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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

GERSON FOX,

Plaintiff and Respondent,

v.

ERNEST RICHARD BARRECA,

Defendant and Appellant.

B261753

(Los Angeles County
Super. Ct. No. LC100200)

APPEAL from an order of the Superior Court of Los Angeles County, Huey P. Cotton, Jr., Judge. Reversed.

Law Office of Jeff Katofsky, Jeff Katofsky and Michael Leff, for Defendant and Appellant.

Slaughter, Reagan & Cole, Gabriele M. Lashly and Jonathan D. Marshall for Plaintiff and Respondent.

This appeal arises from a contract and fraud action brought by Gerson Fox (Fox) against Ernest Richard Barreca (Barreca), based on the alleged misappropriation of certain investment funds. Barreca failed to answer the complaint in a timely manner. More than a year after a default was entered but less than two months after a default judgment was entered, Barreca moved to vacate both the default and the default judgment on the ground of attorney negligence, relying on the mandatory relief provision of Code of Civil Procedure section 473, subdivision (b).¹ The trial court denied Barreca’s motion due to a purported lack of jurisdiction—the motion was brought more than six months after the default was entered—and this appeal followed.

We hold that the trial court erred. Rather than applying the time period for motions seeking mandatory relief under section 473, subdivision (b), the trial court incorrectly applied the time period for motions seeking discretionary relief. Since Barreca’s motion was timely under the mandatory relief provision, we reverse and remand for further proceedings consistent with our holding herein.

BACKGROUND

I. The default and the default judgment

On April 18, 2013, Fox and his wife, individually and as co-trustees of a family trust, sued Barreca. In their complaint, they alleged 15 separate causes of action ranging from elder abuse and fraud to conversion and reformation. They also alleged that they had been damaged in an amount not less than \$15 million.

On May 9, 2013, Fox’s process server personally served Barreca with a copy of Fox’s complaint. Barreca never answered

¹ All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

or otherwise responded to the complaint. As a result, on June 14, 2013, at Fox's request, the clerk of the court entered a default against Barreca.

On July 8, 2014, more than a year after the default had been entered, and following a default prove-up proceeding, the trial court entered a default judgment against Barreca. Under the terms of the default judgment, Barreca owed Fox \$7.9 million.

II. The motion to vacate

Less than two months later, on or about August 26, 2014, Barreca, pursuant to section 473 moved to vacate both the default and the default judgment. According to the motion and the supporting declaration by Barreca's attorney,² Barreca had failed to file a timely responsive pleading due "solely" to "his attorney's mistake, advertence, surprise or neglect." The alleged mistake ostensibly occurred as follows: "[d]ue to defense counsel's large case load and busy schedule," the deadline for filing a responsive pleading was "inadvertently left off of Defense counsel's calendar, and thus responsive pleadings were not filed and default and default judgment were entered against [Barreca]."

Fox opposed the motion by advancing two principal arguments. First, Fox contended that the motion was untimely, as it was brought more than a year after the default was entered.

² We refer to defense counsel's sworn statement as a declaration even though it is captioned as an affidavit. We do so because no jurat by a notary public is attached to the document and because the document contains the "under penalty of perjury" affirmation required for a declaration made in California. (§ 2015.5; see Cal. Rules of Court, rule 3.1306(a).)

Second, Fox argued that the basis for the motion was “disingenuous” in that Barreca’s counsel initially told Fox’s counsel (prior to filing the motion) that the default should be set aside because Barreca had never been served, but then, after learning from Fox’s counsel that Barreca had in fact been personally served, Barreca’s lawyer filed a declaration stating that the sole reason for the default was attorney negligence. (Capitalization omitted.)

III. The trial court’s decision

On December 19, 2014, the trial court heard oral argument on Barreca’s motion. Before the hearing, the trial court issued a tentative ruling denying the motion on jurisdictional grounds alone: “In this case, default was entered 14 months before the motion was filed. It is true that judgment was entered within six months of the motion filing but that is not the trigger for the 6 month period.”

During oral argument, Barreca’s counsel maintained that the motion was timely as to both the default and the default judgment because it was brought within six months of the entry of default judgment. Fox’s counsel focused his oral argument on defense counsel’s declaration of fault, arguing that even if the motion was timely the declaration failed to establish that the default and the resulting default judgment were in fact caused by attorney negligence.

After hearing the parties’ arguments, the trial court ruled that regardless of Fox’s arguments concerning defense counsel’s declaration, the jurisdictional issue was decisive. Accordingly, the trial court did not modify its tentative ruling, but adopted it as “the order of the court.” Barreca timely appealed.

DISCUSSION

I. Guiding principles

“[T]he policy of the law is to have every litigated case tried upon its merits, and it looks with disfavor upon a party, who, regardless of the merits of the case, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary.” (*Weitz v. Yankosky* (1966) 63 Cal.2d 849, 855.) Hence, “ ‘ “[t]he provisions of section 473 . . . are to be liberally construed” [Citation.]’ [Citation.] ‘ . . . [A]ny doubts in applying section 473 must be resolved in favor of the party seeking relief from default.’ ” (*Maynard v. Brandon* (2005) 36 Cal.4th 364, 371–372.) “Section 473 is often applied liberally where the party in default moves promptly to seek relief, and the party opposing the motion will not suffer prejudice if relief is granted. [Citations.] In such situations ‘very slight evidence will be required to justify a court in setting aside the default.’ ” (*Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233.)

II. Relief under section 473

Section 473, subdivision (b), “includes a discretionary provision, which applies permissively, and a mandatory provision, which applies as of right. Although this bifurcation is not demarcated in any internal subtitling, it is plainly evident in the textual structure of the statute.” (*Minick v. City of Petaluma* (2016) 3 Cal.App.5th 15, 25.) Both provisions allow for relief from entry of default and default judgment.³ (*Martin Potts &*

³ California courts regard a default and a default judgment as “ ‘separate procedures’ ” or “discrete events” such that “[t]he latter does not necessarily have any bearing on and *may* be set aside without disturbing the former.” (*Rutan v. Summit Sports, Inc.* (1985) 173 Cal.App.3d 965, 970.)

Associates, Inc. v. Corsair, LLC (2016) 244 Cal.App.4th 432, 438 (*Corsair*).) However, as discussed below, how and when the statute allows relief from entry of default and default judgment depends on the type of relief sought by the moving party.

A. DISCRETIONARY RELIEF

The discretionary relief provision allows the trial court to set aside, inter alia, a default or a default judgment caused by a party's "mistake, inadvertence, surprise, or *excusable* neglect." (§ 473, subd. (b), italics added.) The application for such relief must "be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken." (*Ibid.*)

California courts have consistently held that the six-month period to bring a motion to vacate under the discretionary relief provision runs from "*the date of entry of default* rather than from *the date of entry of the default judgment.*" (*Weiss v. Blumencranc* (1976) 61 Cal.App.3d 536, 541; *Rutan v. Summit Sports, Inc.*, *supra*, 173 Cal.App.3d at p. 970; *Manson, Iver & York v. Black* (2009) 176 Cal.App.4th 36, 42.)

Pulte Homes Corp. v. Williams Mechanical, Inc. (2016) 2 Cal.App.5th 267, is illustrative. In that case, plaintiff filed its complaint against the defendant in 2013. Defendant failed to respond to the complaint and, in 2014, the trial court entered the defendant's default. (*Id.* at p. 271.) In 2015, more than a year after entering defendant's default, the trial court entered a default judgment against the defendant. Less than six months later, the defendant moved to vacate both the default and the default judgment on grounds of excusable neglect (i.e., the defendant sought discretionary relief). (*Ibid.*) The trial court granted the motion, but the Court of Appeal reversed, explaining

its decision as follows: “Williams’s motion was filed less than six months after entry of the default judgment, but more than six months after entry of its default. The trial court therefore could not set aside the default under [the discretionary relief provision of] . . . section 473. And because it could not set aside the default, it also could not set aside the default judgment under . . . section 473, because that would be ‘an idle act.’ [Citation.] ‘If the judgment were vacated, it would be the duty of the court immediately to render another judgment of like effect, and the defendants, still being in default, could not be heard in opposition thereto.’ ” (*Id.* at p. 273.)

A motion seeking discretionary relief under section 473 “lies within the sound discretion of the trial court, and the trial court’s decision will not be overturned absent an abuse of discretion. [Citations.] 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.” ’ ” (*Elston v. City of Turlock*, *supra*, 38 Cal.3d at p. 233.) “[A] trial court order denying relief is scrutinized more carefully than an order permitting trial on the merits.” (*Id.* at p. 233.)

B. MANDATORY RELIEF

The mandatory relief provision, which was added by the Legislature in 1991 (see *Sugasawara v. Newland* (1994) 27 Cal.App.4th 294, 297 (*Sugasawara*)), is narrower than the discretionary relief provision, applying only to attorney-caused defaults, default judgments, and dismissals: “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.” (§ 473, subd. (b).)

Although the mandatory relief provision applies to fewer orders than its discretionary counterpart, it is generally available for the full continuum of attorney-caused neglect—that is, mandatory relief may be obtained for inexcusable neglect, while discretionary relief is reserved for “excusable neglect” only. (§ 473, subd. (b); see *Corsair*, *supra*, 244 Cal.App.4th at p. 439.) In addition, the time in which to bring a motion for mandatory relief is greater than is the case with discretionary relief. In contrast to discretionary relief, courts have held that under the express terms of the newer and narrower mandatory relief provision, the six months in which to seek relief from both a default and a resulting default judgment begins to run from the “*entry of judgment*.” (§ 473, subd. (b), *italics added*.) Moreover, the mandatory relief provision operates to vacate both a default and a resulting default judgment simultaneously.⁴

⁴ The mandatory relief provision’s greater liberality with respect to the circumstances, timing and scope of relief “comes with a price—namely, the duty to pay ‘reasonable compensatory legal fees and costs to opposing counsel or parties.’” (*Corsair*, *supra*, 244 Cal.App.4th at p. 438.) Here, Fox sought to recover more than \$26,000 in attorney fees in the event Barreca’s motion was granted. Fox, however, did not submit any legal invoices or time sheets to support her request for attorney fees. In his reply,

Sugasawara, supra, 27 Cal.App.4th 294, is illustrative. In that case, as here, the question was how to apply the six-month limitation for obtaining mandatory relief based on attorney fault under section 473, subdivision (b), when the motion for relief is filed within six months of the default judgment, but more than six months after entry of the underlying default. (*Id.* at p. 297.) The court in *Sugasawara* concluded, based on the plain language of the statute, that the mandatory relief provision of section 473, subdivision (b) allows six months from the entry of the judgment to obtain relief from both the judgment and the underlying default. (*Ibid.*)

Sugasawara, supra, 27 Cal.App.4th 294, was aided in its analysis by the legislative history of the mandatory relief provision, which indicated “that the Legislature intended the court to vacate the underlying default caused by the attorney’s mistake, inadvertence, surprise or neglect upon vacation of a default judgment. The Assembly Digest for Senate Bill No. 882, the legislative vehicle for the 1991 amendment, explains that when the default judgment is vacated, the court is ‘also’ required to vacate the ‘underlying default entered by a county clerk.’ As the comments in the California Committee Analysis indicate, ‘it makes little sense to vacate a judgment without also vacating an underlying default’ [Citation.] Unless the default itself is vacated, little is gained by vacating the default judgment.” (*Id.* at p. 297.)

One court has summed up the intended operation of the mandatory relief provision as follows: “The legislative history of the 1991 amendment makes clear that when a default judgment

Barreca disputed the reasonableness of Fox’s attorney fee demand.

is vacated pursuant to . . . section [473, subdivision (b)], the trial court is also required to set aside the underlying default.” (*Cisneros v. Vuevo* (1995) 37 Cal.App.4th 906, 910, fn. 2.)

Since relief is mandatory “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)), we will “affirm the trial court’s finding on the causation issue [as] long as it is supported by substantial evidence.” (*Benedict v. Danner Press* (2001) 87 Cal.App.4th 923, 928.)

III. Barreca’s motion was timely because it sought mandatory relief

The first question we must resolve is whether Barreca sought discretionary or mandatory relief. Although Barreca’s notice of motion states that it is being brought pursuant to section 473, subdivision (d), which concerns the correction of clerical mistakes in a judgment, we can overlook such errors if the supporting motion papers made clear the correct grounds for relief sought. (*Luri v. Greenwald* (2003) 107 Cal.App.4th 1119, 1125.)

Here, Barreca’s supporting papers plainly indicate that the motion was being brought pursuant to the mandatory relief provision of section 473, subdivision (b) and not pursuant to the discretionary relief provision or to any other provision of section 473. In his motion, Barreca seeks relief from “neglect” not “excusable neglect”; he quotes from the mandatory relief provisions of section 473 only; and he refers repeatedly to the mandatory relief provision without ever discussing or referring to the discretionary relief provision. In addition, the motion was supported by a declaration by Barreca’s attorney, who accepted complete responsibility for the entry of default—such a

declaration is not necessary for discretionary relief. (See *Corsair*, *supra*, 244 Cal.App.4th at pp. 438–443 [mandatory relief “focuses on *who* is to blame, not *why*”].)

Since Barreca’s motion sought mandatory relief, we must determine next whether it was timely. Barreca’s motion was timely because he filed the motion well within the six-month period following entry of the default judgment. As a result, the trial court was required to set aside both the default and the default judgment, unless it found that defense counsel’s negligence was not the cause of the underlying default.

Fox argues that the trial court, in addition to finding a lack of jurisdiction, also found that Barreca’s motion was deficient because it failed to establish that defense counsel’s negligence was the cause for the entry of default. Specifically, Fox argues that “it is clear that the trial court found that [defense counsel’s] declaration was not credible and that attorney fault did not cause the default. It denied the motion on these grounds as well as on the ground that it lacked jurisdiction.” Fox’s argument about the trial court’s purported factual findings is based on a misreading of the record.

During oral argument, Fox’s counsel made a multi-point argument against the sufficiency of defense counsel’s admission of fault. Among the contentions put forward by Fox’s counsel—in fact, the very last point he made—was that defense counsel’s admission of default was “superfluous” given that the motion to vacate was brought more than six months after the entry of default. The trial court immediately responded to Fox’s multi-point argument by stating that it “agree[d] with that.” From the record before us, it is unclear whether the trial court was agreeing with all of the points made by Fox’s counsel, some of the

points, or just the very last point regarding the lack of jurisdiction. However, what is clear from the record is that the trial court did not base its ruling on any deficiency in the declaration submitted by Barreca's counsel. The trial court stated on the record that "the jurisdictional issue" was the "end of [the] story for [it]" and then expressly adopted its tentative ruling, which focused exclusively on the jurisdictional issue, as "the order of the court."

Accordingly, we hold that the trial court had jurisdiction to rule on the merits of Barreca's motion and, as a result, it abused its discretion by denying the motion on jurisdictional grounds. (See *One World Networks Integrated Technologies, Inc. v. Dutch* (2002) 103 Cal.App.4th 1038, 1044 [trial court's discretion does not permit it to misapply statute as matter of law].) Since the trial court denied the motion on the basis of an error of law, we remand the matter for the trial court to decide if Barreca's motion was meritorious under a correct understanding of the law.

DISPOSITION

The order denying the motion to vacate the default and the default judgment is reversed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.