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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

MCGILLIVRAY CONSTRUCTION, INC., Plaintiff and Respondent, v. GUSHER 5301, LLC et al., Defendants and Appellants.	2d Civil No. B287177 (Super. Ct. No. 56-2016-00486585-CU-MC-VTA) (Ventura County)

McGillivray Construction, Inc., sued Gusher 5301, LLC, and JDP 21 California, LLC (collectively, Appellants), to foreclose a mechanic's lien. Appellants did not answer McGillivray's complaint, and the trial court entered default judgments against them. The court subsequently granted JDP's motion to set aside the default and vacate the default judgment against it (Code Civ. Proc.,[1] § 473, subd. (b)), but denied Gusher's

[1] All unlabeled statutory references are to the Code of Civil Procedure.

analogous motion. After a bench trial on McGillivray's action against JDP, the court ruled that McGillivray was entitled to the value of the work it performed plus prejudgment interest, minus credits for moneys JDP paid directly to subcontractors. JDP paid the judgment in full to prevent the foreclosure sale.

Gusher contends the trial court erred when it denied its motion to set aside the default and vacate the default judgment against it. JDP contends the court miscalculated McGillivray's judgment and that it should not have awarded prejudgment interest. We affirm.

FACTUAL AND PROCEDURAL HISTORY

In January 2016, Gusher leased a building (the Property) to Brooks Institute, LLC. Five months later, Brooks hired McGillivray to improve the Property. When Brooks did not pay, McGillivray ceased work.

On August 15, McGillivray told Gusher's principal, James DeArkland, that it would be filing a mechanic's lien against the Property for the work it had performed. It recorded the lien the next day.

On August 17, DeArkland transferred ownership of the Property from Gusher to JDP. DeArkland was "the sole member" of both entities, with a "100% financial interest" in each. He told the recorder's office that Gusher and JDP were the same entity. Gusher, a Nevada company, and JDP, a California company, are separate entities. No one advised McGillivray of the ownership change.

McGillivray sued Gusher to foreclose its mechanic's lien in September. The following month, JDP appeared in the action through its attorney, Michael Wright. On October 24, McGillivray added JDP as a defendant.

Neither Gusher nor JDP answered the complaint. McGillivray requested entry of default against Gusher on October 27 and against JDP on December 2. McGillivray served Wright with copies of both requests. After a default prove up on January 9, 2017, the trial court issued default judgment against Gusher and JDP, jointly and severally, for $470,986 plus $21,291 in prejudgment interest.

A week later, JDP moved to set aside its default and vacate the default judgment based on Wright's affidavit of fault. (§ 473, subd. (b).) The exhibits attached to the motion showed that Wright claimed to represent Gusher as early as September 12, 2016. But in the motion's accompanying declaration, Wright claimed he was acting solely on JDP's behalf.

At the February hearing on JDP's motion, the trial court asked Wright whether he was moving to set aside the default and vacate the default judgment against Gusher in addition to JDP. Wright replied, "No. Not my client." The court granted JDP's motion. It specified that it "issue[d] no orders as to and [did] not vacate any default or default judgment as to [Gusher]."

On June 13, Gusher moved to set aside its default and vacate the default judgment based on Wright's affidavit of fault. McGillivray filed an opposition, followed by Gusher's reply. McGillivray then filed a "sur-opposition" over Gusher's objection.

The trial court denied Gusher's motion, finding "no credible showing that [Wright] was the attorney for [Gusher] when the default was entered against it." DeArkland did not state that he retained Wright to represent Gusher in the declaration attached to JDP's motion to set aside its default and vacate the default judgment. And during the hearing on JDP's

motion, "Wright stated that he represented just JDP" and was "not the attorney for [Gusher]."

McGillivray's suit against JDP proceeded to trial. During trial, JDP requested setoff credits for amounts it had directly paid subcontractors. McGillivray acknowledged JDP was entitled to such credits: "To the extent [the checks JDP wrote to subcontractors] are equal to or less than what's in our mechanic's lien, they get a credit." JDP told the trial court, "We're fine with that, Your Honor." JDP then established that it had paid subcontractors $169,164.

In its statement of intended decision, the trial court determined that: (1) JDP was collaterally estopped from contesting the $470,986 of damages and $21,291 in prejudgment interest in the default judgment based on Appellants' identity of interest, and (2) JDP was entitled to $169,164 in setoff credits for payments made to subcontractors. JDP subsequently filed requests for a statement of decision, objections to the court's intended decision, and proposed counter findings. It did not challenge the court's calculation of prejudgment interest. The court overruled JDP's objections.

McGillivray then lodged a proposed statement of decision. JDP again filed several objections, but did not challenge the calculation of prejudgment interest. The trial court overruled JDP's objections, and adopted the proposed decision.

Six days after entry of judgment, McGillivray sent a payoff demand to JDP. JDP paid the next day. McGillivray filed acknowledgements of full satisfaction of the judgment as to both Appellants.[2]

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[2] McGillivray requests that we take judicial notice of the trial court's decision in *JDP 21 California, LLC, et al. v. Brooks*

DISCUSSION

Waiver of right to appeal

As an initial matter, we reject McGillivray's argument that Appellants waived their rights to appeal when JDP paid McGillivray to satisfy the judgment.

In general, a party that voluntarily complies with the terms of a judgment waives the right to appeal from it. (*Ryan v. California Interscholastic Federation* (2001) 94 Cal.App.4th 1033, 1040.) But if "compliance arises under compulsion of risk or forfeiture, a waiver will not be implied." (*Lee v. Brown* (1976) 18 Cal.3d 110, 116; see also *Reitano v. Yankwich* (1951) 38 Cal.2d 1, 3 (*Reitano*) [compiling cases].) Waiver of the right to appeal "'ensues only when it is shown that the payment of the judgment was by way of compromise or with an agreement not to take or prosecute an appeal.' [Citation.]" (*Reitano*, at p. 3.)

Here, JDP paid the judgment to avoid the foreclosure sale. That payment was not the result of a compromise, nor did Appellants agree not to prosecute an appeal when JDP paid McGillivray. Rather, JDP paid McGillivray to eliminate the mechanic's lien and prevent the foreclosure sale. There was no waiver of the right to appeal. (*Reitano*, *supra*, 38 Cal.2d at pp. 3-

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Institute Holding, LLC, et al. (Super. Ct. Ventura County, 2018, No. 56-2016-00487318) and various exhibits admitted at that trial. We grant McGillivray's request to take notice of its itemized payoff demand to Appellants (Exhibit B) and Appellants' satisfaction of that demand (Exhibit I). (*Friends of Aviara v. City of Carlsbad* (2012) 210 Cal.App.4th 1103, 1109, fn. 3; see Evid. Code, § 452, subd. (b).) In all other respects, we deny McGillivray's request because the materials are irrelevant to our decision. (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 387, fn. 15.)

5; see also *Alamitos Land Co. v. Shell Oil Co.* (1933) 217 Cal. 213, 215 [where appellant must either "pay or lose [their property] and then pay, it [is] wise for [the appellant] to advance and pay the money demands"].)

Gusher appeal

Gusher contends the trial court violated its due process rights when it denied its motion to set aside the default and vacate the default judgment because the court did not allow it to respond to McGillivray's sur-opposition to the motion. We need not reach the merits of Gusher's contention because the evidence supports the court's conclusion that Wright was not Gusher's attorney when default was entered.[3]

"[W]henever an application for relief is made no more than six months after entry of judgment . . . and is accompanied by an attorney's sworn affidavit attesting to [their] mistake, inadvertence, surprise, or neglect," the trial court must set aside the default and vacate the default judgment "unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." (§ 473,

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[3] We reject McGillivray's argument that the trial court properly denied Gusher's motion because it was filed more than six months after entry of default. The cases on which McGillivray relies hold that those seeking *discretionary* relief from default must move for such relief within six months of entry of default. (*Manson, Iver & York v. Black* (2009) 176 Cal.App.4th 36, 42; *Weiss v. Blumencranc* (1976) 61 Cal.App.3d 536, 541.) But Gusher moved for *mandatory* relief based on attorney neglect. Such a motion must be made within six months of entry of judgment, not default. (§ 473, subd. (b); see *Sugasawara v. Newland* (1994) 27 Cal.App.4th 294, 296-297.) Here, the trial court entered judgment on January 9, 2017. Gusher moved for relief on June 13, well within the six-month timeframe.

subd. (b).) Whether Wright's mistake or neglect caused Gusher's default is a credibility determination for the trial court. (*Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, 915 (*Cowan*).) On appeal, we defer to that determination, and will uphold it if supported by substantial evidence. (*Johnson v. Pratt & Whitney Canada, Inc.* (1994) 28 Cal.App.4th 613, 622-623 (*Johnson*).)

Substantial evidence supports the trial court's determination that Wright did not cause Gusher's default. In his declaration attached to JDP's motion to set aside its default and vacate the default judgment against it, Wright claimed he was acting solely on JDP's behalf. And at the hearing on that motion, Wright said that he "represented just JDP" and that Gusher was not his client. "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. [Citations.]' [Citation.]" (*Johnson*, *supra*, 28 Cal.App.4th at p. 623.) Denial of Gusher's motion was proper. (*Cowan*, *supra*, 196 Cal.App.4th at p. 915 [no relief where evidence shows attorney was not representing client when default entered]; *Cisneros v. Vueve* (1995) 37 Cal.App.4th 906, 910, 912 [same].)

SJP Limited Partnership v. City of Los Angeles (2006) 136 Cal.App.4th 511 and *Yeap v. Leake* (1997) 60 Cal.App.4th 591, on which Gusher relies, are inapposite. *SJP Limited Partnership*, at pages 517-518, held that an attorney could sign an affidavit of fault despite not representing the client in the underlying action so long as their mistake caused the client's default. *Yeap*, at pages 601-602, stands for the proposition that section 473, subdivision (b), relief is mandatory if the attorney's fault causes the client's default. Here, the trial court found that

Wright did not cause Gusher's default because he did not represent Gusher when default was entered. We "have no power" to reassess that finding. (*Johnson*, *supra*, 28 Cal.App.4th at pp. 622-623.)

JDP appeal

1. Nonintegrated materials

Relying on *Stimson Mill Co. v. Los Angeles Traction Co.* (1903) 141 Cal. 30 and cases following it, JDP first contends the trial court erroneously calculated McGillivray's judgment because the calculation included materials delivered to, but not consumed at, the Property. But the rule set forth in *Stimson Mill* applies to a material supplier's ability to obtain a lien. (*Id.* at p. 32 ["to entitle a materialman to a [mechanic's] lien . . . the materials must be furnished to be used, and must actually be used, in the construction of the building or other structure"]; see also *Consolidated Elec. Distributors, Inc. v. Kirkham, Chaon & Kirkham, Inc.* (1971) 18 Cal.App.3d 54, 58.) McGillivray was not a material supplier; it was the general contractor.

As the general contractor, McGillivray was entitled to "enforce a lien . . . for the amount due pursuant to [its] contract after deducting all lien claims of other claimants." (Civ. Code, § 8434.) JDP has not shown that material suppliers made separate lien claims against the Property. Indeed, the suppliers could not have made such claims; their claims were extinguished when McGillivray paid them for their materials. (*Re-Bar Contractors, Inc. v. City of Los Angeles* (1963) 219 Cal.App.2d 134, 135-136.) McGillivray was thus entitled to recover for the amount set forth in its contract. (*Avery v. Clark* (1891) 87 Cal. 619, 628-629 [once contractor pays supplier for materials, it may include material costs in its lien].) Holding otherwise would

permit a result antithetical to the purpose of the mechanic's lien law. (*Industrial Asphalt, Inc. v. Garrett Corp.* (1986) 180 Cal.App.3d 1001, 1006 [purpose of mechanic's lien law is to "prevent unjust enrichment of a property owner"].)

2. Setoff credits calculation

Next, JDP contends the trial court miscalculated McGillivray's judgment because it gave JDP setoff credits for the amounts it paid various subcontractors rather than credits for the higher amounts McGillivray claimed those subcontractors and suppliers were owed. (Cf. *Stone v. Serimian* (1926) 198 Cal. 520, 523-524 [allowing offsets for claims paid]; see also Civ. Code, §§ 8124, 8138 [waiver and release from lien claim].) But JDP agreed to the setoff credit calculation at trial. It thus cannot complain of that calculation on appeal. (*Taliaferro v. Taliaferro* (1954) 125 Cal.App.2d 419, 431-432.)

Even if it could, the amount due on a mechanic's lien is a question of fact for the trial court. (*Basic Modular Facilities, Inc. v. Ehsanipour* (1999) 70 Cal.App.4th 1480, 1485.) Here, the evidence showed that JDP directly paid some subcontractors to secure their claim releases, and that some of those payments were for amounts lower than the amounts McGillivray claimed in its mechanic's lien. But as McGillivray explained at trial, the amounts it claimed in its lien included not only the moneys due to subcontractors but also McGillivray's own costs associated with those subcontractors' particular scopes of work. That explanation provides substantial evidence to uphold the trial court's implied determination that JDP was entitled to setoff credits only for the amounts it paid directly to the subcontractors. (*Frank Pisano & Associates v. Taggart* (1972) 29 Cal.App.3d 1, 21.)

3. Prejudgment interest

Finally, JDP contends the trial court erred when it awarded McGillivray prejudgment interest. But JDP did not object to the prejudgment interest: not in its request for a statement of decision, not in its objections to the court's intended statement of decision, not in its amended request for a statement of decision, and not in its objections to the proposed statement of decision. The contention is forfeited. (*In re Marriage of Fossum* (2011) 192 Cal.App.4th 336, 346 [failure to object to proposed statement of decision forfeits issue on appeal]; *Jones v. Wagner* (2001) 90 Cal.App.4th 466, 481-482 [forfeiture rule applies to claims regarding prejudgment interest].)

DISPOSITION

The trial court's postjudgment order as to Gusher and the judgment as to JDP are affirmed. McGillivray shall recover its costs on appeal.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Henry J. Walsh, Judge

Superior Court County of Ventura

AlvaradoSmith and William M. Hensley, for Defendants and Appellants.

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