Filed 1/18/18 In re Marriage of Aryeh CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| In re Marriage of FERIAL and JAMSHID ARYEH. | B278392 |
| FERIAL ARYEH,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JAMSHID ARYEH,<br><br>Defendant and Appellant. | (Los Angeles County Super. Ct. No. BD499163) |

APPEAL from an order of the Superior Court of Los Angeles County, Tamara Hall, Judge. Affirmed.

Jamshid Aryeh, in pro. per., for Defendant and Appellant.

Trope & DeCarolis, Patrick DeCarolis, Jr., for Plaintiff and Respondent.

## I. INTRODUCTION

Plaintiff Ferial Aryeh petitioned for a permanent restraining order against defendant Jamshid Aryeh, her former spouse. At the outset of the hearing on that order, defendant requested a continuance, which the trial court denied. Following testimony, the trial court granted the petition and issued the permanent restraining order. Defendant subsequently moved to vacate that order under Code of Civil Procedure section 473.[1] This motion was denied. Defendant now appeals from the order denying his section 473 motion. We affirm.

## II. BACKGROUND

A. *Restraining Order*

On January 21, 2009, plaintiff filed a petition seeking a dissolution of her marriage with defendant. While that action was pending, defendant was criminally convicted of spousal abuse against plaintiff and sentenced to six months in county jail. On April 12, 2011, plaintiff obtained a five-year restraining order prohibiting defendant from harassing, contacting, or coming within 100 yards of her.

Almost five years later, on February 9, 2016, plaintiff filed a request to renew the restraining order as a permanent restraining order. In her declaration, plaintiff asserted that she feared defendant and was afraid of his anger and outbursts. She stated that he "continues to spew vitriolic comments" about her to

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[1] Further statutory references are to the Code of Civil Procedure unless otherwise indicated. Defendant purports to challenge the permanent restraining order itself and the denial of a motion for new trial, but we lack jurisdiction over the challenged orders as discussed in section III.A below.

mutual friends and associates, "tells people how angry he is" with her, and "tells people that anything bad in his life is [her] fault." Plaintiff declared that defendant told people "he strongly believes that it is time for [her] to die."

As an example of this, plaintiff declared she received a phone call from Jacob Naimi, who stated to her that defendant did not pay money that he owed to Naimi because of plaintiff putting stress on defendant. Plaintiff also recounted a recent incident when she had to drive to a store on the same street where defendant's business is located. While plaintiff went into the store, her mother stayed in the car. Defendant saw plaintiff's mother, stared into the car from both sides, spit on the car, and chased plaintiff's mother into the store. In another incident, on August 17, 2014, plaintiff attended their son's wedding, which defendant attended with court approval. Defendant stared at her the whole time. Plaintiff recalled being extremely uneasy at the event and for several days after. Plaintiff stated that she continued to experience vivid nightmares of the beatings that she suffered while married to defendant.

Defendant was personally served with the request for permanent restraining order on February 18, 2016. Defendant, representing himself, opposed the request via declarations submitted in opposition filed on March 18, 2016.

The court held a hearing on the restraining order on March 23, 2016. At the outset of the hearing, defendant indicated for the first time that he was "supposed to be represented by an attorney." Defendant said "[M]y attorney asked if the court could continue this for later on because he couldn't show up." Plaintiff's counsel opposed the request because he had no knowledge of it until the hearing, and the opposing papers "were

filed in pro per. We're prepared to go forward. I think it's inappropriate to come to court without any notice and ask for a continuance when we're here ready to proceed."

The trial court confirmed with the court clerk that no substitution of attorney had been filed on defendant's behalf. The trial court decided to proceed with the hearing, noting that "[t]his is the first that the court and counsel are hearing about the lawyer that you hired, but that lawyer has not substituted in, so your status remains pro per."

Defendant indicated he planned to call his son and Naimi as witnesses by declaration. Defendant was not prepared to have them be present to testify. The trial court stated that defendant could not rely on declarations because they were inadmissible hearsay, but prepared to recess so that defendant could contact his witnesses to see if he could get them to court. Plaintiff's counsel then offered to stipulate that all declarations from both sides could go into evidence, and defendant agreed. The trial court accepted the stipulation and stated that it would receive the witnesses' declarations for their truth.

Both plaintiff and defendant testified. After their testimony, the trial court found the plaintiff very credible and granted the permanent restraining order pursuant to Family Code section 6345. The court stated that it was "very obvious to the court that she was . . . visibly afraid, and she cried during the testimony. . . ." The court stated that the events of five or six years earlier still had plaintiff in fear of her safety. The court issued the permanent restraining order on March 23, 2016.

B. *Motion to Vacate Judgment and for New Trial*

On April 5, 2016, represented by counsel, defendant moved for new trial under section 657 and relief from the permanent restraining order under 473, subdivision (b). In support, defendant declared, "[P]art of my strategy was to have a lawyer represent me at the trial. Robert Smith [defendant's counsel] had told me previously that he would attend the hearing if he could get out of a[] [hearing] that was scheduled for the same morning in the Ventura Superior Court. As it turned out, he could not get out of this hearing, so I had to go to court alone." Robert Smith declared, "I told [defendant] that I could appear for him at the hearing on that [restraining order] matter if I could get out of a Request for Order hearing in the Ventura Superior Court scheduled for the same time. . . . I would have attended [defendant's] hearing on the request for extension of restraining order but I could not get out [of] the conflicting Ventura appearance."

On July 29, 2016, the trial court heard defendant's motions. Smith appeared on behalf of defendant. Following argument, the trial court indicated it was denying the motions. The trial court issued its findings and order after hearing on October 4, 2016.

## III. DISCUSSION

A. *Appealability*

Representing himself in this appeal, defendant filed his notice of appeal on September 28, 2016. Defendant's notice of appeal identified that he was appealing from a judgment or order dated September 19, 2016. There is no order or judgment in the record with that date. Defendant's opening brief indicates that he appeals from the permanent restraining order, the denial of

his motion for new trial under section 657, and the denial of his motion to vacate the judgment under section 473. We have jurisdiction to hear an appeal on the last of those three orders, but not on the first two.

The permanent restraining order issued March 23, 2016 is a final order appealable under section 904.1, subdivision (a)(6). The time to file a direct appeal from the restraining order is a maximum of 180 days from the date of issuance of the order. (Cal. Rules of Court, rule 8.104(a)(1)(C).) Because 180 days from the March 23, 2016 restraining order was September 19, 2016, and defendant's notice of appeal was filed September 28, 2016, that notice of appeal cannot support jurisdiction for a direct appeal from the restraining order.[2]

An order denying a motion for new trial is not appealable directly. It is reviewable on appeal from the underlying judgment. (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 18.) Because an appeal from the underlying judgment, the restraining order, is untimely, the order denying the motion for new trial is not reviewable on appeal.[3]

An order denying a motion to vacate under section 473 is appealable as an order after a final judgment under section 904.1, subdivision (a)(2). (*General Bank Nederland v. Eyes of the*

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[2] None of the extensions under California Rules of Court, rule 8.108 apply.

[3] We note that, if defendant's new trial motion was an appropriate vehicle to seek rehearing here, it was denied by operation of law 60 days from when it was filed under section 660. (*Maroney v. Iacobsohn* (2015) 237 Cal.App.4th 473, 485.)

*Beholder Ltd.* (1998) 61 Cal.App.4th 1384, 1394.) Here, the trial court issued its "Findings and Order after Hearing," denying defendant's motion to vacate, on October 4, 2016. The notice of appeal was filed September 28, 2016. Under rule 8.104(d)(2) of the California Rules of Court, "[t]he reviewing court may treat a notice of appeal filed after the superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment." We exercise our discretion and construe the appeal as from the order denying defendant's motion to vacate the restraining order under section 473, subdivision (b).

B. *The Trial Court Did Not Err by Denying the Section 473 Motion*

Defendant appears to seek discretionary and mandatory relief under section 473, subdivision (b).[4] As to discretionary relief, that subdivision provides: "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." We review for an abuse of discretion the trial court's order denying defendant's motion for relief under the discretionary provision of section 473, subdivision (b). (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 257-258.)

We find no abuse of discretion. Defendant asserts relief on a theory of excusable neglect based on his lack of representation by an attorney, speaking English as a second language, and not

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[4] Defendant mistakenly referred to the discretionary relief provision under section 473 as under subdivision (a).

understanding the law. Defendant cites *Karlein v. Karlein* (1951) 103 Cal.App.2d 496, 497 (*Karlein*), which found the trial court abused its discretion by denying a section 473 motion made on excusable neglect grounds because the defendant was in a disturbed mental state and had some difficulty with English. That case was actually far different from this one. There, a default judgment had been entered against a self-represented defendant, who, later with counsel, moved to set it aside. (*Karlein*, *supra*, 103 Cal.App.2d at pp.496-497.) The defendant had been taken into custody on a psychopathic warrant for a period of time and held in custody, such that at the time of his default hearing "he was actually confined in the psychopathic ward of Los Angeles County Hospital." (*Id.* at p. 497.) The Court of Appeal concluded that the defendant "should have an opportunity to defend himself." (*Id.* at p. 498.) The defendant "was in a disturbed mental state" as shown by his appearance in a different matter, where the court commissioner reported that the defendant "appeared on the verge of a nervous collapse." (*Ibid.*)

Here, in contrast to the default judgment in *Karlein*, defendant had his day in court. He represented himself by filing a timely opposition and supporting declarations, and then by appearing at the hearing and testifying. "A party proceeding in propria persona 'is to be treated like any other party and is entitled to the same, but no greater consideration than other litigants and attorneys.' [Citation.] Indeed, "'the in propria persona litigant is held to the same restrictive rules of procedure as an attorney.'" [Citation.]" (*First American Title Co. v. Mirzaian* (2003) 108 Cal.App.4th 956, 958, fn. 1.) Here, defendant knew enough to attempt to hire an attorney in the first

instance. Defendant also knew that Smith might not be available for the hearing and did not seek a continuance until the day of the hearing. Ordinary prudence is required for a showing of excusable neglect. (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1206.) It is reasonable to hold defendant responsible for acting before the outset of the hearing to substitute counsel or seek an continuance. The trial court did not abuse its discretion by finding no excusable neglect.

Defendant also argued surprise as a grounds for discretionary relief. As to surprise, "[t]he 'surprise' referred to in section 473 is defined to be some 'condition or situation in which a party to a cause is unexpectedly placed to his injury, without any default or negligence of his own, which ordinary prudence could not have guarded against.' [Citation.]" (*Baratti v. Baratti* (1952) 109 Cal.App.2d 917, 921.) Defendant was aware that Smith could represent him at the restraining order hearing only if Smith could get out of appearing in Ventura Superior Court. Despite being aware that Smith might not be able to represent him, defendant did not move for a continuance until the day of the restraining order hearing. This was defendant's error.[5] The trial court does not abuse its discretion by denying a continuance in this circumstance.

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[5] We note that the declarations of both defendant and defendant's counsel are lacking important facts such as the date when defendant consulted Smith prior to the hearing, and the date when Smith informed defendant he was unable to attend the hearing. Counsel's declaration does not expressly state that he told defendant to seek a continuance, that he told defendant he would represent him if there was a continuance, or that he provided defendant any dates when he would be available if the court set a continued hearing.

Defendant also fails to demonstrate that mandatory relief should be granted. Concerning mandatory relief, section 473, subdivision (b), provides in pertinent 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."

The mandatory relief provision applies to an actual default, default judgment, or dismissal. (*The Urban Wildlands Group, Inc. v. City of Los Angeles* (2017) 10 Cal.App.5th 993, 996; *English v. IKON Business Solutions, Inc.* (2001) 94 Cal.App.4th 130, 147.) There was no default, default judgment, or dismissal entered against defendant. Rather, the permanent restraining order was issued against defendant following a hearing on the merits. Thus, mandatory relief under section 473, subdivision (b) is not applicable. (See *The Urban Wildlands Group, Inc. v. City of Los Angeles, supra*, 10 Cal.App.5th at pp. 997, 1002 [though attorney attested to error, hearing on the merits is not a default, default judgment, or dismissal under mandatory provision of section 473, subdivision (b)].)

## IV. DISPOSITION

The order denying the motion to vacate is affirmed. Plaintiff Ferial Aryeh shall recover her appeal costs from defendant Jamshid Aryeh.

RAPHAEL, J.*

We concur:

KRIEGLER, Acting P.J.

BAKER, J.

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