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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

BROSEPH'S RESTAURANT GROUP, LLC, et al., Plaintiffs and Respondents, v. FORMOSA CAFÉ, INC., et al., Defendants and Appellants.	B283003 (Los Angeles County Super. Ct. No. BC612082)

APPEAL from a judgment of the Superior Court of Los Angeles County, Barbara M. Scheper, Judge. Affirmed.

Law Offices of Elkanah J. Burns and Elkanah J. Burns for Defendants and Appellants.

Kramer Holcomb Sheik, Shahrokh Sheik and Tammy Wu for Plaintiffs and Respondents

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Defendants Formosa Café, Inc., and Vincent Jung appeal from the default judgment entered in favor of plaintiffs Broseph's Restaurant Group, LLC, Travis Lester, and Justin Safier. Defendants contend that the trial court erred in declining to set aside their default under Code of Civil Procedure section 473, subdivision (b).[1] We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The parties entered into an agreement for plaintiffs to acquire a substantial ownership interest in, and the exclusive management of, the Formosa Café, Inc. Believing that plaintiffs failed to meet their obligations under the agreement, defendants sought to renegotiate its terms. This lawsuit ensued.

Plaintiffs' complaint against defendants sought damages for claims including breach of contract, fraud, and unfair business practices. Plaintiffs served their operative complaint on Formosa Café and Jung, on April 25, 2016, and May 4, 2016, respectively.

To settle the lawsuit, the parties negotiated a memorandum of understanding (MOU) providing for completion of plaintiffs' purchase of the restaurant's assets, including its lease. They signed the MOU at the end of May 2016.

Paragraph 4 of the MOU entitled "Pending Lawsuit" provided, "Upon execution of [the MOU], Plaintiffs and Defendants agree that the due date for Defendants' responsive pleadings is stayed. *If this Agreement is terminated, Defendants shall have ten (10) business days after termination to file their responsive pleadings*." (Italics added.) Otherwise, plaintiffs

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

agreed to withdraw the lawsuit once the asset purchase agreement was completed.

While securing the lease's assignment, plaintiffs discovered that defendants were in default on the lease and that Jung had contracted with the landlord to market the property to others, in what plaintiffs believed was a breach of the MOU. On July 28, 2016, plaintiffs' attorney emailed defendant Jung that plaintiffs were terminating the MOU. In that email, counsel reminded Jung of the dates of the complaint's service, and advised defendants that they "are hereby required to file your Answer on or before two weeks from today on August 11, 2016."

No answer was filed and so the trial court entered defendants' default on September 9, 2016. The court also enjoined defendants from transferring or encumbering right, title, or interest in the Formosa Café.

Defendants filed the instant motion under section 473, subdivision (b) to set aside entry of default on October 17, 2016. The supporting declaration was that of Jung, who did not claim to be an attorney. Jung stated that he had retained Attorney Bernard Lee to negotiate the MOU. Attorney Lee's association with defendants ended in July 2016. Jung declared he believed that a formal settlement agreement would be facilitated. Jung declared, "It was my honest, if mistaken, belief that Mr. Lee had advised me that I had taken all necessary actions in the defense of this action. I was not aware that we had to file an answer to the First Amended Complaint. [¶] At the court hearing on September 20, 2016, I first became aware of the necessity of filing an answer and was advised by Court that I should engage legal counsel . . . [t]o have the Entry of Default Set Aside and to file an Answer."

Plaintiffs' opposition, describing the chronology of events, was supported by the declaration of their attorney Shahrokh Sheik. The opposition clarified that when plaintiffs terminated the MOU, they reminded defendants of the MOU's provision for filing the answer by email sent to the same address they had been using to correspond with Jung. Plaintiffs argued that defendants' failure to file an answer was not excusable neglect or mistake, but intentional, and that plaintiffs would be irreparably prejudiced if the trial court granted defendants' section 473 motion because plaintiffs had been denied access to the property for over a year, during which time the assets had been depreciating.

The trial court entered judgment in the amount of $749,891.84 in favor of plaintiffs and against defendants jointly and severally, and vacated the order to show cause. Defendants' notice of appeal ensued.

DISCUSSION

Motions for relief from default under section 473 are "reviewed under the abuse of discretion standard, and an appellate court will reverse only upon ' " 'a clear case of abuse' " ' and ' " 'a miscarriage of justice.' " ' " (*Grappo v. McMills* (2017) 11 Cal.App.5th 996, 1006; *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981.) An abuse of discretion occurs when, in light of the applicable law and considering all of the relevant circumstances, the court's decision exceeds the bounds of reason and results in a miscarriage of justice. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478–479; *Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1415.) "To succeed, [defendants] must demonstrate that the ruling was arbitrary, capricious, whimsical, or exceeded the bounds of reason." (*Dreamweaver Andalusians, LLC v. Prudential Ins. Co.*

of America (2015) 234 Cal.App.4th 1168, 1171.) Under this standard, defendants have a " 'daunting task.' " (*Ibid.*)

We infer from the record, which does not contain any express findings, that the trial court concluded that defendants failed to establish entitlement to relief.[2] (*Generale Bank Nederland v. Eyes of the Beholder Ltd*. (1998) 61 Cal.App.4th 1384, 1399.)

Section 473, subdivision (b) provides for both discretionary and mandatory relief from dismissals, entries of default, and default judgments. The mandatory provision is premised on the submission of an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, and a showing that the attorney's mistake, inadvertence, surprise or neglect in fact caused the dismissal or entry of default. (§ 473, subd. (b); *Benedict v. Danner Press* (2001) 87 Cal.App.4th 923, 927.) The Legislature's purpose in enacting the mandatory provision was " ' " '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.' " ' " (*Ibid.*) We affirm the trial court's finding whether attorney conduct or inaction caused the dismissal or entry of default for substantial evidence. (*Id.* at p. 928.)

Here, defendants did not submit an affidavit of their counsel attesting to his fault. Rather, defendants' motion was premised on the declaration of Jung, who did not claim to be an

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[2] The record does not contain the trial court's ruling on defendants' section 473 motion or the default judgment and so arguably defendants have not provided us with an adequate record for review. Nevertheless, we will address the merits of defendants' appeal.

attorney. Jung declared that Attorney Lee's association with defendants ended in July 2016—two months *before* default was entered. Defendants only retained a second attorney in October 2016—a month *after* their default was entered. Therefore, defendants provided no evidence that their "default . . . was . . . in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." (§ 473, subd. (b).) Defendants were not entitled to application of the mandatory provision of section 473, subdivision (b).

The discretionary provision of section 473, subdivision (b) will apply when no attorney affidavit of fault is filed. That provision reads, "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." (§ 473, subd. (b).)

Under the discretionary provision, the moving party has the burden to show "that the neglect leading to default was *excusable*. 'Neither mistake, inadvertence, or neglect will warrant relief unless upon consideration of all the evidence it is found to be of the excusable variety. [Citations.] To entitle [a party] to relief the acts which brought about the default must have been the acts of a reasonably prudent person under the same circumstances.' " (*Jackson v. Bank of America* (1983) 141 Cal.App.3d 55, 58, italics added.)

" 'The "reasonably prudent person standard" . . . gives an attorney the benefit of such relief only where the mistake is one which might ordinarily be made by a person with no special training or skill. Obviously, an untrained person might be expected to make mistakes when performing the functions of an

attorney; the acknowledged desirability of professional legal training presumes this to be so.' " (*Generale Bank Nederland v. Eyes of the Beholder Ltd.*, *supra*, 61 Cal.App.4th at p. 1400.)

Jung's declaration explained that defendants' failure to answer the complaint was because "[i]t was my honest, if mistaken, belief that Mr. Lee had advised me that I had taken all necessary actions in the defense of this action. *I was not aware that we had to file an answer to the First Amended Complaint*. [¶] At the court hearing *on September 20, 2016, I first became aware of the necessity of filing an answer* and was advised by Court that I should engage legal counsel." (Italics added.)

Although we are to liberally apply section 473 and to more carefully scrutinize orders denying motions under that statute to afford relief from default so that disputes may be tried on their merits (*Rappleyea v. Campbell*, *supra*, 8 Cal.4th at p. 980), we discern nothing in defendants' motion to justify relief in this case. In July 2016, when Attorney Lee's association with defendants ended, the MOU had been signed and obviated any need to file an answer. Hence, Jung correctly understood that defendants "had taken all necessary actions in the defense of this action" as of that date. However, Jung's next statement that he *first* learned in September 2016 that he had to file an answer is belied by plaintiffs' counsel's earlier email setting out, with underlining emphasis, the exact date in August 2016 by which defendants' answer was due. Defendants did not explain why they failed to file the answer. The record reveals no excusable neglect or mistake, but simply a failure to act. The trial court reasonably concluded this was not the conduct of a reasonably prudent person under the same circumstances. (*Jackson v. Bank of America*, *supra*, 141 Cal.App.3d at p. 58.)

Defendants cite the policies favoring trial on the merits and disfavoring a party " ' "who, regardless of the merits of the case, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary." ' " (*Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 696.) Defendants argue that they promptly sought relief and plaintiffs made no showing of prejudice because the court has enjoined defendants from transferring the property, with the result that " ' "very slight evidence will be required to justify a court in setting aside the default." ' " (*Ibid.*) But, plaintiffs assert they would be prejudiced because the assets they have committed to purchasing are depreciating while this lawsuit is pending. The injunction does not halt the reduction in the assets' value.

Defendants argue that this is a borderline case. It is not. The denial of defendants' section 473 motion was reasonable and not arbitrary or capricious as defendants have not demonstrated excusable neglect or mistake. Meanwhile, plaintiffs would be prejudiced by the grant of defendants' motion.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

EDMON, P. J.

LAVIN, J.