Filed 6/11/15 Moghadam v. Chalon Road Associates CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

BAHMAN HARIRI MOGHADAM, as Trustee, etc., Plaintiff and Appellant, v. CHALON ROAD ASSOCIATES, LLC, Defendant, Cross-complainant and Respondent; GEORGE HARIRI MOGHADAM, Cross-defendant and Respondent.	B250879 (Los Angeles County Super. Ct. No. SC114933)

APPEAL from an order and a judgment of the Superior Court of Los Angeles County, Gerald Rosenberg, Judge. Reversed.

Law Offices of Robert E. Canny and Robert E. Canny for Plaintiff and Appellant.

Freedman + Taitelman, Michael A. Taitelman and Bradley H. Kreshek for Defendant, Cross-Complainant and Respondent Chalon Road Associates.

A plaintiff appeals from an order dismissing its action and from a default judgment entered against a cross-defendant. Defendant and respondent Chalon Road Associates, LLC (CRA) asserts the appeal must be dismissed because it is untimely and the plaintiff lacks standing to appeal from a default judgment entered against another party. CRA also argues the dismissal and default judgment must be affirmed because the affidavit of fault submitted in support of a motion to vacate the dismissal and judgment failed to satisfy the requirements for mandatory relief under Code of Civil Procedure section 473, subdivision (b).[1] We conclude the trial court erred in denying relief under section 473, subdivision (b), and reverse.

PROCEDURAL AND FACTUAL BACKGROUND

This action involves a dispute between plaintiff and appellant Bahman Hariri Moghadam, Trustee of the 808 Ashland Living Trust (Trust), and CRA over their interests in contiguous parcels of real property in Santa Monica (the property). CRA also filed a cross-action for breach of contract against cross-defendant George Hariri Moghadam (George, who is not a party to this appeal).

According to the allegations of the operative first amended complaint (FAC), in May 2006 the Trust obtained a loan for approximately $1.6 million from Lone Oak Fund, LLC to purchase the property. The Trust executed a promissory note for the principal sum, plus annual interest of 9.9 percent, and a subsequently recorded deed of trust securing that note and encumbering the property. In November 2008, Lone Oak's deed of trust was assigned to CRA.

In February 2009, CRA, assignee of the deed of trust on the property, commenced nonjudicial foreclosure proceedings against the Trust, recording a notice of default and election to sell under deed of trust. In July 2009, George, the Trust's representative, negotiated a forbearance agreement. The Trust alleges that it and George were led to

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

believe the Trust's loan remained subject to the initial 9.9 percent annual interest rate (rather than a new default interest rate of 19 percent per year initially demanded by CRA), and that CRA had rescinded the foreclosure proceeding. In July 2011, in response to George's request for the loan balance and pay-off amount, CRA informed him that approximately $508,000 in interest was due (calculated based on an interest rate of 19 percent), for a total pay-off of approximately $2.3 million. The Trust alleged this amount was grossly inflated and based on an improper 19 percent default interest rate and that, at most, it owed CRA $1.77 million. CRA proceeded with foreclosure, acquiring the property at a trustee's sale in November 2011 for a credit bid of approximately $1.7 million.

The Trust initiated this action against CRA in November 2011. The FAC alleges nine causes of action against CRA for: (1) breach of contract; (2) intentional misrepresentation; (3) negligent misrepresentation; (4) unfair business practices; (5) declaratory relief; (6) an action to set aside wrongful foreclosure; (7) damages for wrongful foreclosure; (8) quiet title; and (9) intentional infliction of emotional distress.

On March 2, 2012, CRA filed a cross-complaint against George, as an individual, for breach of the July 2009 forbearance agreement. The Trust was not named as a party to the cross-complaint.

In October 2012, counsel for CRA served written discovery on both the Trust and George. After neither responded or produced discovery, CRA filed a successful motion to compel. On February 19, 2013, the trial court ordered the Trust and George to, among other things, provide responsive discovery. Neither the Trust or George complied with that order.

George answered CRA's cross-complaint on April 5, 2013.

On April 8, 2013, CRA moved for terminating, monetary and/or other sanctions due to continued failure of the Trust and George to comply with the court's February 2013 order to provide discovery responses. That motion, unopposed by the Trust or by George, was granted on June 4, 2013. The court dismissed the FAC, and struck George's answer to the cross-complaint. That same day, CRA served and filed a Notice of Ruling.

On June 20, 2013, the trial court entered George's default. A default prove-up hearing on the cross-complaint was conducted on June 24, 2013.

On June 24, 2013, represented by their current counsel, Robert E. Canny,[2] the Trust and George filed an "Ex Parte Motion for Order Vacating Court's Order of 06-04-2013" (Ex Parte). In support of the Ex Parte, Canny submitted a declaration in which he stated he was a sole practitioner, and had undertaken the representation of the Trust and George in "late 2012" after CRA propounded discovery. After learning of the outstanding discovery Canny scanned "all of the discovery" data into his computer which subsequently "crashed," causing him to lose it all and he then spent several months trying to recover the data. He said he was prepared to provide his clients' discovery responses within 30 days. Canny also informed the court that he devoted up to four hours per day to caring for his disabled spouse, and had been without office assistance "until the last several months." In conclusion, Canny "admit[ted he was] at fault, albeit not willfully, in the failure of the Plaintiff [sic] to comply with discovery and accept[ed] responsibility for this failure." The trial court heard, but denied the Ex Parte on June 24, and scheduled a hearing on a noticed motion to vacate for July 30, 2013.[3]

The court then proceeded with the default prove-up hearing, and ordered that a default judgment be entered against George.

On July 9, 2013, Canny filed a "Motion for Order Vacating Court's Order of 06-04-2013 and the Default Judgment of June 24, 2013" (Motion to Vacate). In contrast with the earlier Ex Parte seeking the same relief, the Motion was not accompanied by an attorney's affidavit of fault. Instead, Canny submitted a lengthy declaration criticizing

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[2] Although he filed requests in May and June 2012 to specially appear on George's behalf to quash service, Canny does not appear to have undertaken representation of the Trust or George until about September 2012, after the court granted a request by the Trust's prior attorneys to be relieved as counsel on July 31, 2012.

[3] The record does not reflect the court's reasons for denying the Ex Parte, although we note that CRA opposed that application on the ground that a noticed motion was required to obtain the requested relief.

the conduct of and representations made by CRA's witness at the default prove-up hearing.

Default judgment in favor of CRA on the cross-complaint was entered on July 12, 2013.

The Trust's and George's Motion to Vacate was argued and denied on July 30, 2013.

On August 19, 2013, the Trust filed a Notice of Appeal from "the judgment or order . . . entered on . . . June 4th, 2013," and "Default Judgment."

DISCUSSION

1. The Trust's appeal from the order dismissing the FAC is timely

CRA's motion seeking (in relevant part) terminating sanctions, was granted on June 4, 2013. The FAC was dismissed and George's answer to CRA's cross-complaint was stricken. Although CRA's counsel filed and served a notice of ruling stating the court had granted the motion for terminating sanctions on June 4, 2013, there was, in fact, no formal order granting that motion entered on that date.

Following the default prove-up hearing on June 24, 2013, judgment on the cross-complaint was granted in favor of CRA and against George. CRA was ordered to and did prepare a judgment after entry of default as against George, which the court entered on July 12, 2013.

On August 19, 2103, the Trust alone filed a notice of appeal from the June 4, 2013 "Default Judgment." The Trust's notice of appeal plainly is intended to cover the trial court's order dismissing the FAC, striking the answer to the cross-complaint, and subsequent entry of a default judgment against George on July 12, 2013. (See Cal. Rules of Court, rule 8.100(a)(2) ["notice of appeal must be liberally construed"].) Nonetheless, CRA argues the appeal is not timely because it was not filed within 60 days of the court's June 4, 2013 decision dismissing the FAC and striking the answer to the cross-complaint. We reject CRA's assertion.

The June 4, 2013 "Notice of Ruling" informing the Trust that the court had dismissed its action against CRA is not entitled "Notice of Entry" of order (that language

never appears in the mailing), nor is it file-stamped as required under California Rules of Court, rule 8.104(a). As such, it is insufficient to trigger the 60-day period to file a notice of appeal. (See *Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894, 905 ["we conclude that rule 8.104(a)(1) does indeed require a single document—either a 'Notice of Entry' so entitled or a file-stamped copy of the judgment or appealable order—that is sufficient in itself to satisfy all of the rule's conditions"]; *Sadler v. Turner* (1986) 186 Cal.App.3d 245, 248 ["notice of ruling . . . is not a '"written notice of entry of judgment" that would start the 60-day period running'"]; *Call v. Los Angeles County Gen. Hosp*. (1978) 77 Cal.App.3d 911, 915 [same].) Thus, the Trust had 180 days to file its notice of appeal; its August 19, 2013 notice fell within this period.

2. The Trust has standing to appeal the default judgment entered against George on the cross-complaint

CRA argues that the Trust lacks standing to appeal from the default judgment entered against George on the cross-complaint because it was not a party to that action. Again, we disagree.

"'Standing to appeal is jurisdictional [citation] and the issue of whether a party has standing is a question of law [citation].' [Citation.] To have standing on appeal, a person generally must be a party of record and sufficiently aggrieved by the judgment or order. (Code Civ. Proc., § 902; *County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 736–737 [*Carleson*].)" (*Bridgeman v. Allen* (2013) 219 Cal.App.4th 288, 292.) To be sufficiently aggrieved by the judgment or order, appellant's rights or interests must be injuriously affected in an "'"immediate, pecuniary, and substantial"'" way, as opposed to being a "'"nominal or a remote consequence"'" of the judgment or order. (*Carleson*, at pp. 736–737; accord, *Ajida Technologies, Inc. v. Roos Instruments, Inc.* (2001) 87 Cal.App.4th 534, 540; see *United Investors Life Ins. Co. v. Waddell & Reed, Inc.* (2005) 125 Cal.App.4th 1300, 1304.) The rules of appellate standing are liberally construed, and any doubts are resolved in favor of the right to appeal. (*In re Matthew C*. (1993) 6 Cal.4th 386, 394; *Ajida Technologies, Inc.*, at p. 540.)

Generally, only parties of record may appeal. (*Carleson*, *supra*, 5 Cal.3d at p. 736; *Stanley v. Robert S. Odell and Co*. (1950) 97 Cal.App.2d 521, 523 [defendants who were not parties to the cross-complaint had no standing to appeal from the judgment on that complaint].) The Trust is not a named party to CRA's cross-action. However, a nonparty has standing to appeal a judgment or order to which the nonparty is bound under the doctrine of res judicata. (*Marsh v. Mountain Zephyr, Inc*. (1996) 43 Cal.App.4th 289, 295.) That doctrine prevents persons and their privies from relitigating in a subsequent proceeding claims that were or should have been adjudicated in a prior proceeding. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.)

The doctrine of res judicata may be applied based upon a prior default judgment. (*Four Star Electric, Inc. v. F & H Construction* (1992) 7 Cal.App.4th 1375, 1380.) "[A] default judgment conclusively establishes, between the parties so far as subsequent proceedings on a different cause of action are concerned, the truth of all material allegations contained in the complaint in the first action, and every fact necessary to uphold the default judgment . . . ." (*Mitchell v. Jones* (1959) 172 Cal.App.2d 580, 586–587; see *Freeze v. Salot* (1954) 122 Cal.App.2d 561, 566 ["[a] judgment by default is a complete adjudication of all the rights of the parties embraced in the prayer of the complaint"].)

Under these standards, the Trust is an aggrieved party entitled to prosecute this appeal. Although it is not a named party to CRA's cross-action, the July 2009 forbearance agreement on which CRA's claim for breach of contract is predicated, appears to have been executed, not by George Moghadam, as alleged in the cross complaint, but by Bahman Hariri Moghadam, as Trustee.[4] The validity of the forbearance agreement, and CRA's alleged misconduct in connection with the negotiation and performance of that agreement, are the principal issues matters at issue in

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[4] According to George's answer to the cross-complaint, he and the trustee, Bahman Hariri Moghadam, are brothers.

the FAC. The default judgment on the contract claim in the cross-complaint against George deprived the Trust of the ability to dispute the validity of the forbearance agreement. The Trust is not merely a third party with an inchoate interest in the property or proceedings. On the contrary, the Trust's standing to appeal rests on the forbearance agreement with CRA (to which the Trust appears to be a signatory), and the parties' respective obligations under that agreement. The Trust's loss of the ability to attack that agreement was substantial and pecuniary, not merely a nominal or remote consequence of the trial court's order. By virtue of its motion to vacate, the Trust, a nonparty to the cross-action injuriously affected by a judgment in that action, became a party of record and gained standing to appeal from that judgment. (*Carleson, supra*, 5 Cal.3d at pp. 736–737; *Tomassi v. Scarff* (2000) 85 Cal.App.4th 1053, 1057 ["aggrieved party" under section 663 is anyone, party or nonparty, whose "'interests are injuriously affected by the judgment,'" where those interests are "'"'immediate, pecuniary, and substantial, not nominal or remote consequence of the judgment'"'"].)

3. The court erred in denying the motion to vacate.

On July 9, 2013, the Trust moved to vacate the order dismissing the FAC and subsequent default judgment. The Trust contends the trial court erroneously denied that motion because relief from those rulings was required under section 473, subdivision (b)), based on its attorney's affidavit of fault.

Section 473, subdivision (b) mandates relief from a dismissal or judgment of default where the movant's request is supported by "an attorney's sworn affidavit attesting to his . . . mistake, inadvertence, surprise, or neglect . . . unless the court finds that the default . . . was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." (§ 473, subd. (b).) The range of attorney conduct for which relief is available in the mandatory provision is broad, and includes inexcusable neglect. (*Leader v. Health Industries of America, Inc*. (2001) 89 Cal.App.4th 603, 616.) The provisions of section 473 are liberally construed. (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 256.) "'It is well settled that appellate courts have always been and are favorably disposed toward such action upon the part of the trial courts as will permit,

rather than prevent, the adjudication of legal controversies upon their merits.'" (*Id*. at pp. 255–256.) The purpose of the relief available under section 473, subdivision (b) is "'to alleviate the hardship on parties who lose their day in court due solely to an inexcusable failure to act on the part of their attorneys.'" (*Id*. at p. 257, italics omitted.) There is no exception to the affidavit of fault requirement under section 473, subdivision (b). However, if the requirements of that provision are met, relief is mandatory. (*Lang v. Hochman* (2000) 77 Cal.App.4th 1225, 1248.)

Here, CRA opposed the motion to vacate based on repeated failures by the Trust and George to respond to discovery, and their failure to submit the sworn affidavit of fault required by section 473, subdivision (b). The record does not contain a reporter's transcript or order reflecting the trial court's reasons for denying the motion to vacate.

In the memorandum of points and authorities submitted in support of the motion to vacate, Canny argued the dismissal and default should be vacated because he was at "fault" for his clients' failure to comply with the trial court's discovery order. However, Canny's July 8, 2013 sworn declaration submitted in support of that motion contains no such admission. In his six-page declaration, Canny fails to explain his clients' failure to comply with the order to produce discovery and, more importantly, fails to acknowledge under penalty of perjury that such noncompliance was his fault. The declaration is not a sworn admission of fault, but is devoted to criticizing the conduct and questioning the integrity of CRA's principal witness at the default prove-up hearing. Canny's declaration did not go to the dismissal of the FAC or entry of the default judgment, and nowhere in the affidavit does he attest to his own mistake, inadvertence, surprise, or neglect. Accordingly, the July 8, 2013 declaration is not a satisfactory sworn attorney affidavit for purposes of the mandatory relief provision in section 473, subdivision (b). Nevertheless, the declaration Canny submitted in support of the Trust's Ex Parte seeking the same relief as the subsequent motion to vacate, does contain Canny's necessary admission that his error resulted in the default. An admission by the attorney that his or her error resulted in the dismissal or default is indispensable to relief under the mandatory provision of section 473, subdivision (b). (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90

Cal.App.4th 600, 609 [affidavit must contain a straightforward admission of fault by the attorney].) We recognize that the Ex Parte was denied and that Canny did not specifically request that the court take judicial notice of or consider his earlier declaration in support of that application in conjunction with the motion to vacate. (Evid. Code § 452, subd. (d).) By Court order, the motion to vacate was filed immediately on the heels and in the stead of the Ex Parte, and sought identical relief. Further, there is no evidence that the trial court found Canny's initial explanation not credible. (See *Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, 915 [trial court may deny motion if it finds the attorney's declaration of fault is not credible].) Rather, it appears the Ex Parte was denied solely in order to permit the parties to address the issue by way of a noticed motion.

Under the circumstances, we conclude that equity required that the Ex Parte and motion, and their supporting declarations, be considered together. The purpose of the "attorney fault" provision of section 473, subdivision (b) is threefold: It aims "to relieve the innocent client of the consequences of the attorney fault, to place the burden on counsel, and to discourage additional litigation in the form of malpractice actions by the defaulted client against the errant attorney." (40A Cal.Jur.3d (2014) Judgments, § 279, citing *Carmel, Ltd. v. Tavoussi* (2009) 175 Cal.App.4th 393, and *Matera v. McLeod* (2006) 145 Cal.App.4th 44.) Where attorney neglect or mistake is adequately shown, relief under section 473, subdivision (b) is mandatory, even if the attorney's neglect was inexcusable. (See *SJP Ltd. Partnership v. City of Los Angeles* (2006) 136 Cal.App.4th 511, 516–517.)

In sum, section 473, subdivision (b) is intended to alleviate "the hardship on parties who lose their day in court due solely to an inexcusable failure to act on the part of their attorneys." (40A Cal.Jur.3d, *supra*, Judgments, § 279, citing *Henderson v. Pacific Gas and Elec. Co*. (2010) 187 Cal.App.4th 215, and *Carmel, Ltd. v. Tavoussi*, *supra*, 175 Cal.App.4th 393.) Further, where the party in default moves promptly to seek relief under the statute authorizing relief from default and default judgment, and the party opposing the motion will not suffer prejudice if relief is granted, very slight evidence is

required to justify a court in setting aside the default. (*Murray & Murray v. Raissi Real Estate Development, LLC* (2015) 233 Cal.App.4th 379, 385; § 473.) Here, no showing was made that the Trust itself (as opposed to its counsel) was at fault, and CRA does not argue it will suffer prejudice if the Trust is granted relief under section 473, subdivision (b).

Considered collectively and in light of the principles discussed above, Canny's declarations in support of the Trust's Ex Parte and its motion to vacate were sufficient to bring the Trust's request for relief within the mandatory relief provision of the statute. On this record, we conclude that the trial court erred by denying the Trust's motion for relief under section 473.

DISPOSITION

The order denying Bahman Hariri Moghadam, Trustee of the 808 Ashland Living Trust's "Motion for Order Vacating Court's Order of 06-04-2013 and the Default Judgment of June 24, 2013" is reversed. Bahman Hariri Moghadam shall recover costs on appeal. The matter is remanded to the trial court with directions to grant the Bahman Hariri Moghadam, Trustee of the 808 Ashland Living Trust's Code of Civil Procedure section 473, subdivision (b) motion.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.