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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

COAST LAND CLEARING, INC., Plaintiff and Appellant, v. WILBUR PATRICK FOWLER et al., Defendants and Respondents.	B284365 (Los Angeles County Super. Ct. No. BC591783)

APPEAL from orders of the Superior Court of Los Angeles County. Monica Bachner, Judge. Affirmed.

Betty S. Chain for Plaintiff and Appellant.

Donna Kirkner for Defendants and Respondents.

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Plaintiff and appellant Coast Land Clearing, Inc., appeals the trial court's order denying its motion, pursuant to Code of Civil Procedure section 473, subdivision (b),[1] to vacate the entry of the voluntary dismissal of its complaint without prejudice.

Finding no abuse of discretion by the trial court in denying plaintiff's motion, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On June 11, 2015, plaintiff filed a complaint against defendant and respondent Wilbur Patrick Fowler, doing business as Earth Movers (Fowler), based on an alleged oral contract for plaintiff to provide construction equipment to Fowler in connection with a construction project for the Long Beach Unified School District (School District).[2] Plaintiff alleged it was owed approximately $20,000 on the contract. The original complaint, filed as a limited jurisdiction action, named Fowler, as well as the School District and defendant and respondent Hartford Fire Insurance Company (Hartford) which issued a public works payment bond for the construction project.

Shortly thereafter and before any defendant appeared in the action, plaintiff filed and served a first amended complaint. Around the same time, plaintiff added defendant and respondent Great American Insurance Company (Great American) as Doe 1. Great American had issued a stop payment notice release bond for the project.

On July 17, 2015, plaintiff filed a voluntary request for dismissal with the court, requesting dismissal of the complaint

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[1] All undesignated section references are to the Code of Civil Procedure.

[2] School District is not a party to this appeal.

without prejudice. The dismissal was apparently not served on any party as there had yet to be any appearances in the action. The dismissal was entered by the limited jurisdiction court the same date.

Notwithstanding the dismissal, the court, on August 14, 2015, accepted for filing the answers to the first amended complaint of Fowler, Hartford and Great American (hereafter defendants). Fowler concurrently filed a cross-complaint against plaintiff, as well as Jets Equipment Rental, Inc.,[3] the entity Fowler alleged was the company with which it had contracted to provide construction equipment. Fowler alleged Jets Equipment Rental was the party that had subcontracted part of its contractual duties to plaintiff.

On August 17, 2015, plaintiff filed a motion to vacate the dismissal entered a month earlier on the grounds of attorney error. Counsel for plaintiff attached a declaration attesting to her clerical error in failing to limit the dismissal to defendant School District. Counsel also requested leave to file a proposed second amended complaint, which was attached to the motion, clarifying the allegations against Great American.

Plaintiff's motion was set for hearing on March 1, 2016, in the limited jurisdiction department. Defendants gave notice of their non-opposition to the motion.

On August 19, 2015, the court gave notice to the parties that the action had been transferred to unlimited jurisdiction (Department 74), apparently in light of the additional amounts in dispute alleged in Fowler's cross-complaint. According to the court's case summary index, an affidavit of prejudice was filed and the action was then reassigned to Department 71. In September

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[3] Jets Equipment Rental is not a party to this appeal.

2015, defendants gave notice of the reassignment to Department 71 and that all previously set dates in the action had been vacated.

There is nothing in the record before this court to indicate that plaintiff ever sought to have its motion to vacate the dismissal re-set in the new unlimited jurisdiction department.

A case management conference was held in Department 71 on December 17, 2015. A trial date was set in February 2017. There is little in the record to indicate what occurred in the action over the course of the next year leading up to the trial date.

Sometime in early January 2017, the parties filed briefs on the effect of the request for dismissal entered on July 17, 2015 (apparently prompted by defendants' reference to the dismissal in their trial brief). Plaintiff argued the dismissal was as to the original complaint only and was therefore irrelevant because it had filed the operative first amended complaint. As in the motion to vacate that was never heard or ruled upon, counsel for plaintiff attested in a declaration to her error in not limiting the dismissal to apply only to defendant School District. Counsel further stated that, because the first amended complaint had already been filed, "superseding" the original complaint, "I considered the dismissal of the complaint to be moot, which I still believe." She also stated that at no time did plaintiff authorize the dismissal of all of its claims against all defendants.

Defendants' brief argued there was no authority to support plaintiff's argument that the request for dismissal was anything other than a dismissal of the operative pleading. Defendants further urged there was no excuse for the failure of plaintiff to timely move to vacate the erroneous dismissal after the case was transferred to a general jurisdiction court, and that it would be prejudicial to defendants if the dismissal was set aside on the eve of trial. Defense counsel attested to her opinion about the lack of

merit of plaintiff's claims and that her clients would be prejudiced if the dismissal was vacated because she had prepared for trial only as to the claims in the cross-complaint.

After considering the parties' briefs at a pre-trial status conference, the court indicated that plaintiff should file a noticed motion for relief.

On January 26, 2017, plaintiff filed its second noticed motion to vacate the dismissal. The motion reiterated plaintiff's previous arguments, and also included a declaration from Vilmore Schexnayder, plaintiff's president. Mr. Schexnayder stated he never authorized the dismissal of all of his claims, but had understood there was good cause to dismiss the School District, and only the School District. He asserted that his deposition was taken in the action in November 2016 and he was questioned "extensively about [his] claims" which he never had any intention to abandon by way of dismissal.

Defendants filed opposition to the motion reiterating their previous arguments, and at the request of the court, both parties filed supplemental briefs on the issue of extrinsic fraud or mistake.

On March 17, 2017, the court issued its written order denying plaintiff's motion to vacate the dismissal.

According to the court's case summary index, judgment was entered in the action on July 25, 2017.

This appeal followed.

DISCUSSION

"A motion for relief under section 473 is addressed to the sound discretion of the trial court and in the absence of a clear showing of abuse thereof, the exercise of that discretion will not be disturbed on appeal." (*Generale Bank Nederland v. Eyes of the Beholder Ltd*. (1998) 61 Cal.App.4th 1384, 1399; accord, *Nixon Peabody LLP v. Superior Court* (2014) 230 Cal.App.4th 818, 822

(*Nixon Peabody*) [trial court ruling on motion to set aside a dismissal is ordinarily reviewed for abuse of discretion].)

Plaintiff raises the following arguments. First, the request for dismissal specified only that the "complaint" was being dismissed, which was no longer the operative pleading as the first amended complaint had been filed, so the dismissal was, in effect, moot. Next, the request for dismissal of the entire complaint, as opposed to just defendant School District was the result of a mistake by counsel to which an affidavit of fault was filed and relief was therefore mandatory. The fact the motion for relief was filed more than six months after the dismissal was entered is not determinative because the dismissal of the entire action was not authorized by the client and therefore relief could be sought at any time. Finally, plaintiff argues that relief based on extrinsic fraud or mistake may also be brought at any time and defendants did not demonstrate any prejudice. We conclude none of plaintiff's arguments has merit.

The filing of the first amended complaint did indeed operate to supersede the original complaint as the operative pleading, but that does not have the effect plaintiff desires. When the request for dismissal of "the complaint" was filed, it operated as a dismissal of the operative pleading, namely the first amended complaint. It did not leave the first amended complaint operative simply because the form did not contain the words "first amended." None of the authorities cited by plaintiff stands for the proposition that a separate dismissal form must be filed for every amended version of a pleading that is filed, and we are aware of no such authority.

Plaintiff's first motion to vacate the dismissal was timely filed and properly based on an attorney affidavit of fault. However, the hearing date on that motion was vacated when the action was reclassified as an unlimited jurisdiction action and transferred to a

new department. Plaintiff inexplicably never took any action to reset a hearing on that first motion. The second motion was not filed until January 26, 2017, *some 18 months after entry of the dismissal*. A motion for relief based on an attorney's affidavit of fault pursuant to section 473, subdivision (b) must be filed within six months of the entry of dismissal. In relevant part, the statute provides: "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a . . . dismissal, . . . taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief *shall* be . . . made within a reasonable time, in no case exceeding six months, after the . . . dismissal . . . was taken." (§ 473, subd. (b), italics added.) Plaintiff's second motion was therefore untimely.

Plaintiff's first argument for why the motion could be considered outside the six-month time limitation of section 473, subdivision (b) is that the dismissal of the entire complaint was not authorized by the client and so it was void. A dismissal or judgment that is void may in fact be collaterally attacked or set aside at any time under the provisions of section 473, subdivision (d). However, plaintiff has failed to demonstrate that the dismissal was void due to lack of client consent.

An "attorney is authorized by virtue of his employment to bind the client in procedural matters arising during the course of the action but he may not impair the client's substantial rights or the cause of action itself." (*Romadka v. Hoge* (1991) 232 Cal.App.3d 1231, 1235.) "Clearly a dismissal *with prejudice* disposes of the client's substantive rights and therefore requires for its validity the authorization of the client." (*Id.* at p. 1236, italics added.)

But the dismissal here was *without* prejudice, and it was also filed before the expiration of the statute of limitation. " 'It is clearly within the attorney's authority to dismiss the client's action without

prejudice. . . .' [In a civil action,] 'the conduct and management of the action is entrusted to the attorney's judgment; he decides what should be contested, what points should be taken, and what should be abandoned. This authority is, however, subject to the qualification that an attorney ordinarily does not have implied authority to do an act which will affect the surrender or loss of a client's substantial rights.' " (*Gagnon Co. v. Nevada Desert Inn, Inc.* (1955) 45 Cal.2d 448, 459-460, citations omitted.)

Moreover, according to the declaration of plaintiff's president, Mr. Schexnayder, he had been advised by counsel of the propriety of dismissing the School District and had apparently consented to the filing of a dismissal for that purpose. As set forth in counsel's declaration, the dismissal of the entire complaint was an error by counsel for which the first motion for relief was timely filed. This was *not* a situation where an attorney was acting without client knowledge or authority. Counsel acted with authority to dismiss the School District and had no intent to dismiss the entire complaint, but made an error in preparing the request for dismissal by omitting the limiting language. Counsel then compounded that error by failing to have the timely filed first motion for relief re-set for hearing, after the action was reassigned, so that a ruling on the request for relief could be obtained. Attorney error or actions taken upon mistaken legal advice are not the same as unauthorized actions resulting in substantial impairment of rights. (See, e.g., *Nixon Peabody*, *supra*, 230 Cal.App.4th at pp. 823-824 ["We are not aware of . . . any authority indicating a voluntary dismissal resulting from erroneous legal advice is void under section 473, subdivision (d)"].)

Plaintiff relies on *Whittier Union High Sch. Dist. v. Superior Court* (1977) 66 Cal.App.3d 504 (*Whittier Union*), but it is of no assistance to plaintiff. There, the attorney, without the knowledge

or consent of his clients, settled their personal injury claims, dismissed the action with prejudice and absconded with the funds; actions for which he was later disbarred and incarcerated. (*Id.* at p. 506.) Over a year and a half later, the clients discovered the wrongdoing, hired new counsel and successfully moved to set aside the dismissal. (*Ibid.*)

In denying the defendant's writ petition challenging the trial court's grant of relief, *Whittier Union* explained, "[i]f [the attorney] wholly lacked power to dismiss the cause and acted beyond the scope of his authority in dismissing his clients' complaint, his action remained voidable for an indeterminate period, and *his clients could vacate the unauthorized dismissal within a reasonable time after learning of it*, regardless of the time limitations in section 473 and regardless of rules governing relief in instances of extrinsic fraud or extrinsic mistake." (*Whittier Union*, *supra*, 66 Cal.App.3d at pp. 507-508, italics added.)

Whittier Union involved intentional misconduct by the attorney in compromising the clients' claims and dismissing the action with prejudice and without their knowledge so he could abscond with the settlement funds. Nothing remotely like that happened here. Counsel here was not dishonest. Counsel acted with authority to dismiss the School District but made an honest mistake in preparing the request for dismissal and compounded that error by neglecting to set the motion to vacate on calendar for hearing after the first hearing date was vacated. Indeed, as is seen below, *Whittier Union* specifically rejected the notion that the doctrine of "extrinsic mistake" may be used to grant relief to a client who relied to its detriment on a negligent lawyer. (*Whittier Union*, *supra*, 66 Cal.App.3d at p. 507.)

We turn now to plaintiff's contention that a trial court retains inherent equitable powers to grant relief based on extrinsic fraud or

mistake. *Whittier Union* described the doctrine of "extrinsic mistake" as "a species of legal fiction used to justify court action, in that the real mistake involved is either that of the client in employing unsatisfactory counsel or that of the attorney in failing to meet his professional obligations." (*Whittier Union*, *supra*, 66 Cal.App.3d at p. 507.) The court found "the doctrine of extrinsic mistake, when used to provide remedial relief for misconduct or neglect of a party's own counsel, produces law that is forced and contrived and creates the hard cases that make bad law." (*Ibid*.) "An attorney's mistake will not provide the basis for relief unless it is caused by the party's adversary." (*Janetsky v. Avis* (1986) 176 Cal.App.3d 799, 811.)

There is no evidence here of extrinsic fraud or mistake. Counsel for plaintiff was aware of her clerical error in dismissing the complaint instead of only dismissing defendant School District. Counsel timely filed, within one month of the entry of the erroneous dismissal, a motion to obtain relief from that error. The hearing date was vacated when the action was transferred to an unlimited jurisdiction department.

Inexplicably, counsel failed to take any action to have that motion re-set in the new department or otherwise get another motion timely on file. The record is also devoid of any evidence that counsel sought to refile the action which was another option because the erroneous dismissal had been without prejudice and the statute of limitation had not yet expired. Instead, counsel allowed the dismissal to remain of record and proceeded with the action, in the mistaken belief that only the original complaint had been dismissed, not the operative first amended complaint.

The second motion for relief was not filed until 18 months after the dismissal was entered and on the eve of trial. Plaintiff has not established extrinsic fraud or mistake. We find it unusual that,

after the case management conference was held in December 2015, setting the case for trial in February 2017, the question whether there was a pending complaint was not raised until early January 2017. However, on this minimal record, plaintiff has failed to affirmatively show error in the trial court's denial of relief.

DISPOSITION

The court's order denying plaintiff and appellant's motion to vacate and set aside the dismissal of the action is affirmed. Defendants and respondents shall recover their costs of appeal.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.