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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

ARLENE T. PENZA, Plaintiff, Cross-defendant and Respondent, v. RONALD A. BROWN et al., Defendants, Cross-complainants and Appellants.	B278235 (Los Angeles County Super. Ct. No. BC582115)

APPEAL from a judgment and post-judgment order of the Superior Court of Los Angeles County, Elizabeth R. Feffer, Judge. Dismissed as to Calcor Space Facility, Inc. and Ram's Manufacturing, Inc. Reversed and remanded with directions as to Ronald Brown.

James & Associates, Becky S. James and Rachael A. Robinson for Defendants, Cross-complainants and Appellants.

Hunter Salcido & Toms and Robert L. Toms, Jr., for Plaintiff, Cross-defendant and Respondent.

Defendant and cross-complainant Ronald Brown appeals from a default judgment, contending the trial court erred in imposing terminating sanctions for his failure to comply with the court's discovery orders. He also appeals from the order denying his motion to vacate the default judgment, contending he demonstrated excusable neglect.[1]

For the reasons explained below, we conclude the trial court abused its discretion in imposing terminating sanctions. Accordingly, we reverse the default judgment and remand the matter.

BACKGROUND

Brown was formerly married to plaintiff and cross-defendant Arlene Penza. They divorced in 1964. Over the years, they remained in contact. This dispute between them concerns money. Penza claims between April 2013 and April 2014, she wrote a series of checks payable to Brown or his companies, Calcor Space Facility, Inc. (Calcor) and Ram's Manufacturing, Inc. (Ram's), loaning them a total of $421,000 from her retirement funds to be paid back a year later with 10 percent interest after Brown invested the funds. Brown claims the above-described checks Penza wrote constituted partial repayment of

[1] The notice of appeal in this case states that Brown's companies, Calcor Space Facility, Inc. and Ram's Manufacturing, Inc., also appealed from the default judgment and order denying the motion to vacate the default judgment. The judgment and order are against Brown only, and Brown does not argue on appeal that his companies are aggrieved by the judgment or order. Accordingly, the appeal is dismissed as to Calcor Space Facility, Inc. and Ram's Manufacturing, Inc.

large sums of money he and his two companies (Calcor and Ram's) loaned her. According to Brown, Penza still owes them an undefined amount of money.

On May 15, 2015, Penza filed this action, asserting a breach of contract cause of action against Brown and common counts for money had and received and money lent against Brown, Calcor and Ram's (collectively, defendants), seeking repayment of alleged loans plus interest. On July 9, 2015, defendants filed an answer, denying the allegations in Penza's complaint and asserting affirmative defenses. The same day, defendants filed a cross-complaint against Penza, asserting causes of action for breach of contract, common counts and an accounting, seeking repayment of alleged loans plus interest. On September 14, 2015, Penza filed an answer, denying the allegations in the cross-complaint and asserting affirmative defenses.

On November 19, 2015, Penza propounded form interrogatories, requests for production of documents and requests for admissions to defendants.

On December 24, 2015, defendants' counsel filed a motion to be relieved, citing "a breakdown in the working relationship between attorney and client," and asserting Brown had breached the "client fee agreement." The attorney's declaration in support of the motion also stated Brown "refused to sign a substitution of attorney form."

On January 15, 2016, defense counsel obtained an extension from Penza's counsel for defendants to respond to Penza's written discovery. The new due date was February 1, 2016.

On January 20, 2016, the trial court granted defense counsel's motion to be relieved and signed an order notifying defendants of the upcoming hearing dates—an April 12, 2016 post-mediation status conference, a May 20, 2016 final status conference and the May 31, 2016 trial. The order also notified defendants that corporate entities may not represent themselves in court.[2] On January 21, 2016, former defense counsel served the order on defendants by mail at their current addresses.

Defendants did not respond to Penza's written discovery by the extended due date, February 1, 2016. Therefore, on February 16, 2016, Penza filed and served on defendants by mail a motion to compel responses to the form interrogatories and requests for production of documents. As part of the motion, Penza sought $1,165 in sanctions against Brown. The same day, Penza filed and served on defendants a motion to deem admitted against them the requests for admissions. As part of this motion, Penza sought $417 in sanctions against Brown. Brown did not oppose these motions.

On March 16, 2016, the trial court granted Penza's discovery motions, deeming the requests for admissions admitted, ordering defendants "to serve complete, objection-free, verified responses to the interrogatories and requests for production of documents, with responsive documents, by March 30, 2016," and ordering Brown to pay Penza sanctions in the amount of $1,582 by March 30, 2016. The same day, the court set for April 12, 2016 an order to show cause regarding dismissal of Ram's and Calcor's answer and cross-complaint due to their failure to obtain

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[2] The order did not advise Brown about the February 1, 2016 discovery deadline because it was not a court proceeding.

counsel per the court's January 20, 2016 order. The court gave defendants until April 6, 2016 to file and serve declarations in opposition to the order to show cause. On March 17, 2016, Penza's counsel served on defendants by mail a detailed notice of the court's orders granting the discovery motions and setting the order to show cause and opposition due date.

On April 7, 2016, Penza filed and served on defendants by mail a motion to strike Brown's answer and cross-complaint and enter default against Brown based on his failure to comply in any respect with the trial court's March 16, 2016 discovery and sanctions order. The hearing on the motion was scheduled for May 11, 2016. As an exhibit to the motion, Penza attached a March 24, 2016 letter her counsel mailed to Brown, reminding him of the post-mediation status conference set for April 12, 2016, setting forth the mediator's available dates, and asking him to respond by March 28, 2016 regarding his availability for mediation. He did not respond to the letter.

On April 11, 2016, Penza's counsel filed a supplemental declaration, informing the trial court that Brown "contacted [him] for the first time" on April 7, 2016 "and expressed an interest in mediation."

As reflected in the trial court's April 12, 2016 minute order,[3] Brown appeared in propria persona at the post-mediation status conference and hearing on the order to show cause regarding dismissal of Ram's and Calcor's answer and cross-complaint. Defendants did not file opposition to the order to show cause. The court struck the answer and cross-complaint as

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[3] There is no reporter's transcript of any proceedings in the record before us.

to Ram's and Calcor. The court denied Brown's request to continue the proceedings so he could obtain counsel. Penza and Brown waived jury trial, and the court stated the court trial would proceed as scheduled on May 31, 2016. Penza's counsel filed and served on defendants by mail notice of the court's ruling on the order to show cause.

On May 10, 2016, Brown emailed Penza's counsel and stated he would not be present at the hearing scheduled for the next day because he would be flying to Oklahoma in advance of a May 12, 2016 court appearance in his criminal case.[4] He also explained he had spoken by telephone that day with a member of the trial judge's courtroom staff, who suggested he appear by CourtCall. He stated he would try to change his flight schedule so he could appear by telephone at the May 11, 2016 hearing in this case. He also informed Penza's counsel that he was "still agreeable to mediation."

On May 11, 2016, the trial court held the scheduled hearing on Penza's motion to strike Brown's answer and cross-complaint and enter default against Brown. As reflected in the court's minute order, Brown did not file opposition to the motion or appear at the hearing. The court granted the motion, striking the answer and cross-complaint as to Brown and entering Brown's default on Penza's complaint pursuant to Code of Civil Procedure sections 2023.030, subdivision (d) and 2030.290,

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[4] In 2014, Brown was arrested and criminal proceedings were commenced against him after he purchased a truck in Oklahoma and then stopped payment on the check he issued to pay for the truck after he learned the seller failed to disclose the truck had been in a "major accident."

subdivision (c).[5] The court found "sufficient evidence of Defendant Brown's willful violation of the court's March 16, 2016 order, and Defendant's complete failure to comply with his discovery obligations." The court also noted "the deadline to complete factual discovery ha[d] passed," and Penza had "lost the ability to complete discovery as a matter of right." The court set for June 30, 2016 an order to show cause regarding entry of default judgment. On May 12, 2016, Penza's counsel served defendants by mail with notice of the court's ruling.

On June 29, 2016, Brown and his newly-retained counsel signed a substitution of attorney form. The same day, Brown's counsel emailed Penza's counsel, requesting that Penza stipulate to set aside the entry of default and explaining that Brown intended to file a motion to vacate the default. Brown's counsel served the substitution of attorney form by mail on Penza's counsel on July 5, 2016 and filed the form with the court on July 6, 2016.

On June 30, 2016, the trial court entered a default judgment against Brown for $518,992 plus interest and costs, based on declarations Penza and her counsel had previously filed and served by mail on defendants in support of Penza's application for a default judgment. The same day, the court dismissed Calcor and Ram's from the action without prejudice on Penza's oral motion.

On July 8, 2016, Brown's counsel filed on his behalf a motion to vacate the default judgment pursuant to section 473, subdivision (b), "on the basis of mistake, inadvertence, surprise or

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[5] Further statutory references are to the Code of Civil Procedure.

excusable neglect." Brown submitted a declaration with the motion, indicating that his involvement in the criminal proceedings filed against him in Oklahoma interfered with his ability to participate in this action. Brown stated, in pertinent part: "I was wrongfully arrested and put in jail for stopping payment on the check [for the truck]. I have been forced to attend over ten court appearances in Oklahoma and must return again in early September. I have to fly at least one or two days ahead to insure that I make it in case of flight delays so that my bail is not put at risk. I hope to have this matter resolved as Oklahoma counsel now understands that I was the victim. [¶] . . . On September 3, 2015, I went to Oklahoma to appear at a hearing and the judge for some unknown reason became concerned that I was a flight risk and put me in jail. I spent almost 6 weeks in jail where I developed a serious medical issue which I am continuing to deal with on a twice weekly basis.[6] [¶] . . . Due to my incarceration, I did not know what was transpiring in this case in California."[7]

Brown also stated in his declaration: "I did not receive the discovery and my previous attorney did not discuss it with me. I

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[6] In his declaration submitted with the reply brief, Brown added: "I developed a severe auto immune issue with my skin that causes severe itching and rashes all over my body. I have been fearful and anxiety ridden since the day I was incarcerated. I am doing the best I can. I am under the care of a doctor."

[7] Brown was represented by his original counsel in this action at the time he was incarcerated in Oklahoma. There is nothing in the record indicating his counsel missed any deadlines or court appearances while he was incarcerated. Penza propounded the discovery after Brown's incarceration and return to California.

had no idea that a motion to compel had been filed against me or that a motion to strike had been filed against me. Where I live in the Palisades, we have had and continue to have a documented problem with our mail." Brown did not elaborate on the nature of this "problem" or provide any documentation.[8] He also denied knowing "about the mediation requirement until on or about April 7, 2016 when [he] received the letter from [Penza's counsel] over a week after he sent it to [him]."

Brown's new counsel also submitted a declaration in support of the motion to vacate the default judgment. She stated, in pertinent part: "Mr. Brown's health has been so severely affected by the criminal case and the stress of being thrown into an Oklahoma jail that he is covered in red blotches and bumpy rashes. It is obvious after speaking to him that this ordeal has severely impacted his mental well being. He is unsteady and the doctors have been unable to alleviate his symptoms. [¶] . . . During my first meeting with him his bumpy red rash became so debilitating that he had to leave and go to the doctor."[9] Counsel further stated: "Mr. Brown's sister's death occurred on May 20, 2016 in Oregon. After speaking to Mr. Brown it is obvious to me that this has been another significant blow to him." Counsel also asserted that the default judgment is "patently unfair and

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[8] In his declaration submitted with the reply brief, Brown added: "I have had trouble with the mail in the Palisades for years. Both my previous attorney and [Penza's counsel] have my email address. [Penza's counsel] did not email me the motion to strike and as I told the court I had not received it."

[9] In her declaration submitted with the reply brief, counsel added: "Mr. Brown is continuing to seek medical treatment. He is very thin and unable to focus for any length of time."

prejudicial" to Brown given that Penza paid the majority of the money to Calcor, but the judgment is only against Brown.

Penza filed an opposition to Brown's motion to vacate the default judgment, arguing Brown's "declaration in support of the motion is vague and general" and the "chronology of affairs in this matter shows that Mr. Brown has no basis for relief whatsoever."

On September 1, 2016, after hearing oral argument, the trial court denied Brown's motion to vacate the default judgment, concluding Brown "failed to establish a right to relief" under section 473, subdivision (b). The court did not "find Brown's declaration credible as to the receipt of notice of the motions filed in this matter." The court also noted that Brown personally appeared at the April 12, 2016 hearing (and made no mention of any health issues) and knew about the May 11, 2016 hearing but chose not to appear by telephone. The court found Brown's criminal case and health issues did not excuse his failure to act in this case and comply with court orders.

DISCUSSION

Brown contends the trial court abused its discretion in imposing terminating sanctions—striking his answer and cross-complaint and entering default.

A court may impose terminating sanctions on a party who misuses the discovery process. (§§ 2023.030, subd. (d) & 2030.290, subd. (c).) " ' " 'The power to impose discovery sanctions is a broad discretion subject to reversal only for arbitrary, capricious, or whimsical action. [Citations.] Only two facts are absolutely prerequisite to imposition of the sanction: (1) there must be a failure to comply . . . and (2) the failure must be willful . . . .' " ' " (*R.S. Creative, Inc. v. Creative Cotton, Ltd.*

(1999) 75 Cal.App.4th 486, 496.) "Despite this broad discretion, the courts have long recognized that the terminating sanction is a drastic penalty that should be used sparingly." (*Lopez v. Watchtower Bible and Tract Society of New York, Inc.* (2016) 246 Cal.App.4th 566, 604.) "Dismissal is a proper sanction to punish the failure to comply with a rule or an order only if the court's authority cannot be vindicated through the imposition of a less severe alternative." (*Rail Service of America v. State Comp. Ins. Fund* (2003) 110 Cal.App.4th 323, 331.)

We find the trial court abused its discretion in imposing terminating sanctions. Brown's original counsel withdrew less than two weeks before the discovery responses were due. It is not clear from the record that Brown was advised of the extended discovery due date of February 1, 2016. Brown was juggling a criminal proceeding in Oklahoma, in which he was the defendant, and a civil proceeding in California, in which he was acting in propria persona. Brown was in his 70's and in declining health. We acknowledge that Brown was noncompliant with the discovery process and the trial court's order compelling him to respond and pay monetary sanctions. But the trial court did not give him much time to turn things around. The court imposed the terminating sanctions less than two months after it granted Penza's first round of discovery motions.

In April 2016, the month before the trial court imposed the terminating sanctions, Brown appeared ready to participate in the proceedings. He informed Penza's counsel he was prepared to mediate (and Penza's counsel conveyed this information to the court in a declaration filed April 11, 2016), and he appeared at the April 12, 2016 hearing and requested a continuance of the proceedings so he could retain counsel. The court denied his

request. The following month, he missed the May 11, 2016 hearing because he was traveling to Oklahoma to appear in his criminal case. His absence was excusable given the hearing in California was scheduled just a few hours before his flight to Oklahoma was leaving.

To the extent the trial court was unaware of all of the extenuating circumstances of Brown's situation at the time it imposed the terminating sanctions, all of those circumstances were brought before the court in connection with Brown's motion to vacate the default judgment under section 473, subdivision (b). "While a request for relief under section 473(b) is entrusted 'largely' to the trial court's discretion [citation], the law strongly favors an exercise of that discretion in favor of granting relief. 'With respect to setting aside a default judgment, it is the policy of the law to favor, whenever possible, a hearing on the merits. . . .' [Citations.] 'Because the law favors disposing of cases on their merits, "any doubts in apply section 473 must be resolved in favor of the party seeking relief from default." ' " (*Shapiro v. Clark* (2008) 164 Cal.App.4th 1128, 1139.) For the reasons already set forth above, we find the trial court abused its discretion in denying Brown's motion to vacate the default judgment based on the unique set of circumstances in this case.

Again, we acknowledge that Brown had been derelict in his discovery obligations and in complying with the court's orders regarding discovery. It is understandable that the trial court was frustrated when Brown moved to set aside the entry of default. At that time, however, Brown was facing serious threats to his health and liberty, all occurring over a condensed time period. Under these unique facts, we believe justice requires that Brown

should be given one more opportunity to have his case heard on the merits.

Accordingly we reverse the default judgment and order the trial court to reinstate Brown's answer and cross-complaint upon remand.

DISPOSITION

The judgment is reversed and the matter remanded for further proceedings consistent with this opinion. Upon remand, the trial court shall reinstate Brown's answer and cross-complaint. The appeal is dismissed as to Calcor and Ram's. Brown is entitled to recover costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, Acting P. J.

We concur:

JOHNSON, J.

BENDIX, J.*

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