subdivision (b) relief. (See *Huh v. Wang*, *supra*, 158 Cal.App.4th at p. 1422.) Aguirre filed his motion for relief almost five months after that date, on January 10, 2019. The unsworn declarations he submitted in support of his motion did not explain the reasons for the delay, and addressed only the reasons for his failure to oppose the MSJ. (See *Kendall v. Barker*, *supra*, 197 Cal.App.3d at p. 625 [" 'The moving party has a double burden: He must show a satisfactory excuse for his default, and he must show *diligence* in making the motion after discovery of the default.' "].) Further, Aguirre's five-month delay in seeking relief undermines any claim of diligence because, during this period, Borenstein informed Aguirre of his intent to enforce the judgment and took preliminary steps to do so. Nonetheless, Aguirre waited almost five months to remedy the entry of judgment against him, and cannot be said to have acted diligently in seeking relief within a "reasonable time." Therefore, the trial court abused its discretion by granting Aguirre's motion to vacate the judgment.[3]

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[3] We note that the trial court, in its order granting the motion to vacate the judgment, found that Hanson had not established prejudice or any injustice resulting from a trial on the merits. Whether or not Hanson was prejudiced, however, "does

DISPOSITION

The order granting Aguirre's motion to vacate the judgment is reversed, and the judgment entering summary judgment in favor of Hanson is reinstated. Hanson is awarded costs on appeal.

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EDMON, P. J.

We concur:

LAVIN, J.

EGERTON, J.

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not obviate a showing of compliance with the 'reasonable time' requirement in making the motion." (*Benjamin*, *supra*, 31 Cal.2d at p. 531.) A court cannot set aside a judgment simply because the opposing party has not been prejudiced. (See *Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 900.)

Because we conclude that the trial court's order granting Aguirre's motion to vacate the judgement must be reversed, we need not address Hanson's other contentions regarding the defects in Aguirre's motion.