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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MAJESTIC CONVERSION, INC.,

Plaintiff, Cross-defendant, and  
Respondent,

v.

JAMES KIM AND SUKJIN LEE,

Defendants, Cross-  
complainants, and Appellants,

RICHARD HONG, et al.,

Cross-defendants and  
Respondents.

B271807

(Los Angeles County  
Super. Ct. No. BC495491)

APPEAL from an order of the Superior Court of the County  
of Los Angeles, Elizabeth R. Feffer, Judge. Affirmed.

Kim, Shapiro, Park, & Lee, Paul Park, for Defendants,  
Cross-complainants, and Appellants.

Boren, Osher, & Luftman, LLP, Jeremy J. Osher, for  
Plaintiff, Cross-defendants, and Respondents.

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After defendants' answer and cross-complaint were stricken for discovery abuses and plaintiff obtained a default judgment, defendants sought relief under the mandatory provisions of Code of Civil Procedure section 473, subdivision (b).<sup>1</sup> The trial court denied the motion. We affirm.

### **PROCEDURAL BACKGROUND**

In November 2010, Majestic Conversion, Inc. (Majestic) filed a complaint against James Kim and Sukjin Lee (defendants) for defaulting on a loan. As of the date the complaint was filed, defendants had not repaid \$422,595 of the debt.

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<sup>1</sup> Code of Civil Procedure section 473, subdivision (b) provides, "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."

All statutory references are to the Code of Civil Procedure.

In February 2013, defendants filed a cross-complaint against Majestic and others.<sup>2</sup> The operative second amended cross-complaint was filed August 15, 2013.

The stage for this appeal was then set with a series of discovery motions by Majestic. The first, Majestic's motion to compel the production of documents and to award monetary sanctions, was argued in December 2014. Defendants opposed the motion on the merits and asked the trial court to sanction Majestic's counsel for filing the motion. The trial court declined to do that, but it granted Majestic's motion, ordered defendants to provide responses and documents without objection, and assessed sanctions of \$3,950 jointly and severally against defendants and their attorney, Khasayar Eshraghi.

Soon thereafter, Majestic filed a motion to compel responses to special interrogatories (set one). Defendants opposed the motion, again asked that sanctions be imposed against Majestic's counsel, and attached the clients' discovery responses to Mr. Eshraghi's declaration in support of the opposition. At the March 13, 2015, hearing, the trial court deemed Majestic's motion moot, but awarded \$4,000 in monetary sanctions jointly and severally against defendants and counsel. The trial court also ordered defendants and counsel to pay all outstanding monetary sanctions by March 31, 2015.

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<sup>2</sup> Cross-defendant Richard Hong, an individual, is also a respondent on appeal represented by the same counsel as plaintiff and cross-defendant Majestic Conversion, Inc. Because no issue on appeal requires us to differentiate between the corporate and individual cross-defendants, those two parties will be referred to collectively as Majestic.

Finding the interrogatory responses to set one inadequate, Majestic moved to compel further responses. In addition to seeking more monetary sanctions, Majestic asked for terminating sanctions or the issuance of an order to show cause why terminating sanctions should not be imposed. Defendants did not file written opposition to this motion, nor did their counsel appear at the May 31, 2015 hearing.

The trial court ordered defendants to provide further interrogatory responses, assessed \$5,450 in sanctions jointly and severally against defendants and counsel, and set a June 9, 2015, hearing date for defendants to show cause why terminating sanctions should not be imposed against them.

Defendants filed no written response to the order to show cause and Mr. Eshraghi failed to appear on June 9, 2015. The trial court issued terminating sanctions against defendants, striking the answer and dismissing the cross-complaint. The court reaffirmed the obligation to pay outstanding monetary sanctions. The trial court further ordered the entry of defendants' defaults on the complaint and set a June 30, 2015, deadline for Majestic's counsel to submit the default judgment packet.

The default judgment was entered September 17, 2015, in the amount of the outstanding balance of the loan, prejudgment interest, all outstanding sanctions, costs, and \$1,125 in attorney fees incurred by Majestic's counsel when defense counsel failed to appear for an ex parte hearing defendants noticed.

On October 13, 2015, defendants, represented by new counsel,<sup>3</sup> filed a motion pursuant to section 473, subdivision (b) to set aside the “default” (section 473 motion). The motion was expressly directed to the default entered June 9, 2015, not the resulting default judgment, and was supported by declarations from both defendants and Mr. Eshraghi.

Defendant Kim submitted a declaration advising he last spoke to Mr. Eshraghi on February 16, 2015, and understood “there were no issues with the content or timeliness” of interrogatory responses. He last heard from Mr. Eshraghi via text on August 28, 2015, when counsel told him “that due to medical related reasons, he was forced to keep off work.” Defendant Lee’s declaration was similar, although he stated his contact with Mr. Eshraghi was indirect, always through codefendant Kim.

In paragraph 1 of his declaration, Mr. Eshraghi advised he began representing defendants in this litigation in December 2012. Majestic’s evidentiary objection to most of paragraph 2 was sustained, but in the footnote, defense counsel wrote, “With one noted exception my associate was substituting in as counsel as a result of a conflict of interest. This substitution was already in the process before the onset of my illness.” In paragraph 3, Mr. Eshraghi wrote, “Just before the onset of my illness, I had drafted a motion to withdraw as counsel for unpaid legal expenses that were past due 395 plus days. Said motion was never filed because of the onset of my illness and the medical treatments that I was placed on.” Mr. Eshraghi further averred he left

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<sup>3</sup> The appellants’ appendix does not include a substitution of attorney form. (§ 284, subd. 1.)

messages for Mr. Kim in March and April 2015, “that were not answered.” He did not indicate the substance of the messages. He stated that as a result of his illness, he was “unable to notify [defendants] of any sanctions that had been ordered after the onset of my illness.”

Mr. Eshraghi ended his declaration by concluding, “But for my illness and absence from work, the terminating sanctions entered against [defendants] would not have occurred. As such, [defendants] should have their day in court, and the terminating sanctions be set aside . . . .”<sup>4</sup>

Majestic opposed the section 473 motion, arguing the defaults were not solely the result of Mr. Eshraghi’s mistake, inadvertence, surprise, or neglect because his declaration was not credible; the defaults were the result of defense counsel’s discovery abuses and bad faith litigation tactics; and defendants contributed to the situation by failing to communicate with or pay their attorney. Majestic’s opposition was supported by the declaration of Majestic’s attorney, Jeremy Osher, detailing the procedural history and events that resulted in the monetary sanction awards and terminating sanctions order.

Defendants’ motion was argued on November 10, 2015, and current defense counsel appeared. The trial court denied the motion.

The hearing was not reported. The appendix does not include a signed order, a notice of ruling, or a settled statement. The clerk’s minutes provide the only record of the hearing and

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<sup>4</sup> The trial court properly sustained Majestic’s evidentiary objection to the conclusion that “but for” counsel’s illness, the terminating sanctions would not have been imposed.

ruling. The minutes reflect the court ruled on evidentiary objections and then found, “the attorney declaration in support of the motion to lack credibility and that this is not a mandatory relief case. The relief sought is not warranted under the law and the motion is, therefore, denied.”

Defendants filed a timely notice of appeal on April 25, 2016.

## DISCUSSION

### *Adequacy of the Record*

On August 18, 2016, before respondent’s brief was due, this court invited the parties “to brief the issue of whether defendants’ failure to provide a reporter’s transcript or a suitable substitute of the relevant hearings concerning the default warrants affirmance based on the inadequacy of the record.” The parties addressed the issue in their respective briefs.

In the reply brief, defendants, citing *Chodos v. Cole* (2012) 210 Cal.App.4th 692, contend the appellate issue presents “a pure legal issue based on the filings before the trial court [that] can be reviewed by the appellate court without a reporter’s transcript.” We agree “[a] reporter’s transcript may not be necessary if the appeal involves legal issues requiring de novo review.” (*Southern California Gas Company v. Flannery* (2016) 5 Cal.App.5th 476, 483 (*Flannery*)). We disagree with defendants, however, that this appeal involves only a legal issue subject to de novo review. Instead, as we noted in *Flannery*, “[in] many cases involving the substantial evidence or abuse of discretion standard of review, . . . a reporter’s transcript or an agreed or settled statement of the proceedings will be indispensable.” (*Ibid.*) This is such a case.

Accordingly, “[w]e proceed to consider the issues raised on appeal, cognizant of appellants’ obligation to provide an adequate record to demonstrate error as well as our obligation to presume that the decision of the trial court is correct absent a showing of error on the record.” (*Flannery, supra*, 5 Cal.App.5th at p. 483.)

### *Section 473 Motion*

An attorney’s declaration of fault does not guarantee automatic relief, even under the mandatory provisions of section 473. (See, e.g., *Jerry’s Shell v. Equilon Enterprises, LLC* (2005) 134 Cal.App.4th 1058, 1074; *Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 615.) Where, as here, there is no reporter’s transcript, we must affirm the trial court’s decision if any substantial evidence supports it and there is no evidence in the record of an abuse of discretion. (*Flannery, supra*, 5 Cal.App.5th at p. 497.)

On the merits, *Johnson v. Pratt & Whitney Canada, Inc.* (1994) 28 Cal.App.4th 613 (*Pratt & Whitney*), discussed by both parties in their briefs, is on point. There, as a discovery sanction, the trial court struck the defendant’s answer. (*Id.* at pp. 620-621.) The defendant retained new counsel and moved for relief under the mandatory provisions of section 473. (*Id.* at p. 621.) The court denied the section 473 motion, but revised its previous order and struck everything in the defendant’s answer except the issue of damages. (*Ibid.*) The matter proceeded to trial on damages only, and the plaintiffs prevailed.

On appeal, the defendant’s “only contention regarding the sanctions [was] that the trial court should have granted relief under section 473 because [its] attorney presented an affidavit swearing he and he alone was responsible for the conduct that



had resulted in the sanctions.” (*Pratt & Whitney, supra*, 28 Cal.App.4th at p. 622, fn. omitted.) The court in *Pratt & Whitney* rejected the argument. The discussion, while lengthy, deserves to be reproduced here: “In certain situations, section 473 mandates relief on the basis of an attorney’s affidavit ‘*unless* the court finds that the default or dismissal was not in fact caused by the attorney’s mistake, inadvertence, surprise, or neglect.’ The statute clearly involves an assessment of credibility by the trial court. Here, the [trial] court did not believe [the defendant’s] attorney’s sworn statement that the discovery fiasco was solely his fault. It found: ‘The misconduct of which [the defendant] and [its] counsel were, in my opinion, guilty in order to reach these really terrible decisions had to do with liability.’ [¶] Credibility is an issue for the fact finder. As we have repeatedly stated, we do not reweigh evidence or reassess the credibility of witnesses. (*Orange County Employees Assn. v. County of Orange* (1988) 205 Cal.App.3d 1289, 1293-1294 [253 Cal.Rptr. 584].) We have no power to judge [ ] the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom. [Citations.] When, as here, the evidence gives rise to conflicting reasonable inferences, one of which supports the findings of the trial court, the trial court’s finding is conclusive on appeal.” (*Id.* at pp. 622-623, fn. and some internal quotation marks omitted.)

As already noted, we have no reporter’s transcript or settled statement. We have no order signed by the court. We have no notice of ruling. We have only the clerk’s minutes indicating the trial court’s credibility finding and conclusion “that this is not a mandatory relief case.”

One reasonable inference from that ultimate credibility determination is that the trial court did not believe defendants' former attorney was solely responsible for the default. Substantial evidence supports that inference and the trial court's credibility determination. (*Pratt & Whitney, supra*, 28 Cal.App.4th 613; *Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, 915 (*Cowan*).) It matters not that there may be conflicting inferences.

Moreover, without a reporter's transcript, there is no evidence in the record of an abuse of discretion by the trial court in so finding. Mr. Eshraghi's declaration was not unequivocal on the issue of fault. More than a few reasonable inferences suggested the default was not solely caused by defense counsel's mistake, surprise, or inexcusable neglect.

Mr. Eshraghi's statement under penalty of perjury that he never told his clients about "sanctions that had been ordered after the onset of my illness" implies he advised his clients of the first two sanction orders, but not the one that led to terminating sanctions. Both clients dispute that. He obliquely called into question Mr. Lee's veracity by stating under penalty that Mr. Lee "does not speak any English." Yet Mr. Lee presented the trial court with a declaration in English. One reasonable inference from the footnote in Mr. Eshraghi's declaration is that he prepared a substitution of attorney form in this case before the terminating sanctions motion, but defendants did not sign it. A reasonable inference from the statement concerning unpaid bills is that he and defendants agreed he would incur no more legal fees.

The section 473 motion unquestionably called for the trial court to assess credibility. (*Pratt & Whitney, supra*, 28

Cal.App.4th at p. 622.) Mr. Eshraghi had represented defendants for several years before the hearing on the terminating sanctions motion. “The trial court—who, unlike us, was also able to assess [defense] counsel’s credibility in person—could reasonably find his declaration not credible. We have no basis to disturb this finding on appeal.” (*Cowan, supra*, 196 Cal.App.4th at p. 915.) Moreover, just as the *Cowan* court noted, Mr. Eshraghi’s declaration “did not unequivocally admit error.” (*Id.* at p. 916.) The trial court found defendants’ evidence lacked credibility, and reasonable inferences from evidence in the record before us support this finding. Other reasonable inferences that may be in conflict are of no moment. Lacking a reporter’s transcript to demonstrate error, “the trial court’s finding is conclusive on appeal.” (*Id.* at p. 623.)

### **DISPOSITION**

The order denying defendants' section 473 motion is affirmed. Plaintiff and cross-defendant Majestic Conversion, Inc. and cross-defendant Richard Hong are awarded costs on appeal.  
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DUNNING, J.\*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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\* Judge of the Orange Superior Court, appointed by the Chief Justice pursuant to article VI, section 6, of the California Constitution.