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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

KRACKSMITH, INC., Plaintiff and Appellant, v. KEVIN HERNANDEZ, Defendant and Respondent.	B235045 (Los Angeles County Super. Ct. Nos. BC379353, BC384027)

APPEAL from an order of the Superior Court of Los Angeles County, Maureen Duffy-Lewis, Judge. Affirmed.

Glen Broemer for Plaintiff and Appellant.

Law Offices of Martin F. Goldman and Martin F. Goldman for Defendant and Respondent.

While the jury was deliberating, the trial court entered into the record an oral settlement agreement. As part of the oral settlement, "all parties" agreed to dismiss all actions pending before the court with prejudice. Following dismissal, plaintiff and appellant Kracksmith, Inc., doing business as American Business Fund (Kracksmith), filed a motion for new trial and to set aside the settlement agreement pursuant to Code of Civil Procedure section 473, subdivision (b) (section 473(b))[1] on the ground that Boschal Lee (Lee), the only plaintiff to assent to the settlement agreement, did not have settlement authority to dismiss Kracksmith's complaint. Kracksmith appeals from the order denying the motion. We conclude the trial court lacked jurisdiction to hear the motion for new trial and did not abuse its discretion in denying section 473(b) relief. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Both Kracksmith and respondent Kevin Hernandez recite facts without citation to the record and rely on evidence that was not presented to the court in ruling on the motion. Our review is limited to the record before the trial court. (See *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.) Kracksmith has the burden of providing an adequate record and showing prejudicial error. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132.) Absent an adequate record to demonstrate error, we presume the judgment or order is supported by the evidence. (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1271.)

Despite the state of the record on appeal, we present the following factual background before addressing Kracksmith's claims of error.

1. *Complaints, Cross-Complaint, Trial*

Kracksmith filed a verified complaint against Louis Verdad, Inc. (Verdad), Louis Verdad, and Hernandez alleging breach of contract and also alleging common counts to recover funds advanced to Verdad pursuant to a factoring agreement. The claim against Hernandez was allegedly based upon a guaranty agreement in which he acted as

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

guarantor of the underlying agreement. Kracksmith and Lee then brought a separate action against Hernandez alleging fraud.[2] Hernandez answered and filed a cross-complaint alleging fraud against Kracksmith and Lee.

The case proceeded to a jury trial.

2. *Inconsistent Verdicts*

The jury reached a verdict in favor of Kracksmith on its claims for money had and received, account stated, open book account, and money paid, awarding Kracksmith $277,006 in damages. The jury found in favor of Hernandez on Kracksmith's claims against him for breach of contract and fraud.

At issue here is the jury's special verdict on Hernandez's fraud claims alleged against Kracksmith and Lee. The jury found no fraud but inconsistently answered "yes" to special verdict questions asking the following: "Did Boschal Boz Lee engage in the conduct with malice, oppression or fraud"; and "[w]as the conduct constituting malice, oppression or fraud committed by one or more officers, directors or managing agents of Kracksmith Inc. on behalf of Kracksmith Inc.?"

The court informed the jury that there were inconsistencies with the special verdicts and asked the jury to continue to deliberate. After further deliberation, the jury's findings again indicated no underlying fraud on the part of Kracksmith or Lee, but a finding of fraud to support punitive damages.

The court did not dismiss the jury and attempted to resolve the inconsistent special verdicts. The court told the jury that if it did not find any underlying fraud, it should not answer the punitive damages verdict forms. After receiving this clarification and returning to deliberate, the jury asked the court two questions concerning damages.

The jury again notified the court that it had reached a verdict. But the verdict was sealed and never read because the parties entered into a settlement agreement.

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[2] The incomplete record shows discrepancies in the procedural aspects of this case, but this is not critical to our analysis.

3. *Oral Settlement Agreement*

As stated in open court, "all parties to the proceeding agree to dismiss all actions now pending and release all claims with prejudice mutually." After a discussion that the settlement would bind only the parties to the litigation, including Hernandez, Lee, and Kracksmith or American Business Fund, Hernandez and Lee agreed to the settlement in open court. Pursuant to section 664.6, Hernandez and Lee asked the court to retain jurisdiction to enforce the settlement agreement.[3] Thereafter, the court dismissed the action.

4. *Motion for New Trial and to Set Aside the Settlement Agreement*

Kracksmith filed a motion for a new trial, which also sought "to set aside [the] settlement agreement" pursuant to section 473(b). The new trial motion listed eight grounds under section 657 arising from the trial court's efforts to clarify the special verdict forms and to ask the jury to continue deliberations. The motion also sought to set aside the settlement agreement on the grounds that Lee had no settlement authority, and the settlement was obtained through undue influence.

Kracksmith's chairman, Allan Lee, submitted a declaration stating that "Boschal Lee does not have any authority to make decisions, represent Kracksmith Inc., or bind Kracksmith, Inc. to any agreements without written consent from Kracksmith, Inc.'s Board of Directors." Kracksmith and its board of directors did not give Lee express written authority to enter into the settlement agreement.

Kracksmith contended that because of the trial court's request that the jury continue its deliberation, Lee was forced to settle or risk a "career-ending verdict, rendered under conditions where the judge had exhibited unfairness and appeared to be pressuring the jury, and where the jury clearly did not understand the law."

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[3] Section 664.6 states: "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement."

Hernandez's response to this motion is not included in the record. During argument, Hernandez's counsel reminded the court that Lee verified the complaint as an officer of Kracksmith, and the factoring agreement was signed by Lee as a "managing director" of Kracksmith. Additionally, counsel informed the court that Lee had obtained a fictitious business name statement as president of Kracksmith, Inc.[4] Hernandez's counsel argued that no other company representative was present during the trial, and Hernandez and the court understood that Lee's presence at trial was also on behalf of Kracksmith.

Following the hearing, the trial court denied the motion. The trial court stated that "during the course of this trial, all indications were that Boschal Lee represented Kracksmith" and "[t]hose representations were made to the court."

Kracksmith timely filed a notice of appeal. The appeal is taken from the order denying the motion for a new trial and to vacate the settlement agreement under section 473(b).[5]

DISCUSSION

1. *Appellate Jurisdiction*

Hernandez contends the appeal must be dismissed because Kracksmith has appealed from a nonappealable voluntary dismissal and a nonappealable motion for new trial. Kracksmith counters that this court has appellate jurisdiction because the summary procedure in section 664.6 to enforce a settlement agreement is an appealable order.

As a preliminary matter, we do not have jurisdiction to hear the appeal of a section 664.6 motion because Kracksmith did not bring that motion. We cannot

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[4] In respondent's brief, Hernandez requests judicial notice of certified copies of these records. We decline the request because these documents are not necessary to the resolution of the appellate issues presented in this case.

[5] The notice of appeal also refers to two orders. We construe the appeal taken from "[a]ll judicial orders and determinations related to the jury verdict(s)," and the "[o]rder of May 17, 2011 dismissing this entire action with prejudice" as included in the appeal from the order denying the motion for new trial and to vacate the settlement agreement under section 473(b).

characterize the trial court's ruling on the motion as one to enforce the settlement agreement because, by its own terms, section 664.6 only grants the court authority to enforce the settlement agreement. "Section 664.6 says nothing about vacating judgments." (*Basinger v. Rogers & Wells* (1990) 220 Cal.App.3d 16, 23.)

a. *Motion for New Trial is Reviewable from the Underlying Judgment*

An order denying a motion for new trial is not separately appealable but is reviewable on appeal from the underlying judgment. (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 19-20.)

Hernandez is correct that a voluntary dismissal under section 581, subdivision (b)(1) is not a final judgment, as no judgment is necessary for dismissal. (See *H. D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1364-1366.) A voluntary dismissal is a ministerial act, not a judicial act, and not appealable. (*Id*. at p. 1365.)

Here, however, we have a dismissal by the court entered pursuant to a settlement agreement that constitutes a final judgment. The record contains a minute order dismissing the action with the judge's stamped signature appearing before the statement "It is so ordered." In *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225, the court recognized that this practice of the Los Angeles Superior Court complied with section 581d, requiring that " '[a]ll dismissals ordered by the court shall be in the form of a written order signed by the court and filed in the action and those orders when so filed shall constitute judgments and be effective for all purposes.' " (*Brehm v. 21st Century Ins. Co.*, *supra*, at p. 1234, fn. 5; see *Powell v. County of Orange* (2011) 197 Cal.App.4th 1573, 1577-1579 [the court relied on *Brehm*, to conclude that an unsigned minute order dismissing the action does not comply with section 581d].)

b. *Denial of the Section 473(b) is an Appealable Order*

The denial of the section 473(b) motion to vacate the dismissal entered pursuant to the settlement agreement is a special order made after final judgment and is appealable under section 904.1, subdivision (a)(2). (*Burnete v. La Casa Dana Apartments* (2007) 148 Cal.App.4th 1262, 1265-1266.)

2. *The Trial Court Lacked Jurisdiction to Hear the Motion for New Trial*

Kracksmith contends that the trial court erred in denying its motion for new trial, and devotes much of its brief to argue the trial court's errors related to the special verdict forms. We need not address these arguments because we decide the issue on jurisdictional grounds.

Once the court entered the dismissal of the entire action, it lacked subject matter jurisdiction to hear a motion for new trial. (See *Hagan Engineering, Inc. v. Mills* (2003) 115 Cal.App.4th 1004, 1007-1010; *Wackeen v. Malis* (2002) 97 Cal.App.4th 429, 433, 437-441.)

Although Kracksmith contends that Lee lacked authority to agree to dismiss the action, if the action had not been dismissed pursuant to the settlement agreement, we would have an entirely different case. Kracksmith may or may not have filed a motion for new trial, and we can only speculate on the judgment. No judgment was entered following the jury's verdict and there remained issues left in the trial court for consideration. For the same reason, we reject Kracksmith's argument that appears to be brought under section 663 to vacate the judgment and enter a judgment awarding damages based upon the jury's initial verdict.

3. *The Trial Court Did Not Abuse its Discretion in Denying Section 473(b) Relief to Vacate the Voluntary Dismissal Entered Following Settlement of this Action*

Kracksmith's motion for statutory relief under section 473 argued that Lee did not have settlement authority, and the settlement agreement was obtained by undue influence because Lee could not risk a potential career-ending fraud verdict. We review the ruling on the motion for an abuse of discretion. (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 257-258.)

The discretionary relief provision of section 473(b) provides: "The 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." This provision applies to voluntary dismissals. (*Zamora v. Clayborn Contracting Group, Inc.*, *supra*, 28 Cal.4th at

p. 254.) In order to qualify for discretionary relief under section 473, the moving party must show a proper ground for relief within the applicable time limits. (*Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1419.) Diligence is not an issue here, thus our focus is on whether there was a proper ground for relief.[6]

The term "surprise" as used in section 473(b) means some condition or situation in which a party is unexpectedly placed to his or her injury, without any default or negligence of his or her own, and "which ordinary prudence could not have guarded against." (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1206.) Mistake of counsel does not justify relief under section 473(b) if the trial court finds the mistake was the result of professional incompetence, general ignorance of the law, or unjustifiable negligence in discovering the law. (*Hearn v. Howard, supra*, at p. 1206.) Inadvertence or excusable neglect justifying relief is defined as an error that might have been made by a reasonably prudent person under the same or similar circumstances. (*Zamora v. Clayborn Contracting Group, Inc.*, *supra*, 28 Cal.4th at p. 258.) The inadvertence contemplated by the statute is not in the abstract. " 'It is the duty of every party desiring to resist an action or to participate in a judicial proceeding to take timely and adequate steps to retain counsel or to act in his own person to avoid an undesirable judgment. Unless in arranging for his defense he shows that he has exercised such reasonable diligence as a man of ordinary prudence usually bestows upon important business his motion for relief under section 473 will be denied. [Citation.] Courts neither act as guardians for incompetent parties nor for those who are grossly careless of their own affairs. . . . The only occasion for the application of section 473 is where a party is unexpectedly placed in a situation to his injury without fault or negligence of his own and

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[6] Kracksmith brought the motion less than a month after the trial court dismissed the action. A party seeking relief under section 473(b) "must be diligent, i.e., apply for relief within a reasonable time not to exceed six months after the judgment, dismissal, order, or proceeding was taken, and there must not be any prejudice to the opposing party if relief is granted. [Citation.]" (*Henderson v. Pacific Gas & Electric Co.* (2010) 187 Cal.App.4th 215, 229.)

against which ordinary prudence could not have guarded.' [Citation.]" (*Hearn v. Howard*, *supra*, at p. 1206.)

Kracksmith cannot obtain relief under section 473(b) by pointing to trial court errors. It is the party's burden seeking relief under section 473(b) to demonstrate " 'that due to *some mistake*, either of fact or of law, of himself or of his counsel, or through *some inadvertence*, surprise or neglect which may properly be considered excusable, the judgment or order from which he seeks relief should be reversed.' [Citation.]" (*Hopkins & Carley v. Gens* (2011) 200 Cal.App.4th 1401, 1410.)

Kracksmith did not specify the grounds for relief under section 473(b). We characterize its arguments as seeking relief on the grounds of surprise or mistake, as Kracksmith's evidence in support of the 473(b) motion does not admit its own fault or negligence. Undue influence is not one of the grounds for relief in section 473(b).

a. *No Relief Based on "Surprise"*

Kracksmith's claim of surprise, as supported by the declaration filed by its chairman, appears to be Lee's unauthorized settlement of the company's lawsuit. But, to obtain relief Kracksmith also had to show that the unauthorized settlement was obtained without any negligence on its part "against which ordinary prudence could not have guarded." (*Hearn v. Howard*, *supra*, 177 Cal.App.4th at p. 1206.) The trial court determined that this evidence was lacking. Kracksmith and Lee were plaintiffs in this action and also had to defend against Hernandez's fraud claims. They also were represented by the same counsel at trial, and Lee was present throughout the proceedings. In this situation, ordinary prudence would suggest that Kracksmith would have communicated at some point to its counsel or to the court (through its counsel) that Lee was not its authorized representative. On this record, the trial court did not abuse its discretion in denying relief on this ground.

b. *No Relief Based on "Mistake"*

Kracksmith's claim of mistake must be based on its counsel's belief that Lee had settlement authority because the record is clear that its counsel did not enter into the

settlement agreement on Kracksmith's behalf.[7] The record, however, is devoid of facts, and Kracksmith cites none, to show that its counsel mistakenly believed Lee had settlement authority.

Lee's declaration states that he was not authorized to enter into the settlement agreement on Kracksmith's behalf, but Lee does not state he told counsel he lacked settlement authority. Kracksmith's counsel does not suggest in his declaration that there was any confusion as to whether Lee had settlement authority. Kracksmith's counsel stated that because Lee could not risk a finding of fraud "Kracksmith and Lee opted to settle the entire case with mutual releases of all claims with Hernandez and for the mutual dismissals of their legal actions with prejudice. Kracksmith expressly gave up its jury award of $277,006 against Hernandez."[8]

Kracksmith disavows that Lee acted as its agent when he executed the settlement agreement. Relying on *Gauss v. GAF Corp.* (2002) 103 Cal.App.4th 1110, Kracksmith argues a settlement agreement is not enforceable under section 664.6 unless it is agreed to by an authorized corporate representative. (*Gauss v. GAF Corp.*, *supra*, at pp. 1118-1122; see also *Provost v. Regents of University of California* (2011) 201 Cal.App.4th 1289, 1295-1298.) Kracksmith maintains that ostensible authority is not sufficient to satisfy the section 664.6 party-litigant requirement.[9] The rule that Kracksmith relies on is

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[7] Kracksmith also cannot obtain section 473(b) relief based on opposing counsel's mistake, inexcusable neglect, or failure to recall Lee's trial testimony describing his employment relationship with Kracksmith.

[8] We also reject Kracksmith's argument that Hernandez's counsel believed only Lee entered into the agreement because the minute order indicates that Lee did not comply with the terms of the settlement agreement. According to its terms, the settlement also included Kracksmith as one of the "parties to the proceedings."

[9] Whether Lee was acting as an agent when he executed the settlement agreement is a question of fact. (*Gulf Ins. Co. v. TIG Ins. Co.* (2001) 86 Cal.App.4th 422, 439.) We accept the trial court's findings on agency if supported by substantial evidence in the record. (*Ibid*.) While it is true that the ostensible authority of an agent cannot be based solely upon the agent's conduct, see *Kaplan v. Coldwell Banker Residential Affiliates, Inc.* (1997) 59 Cal.App.4th 741, 747, it is not true that the principal must make explicit

triggered when the parties seek to enforce a settlement agreement by employing the statutory mechanism in section 664.6. (*Levy v. Superior Court* (1995) 10 Cal.4th 578, 581-585; *Critzer v. Enos* (2010) 187 Cal.App.4th 1242, 1253-1258.) Because of its summary nature, strict compliance with the requirements of section 664.6 is a prerequisite to invoking the power of the court to enforce a settlement agreement. (*Critzer v. Enos, supra*, at p. 1256.) As previously stated, no section 664.6 motion to enforce the settlement agreement was ever before the court.

We do not consider other grounds to set aside the settlement agreement or to attack the judgment that have not been fully briefed and are not stated in section 473. The trial court did not abuse its discretion in denying the motion seeking section 473(b) relief.

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representations regarding the agent's authority to the third party before ostensible authority can be found. Ostensible authority, for example, may be proven through evidence of the principal solely transacting through the agent. (See *Kelly v. R. F. Jones Co.* (1969) 272 Cal.App.2d 113, 120.) Here, Lee signed the verified complaint for breach of contract, signed the contract at issue in the action, and appeared to be the only representative from the company that attended the trial. Kracksmith held Lee out as clothed in the authority to settle the action. This is sufficient evidence to support the trial court's conclusion that Kracksmith was managing the litigation solely through its agent, Lee.

DISPOSITION

The order denying the motion for new trial and to vacate the dismissal entered by the court following settlement of this action is affirmed. No party is awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.