Filed 9/10/14 Grinberg v. Kalili CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ROY GRINBERG et al., Plaintiffs and Appellants, v. TOM KALILI et al., Defendants and Respondents.	B245899 (Los Angeles County Super. Ct. No. BC451889)

APPEAL from a judgment and orders of the Superior Court of Los Angeles County, Rita J. Miller, Judge. Dismissed in part, affirmed in part.

Howard R. Price for Plaintiffs and Appellants.

John D. Younesi, Jan A. Yoss; Law Offices of Robert E. Young and Robert E. Young for Defendants and Respondents.

INTRODUCTION

This appeal arises out of an action for malicious prosecution brought by plaintiffs and appellants Roy Grinberg and Mauricio Pier against defendants and respondents Tom Kalili and Robert E. Young. Grinberg and Pier purport to appeal from (1) the judgment entered in favor of Kalili and Young after the court granted their special motion to strike brought pursuant to the anti-SLAPP statute, Code of Civil Procedure section 425.16;[1] (2) the order granting Kalili prevailing party attorney fees; and (3) the order denying Grinberg and Pier's section 473 motion to vacate the award of attorney fees.

We dismiss as untimely the appeal as it relates to the judgment and the order granting attorney fees. As to the section 473 motion to vacate, we find the trial court did not abuse its discretion in concluding appellants were not entitled to either discretionary or mandatory relief. We therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Underlying Lawsuit

Kalili, represented by attorney Young, sued Grinberg and Pier (collectively, Grinberg) in a dispute over Kalili's purchase of a Ferrari from Grinberg for more than $158,000. Kalili alleged that the Ferrari was not properly converted for use in California and therefore could not be driven here legally. The lawsuit was resolved in Grinberg's favor after a trial resulted in nonsuit.

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[1] "SLAPP" is an acronym for "strategic lawsuit against public participation." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 85 & fn. 1.)

All subsequent undesignated statutory references are to the Code of Civil Procedure.

II. The Present Action for Malicious Prosecution and the Anti-SLAPP Motion

In December 2010, Grinberg sued Kalili and Young for malicious prosecution. Kalili and Young filed a special motion to strike pursuant to the anti-SLAPP statute. Grinberg filed opposition.

The trial court granted the anti-SLAPP motion on July 22, 2011, and entered judgment for Kalili and Young on October 12, 2011. The proposed judgment prepared by Kalili and Young stated: "Defendants are awarded costs in the sum of $_____ and attorney's fees pursuant to statute in the sum of $_____." As signed by the court and filed, the judgment awarded $830 in costs ("830.00" was handwritten in the first blank space) but the amount of attorney fees was left blank.

Kalili and Young served notice of entry of judgment on counsel for Grinberg on October 19, 2011.

III. Kalili and Young's Motion for Attorney Fees

On December 19, 2011, Kalili filed a motion seeking prevailing party attorney fees in the amount of $55,615. The motion was served on Grinberg by mailing a copy to his attorney, Barry Fischer, at the address listed in the court file on December 16, 2011. Hearing on the matter was scheduled for March 20, 2012.

Opposition was due to be filed on March 7, 2012, but was neither filed nor served by that date. Accordingly, on March 13, 2012, Kalili filed notice of nonopposition to the motion for attorney fees, and also served the notice on Grinberg by mailing a copy to Fischer.

At the hearing on March 20, 2012, no one appeared on behalf of Grinberg. The court proceeded to hear the motion and awarded fees of $43,237.50, about $12,377 less than Kalili requested. The court directed counsel for Kalili and Young to file an "amended judgment." The amended judgment—which was identical to the judgment filed on October 12, 2011, except the amounts of the awards of costs and attorney fees were inserted in type—was entered on May 8, 2012.

IV. Grinberg's Motion to Vacate the Order Awarding Attorney Fees

On August 16, 2012, Grinberg filed a motion to vacate the attorney fee order and a proposed opposition to the motion for attorney fees. Grinberg asserted that he had not been served with the attorney fee motion or notice of nonopposition because his attorney had neglected to file a change of address form with the court. As a result, the motion and notice of nonopposition were mailed to the Law Offices of Barry Fischer, 9454 Wilshire Boulevard, Suite 805, Beverly Hills, California, 90212, instead of Suite 701 at the same street address. Notably, Fischer did not state in his sworn declaration that his office did not receive the motion for attorney fees or the notice of nonopposition.

Kalili filed an opposition to the motion to vacate the order granting attorney fees. Koko Sandmeyer, an office assistant for Kalili's attorney, submitted a declaration stating none of the documents served on Grinberg at Fischer's office were ever returned as undeliverable. In addition, Sandmeyer telephoned Fischer's office on March 12, 2012, and spoke with a man who said opposition to the motion for attorney fees was on his desk but had not yet been filed. She requested a copy of the opposition, but the man said he would discuss the issue with Fischer. A few hours later, Fischer telephoned Sandmeyer and said Grinberg was not going to file opposition. One of Kalili's attorneys, Jan Yoss, filed a declaration attaching a letter from Fischer, dated April 19, 2012, stating Fischer had received the notice of nonopposition but had never received the motion for attorney fees. In that letter, Fischer stated his intention to file a motion to set aside the judgment and attorney fee order.

On September 28, 2012, the trial court issued a tentative ruling finding that Grinberg failed to show entitlement to relief under the discretionary provisions of section 473, subdivision (b), because he failed to demonstrate he acted diligently in seeking to set aside the May 8th order. The court ordered supplemental briefing on whether the mandatory provision of section 473 applied to Grinberg's counsel's failure to file timely opposition to the attorney fee motion. Accordingly, both parties submitted supplemental briefing. Grinberg asserted the court should give a liberal interpretation to section 473,

while Kalili urged the court not to apply mandatory relief under section 473 to an order on a nondispositive motion.

Hearing was held on November 9, 2012, after which the trial court denied the motion to vacate.

V. The Appeal

On December 19, 2012, Grinberg filed a notice of appeal from the order entered on November 9, 2012, described as "[a]n order or judgment under Code of Civil Procedure section 904.1(a)(3)-(13)."

DISCUSSION

I. The Appeal From the Judgment Is Untimely

Kalili and Young argue the appeal from the judgment should be dismissed because it was not timely filed. We agree and dismiss the appeal in that regard.

"'An order granting or denying a special motion to strike [under the anti-SLAPP statute] shall be appealable under Section 904.1.' (§ 425.16, subd. (i); see generally § 425.16 et seq.) Section 904.1 provides '[a]n appeal . . . may be taken . . . [f]rom an order granting or denying a special motion to strike under Section 425.16.' (§ 904.1, subd. (a)(13).) '"If a judgment or order is appealable, an aggrieved party *must* file a *timely* appeal or forever *lose* the opportunity to obtain appellate review." [Citations.]' (*Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 46.)" (*Maughan v. Google Technology, Inc.* (2006) 143 Cal.App.4th 1242, 1246-1247 (*Maughan*).)

The trial court entered the order granting the anti-SLAPP motion and judgment dismissing the action on October 12, 2011, and Kalili and Young served notice of entry of judgment on October 19, 2011. Accordingly, the notice of appeal from that order had to be filed within 60 days, or no later than December 18, 2011. (Cal. Rules of Court, rule

8.104(a).)[2] Grinberg filed his notice of appeal more than a year later, on December 19, 2012.

The notice of appeal filed by Grinberg indicates the appeal is taken from the "order or judgment under Code of Civil Procedure section 904.1(a)(3)-(13)" entered on November 9, 2012. However, the order entered on November 9, 2012, is a minute order denying Grinberg's motion to vacate the attorney fee award. Grinberg invokes the one final judgment rule in attempting to argue that the notice of appeal was timely as to the trial court's order granting the anti-SLAPP motion, dismissing the malicious prosecution action, and entering judgment in favor of Kalili and Young. He contends the minute order of November 9, 2012, was the final judgment disposing of all matters in the case. He is incorrect. A postjudgment order granting attorney fees does not convert the prior judgment into an interim order. (See *Maughan*, *supra*, 143 Cal.App.4th at pp. 1246-1247.) Thus, while a motion to vacate an attorney fee order may extend the time to appeal that order, it does *not* extend the time to appeal from the underlying judgment. The order granting the anti-SLAPP motion and judgment dismissing the complaint in its entirety was final when made and thus appealable at that time. (*Ibid.*)

Grinberg's notice of appeal served a year after notice of entry of the judgment appealed from was untimely. "If a notice of appeal is filed late, the reviewing court must dismiss the appeal." (Rule 8.104(b).) The time for appealing a judgment is jurisdictional, and once the deadline expires, this court has no power to entertain the appeal. (See *Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 56.) Accordingly, we dismiss the appeal from the judgment. We therefore do not consider any of the issues raised on appeal as to the anti-SLAPP motion and judgment.

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[2] All further references to rules are to the California Rules of Court.

II. The Appeal From the Order Granting Attorney Fees Is Untimely

Under rule 8.108(c), the time for filing a notice of appeal from a judgment or appealable order may be extended by the timely filing of a motion to vacate the judgment or order. Rule 8.108(c) provides: "If, within the time prescribed by rule 8.104 to appeal from the judgment [or appealable order], any party serves and files a valid notice of intention to move—or a valid motion—to vacate the judgment [or appealable order], the time to appeal from the judgment [or appealable order] is extended for all parties until the earliest of: [¶] (1) 30 days after the superior court clerk or a party serves an order denying the motion or a notice of entry of that order; [¶] (2) 90 days after the first notice of intention to move—or motion—is filed; or [¶] (3) 180 days after entry of judgment [or appealable order]." "A motion to set aside a judgment under section 473 qualifies as such a motion for purposes of extending the time to file a notice of appeal under rule 3(b) [the predecessor to rule 8.108(c)]." (See *In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 108.)

Grinberg timely filed a motion to vacate the attorney fee order on August 16, 2012, within 180 days of the entry of that order.[3] Therefore, under rule 8.108(c), the time to appeal from the attorney fee order was extended to *the earliest of*: (1) 30 days after the clerk or a party served an order denying the motion to vacate (none was apparently served here); (2) 90 days after the motion to vacate was filed (Nov. 14, 2012); or (3) 180 days after entry of the attorney fee order (Sep. 16, 2012). In other words, because rule 8.108 dictates that the earliest date applies, the notice of appeal was extended to September 16, 2012.[4] Because the notice of appeal was not filed until December 19, 2012, it was untimely as to the attorney fee order. For this reason, we have no

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[3] Because neither the clerk nor any party served notice of the ruling on the attorney fee motion, Grinberg had 180 days to appeal the order under rule 8.104(a)(1)(C).

[4] Arguably, because the trial court directed the preparation of an amended judgment, the time to appeal may have run from entry of that amended judgment on May 8, 2012. (Rule 8.104(c).) Even if that were the case, however, the time to appeal would have run by November 4, 2012, more than a month before the notice of appeal was filed.

jurisdiction to review the trial court's order granting attorney fees and must dismiss the appeal insofar as it purports to seek review of that order.

III. The Motion to Vacate the Attorney Fee Award Was Properly Denied

Having determined that the appeal from the judgment and attorney fee order were untimely, we now turn to the only part of Grinberg's appeal that is timely, i.e., the appeal from the trial court's denial of the motion to vacate.[5]

A. Applicable Law

"Section 473, subdivision (b), permits a party or the party's legal representative to be relieved from the consequences of a dismissal entered as a result of mistake, inadvertence, surprise, or neglect. Two aspects of subdivision (b) achieve this end. First, it provides for discretionary relief; it states 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.' A grant of relief under this provision is a matter of trial court discretion. (*J.A.T. Entertainment, Inc. v. Reed* (1998) 62 Cal.App.4th 1485, 1491.)

"Subdivision (b) of section 473 also includes an 'attorney affidavit,' or 'mandatory,' provision. It states in pertinent part: 'Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is [timely], is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise or neglect, vacate any . . . (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.' Under the 'mandatory' provision of section 473, subdivision (b), 'a party is relieved from the consequences of his or her attorney's mistake, inadvertence,

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[5] The minute order denying the motion to vacate was entered on November 9, 2012, and Grinberg filed a notice of appeal on December 19, 2012, within the 60 days permitted by rule 8.104.

surprise, or neglect and relief is available regardless of whether the attorney's neglect is excusable.' (*J.A.T. Entertainment, Inc. v. Reed*, *supra*, 62 Cal.App.4th at p. 1492.)" (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 608.)

"'"While a denial of a motion to set aside a previous judgment is generally not an appealable order, in cases where the law makes express provision for a motion to vacate such as under Code of Civil Procedure section 473, an order denying such a motion is regarded as a special order made after final judgment and is appealable under Code of Civil Procedure section 904.1, subdivision [(a)(2)]."' [Citation.]" (*Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 1004, 1008.)

B. Mandatory Relief Was Not Available

The trial court denied the motion to vacate, in part, on the basis that the mandatory relief provision of section 473, subdivision (b) applies only to defaults, default judgments, and dismissals—*not* to motions such as the motion for attorney fees at issue here. Grinberg argues on appeal that the trial court erred in that regard, and that the mandatory relief provision of section 473, subdivision (b) applies to the present case. Because this issue is a pure question of law, we review it de novo. (E.g., *Carmel, Ltd. v. Tavoussi* (2009) 175 Cal.App.4th 393, 399 ["to the extent that the applicability of the mandatory relief provision does not turn on disputed facts, but rather, presents a pure question of law, it is subject to de novo review"].)

As summarized by the court in *Matera v. McLeod* (2006) 145 Cal.App.4th 44 at page 64: "Courts have differed as to whether a defendant who does not suffer a default judgment can be entitled to mandatory relief under section 473, subdivision (b). Some courts have held that the provision for mandatory relief applies when a defendant suffers a judgment as a result of circumstances that are deemed analogous to a default or the procedural equivalent of a default, even if there is no actual default, default judgment, or dismissal. (*In re Marriage of Hock & Gordon-Hock* (2000) 80 Cal.App.4th 1438, 1444 [held that the appellant was entitled to mandatory relief from a judgment on spousal support and the division of property entered after a trial in which the appellant failed to

appear]; *Yeap v. Leake* (1997) 60 Cal.App.4th 591, 601 [held that the plaintiff was entitled to mandatory relief from a judgment on an arbitration award entered after the plaintiff failed to appear in the arbitration]; *Avila v. Chua* (1997) 57 Cal.App.4th 860, 868 [held that the plaintiff was entitled to mandatory relief from a summary judgment granted by the court after striking the plaintiff's untimely opposition].) Other courts have rejected that reasoning and held that the provision for mandatory relief does not apply absent an actual default, default judgment, or dismissal. (*Vandermoon v. Sanwong* (2006) 142 Cal.App.4th 315, 321 [held that the mandatory relief provision did not apply to a judgment entered after the defendants failed to appear at trial]; *Prieto v. Loyola Marymount University* [(2005)] 132 Cal.App.4th [290,] 295 [held that the mandatory relief provision did not apply to a summary judgment]; *English v. IKON Business Solutions, Inc.* [(2001)] 94 Cal.App.4th [130,] 144, 148-149 [same].)"

We find more persuasive the cases that interpret the mandatory provision according to its statutory terms. "[F]or purposes of the mandatory provision of section 473[, subdivision] (b), a 'default' means only a defendant's failure to answer a complaint, and a 'default judgment' means only a judgment entered after the defendant has failed to answer and the defendant's default has been entered. (*English v. IKON*, *supra*, 94 Cal.App.4th at p. 143.)" (*Vandermoon v. Sanwong*, *supra*, 142 Cal.App.4th at p. 321.) As did the court in *Vandermoon*, we conclude that, "Given our prior holdings, and consistent with the Legislature's choice to limit the circumstances in which a court must grant relief under section 473[, subdivision] (b) based on an attorney's neglect, the trial court did not err in finding that, because the amended judgment was neither a default nor a default judgment for purposes of section 473[, subdivision] (b), the mandatory provision of that section does not apply." (*Ibid*.; accord, *Hossain v. Hossain* (2007) 157 Cal.App.4th 454, 456, 458; *Noceti v. Whorton* (2014) 224 Cal.App.4th 1062, 1067.) Accordingly, Grinberg was not entitled to mandatory relief because he did not seek relief from a default or default judgment.

C. Discretionary Relief Was Not Warranted

The trial court's tentative ruling (apparently later adopted as its final ruling)[6] stated that there was a factual dispute as to whether Grinberg's counsel was notified by telephone of the pending motion for attorney fees. The court indicated it was "inclined to give plaintiffs' counsel's statements credence for purposes of this motion." The trial court noted, however, that a motion to vacate pursuant to section 473 must be made "'"within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken. . . ."' (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 258 (quoting Code of Civil Procedure 473, subd. (b)).) It has been held to be an abuse of discretion to grant relief under Code of Civil Procedure Section 473 where there is unexplained delay of over three months before moving for relief. (*Huh v. Wang* (2008) 158 Cal.App.4th 1406, 1421 n. 4.)" The court concluded that "[t]his motion was filed five months after the court's order granting defendants attorney fees. No satisfactory explanation for the delay has been provided. Counsel merely states he has been diligent. He has not provided the date he learned of the order, or how he learned of the order. Discretionary relief is not available."

We review the trial court's factual finding for abuse of discretion. (E.g., *Hopkins & Carley v. Gens* (2011) 200 Cal.App.4th 1401, 1410; *Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1200.) On appeal, Grinberg argues that the court believed Fischer's representation that he had not received service or notice of the motion or the notice of nonopposition, yet abused its discretion by failing to find a satisfactory explanation for the delay. However, Grinberg mischaracterizes the court's findings; the court merely credited for purposes of the motion Fischer's representation that he was not "notified of

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6 The court heard argument on the motion to vacate on September 28, 2012, and issued a written tentative ruling on that date, which is included in the record on appeal. At that time, the court requested supplemental briefing regarding whether the mandatory relief provision of section 473 is available to vacate the ruling on a motion rather than a true default judgment. The record on appeal does not contain an additional tentative ruling for the continued hearing date of November 9, 2012, and it therefore appears the tentative ruling referred to in the minute order denying the motion to vacate is the one from September 28, 2012.

the pending motion by telephone." Indeed, the court had before it a letter from Fischer dated April 19, 2012, submitted by Kalili in support of the opposition to the motion to vacate, in which Fischer stated he had "just received" the notice of nonopposition (served on Mar. 13, 2012) but had never received the motion for attorney fees. Fischer also stated his intention to file a motion to set aside the judgment awarding attorney fees and costs. Thus, Fischer knew of the motion at least as early as April 19, 2012—and in all likelihood knew of it not long after the service date of the notice of nonopposition—and stated that he intended to file a motion to set aside the award of attorney fees. The trial court did not abuse its discretion in finding that Fischer had not provided any explanation for the five-month delay in filing the motion to vacate, and that such a delay was unreasonable under the circumstances. Nor did Fischer explain, for that matter, his failure to follow up on the motion upon receiving the notice of nonopposition.

Apparently ignoring the Fischer letter of April 19, 2012, Grinberg asserts that the trial court's finding that he delayed five months before bringing the motion to vacate was flawed. Rather than dating the delay beginning with the notice of nonopposition served on March 13, he would have us consider the date of entry of the amended judgment, May 8, as the date the clock started running. We decline to adopt this reasoning, as it is clear the trial court had before it evidence, which we presume it credited, that Fischer was aware of the motion for attorney fees as a result of his receipt of the notice of nonopposition, in no event later than April 19, 2012.

In short, we find the trial court did not abuse its discretion in concluding the lengthy delay in bringing the motion to vacate was unreasonable and that the lack of diligence foreclosed the availability of discretionary relief. A party seeking relief under section 473 must demonstrate diligence, and Grinberg failed to do so here. (*Zamora v. Clayborn Contracting Group, Inc.*, *supra*, 28 Cal.4th 249, 258, citing *Benjamin v. Dalmo Mfg. Co.* (1948) 31 Cal.2d 523, 527-528.)

DISPOSITION

The appeal is dismissed as to the judgment and order granting attorney fees. The order denying the motion to vacate the order granting attorney fees is affirmed. Costs on appeal are awarded to Kalili and Young.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, J.*

We concur:

EPSTEIN, P. J.

WILLHITE, J.

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