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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

CARLO LLC,

Plaintiff and Appellant,

v.

4518 HOLLYWOOD LLC,

Defendant and Appellant.

B277683

(Los Angeles County
Super. Ct. No. BC616844)

APPEALS from a judgment of the Superior Court of Los Angeles County. Richard E. Rico, Judge. Reversed and remanded with directions; Carlo LLC's cross-appeal dismissed.

Franklin P. Jeffries for Plaintiff and Appellant.

Robert G. Berke and Carlo Brooks for Defendant and Appellant.

4518 Hollywood LLC (Hollywood) appeals from a judgment following a default. Respondent Carlo LLC (Carlo) filed a complaint against Hollywood alleging a claim for forcible entry under Code of Civil Procedure section 1159, subdivision 2.¹ Carlo obtained a default judgment when Hollywood failed to file a responsive pleading within five days of service as required under sections 1167 and 1167.3.

Hollywood moved under section 473 to set aside the default. The trial court denied the motion, finding that the motion was not supported by a showing that the default was caused by the mistake of Hollywood's attorney.

We reverse. In support of Hollywood's motion to set aside the default, Hollywood's attorney submitted a declaration stating that she "mistakenly assumed" that she had 30 days to respond to Carlo's complaint. She explained that she had not received the summons page along with the complaint from the client, and that it was "my mistake not to have immediately realized" that she needed to see the summons page.

Counsel's admitted failure to determine the statutory time to file a response to the complaint was a legal error. Thus, Hollywood met the statutory requirement to provide a "sworn affidavit" from its counsel "attesting to his or her mistake, inadvertence, surprise, or neglect" resulting in the default. Under these circumstances, relief from default was required under section 473, subdivision (b).

¹ Subsequent undesignated statutory references are to the Code of Civil Procedure.

The trial court therefore erred in denying Hollywood's motion to set aside the default. In light of our reversal on this basis, there is no need to consider Carlo's cross-appeal challenging the trial court's decision not to award certain categories of damages following the default.²

BACKGROUND

On April 13, 2016, Carlo filed a complaint against Hollywood alleging a single cause of action for forcible entry under section 1159, subdivision (2).

The complaint alleged that Carlo had a 10-year lease for space in Hollywood's building, which contained a pizza restaurant and an upstairs apartment. Carlo claimed that, on August 1, 2014, Hollywood's "agent," William Leyton, turned a Carlo representative out of the apartment through threats. Several months later, on November 18, 2015, Leyton allegedly used threats against a Carlo employee to force her to convey "all of [Carlo's] proprietary rights" without compensation, and without returning Carlo's deposit or any of its personal property or furnishings.

On April 13, 2016, Carlo personally served the summons and complaint on Leyton as the "Managing Member" of Hollywood. Under sections 1167 and 1167.3, a responsive pleading was due within five days.

Hollywood did not file a timely response. Carlo requested a default, which was entered on May 2, 2016.

² We also need not consider Hollywood's other arguments that Carlo acted fraudulently and lacked standing in light of bankruptcy proceedings. In light of our disposition, we deny Hollywood's requests for judicial notice as moot.

Hollywood filed a motion to set aside the entry of default. The trial court denied Hollywood's initial motion, citing procedural defects and the fact that Hollywood had been suspended by the Franchise Tax Board (FTB). Hollywood filed a renewed motion on July 1, 2016, after it had restored its status with the FTB.

Hollywood sought to set aside the default under section 473, subdivision (b). Hollywood supported its motion with declarations from Leyton and from Hollywood's counsel, Helene Farber.

Leyton testified that he received the complaint on April 13, 2016, and gave it to Farber. However, prior to giving Farber the complaint, "the Summons page became detached" and Leyton therefore did not give Farber the summons. During the first week of May, Farber asked for the summons. Leyton searched for and found the summons and provided it to Farber.

Farber testified consistently. She said that she received the complaint from Leyton "on or about" April 13, 2016, without the summons. Farber mistakenly assumed that Hollywood had 30 days to respond to the complaint, "and I told William Leyton as much." Farber then did some investigation concerning the property at issue. When she began her research to respond to the complaint on May 5, 2016, she asked Leyton if he had received the summons. Leyton provided the summons and Farber "realized Defendant had had only five days to respond and the time had expired." Farber then made various unsuccessful attempts to get an agreement from Carlo's counsel for an extension to respond to the complaint. After learning that a default had been entered, Farber filed Hollywood's motion to set aside the default.

The trial court denied Hollywood's motion to set aside the default judgment on August 11, 2016.³ The court found that the mandatory provision in section 473, subdivision (b) for setting aside a default based upon attorney fault did not apply because Hollywood's motion was "devoid of facts as to mistake, inadvertence, or excusable neglect by counsel." The court cited Leyton's testimony that the summons had become detached in concluding that "[t]he disappearance of the Summons and/or Leyton's failure to provide the Summons to counsel is not the fault of counsel." The trial court's order did not mention Farber's declaration at all.

The trial court also denied Hollywood's request for discretionary relief under section 473, subdivision (b). The trial court concluded that, while "*evidence* that the Defendant mislaid or misfiled papers may show 'excusable neglect,' it is not enough to show that the client was busy and/or forgot about the lawsuit." The court found that "Defendant's vague representation that the Complaint was delivered without a Summons page is insufficient and lacks credibility."

DISCUSSION

1. Legal Standard for Relief From Default

Section 473 provides in part that "[n]otwithstanding 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,

³ Prior to the hearing on Hollywood's renewed motion, the trial court entered a judgment on the default.

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." (§ 473, subd. (b).) When a court orders relief from default pursuant to this provision, the court also "shall . . . direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties." (*Ibid.*) The purpose of this provision is to " 'relieve the innocent client of the burden of the attorney's fault, to impose the burden on the erring attorney, and to avoid precipitating more litigation in the form of malpractice suits.' " (*Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 839, quoting *Metropolitan Service Corp. v. Casa de Palms, Ltd.* (1995) 31 Cal.App.4th 1481, 1487.)

Section 473, subdivision (b) reflects a policy favoring the determination of claims on their merits. (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 255–256.) "Thus, 'the provisions of section 473 . . . are to be liberally construed.' " (*Id.* at p. 256.)

If the requirements of the attorney fault provision in section 473 are met, relief is mandatory. (§ 473, subd. (b); *Lorenz v. Commercial Acceptance Ins. Co.* (1995) 40 Cal.App.4th 981, 989.) The only exception provided by the statute is if the default "was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." (§ 473, subd. (b).)

A lawyer's mistake or neglect "cause[s]" a default if it is a proximate cause of the default. It need not be "the only proximate cause of a client's injury so long as there is causation

in fact.” (*Milton v. Perceptual Dev. Corp.* (1997) 53 Cal.App.4th 861, 867 [proximate cause rule for legal malpractice actions applied to relief from default under section 473].)

Where the facts are disputed, an appellate court reviews the issue of whether the requirements of section 473, subdivision (b) have been met in a particular case under the substantial evidence standard. (*Martin Potts & Associates v. Corsair, LLC* (2016) 244 Cal.App.4th 432, 437 (*Martin Potts*).) Because the facts in this case concerning the summons form are disputed, we apply the substantial evidence standard. However, as discussed below, the disputed facts concerning what Leyton did with the summons and when are ultimately not material to deciding whether the mandatory attorney fault provision of section 473, subdivision (b) applies.

2. The Trial Court’s Order Denying Relief From Default Is Not Supported by Substantial Evidence

We initially observe that the record is unclear whether the trial court applied the correct legal standard. The trial court found that Hollywood’s motion was “devoid of facts as to mistake, inadvertence, or *excusable* neglect by counsel.” (Italics added.) An attorney’s neglect need not be excusable to support relief from default under section 473, subdivision (b). (*Martin Potts, supra*, 244 Cal.App.4th at pp. 438–439.) The only requirement is an attorney’s sworn statement admitting mistake or neglect that caused the default. (*Id.* at p. 443 [attorney is not required to explain the reasons for his or her mistake or neglect].)

Even assuming the trial court applied the correct standard, its finding cannot be reconciled with the evidence. In support of that finding, the trial court cited only Leyton’s declaration explaining that he did not provide the summons page to Farber.

The trial court concluded from Leyton's testimony that the "disappearance of the Summons and/or Leyton's failure to provide the Summons to counsel is not the fault of counsel."

While counsel might not have been responsible for the missing summons, she was certainly responsible for filing a timely responsive pleading. The trial court's order simply ignores the lengthy declaration from Farber admitting that the failure to determine the filing deadline for a responsive pleading *was* her fault. Farber testified that she "mistakenly assumed that I had 30 days to respond, and I told William Leyton as much." She also explained that she "had tried to be diligent but was unfamiliar with the five-day window for responding to 'forcible entry,' and without the Summons page I assumed a 30-day window. It was my mistake not to have immediately realized that I needed to see the Summons Page." When she learned of the mistake several weeks later, she attempted to obtain a stipulation from opposing counsel permitting a responsive pleading, but was unsuccessful in getting an agreement.

Researching the statutory time period to respond to a complaint is clearly an attorney's responsibility, whether or not the attorney has a summons in hand. Farber acknowledged her mistake in believing that she had 30 days to respond rather than five. That mistake was a proximate cause of the default.

Carlo argues that evidence that "shows fault on the part of the client does not support the contention of attorney's fault." Carlo claims that such evidence exists here because "Leyton testified he was taking personal responsibility for failing to deliver the Summons to Farber until May 5, 2016; that is, until after entry of default." Carlo points out that it "was for the Court to decide whether Leyton knew what a summons was on April 13, 2016, and whether he and Farber were telling the truth that

Leyton detached the Summons from the complaint before Leyton's handing the complaint to attorney Farber on the same day."

This argument is not persuasive because the evidence does not show that Leyton's conduct caused the default.⁴ Although Leyton did not initially provide the summons to Farber, there is no evidence to suggest that Leyton instructed or advised Farber concerning when to file a responsive pleading. Farber freely admitted that it was her mistake to assume that she had 30 days to respond to the complaint. Carlo's suggestion that Leyton might not have been truthful about what he did with the summons does not help its argument. If Leyton actually *did* provide the summons to Farber earlier than claimed, there is even less reason to attribute fault to Leyton. Under these

⁴ Even if there had been such evidence, Farber's conduct in failing to determine the correct date to respond to the complaint would still have been a cause of the default. There is a split of authority on whether the mandatory attorney fault provision applies when the client is partially responsible for the error leading to default. (See *Martin Potts, supra*, 244 Cal.App.4th at p. 442 [citing cases].) This court has previously held that the attorney fault provision applies even if the client shared responsibility for a default, so long as the client did not engage in intentional misconduct. (See *SJP Limited Partnership v. City of Los Angeles* (2006) 136 Cal.App.4th 511, 519–520.) However, we need not consider that issue in this case. As discussed, even if Leyton was at fault in failing to provide the summons form to Hollywood's lawyer, it was the lawyer's responsibility, not Hollywood's, to determine the deadline for filing a response to the complaint. Leyton's conduct in failing to provide Farber with the summons did not change that responsibility.

circumstances, the lawyer, Farber, not the client, Hollywood, caused the default. (See *Solv-All v. Superior Court* (2005) 131 Cal.App.4th 1003, 1011 [“there is *no evidence* that petitioners were aware of counsel’s decision to delay filing an answer, or that they suggested or agreed that he should do so. Thus, on the record before us, they do not share responsibility for the delay”].)

The trial court therefore erred in denying Hollywood’s motion to set aside the default judgment under the attorney fault provision of section 473, subdivision (b).

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court with directions to set aside the default judgment and for consideration of “reasonable compensatory attorney legal fees and costs to opposing counsel or parties” pursuant to Code of Civil Procedure section 473, subdivision (b). In light of this disposition, Carlo’s cross-appeal is dismissed as moot. Hollywood is entitled to its costs on appeal.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.