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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

CERRITOS VILLAS HOMEOWNERS ASSOCIATION et al., Plaintiffs and Appellants. v. ARTHUR L. CONEY, Defendant and Respondent.	B225631 (Los Angeles County Super. Ct. No. BC419047)

APPEAL from an order of the Superior Court of Los Angeles County. Mark V. Mooney, Judge. Affirmed.

Law Offices of Keith Alan, Keith Alan; Law Offices of John A. Schlaff and John A. Schlaff for Plaintiffs and Appellants.

Orloff & Associates and Paul Orloff for Defendant and Respondent.

Plaintiffs and appellants Cerritos Villas Homeowners Association, Debra Thomas, Robert Stewart, Sharrone McCall, Stacie O'Dowd, and Gerald Faris appeal from a trial court order granting the motion by defendant and respondent Arthur L. Coney (Coney) to set aside the default judgment entered against him, pursuant to Code of Civil Procedure section 473, subdivision (b).[1] We find no abuse of discretion. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Complaint and Coney's Default

This litigation arises out of a dispute among members of a homeowners association. On August 4, 2009, plaintiffs filed a complaint against Coney and others.

After Coney was served with the complaint, he contacted plaintiffs' attorney to discuss settlement. Apparently an agreement was reached, and Coney signed a stipulation for entry of judgment (stipulation) on September 8, 2009. Coney believed that upon signing the stipulation, the lawsuit would be dismissed.

The lawsuit was not dismissed. Instead, on September 4, 2009, a few days prior to Coney signing the stipulation, the trial court entered Coney's default. Then, on December 14, 2009, plaintiffs requested that a default judgment be entered against Coney.

Coney's Motion to Vacate and Set Aside Default

In December 2009 or January 2010, Coney filed and served a motion to vacate and set aside his default. He argued that the default entered against him was premature because a settlement was impending. After he signed the settlement agreement, which had been drafted by plaintiffs' counsel, he believed that the lawsuit was going to be dismissed. Thus, he was surprised when he learned that a default had been entered against him.

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

Plaintiffs opposed Coney's motion, asserting that Coney had not demonstrated mistake, inadvertence, or excusable neglect. And, even if he had, he still was not entitled to relief under section 473, subdivision (b).

Default Judgment

While Coney's motion was pending, a default judgment was entered against him on March 16, 2010.

Trial Court Hearing and Order

Coney's motion was heard on May 5, 2010. After listening to counsel's arguments, the trial court granted Coney's motion and vacated the default judgment. It reasoned: "Frankly, I'm not really concerned with the various allegations of misrepresentations that are being tossed back and forth. The fact of the matter is, we've got someone who is involved in the case. I mean, this is not someone who ignored everything. He made appearances, had counsel come in. So there was involvement in the case. The motion was filed in January, the 473 motion. I don't know, that is what, four months after the default was taken. It's within the timeframe. Whether or not he thought he was being included in the settlement, he says he thought so. He should, you said he should know he wasn't. That doesn't matter as far as the court is concerned. Here is someone who is not ignoring the process totally. He's involved here.

"There is a policy in terms of having matters heard on the merits of the case. So I don't know what the merits are in terms of Mr. Coney's position. I've [seen] a lot of allegations going both ways. It's not for me to make the call, but to have matters heard properly is really what the court is concerned with. That gives everyone a chance to be heard.

"So I'm going to grant the 473 relief in terms of the default as to Mr. Coney."

The trial court ordered "the Judgment entered 3-16-2010 vacated. Defendant Arthur Coney to respond within 20 days."

Coney's Response to Plaintiffs' Complaint; Plaintiffs' Appeal

On July 1, 2010, Coney filed an anti-SLAPP[2] motion to strike plaintiffs' complaint.

Plaintiffs' timely appeal ensued.

DISCUSSION

Before we turn to plaintiffs' argument on appeal, we note the following: The only issue on appeal is the propriety of the trial court's order granting Coney's section 473 motion. We are not resolving the merits of this lawsuit; we are not reviewing the trial court's order granting a temporary restraining order; and we are not evaluating Coney's anti-SLAPP motion. To that end, plaintiffs should have provided us with a cogent argument that contained a discussion of only relevant facts and an appropriate legal analysis tethered to an accurate summary of the standard of review. They did not do so.

Instead, we were forced to trudge through unwarranted mudslinging and hyperbole. We did not appreciate plaintiffs' rambling and unnecessarily lengthy appellate briefs, including the late-filed 54-page reply brief, filled with irrelevant facts. And, we were not persuaded by plaintiffs' overuse of stylistic tools. In fact, plaintiffs' counsel is reminded that we do not read highlighting, bold, underlining, double-underlining, and italics any more carefully than the rest of the words and phrases set forth in the briefs.

Be that as it may, we took the time to sift through the appellate briefs to discern the arguments raised on appeal. We now address those claims.

I. *Standard of review*

"'A motion to vacate a default and set aside [a] judgment (§ 473) "is addressed to the sound discretion of the trial court, and in the absence of a clear showing of abuse . . . the exercise of that discretion will not be disturbed on appeal." [Citations.] The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of

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[2] SLAPP is an acronym for strategic lawsuit against public participation. (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 813, overruled in part on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.)

reason. [Citation.]' [Citation.]" (*Strathvale Holdings v. E.B.H.* (2005) 126 Cal.App.4th 1241, 1249.) Whether the evidence is oral testimony, affidavits, or documents, when there is conflicting evidence, the trial court's express and implied factual determinations are not disturbed on appeal if supported by substantial evidence. (*Id.* at p. 1250.)

In general, it is the policy of the law to favor trial on the merits of an action. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478.) For this reason, if a party in default promptly seeks relief, very slight evidence is needed to justify setting aside the default and default judgment. (*Ibid*.) Similarly, appellate courts are more disposed to affirm an order vacating a default and default judgment than one allowing them to stand. (*Ibid*.)

II. *The trial court did not abuse its discretion*

In urging us to find that the trial court erred in granting Coney's section 473 motion, plaintiffs primarily raise three arguments. As set forth below, we conclude that plaintiffs did not meet their burden on appeal.

A. Coney's anti-SLAPP motion

Coney first argues that the trial court erred in granting Coney's section 473 motion because he failed to submit a copy of his proposed response to the complaint with his motion for relief from default. Despite having filed an opposition to Coney's motion and a corrected opposition, plaintiffs failed to raise this argument below.[3] "'"'[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court.' Thus, 'we ignore arguments, authority, and facts not presented and litigated in the trial court. Generally, issues raised for the first time on appeal which were not litigated in the trial court are waived. [Citations.]'" [Citation.] "Appellate courts are loath to reverse a judgment on grounds that the opposing party did not have an opportunity to argue and the trial court did not have an opportunity to consider. [Citation.] In our adversarial system,

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[3] At oral argument on Coney's section 473 motion, plaintiffs did mention that filing a proposed answer is a jurisdictional requirement to obtaining relief pursuant to section 473. Counsel's remark, not mentioned in the opposition papers and unsupported by any legal authority, is inadequate.

each party has the obligation to raise any issue or infirmity that might subject the ensuing judgment to attack . . . ." [Citation.]' [Citation.]" (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2008) 163 Cal.App.4th 550, 564.) By failing to raise the issue before the trial court, plaintiffs have forfeited this claim on appeal. (*Owen v. Sands* (2009) 176 Cal.App.4th 985, 995.)

Even on the merits, this argument fails. It is well-established that a judgment is reversible only if any error or irregularity in the underlying proceeding was prejudicial. (Cal. Const., art. VI, § 13; § 475.) There is no presumption of prejudice. (*Ibid*.) Instead, the appellant bears the burden of demonstrating prejudice. (*Arnett v. Nall* (1921) 51 Cal.App. 194, 195; *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106 ["the appellant bears the duty of spelling out in his brief exactly how the error caused a miscarriage of justice"].)

As plaintiffs correctly point out, section 473, subdivision (b) provides, in relevant part: "Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted." (§ 473, subd. (b).) Despite the statutory requirement, Coney did not attach a copy of his proposed answer or other pleading to his section 473 motion. He likewise did not present his response to the complaint at the hearing on May 5, 2010. Thus, the trial court may have erred in granting his section 473 motion and allowing him to file a response to the complaint after the hearing. But, plaintiffs have not shown how that alleged error was prejudicial. Coney has since filed his response to plaintiffs' complaint—an anti-SLAPP motion. Plaintiffs have time to respond to Coney's motion and to litigate this dispute on the merits. We see no prejudice.

B. Coney's motion was timely

Coney's motion was timely. Section 473 provides, in relevant part, that applications for relief must be "made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken." (§ 473, subd. (b).) Coney's default was entered on September 4, 2009, and he filed and served his section 473 motion in December 2009 or January 2010, well within the six-month

statutory period. And, the delay in seeking relief was reasonable. As the trial court noted, Coney was involved in the process and thought that he was part of a global settlement. As soon as he realized the error, he sought relief.

C. We do not determine the credibility of Coney's declaration

Third, plaintiffs ask us to evaluate the credibility of Coney's declaration and find that his "excuse" was invalid. Under the applicable standard of review, we will not, and cannot, do so. In determining whether there has been an abuse of discretion, we do not reweigh evidence or pass upon witness credibility; rather, we interpret the facts and make all reasonable inferences in support of the order issued. (*Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1450.) Where multiple inferences can be drawn from the evidence, we do not redetermine the matter, but defer to the trial court's findings. (*Shamblin v. Brattain, supra*, 44 Cal.3d at pp. 478–479; *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925.)

Simply put, the trial court believed Coney and, keeping in mind the public policy in favor of trial on the merits, granted Coney's motion. That finding is supported by substantial evidence, namely Coney's representations in his declaration. There are no grounds for us to question the trial court's assessment of Coney's credibility.

D. Vacation of the judgment as to Coney only

Finally, plaintiffs argue that the trial court erred in vacating the judgment in its entirety; if anything, only the judgment against Coney could have been vacated. We have reviewed the trial court's May 5, 2010, minute order granting Coney's section 473 motion, and it does not appear that the entire judgment was set aside. Only Coney's motion to vacate his default was heard, and that was the only motion granted.

DISPOSITION

The order of the trial court is affirmed. Coney is entitled to costs on appeal.

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_____, J.
ASHMANN-GERST

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
CHAVEZ