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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ELMER MURRY, JR.,

Plaintiff and Appellant,

v.

MICHAEL J. CARRAS et al.,

Defendants and Appellants.

B268841

(Los Angeles County
Super. Ct. No. VC061416)

APPEALS from orders of the Superior Court of Los Angeles County. Roger Ito, Judge. The order dismissing the case is affirmed, and the order vacating the dismissal is reversed.

John A. Bunnett for Plaintiff and Appellant.

Michael J. Carras and Daniel A. Conforti, in pro. per.; and
Conforti & Carras for Defendants and Appellants.

* * * * *

This is the second time this case has been before us. Plaintiff Elmer Murry, Jr., previously appealed the trial court’s order sustaining the demurrer of defendants Michael J. Carras, Daniel A. Conforti, Ricky Grayson, and Draft Picks Management Group, LLC, to his first amended complaint without leave to amend. (*Murry v. Carras* (Nov. 6, 2014, B251381 [nonpub. opn.] (*Murry I*)).) We reversed, directing that plaintiff “should be given the opportunity to amend his complaint” (*Id.* at p. 8.)

Following remittitur, plaintiff failed to amend his complaint, and defendants moved to dismiss the action under Code of Civil Procedure section 472b,¹ reasoning that by statute, plaintiff had only 30 days following remittitur to file his amended pleading. After the filing of defendants’ motion, and *more than seven months after* our remittitur issued, plaintiff filed an amended pleading, and opposed dismissal. The trial court dismissed the action. Plaintiff then moved for relief from the dismissal, and the court granted relief under the discretionary provisions of section 473, subdivision (b).

Defendants appeal the order vacating the dismissal, and plaintiff has cross-appealed the order dismissing his complaint. We affirm dismissal of plaintiff’s case, and reverse the order vacating the dismissal, finding the trial court abused its discretion in granting discretionary relief under section 473, subdivision (b).

BACKGROUND

The original complaint was brought by plaintiff and Draft Picks Limited Liability Company, of which Murry was the sole member, against defendants Michael J. Carras, Daniel A. Conforti,

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

Ricky Grayson, and Draft Picks Management Group, LLC. The complaint alleged claims for fraud, cancellation of written instrument, rescission, imposition of constructive trust, conversion, breach of fiduciary duty, declaratory relief, and an accounting. Defendants demurred, contending the plaintiff LLC was suspended for failure to pay taxes, and therefore lacked the capacity to sue. Before the hearing on the demurrer, Murry filed a first amended complaint, which was nearly identical to the original complaint, but omitted the LLC as a plaintiff.

Defendants again demurred, challenging Murry's standing to bring the claims, arguing that the claims asserted in the first amended complaint belonged to the LLC and not to Murry individually. The trial court sustained the demurrer without leave to amend, and dismissed the action.

Murry appealed, and we reversed, finding that the first amended complaint "states facts which would support individual claims by Murry that do not depend on the LLC's participation in the lawsuit." (*Murry I, supra*, B251381, at pp. 2, 8.) We ruled that "Murry should be given the opportunity to amend his complaint to state claims based on the harm unique to him, seeking recovery of individual damages he suffered as a result of defendants' wrongdoing." (*Id.* at p. 8.) Our opinion was filed on November 6, 2014, and remittitur issued on January 5, 2015.² Plaintiff was awarded his costs on appeal.

On January 29, 2015, the trial court issued an "order after remittitur," ordering plaintiff to file a second amended complaint

² The remittitur contained a clerical error, reflecting a remittitur date of January 5, 2014. On June 10, 2015, this court recalled the remittitur based on the clerical error, and issued a new remittitur that same day.

within 20 days. The clerk's certificate of mailing indicated that the minute order was sent to plaintiff's counsel at the address listed on plaintiff's filings with the superior court. However, that minute order was returned to the superior court on February 27, 2015, with the notation "returned to sender." Nevertheless, plaintiff's counsel was aware we had issued our remittitur because on February 12, 2015, plaintiff's counsel executed a memorandum of costs on appeal.

On April 13, 2015, plaintiff's counsel filed a case management statement, indicating that he intended to file a motion to amend the complaint. On April 27, 2015, defendants filed a case management statement stating "there is no operative complaint." Plaintiff appeared at the April 28, 2015 case management conference, and learned of the court's January 29 minute order directing that plaintiff file an amended complaint within 20 days. Still, no amended complaint was filed until almost three months later, and only after defendants moved to dismiss the action.

On July 6, 2015, defendants moved to dismiss the action under section 472b, arguing that plaintiff failed to file an amended pleading within 30 days of issuance of remittitur. Plaintiff filed a second amended complaint on July 10, 2015.

On July 28, 2015, plaintiff opposed the motion to dismiss, arguing that the time limitations of section 472b did not apply because we had held he could state valid claims. Counsel's declaration stated he interpreted our opinion to mean that an amendment to the complaint should be permitted but was not necessary, and that he had not received the trial court's minute order directing him to file an amended complaint until he attended the April 28 case management conference.

On August 11, 2015, the trial court granted the motion to dismiss, finding that the time limitations of section 472b applied, and that this court's recall of remittitur did not extend the time in

which plaintiff had to file an amended pleading. Dismissal was entered on September 2, 2015.

On September 24, 2015, plaintiff moved to vacate the dismissal under both the discretionary and mandatory provisions of section 473, subdivision (b). Plaintiff argued that discretionary relief was available because counsel mistakenly interpreted our opinion to mean that the allegations of the first amended complaint were sufficient. Counsel's declaration attested to this interpretation of the opinion. Counsel also averred that if he had received notice of the court's order to file an amended pleading, he would have done so (without explaining why he had not done so after he received the order in April except to say that he was pressed with other business). A proposed amended pleading was appended to the motion.

Defendants' opposition argued that plaintiff's motion was an untimely motion for reconsideration of the ruling on the dismissal motion. Moreover, discretionary relief was unavailable because the error of plaintiff's counsel was not excusable.

The trial court granted the motion under the discretionary relief provisions of section 473, subdivision (b), finding that "plaintiff's failure to amend the pleading was the result of mistake, inadvertence and/or excusable neglect" Both parties timely appealed.

DISCUSSION

Section 473, subdivision (b) provides, in pertinent part, that "[t]he court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. 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, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken.” We review a trial court’s ruling under section 473 for abuse of discretion. (*Uriarte v. United States Pipe & Foundry Co.* (1996) 51 Cal.App.4th 780, 789-790.) The scope of the trial court’s discretion, however, lies with the particular law being applied, and the legal principles applicable to that law. (*Hambrick v. Healthcare Partners Medical Group, Inc.* (2015) 238 Cal.App.4th 124, 147.)

“ ‘A party who seeks relief under section 473 on the basis of mistake or inadvertence of counsel must demonstrate that such mistake, inadvertence, or general neglect was excusable because the negligence of the attorney is imputed to his client and may not be offered by the latter as a basis for relief.’ [Citation.] In determining whether the attorney’s mistake or inadvertence was excusable, ‘the court inquires whether “a reasonably prudent *person* under the same or similar circumstances” might have made the same error.’ [Citation.] In other words, the discretionary relief provision of section 473 only permits relief from attorney error ‘fairly imputable to the client, i.e., mistakes anyone could have made.’ [Citation.] ‘Conduct falling below the professional standard of care, such as failure to timely object or to properly advance an argument, is not therefore excusable. To hold otherwise would be to eliminate the express statutory requirement of excusability and effectively eviscerate the concept of attorney malpractice.’ ” (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 258.)

Here, we find that the trial court abused its discretion in vacating the dismissal, as the dismissal did not, under any hypothesis, result from *excusable* neglect, mistake, or inadvertence.

Section 472b provides that “[w]hen an order sustaining a demurrer without leave to amend is reversed or otherwise remanded by any order issued by a reviewing court, any amended complaint shall be filed within 30 days after the clerk of the reviewing court mails notice of the issuance of the remittitur.” The parties do not dispute that the clerk of this court mailed notice of the issuance of the remittitur on January 5, 2015. Therefore, plaintiff had 30 days from that date to file an amended pleading. Plaintiff did not file an amended pleading until *seven months later*, and his counsel offered no reasonable explanation for the failure to timely file an amended complaint.

We are not persuaded that it was reasonable for plaintiff’s counsel to conclude that the time limitations of section 472b did not apply because of the language used in our opinion in plaintiff’s earlier appeal. We found that “the first amended complaint states facts which would support individual claims by Murry that do not depend on the LLC’s participation in the lawsuit.” (*Murry I, supra*, B251381, at p. 2.) We also concluded that “Murry suffered individual harm separate from the harm allegedly suffered by the LLC. The first amended complaint alleges the attorney defendants violated their ethical obligations to Murry, and that defendants manipulated the books in an attempt to divest Murry of his sweat equity in the new entity. These facts support causes of action for breach of fiduciary duty and breach of the covenant of good faith and fair dealing owed specially to Murry, and perhaps other causes of action arising from duties owed to Murry separate from any duty owed to the LLC [¶] . . . [¶] Murry should be given the opportunity to amend his complaint to state claims based on the harm unique to him, seeking recovery of individual damages he suffered as a result of defendants’ wrongdoing.” (*Id.* at p. 8.)

Plaintiff argues that this court only *suggested* that plaintiff could amend the pleading if he so desired, but that we held the allegations of the complaint were sufficient to withstand demurrer. Therefore, plaintiff reasons that no amended pleading was required under section 472b. Plaintiff cites *Dye v. Caterpillar, Inc.* (2011) 195 Cal.App.4th 1366 (*Dye*) for the proposition that section 472b's deadline for filing an amended pleading only applies when the Court of Appeal issues a remittitur "direct[ing] the trial court to sustain [the] demurrer with leave to amend." (*Dye*, at p. 1383.)

Of course, that is exactly what we did in our previous opinion. We said: "Murry should be given the opportunity to amend his complaint to state claims based on the harm unique to him, seeking recovery of individual damages he suffered as a result of defendants' wrongdoing." (*Murry I, supra*, B251381, at p. 8.)

In any event, *Dye* is not instructive here. In *Dye*, the Court of Appeal reversed orders sustaining the defendants' demurrers to plaintiffs' complaint without leave to amend, specifically finding that the pleadings were *adequate* to state claims against the defendants, and did not require any further amendment. (*Dye, supra*, 195 Cal.App.4th. at p. 1371.) Some months after the remittitur, plaintiffs sought leave to amend to add some defendants and delete others. (*Id.* at pp. 1371-1372.) The defendants later demurred and moved to strike the amended pleading as untimely under section 472b, and the trial court dismissed the action. (*Dye*, at pp. 1372-1373.) The *Dye* court found it would be absurd to construe section 472b as applying when the court of appeal found that a demurrer was improperly sustained *because the pleading was adequate and did not require amendment*. Our appellate opinion, however, made no such finding. Rather, our opinion found that the pleading could be amended to state individual claims by plaintiff, and therefore, that leave to amend should be granted to state such

claims. As such, plaintiff was required to file an amended pleading within 30 days of issuance of remittitur. (§ 472b.)

Plaintiff's failure to do so is particularly troubling in light of the fact that he also learned in April 2015 that the trial court *had ordered him to file an amended pleading within 20 days*, and counsel completely ignored the court's order. Therefore, the dismissal did not result from excusable neglect, and the trial court abused its discretion in granting plaintiff relief.

For the reasons discussed *ante*, we find no error in the court's dismissal order.

DISPOSITION

The order dismissing the case is affirmed, and the order vacating the dismissal is reversed. Defendants shall recover their costs on appeal.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

SORTINO, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.