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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

EDWIN MINASSIAN, Plaintiff and Respondent, v. MICHAEL PANOSIAN et al., Defendants and Appellants.	B293419 (Los Angeles County Super. Ct. No. EC065533)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura A. Matz, Judge. Reversed and remanded.

Stradling Yocca Carlson & Rauth, Katie Beaudin and Jason H. Anderson for Defendants and Appellants.

Law Offices of Matthew D. Rifat and Matthew D. Rifat for Plaintiff and Respondent.

Michael Panosian and Toughbuilt Industries, Inc. (collectively "Toughbuilt") appeal from an order of the trial court denying their motion under Code of Civil Procedure section 473, subdivision (b) (section 473(b)) for relief from a default judgment entered in favor of plaintiff and respondent Edwin Minassian.[1] We conclude that Toughbuilt was entitled to relief under the mandatory provision of section 473(b). We therefore reverse and remand for the trial court to grant the motion and permit Toughbuilt to file their answer.

FACTUAL AND PROCEDURAL BACKGROUND

On August 16, 2016, Minassian filed a complaint against Toughbuilt based on claims that Panosian, the Chief Executive Officer and Managing Director of Toughbuilt, owed Minassian compensation for work he allegedly performed on Toughbuilt's behalf from approximately 2011 through 2016. Toughbuilt filed an answer and a cross-complaint.

On March 7, 2017, Minassian moved for terminating sanctions or, in the alternative, evidentiary sanctions based on Toughbuilt's repeated failure to provide responses to discovery despite court orders to do so. On April 14, 2017, the trial court granted the unopposed motion for terminating sanctions. The court struck Toughbuilt's answer as a sanction for discovery abuse. A clerk's entry of default was filed on May 18, 2017. On June 16, 2017, Minassian filed an application for entry of judgment against Toughbuilt and a memorandum of costs. On July 14,

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[1] Unspecified statutory references will be to the Code of Civil Procedure.

2017, the trial court denied the application and scheduled a default prove up hearing for October 6, 2017. Minassian filed a new application for entry of judgment and memorandum of costs on September 21, 2017. On November 9, 2017, the trial court entered default judgments against Toughbuilt in the amount of $235,541.58 and also awarded Minassian a 7 percent ownership interest in Toughbuilt.

On November 13, 2017, new counsel for Toughbuilt, Jason Anderson, substituted in, replacing former counsel Lloyd Dix. Four days later, Toughbuilt moved for relief from default and the default judgments and sought leave to file its answer. Toughbuilt argued that relief was mandatory under section 473(b) because its former counsel, Dix, filed an affidavit acknowledging the default judgment resulted solely from his neglect.

Dix averred in his affidavit that in June 2016, a few months before he was retained by Toughbuilt, his wife began having seizures that continued through November 2017. As a result of her illness, he delegated the tasks of representing Toughbuilt to other attorneys, but he subsequently learned that those attorneys "did not handle the representation" of Toughbuilt. Dix acknowledged that he failed to respond to six motions to compel responses to discovery requests filed by Minassian and failed to inform Toughbuilt that he did not oppose the motions to compel. He then failed to contact Toughbuilt to obtain responses in order to comply with the court's order compelling responses. Dix did not inform Toughbuilt of the motion for terminating sanctions. Nor did he respond to or oppose the motion, or even inform Toughbuilt that the motion had been granted and that default had been

entered. Dix acknowledged that Toughbuilt's failure to respond to discovery and the resultant terminating sanctions, default and judgments were due solely to his negligence.

Following a February 9, 2018 hearing, the trial court granted in part Toughbuilt's motion for relief. The court set aside the defaults and the default judgments but denied the request to set aside the order issuing terminating sanctions on the ground that the motion was not made within six months of the order. The court thus declined to accept Toughbuilt's answer. Minassian requested and obtained new entries of default against Toughbuilt on February 13, 2018.

On February 16, 2018, Toughbuilt again moved for mandatory relief under section 473(b), relying on the affidavit by Dix. The trial court denied the motion on the ground that Toughbuilt's counsel of record had not failed an affidavit of fault. On April 12, 2018, the default judgment was entered, again awarding Minassian $235,541.58 and a 7 percent ownership interest in Toughbuilt.

On April 25, 2018, Toughbuilt filed the motion for relief that is at issue on appeal. Toughbuilt sought relief from the default judgment, the default, and the order granting terminating sanctions, and sought leave to file its answer. The trial court denied the motion without explanation.

DISCUSSION

Section 473(b) provides for both mandatory and discretionary relief. (*Gee v. Greyhound Lines, Inc.* (2016) 6 Cal.App.5th 477, 484 (*Gee*).) Only the mandatory relief provision is at issue here. That

provision states: "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."

"'"[T]he provisions of section 473 . . . are to be liberally construed and sound policy favors the determination of actions on their merits." [Citation.]' [Citation.] '[B]ecause the law strongly favors trial and disposition on the merits, any doubts in applying section 473 must be resolved in favor of the party seeking relief from default.' [Citation.]" (*Maynard v. Brandon* (2005) 36 Cal.4th 364, 371-372.) Where, as here, "[t]he applicability of the mandatory relief provision does not turn on disputed facts and presents a pure question of law," the trial court's decision is subject to de novo review. (*Gee*, *supra*, 6 Cal.App.5th at p. 485.)

The trial court did not explain its denial of Toughbuilt's section 473(b) motion in its August 23, 2018 ruling. However, in its February 2018 order setting aside the default and default judgment, but not the order granting terminating sanctions, the court explained that it refused to accept Toughbuilt's answer for filing because the section 473(b) motion was untimely as to the order granting terminating

sanctions.[2] We rely on our decision in *Sugasawara v. Newland* (1994) 27 Cal.App.4th 294 (*Sugasawara*), and on a decision by Division Three of this appellate district, *Matera v. McLeod* (2006) 145 Cal.App.4th 44 (*Matera*), to conclude that the trial court erred in denying Toughbuilt's motion.

Sugasawara, 27 Cal.App.4th 294, presented facts similar to those presented here. There, the superior court struck the defendant's answer as a sanction for failure to comply with discovery on February 28, 1992. The plaintiffs subsequently obtained a default, and the superior court entered a default judgment on January 19, 1993. On March 15, 1993, the defendant moved to set aside the default and default judgment under section 473. The superior court granted the motion and reinstated the answer. The plaintiffs appealed from the order vacating the default, and we affirmed. (*Id.* at p. 298.)

In *Sugasawara*, "[t]he central question [was] whether the six-month limitation allowed by section 473 for relief based on attorney's neglect commences at the time default is entered or when the default judgment is rendered." (*Sugasawara*, *supra.* 27 Cal.App.4th at p. 296.) The statute states that the application for relief must be "'made no more than six months *after entry of judgment*.'" (*Id.* at p. 297.) We thus concluded that the motion was "timely under the plain language of the statute," despite having been made more than a year after the answer

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[2] The order granting terminating sanctions was on April 14, 2017, and the section 473(b) motion was filed seven months later, on November 13, 2017.

was struck and more than six months after entry of default. (*Ibid.*) "As the comments in the California Committee Analysis indicate, 'it makes little sense to vacate a judgment without also vacating an underlying default . . . .' (Assem. Com. on Judiciary, Sen. Bill No. 882 (1991).) Unless the default itself is vacated, little is gained by vacating the default judgment." (*Ibid.*)

Although the issue here is the trial court's refusal to vacate the order granting terminating sanctions rather than the default, the reasoning of *Sugasawara* applies. As we stated, "little is gained by vacating the default judgment" if the underlying ruling leading to the default judgment is not also vacated. (*Sugasawara*, *supra*. 27 Cal.App.4th at p. 297; see also *Standard Microsystems Corp. v. Winbond Electronics Corp.* (2009) 179 Cal.App.4th 868, 893 [granting relief from a judgment but not the underlying default would be a useless act], disapproved of on other grounds by *Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 844.)

In *Matera*, *supra*, 145 Cal.App.4th 44, the superior court granted the plaintiffs' motion for terminating sanctions and struck the defendants' answer after the defendants repeatedly failed to respond to discovery. The court subsequently entered judgment in favor of the plaintiffs. The defendants filed a motion for relief from the defaults and default judgment under the mandatory provision of section 473(b). The trial court initially granted the motion on the ground that their former counsel's neglect was the sole cause of their failure to oppose the motion

for a terminating sanction. However, upon reconsideration, the court denied the motion for relief "because (1) the defaults were entered by the court rather than 'entered by the clerk' as stated in the statute, and (2) the default and default judgment resulted from the court's discretionary decision to strike the answer rather than from a ministerial act." (*Id.* at p. 54.) On appeal, the court reasoned that "[t]he striking of a defendant's answer as a terminating sanction leads inexorably to the entry of default. [Citations.] To vacate the defaults without reinstating defendants' answer would be an empty gesture." (*Id.* at p. 62.) The court thus reversed the order denying the motion for relief, concluding that "the order striking the answer must be vacated and the answer reinstated." (*Id.* at pp. 49, 62.) As in *Matera*, vacating the defaults and the default judgments without reinstating Toughbuilt's answer was "an empty gesture," as shown by the fact that Minassian immediately obtained another default judgment. (*Id.* at p. 62.)

Minassian contends that the trial court order granting terminating sanctions was not a default order within the meaning of section 473(b) because the order "did not result from a failure of Toughbuilt to oppose it," but instead was based on "express findings concerning discovery abuse." We disagree.

In *Rodriguez v. Brill* (2015) 234 Cal.App.4th 715 (*Rodriguez*), judgment was entered in favor of the defendant after the trial court dismissed the complaint as a sanction for the plaintiff's failure to comply with an order compelling her to respond to discovery. The trial court denied the plaintiff's motion for relief under the mandatory provision of section 473(b). Similar to Minassian here, the defendant

argued on appeal "that a dismissal entered as a terminating sanction for failure to comply with a discovery order is not the type of 'dismissal' for which mandatory relief under section 473(b) is available." (*Id.* at p. 725.) The court disagreed, citing the plain language of the statute requiring that "[w]hen the requisite sworn statement of attorney fault is presented, the court shall 'vacate *any* . . . resulting default judgment or *dismissal entered* against his or her client.' (§ 473(b), italics added.)" (*Ibid.*) The court reasoned as follows: "First, the plain meaning of 'any . . . dismissal' includes a judgment of dismissal that states the case is dismissed with prejudice. [Citation.] Second, even if this court ignored the directive to give section 473 a liberal construction and construed the phrase 'any . . . dismissal entered' narrowly to mean only dismissals that are similar to default judgments, the judgment of dismissal as a terminating sanction qualifies as such a dismissal because that dismissal was, in essence, the result of a default on discovery obligations. Therefore, we agree with the statement by the court in *Aldrich v. San Fernando Valley Lumber Co.* (1985) 170 Cal.App.3d 725, 736 that 'an order of dismissal entered for failure to comply with an order compelling answers to interrogatories is the practical equivalent of a default judgment.'" (*Ibid.*) *Rodriguez* concluded that mandatory relief under section 473(b) for "'any . . . dismissal entered' encompasses dismissals entered as a terminating sanction for discovery abuse." (*Id.* at p. 726.) We agree with *Rodriguez* and therefore reject Minassian's argument that Toughbuilt is not entitled to relief from the order granting terminating sanctions.

Minassian relies on *English v. IKON Business Solutions, Inc.* (2001) 94 Cal.App.4th 130 (*English*) and *Huh v. Wang* (2007) 158 Cal.App.4th 1406 (*Huh*) to argue that section 473(b) is inapplicable here. *English* and *Huh* are inapposite. The issue in those cases was whether section 473(b) applied to provide relief from an order granting summary judgment. (See *Huh*, *supra*, 158 Cal.App.4th at p. 1425; *English*, *supra*, 94 Cal.App.4th at p. 138.) As such, they are part of a line of cases addressing whether section 473(b) applies when there has been no dismissal or default judgment entered. (See *The Urban Wildlands Group, Inc. v. City of Los Angeles* (2017) 10 Cal.App.5th 993, 998-1002 [relying on *English* and *Huh* to conclude that the failure to lodge an administrative record, resulting in a trial on the merits and a judgment for the defendant, was not a default, default judgment, or dismissal within the meaning of section 473(b)].) In *Hossain v. Hossain* (2007) 157 Cal.App.4th 454, this court agreed with *English*'s conclusion that section 473(b) does not apply in situations where there has been "the procedural equivalent of a default," such as the failure to timely oppose summary judgment or the failure to attend arbitration. (*Id.* at p. 457; see Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2018) ¶ 18:513.10 ["The mandatory relief provision under [section] 473(b) based on an attorney's affidavit of fault does not apply under circumstances that are the procedural equivalent of a default where there has been no actual default, default judgment, or dismissal"].)

In contrast to *English* and *Huh*, the trial court here entered a default judgment, which indisputably comes within the purview of section 473(b). As in *Matera*, the court struck Toughbuilt's answer as a terminating sanction, which "[led] inexorably to the entry of default." (*Matera*, *supra*, 145 Cal.App.4th at p. 62.) The issue thus is whether Toughbuilt is entitled to relief from the default judgment.

There is no question that Toughbuilt's original section 473(b) motion and its subsequent two motions were filed within six months of the entries of the judgments. The final default judgment was entered on April 12, 2018, and Toughbuilt's section 473(b) motion was filed on April 25, 2018. The motion was filed within six months of the entry of judgment and therefore was timely. (*Sugasawara*, *supra*, 27 Cal.App.4th at p. 297; see also Edmon et al., Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2019) ¶ 5:305.1 ["The wording of the statute makes clear that the 6-month period runs from entry of the default judgment, not the original default. [¶] A motion made within that period is timely although the attorney neglect *predated* the entry of default"]; Cal. Judges Benchbook: Civil Proceedings After Trial (CJER 2018) Relief from Default and Default Judgment, § 1.12 ["A motion for mandatory relief is timely, even though more than six months have passed since entry of the *default*, as long as it is filed within six months after entry of the *judgment*"].)

In addition, Toughbuilt's motion was accompanied by an attorney's sworn affidavit of fault and the answer it sought to file, thus

complying with the requirements of section 473(b).[3] Toughbuilt clearly complied with the statutory requirements. The trial court acknowledged as much in February 2018 by setting aside the defaults and the default judgments. Indeed, "'if the prerequisites for the application of the mandatory provision of section 473, subdivision (b) exist, the trial court does not have discretion to refuse relief.' [Citation.]" (*Gee*, *supra*, 6 Cal.App.5th at p. 484; see *Rogalski v. Nabers Cadillac* (1992) 11 Cal.App.4th 816, 821 ["When a default is the attorney's fault the court must grant a timely noticed motion for relief. The only limitation is when the court finds the default was not in fact the attorney's fault, for example when the attorney is simply covering up for the client"].) However, the trial court did not set aside the underlying order granting terminating sanctions that led to the default, resulting in the re-entry of the default and default judgment. This was error. Pursuant to *Sugasawara*, *Matera*, and *Rodriguez*, we conclude that Toughbuilt is entitled to relief not only from the default and

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[3] We note that the trial court erroneously found that Toughbuilt's current attorney of record was required to file the affidavit in denying Toughbuilt's second 473(b) motion. The plain language of the statute indicates that it was not necessary for the attorney of record to file the affidavit. (*Younessi v. Woolf* (2016) 244 Cal.App.4th 1137, 1147.) "'We find nothing in the language of section 473, subdivision (b) to suggest that the Legislature intended the mandatory relief provision to be limited to those circumstances where the attorney affidavit of fault is signed by the defaulting or dismissed party's *attorney of record* in the civil case. . . . By its language, the statute only requires the affidavit be executed by an attorney who represents the client and whose mistake, inadvertence, surprise or neglect in fact caused the client's default or dismissal.' [Citation.]" (*Id.* at p. 1148.)

default judgment but also from the order granting terminating sanctions.

DISPOSITION

The judgment appealed from is reversed and the matter remanded. Upon remand, the trial court is to grant Toughbuilt's section 473(b) motion and permit Toughbuilt to file their answer. Toughbuilt is entitled to costs on appeal.

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WILLHITE, Acting P. J.

We concur:

COLLINS, J.

CURREY, J.