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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

KREMLIN FILMS, Plaintiff and Respondent, v. SEVEN ARTS PICTURES, INC., Defendant and Appellant.	B250211 (Los Angeles County Super. Ct. No. SC117146)

APPEAL from orders of the Superior Court of Los Angeles County, Allan J. Goodman, Judge. Reversed with directions.

Peter Hoffman for Defendant and Appellant.

Hamrick & Evans, Martin J. Barab, A. Raymond Hamrick, James M. Pazos, Rebecca L. Worden and Douglas Lackey for Plaintiff and Respondent.

Respondent Kremlin Films, a British Virgin Islands corporation (Kremlin), entered into two contracts with appellant Seven Arts Pictures, Inc. (Seven Arts) regarding distribution and leasing rights to a motion picture and DVD entitled "Mirror Wars" (Picture). Kremlin filed a Second Amended Complaint (SAC) against Seven Arts for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, negligent misrepresentation and an accounting and Seven Arts filed a demurrer. Seven Arts appeals from the trial court's orders striking the pleadings filed in support of its demurrer, striking its motion to stay or dismiss entering default and denying its motion for relief from default. We reverse with directions.

FACTUAL & PROCEDURAL BACKGROUND

In February 2006, Kremlin and Seven Arts entered into a Distribution Agreement (DA) pursuant to which Kremlin granted Seven Arts the rights to distribute the Picture internationally and to lease the rights for specific territories. In turn, Seven Arts agreed to pay Kremlin a certain percentage of the monies it received from the leases and distribution of the Picture. In December 2006, Kremlin and Seven Arts entered into a Producer's Representation Agreement (PRA) relating to the DVD release of the Picture. The PRA provided that Seven Arts was to pay $50,000 to Kremlin upon the release of the DVD. Both the DA and the PRA required Seven Arts, inter alia, to obtain Kremlin's consent and approval to enter into leases and distribution agreements, to accept only a certain minimum amount for the leasing rights, to provide periodic statements to Kremlin reporting gross receipts and distribution fees, and to promptly pay amounts due to Kremlin as provided. Seven Arts sent periodic statements to Kremlin. In January 2012, Kremlin completed an audit of Seven Arts' books and records at its London offices. After the audit, Kremlin claimed Seven Arts had seriously underreported amounts due and failed to make payments pursuant to the DA and PRA and filed a lawsuit in May 2012.

Kremlin subsequently filed amended complaints. The SAC, filed in September 2012, alleged, inter alia, that Seven Arts entered into agreements with third parties for the distribution of the picture and the licensing of rights but did not pay Kremlin the proper

amount of money due, underreported the amount of money it received for distribution and licensing, failed to pay the $50,000 upon release of the DVD, failed to obtain the approval of Kremlin to accept lease offers from third parties, accepted offers for less than the amounts specified in the DA and overcharged Kremlin for distribution of the Picture.

Seven Arts filed a demurrer to the SAC. The demurrer contended all the causes of action in the SAC were barred due to (1) the statute of limitations and the limitations period contained in the DA and (2) Corporations Code section 2203, subdivision (c) which bars foreign corporations from maintaining actions against California residents arising from intrastate business unless the corporations are qualified to do business in California.

In support of the demurrer, Seven Arts submitted the declaration of Peter Hoffman, its attorney, which stated: (1) he was the President and Chief Executive Officer of Seven Arts, (2) he personally negotiated the DA and the PRA over the phone and directly with Oleg Kapanets, the "apparent owner" of Kremlin, and (3) the negotiations took place in Los Angeles with Kapanets, who had a residence in California.

Seven Arts also submitted a Request for Judicial Notice of (1) the DA, as amended December 18, 2006, (2) a document from the video distributor of the Picture, showing the "Street Date" or release date of the DVD, (3) the accounting statement given by Seven Arts to Kremlin on January 29, 2008, and (4) a printout of California Secretary of State's records showing that Kremlin's corporate status was "forfeited," its "jurisdiction" (Delaware) and name and address of its California agent for service of process.

The trial court struck the "moving brief" for the demurrer, took it off calendar and ordered Seven Arts to serve and file a proper response to the SAC by December 24, 2012. In its ruling, the trial court found the demurrer was improperly based on extrinsic evidence and it noted various procedural defects in the filing of the demurrer. The court admonished counsel: "The Code of Civil Procedure, the Rules of Court, and LASC Local Rules are in place for a reason—and the Court expects the parties to follow them, even if they disagree with them or do not feel the need to be 'inconvenienced' by them. In other

words, the Court expects all counsel to know the rules and to play by them. Counsel are not free to disregard established rules of procedure."

Seven Arts then filed a Motion to Stay or Dismiss the action on December 20, 2012. The motion was based on the same Corporations Code section 2203 argument raised in the demurrer, that is, Kremlin was barred from bringing the action because it was a foreign corporation transacting intrastate business.

Kremlin filed an opposition to the motion requesting the entry of Seven Arts' default.

On March 15, 2013, the trial court struck the Motion to Stay or Dismiss, stating: "Notwithstanding the [prior ruling], rather than filing a demurrer properly supported by a valid request for judicial notice, defense counsel (who is also [Seven Arts]' President and CEO), unreasonably filed the motion at bar, which is (once again) improperly based on his declaration and the matters contained therein which are not subject to judicial notice. The Court declines to permit defense counsel's continuing and inexcusable violations of basic rules of procedure." The court then ordered the entry of Seven Arts' default.

Seven Arts unsuccessfully attempted to file an Answer on March 19, 2013.

Seven Arts thereafter filed a Motion for Relief from Default, together with another declaration from Hoffman in which he stated he was the counsel of record for Seven Arts and made the decision to file the Motion to Stay or Dismiss "on my own." He stated: "I believed it was a proper responsive pleading under Code of Civil Procedure section 430.10(b) to raise the defense of Kremlin's legal incapacity to bring this action under Corporation Code section 2203(a). In the short time available to me, I read two cases which I believed authorized this procedure. I considered filing a motion to strike under [Code of Civil Procedure] Section 436(b), but determined that reference to that Section (which permits introduction of the evidence) was not necessary. . . . 3. Upon further review of the authorities and the Court's ruling of March 15, 2013, I realize I was mistaken that a motion to stay or dismiss could be used to challenge Kremlin's capacity to bring this action without filing of an answer or a motion to strike. The decision by Seven Arts to file the Seven Arts Motion without filing an answer or to not style the

motion as a motion to strike under [Code of Civil Procedure] Section 436(b) was wholly my fault with no approval or discussing with the owners of Seven Arts or the liquidator."

The motion for relief also challenged the propriety of the court's entry of default, contending that: (1) only the clerk could enter a default after a request made by the opposing party; (2) no default could be entered without a statement of damages; (3) Seven Arts had recently filed an answer to the SAC; and (4) Kremlin was not qualified to do business in California and thus could not request the entry of default.

The court heard the motion for relief on May 17, 2013. It issued an order denying the motion. First it addressed the court's power to enter a default in absence of a request from the court clerk notwithstanding the provisions of Code of Civil Procedure section 585[1] which allow the clerk to enter default under specific circumstances. It stated that under Seven Arts' reasoning, Seven Arts could continue filing improper responses to the complaint to forestall entry of default by the court clerk. Second, it addressed Seven Arts' contention that it had to attack Kremlin's ability to maintain the action by way of a demurrer or motion to dismiss. The court stated Seven Arts could have alleged the Corporations Code violation as an affirmative defense but waived it by failing to properly assert it. The court also found that section 473, subdivision (b) does not permit relief from defense counsel's "blatant disregard" for the rules of procedure. It also noted that Seven Arts sought to circumvent the court's ruling by attempting to file an answer on March 19, 2013 (as opposed to lodging a proposed answer), even though the court had already entered its default.

After Kremlin submitted prove-up materials, on July 10, 2013, the court entered judgment in favor of Kremlin and against Seven Arts in the amount of $223,385.53. Seven Arts appealed from the orders striking the demurrer, denying the motion to dismiss, entering default, and denying motion for relief from default.

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[1] All further undesignated statutory references shall be to the Code of Civil Procedure.

CONTENTIONS ON APPEAL

Seven Arts contends the court erred in (1) striking its demurrer because Seven Arts was barred by Corporations Code section 2203 from bringing the action in California and the claims for relief in the SAC were barred by the statute of limitations, (2) striking the motion to stay or dismiss because it was a proper responsive proceeding, (3) entering default because the default could only have been entered by the clerk of the court, and (4) denying the motion for relief from default because Seven Arts submitted a declaration of its attorney admitting fault.

DISCUSSION

1. The Demurrer

A demurrer tests the sufficiency of the plaintiff's complaint, i.e., whether it states facts sufficient to constitute a cause of action upon which relief may be based. (Code Civ. Proc., § 430.10, subd. (e); *Traders Sports, Inc. v City of San Leandro* (2001) 93 Cal.App.4th 37, 43-44.) We review the ruling on a demurrer de novo. (*Williams v. Housing Authority of Los Angeles* (2004) 121 Cal.App.4th 708, 718-719; *Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790.) In determining whether the complaint states facts sufficient to constitute a cause of action, "[w]e treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) We do not consider the available evidence, the plaintiff's ability to prove the allegations in the complaint or other extrinsic matters. (*Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 922; see *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 459.)

The trial court struck the moving papers for the demurrer and took it off calendar pursuant to sections 436, 430.30, subdivision (a) and 128, because the demurrer was based on extrinsic evidence and was in reality a procedurally deficient motion for

summary judgment. In addition, the court noted that the internet records of the Secretary of State were not certified for their accuracy.

a. Statute of Limitations

The SAC alleged Kremlin did not know or have reason to know of Seven Arts' breaches until the audit in 2012. It alleged a breach occurred prior to June 30, 2011, but also alleged each periodic statement issued by Seven Arts constituted a breach of the agreement. Kremlin alleged it had no knowledge the statements were inaccurate until the 2012 audit. The SAC also alleged that Kremlin did not become aware of the Street Date of the release of the DVD or of Seven Arts' failure to pay the amounts due until the audit was completed in 2012.

Seven Arts contended that Kremlin knew of a breach since July 2007, and that Kremlin did not bring an action within the three-year limitation period provided in the DA or the four-year period for written contracts provided in section 337.

Hoffman stated in his declaration that the "Street Date" of the release of the DVD was July 10, 2007, and argued in the demurrer that Kremlin must have known of Seven Arts' failure to make payments pursuant to the PRA at that time.

The defense of the statute of limitations can only be raised in a demurrer, if the complaint clearly and affirmatively shows on its face that the action is barred. (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1315 (*E-Fab*); see *April Enterprises, Inc. v. KTTV* (1985) 147 Cal.App.3d 805, 825-826 (*April Enterprises*).)

The SAC does not suggest any circumstances which demonstrate Kremlin had knowledge of its injury before the audit, because it relied on the information contained in statements prepared by Seven Arts. On the face of the SAC, none of the causes of action were barred by the contractual limitations clause or the statute of limitations. All of the relevant facts upon which Seven Arts relies for its statute of limitations defense were contained in Hoffman's declaration, which was not a proper basis for a demurrer. (*CrossTalk Productions, Inc. v. Jacobson* (1998) 65 Cal.App.4th 631, 635.) As a result, the issue must be decided by a full development of the facts in the action and is not

properly raised in a demurrer. (*E-Fab, supra*, 153 Cal.App.4th at p. 1325; *April Enterprises, supra*, 147 Cal.App.3d at p. 833.)

b. Corporations Code Section 2203

Corporations Code section 2203, subdivision (c) requires a foreign corporation to obtain a certificate of qualification to do business in the state in order to sue in the state on claims arising from intrastate business.[2] (See *Neogard Corp. v. Malott & Petterson-Grundy* (1980) 106 Cal.App.3d 213, 330.)

The SAC alleged that Kremlin is a British Virgin Islands corporation, and "has the capacity to maintain this action and is exempt from the requirements of California Corporations Code Section 2100, et al., as [its] business consists primarily of transactions involving interstate and foreign commerce, and the events complained of herein arise out of agreements involving foreign commerce."

In its demurrer, Seven Arts contended that Kremlin is not registered to do business in California, and relied on the declaration of Hoffman to establish that the DA and the PRA were negotiated in California and were intended to be performed in California.

Attached to its demurrer, Seven Arts filed a Request for Judicial Notice attaching what purported to be certified records of the Secretary of State relating to Kremlin Films showing that its corporate status was "forfeited."

First of all, the printout of Secretary of State records submitted with the Request for Judicial Notice was not certified. Second, we cannot take judicial notice of a purported printout of the Secretary of State's records to establish the fact of Kremlin's corporate status. (Evid. Code §§ 451, 452; *Ragland v. U.S. Bank Nat. Assn.* (2012) 209 Cal.App.4th 182, 193-194.) Because the complaint did not disclose on its face a violation of Corporations Code section 2203, the issue could not be decided by demurrer.

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[2] The statute provides: "A foreign corporation subject to the provisions of Chapter 21 (commencing with Section 2100) which transacts intrastate business without complying with Section 2105 shall not maintain any action or proceeding upon any intrastate business so transacted in any court of this state. . . ."

2. Denial of Motion to Dismiss And Entry of Default

Seven Arts contends its motion to dismiss or stay was a proper responsive pleading.

The motion to dismiss was based on the Corporations Code section 2203 bar to actions by foreign corporations. It also contained a declaration of Peter Hoffman similar to the declaration submitted in support of the demurrer, but contained a statement by Hoffman that he had personally reviewed the records of the Secretary of State. Seven Arts contended that Hoffman's declaration establishes that the DA was negotiated and executed here in Los Angeles, and the action arises out of this transaction.

In March 2013, Seven Arts filed another Request for Judicial Notice in which it submitted what it stated was "a true copy" of the records of the California Secretary of State, stating that a certified copy of the record would be presented at the hearing on the motion to dismiss.

Seven Arts contends that it was challenging Kremlin's ability to maintain the action and the only way it could have done so was to present evidence of its corporate status. It also argues that a motion to dismiss or strike is the proper vehicle to raise a Corporations Code section 2203 claim. While this may be true, Seven Arts still did not properly respond to the SAC.

Section 430.10 provides that "the party against whom a complaint or cross complaint has been filed may object by *demurrer or answer*." (Italics added.)

Section 421.30 specifies the form and content of an answer. It must contain a general or specific denial of the material allegations of the complaint; and a statement of any new matter constituting a defense.

Section 430.80 provides that if the party against whom a complaint has been filed fails to object to the pleading either by demurrer or answer, that party is deemed to have waived the objection unless it is an objection that the court has no jurisdiction of the subject of the cause of action alleged in the pleading or an objection that the pleading does not state facts sufficient to constitute a cause of action.

Since Seven Arts filed neither a demurrer nor an answer, it did not file a responsive pleading to the SAC.

As far as the propriety of the motion to dismiss to raise objections to Kremlin's ability to maintain the action, Seven Arts mistakenly relies upon *United Medical Management Ltd. v. Gatto* (1996) 49 Cal.App.4th 1732 (*UMML*). In that case, a foreign corporation brought an action for breach of contract without meeting certain requirements of Corporations Code section 2203. Two months later, the defendant filed a motion to dismiss the complaint, based upon a certificate from the Secretary of State. The complaint was dismissed without prejudice and the corporation subsequently filed a second complaint after filing a certificate of compliance. (*Id*. at p. 1739.) The defendant again filed a motion to dismiss, contending the corporation still had not filed proper documentation. The trial court granted the second motion to dismiss, which was affirmed on appeal. Seven Arts cites *UMML* for the proposition that a motion to dismiss was the proper pleading to file to show Kremlin's non-compliance with Corporations Code section 2203. However, the opinion in *UMML* does not indicate whether an answer or demurrer was filed by the defendant prior to the filing of the motion to dismiss. Nor does it address the issue here, that is, whether Seven Arts' motion to dismiss was a proper responsive pleading in compliance with the trial court's order. While *UMML* does state that an answer or demurrer is the proper pleading to raise a Corporations Code section 2203 violation (*id*. at p. 1740), it does not aid Seven Arts because the complaint does not indicate on its face that Kremlin is not qualified under Corporations Code section 2203 and thus the proof of noncompliance is a disputed factual issue.

Because Seven Arts filed neither a demurrer nor an answer, it did not file a responsive pleading to the SAC. The trial court had the authority to enter its default based on its failure to disregard the rules of process. (*Del Junco v. Hufnagel* (2007) 150 Cal.App.4th 787, 797.)

Seven Arts raised additional issues with respect to the entry of default. It contends that default could only have been entered by the clerk, and not the court, and that default should not have been entered because Kremlin failed to serve a statement of damages as

required by section 425.11. In light of our discussion which follows on Seven Arts' entitlement to relief from default, these issues have become moot.

However, we note that a default can be entered by either the clerk or the court. (See, e.g. *Matera v. McLeod* (2014) 145 Cal.App.4th 44, 67.) The actual recording of the entry of default is a ministerial duty. (*Lorenz v. Commercial Acceptance Ins. Co.* (1995) 40 Cal.App.4th 981, 991-992.) Seven Arts misconstrues the language of section 585 and Los Angeles Superior Court Local Rule 3.200, which address the entry of default by the clerk. In this case, the trial court ordered the entry of default, pursuant to Kremlin's request. The actual recording of a default in the action was most likely performed by the clerk. This was a proper procedure. In any event, the mandatory relief provision of section 473, subdivision (b) provides for relief regardless of whether the default was entered by the clerk or the court. (*Matera, supra,* 145 Cal.App.4th at p. 67.)

3. The Trial Court Erred in Denying Relief Under Section 473, Subdivision (b)

Section 473, subdivision (b), authorizes the trial court to relieve a party from a default judgment or dismissal entered as a result of the party's or its attorney's mistake, inadvertence, surprise or neglect. It provides for both mandatory and discretionary relief.

Under the discretionary relief provision, on a showing of "mistake, inadvertence, surprise, or excusable neglect," the trial court may allow relief from a "judgment, dismissal, order, or other proceeding" taken against a party based on its evaluation of the nature of the mistake or error alleged and the justification proffered for the conduct that occurred. Under the mandatory relief provision, on the other hand, upon a showing by attorney declaration of "mistake, inadvertence, surprise, or neglect," the trial court shall vacate any resulting default judgment or dismissal entered. (§ 473, subd. (b).)

Mandatory relief is available "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, inadvertence, surprise, or neglect . . . ." (§ 473, subd. (b).) "[I]f the prerequisites for the application of the mandatory provision of section 473, subdivision (b) exist, the trial court does not have

discretion to refuse relief." (*Leader v. Health Industries of America* (2001) 89 Cal.App.4th 603, 612.)

The purpose of the mandatory relief provision is to relieve the hardship on those parties who have lost their day in court because of counsel's inexcusable failure to act. (*Zamora v. Clayborn Contracting* (2002) 28 Cal.4th 248, 257; *Rodriguez v. Brill* (Feb. 20, 2015, F068518) ___ Cal.App.4th ___ [15 D.A.R. 2057, 2058-2059].)

In Matera, supra, 145 Cal.App.4th 44, the plaintiffs obtained a default judgment which awarded them compensatory and punitive damages and attorney fees as well as a sanctions award. The defendants' attorney had failed to file opposition to plaintiff's discovery motions and failed to appear at several subsequent hearings. In a motion for relief from default judgment, the attorney submitted a declaration stating that his failure to file opposition papers, attend hearings, or communicate with his clients was due to his own neglect. (*Id*. at p. 53.) The court of appeal found the attorney's neglect was the sole cause of defendants' failure to comply with the discovery order which resulted in the terminating sanction and reversed the order denying relief from the default judgment. (*Id*. at p. 68.) "The application of the mandatory relief provision in these circumstances is consistent with the purpose of the statute to relieve the client of the burden caused by the attorney's error, impose a burden on the attorney instead, and avoid additional malpractice litigation." (*Id*. at p. 67.) The determinative question is whether the attorney's conduct deprived the party of its "day in court"—"the opportunity to appear and present evidence and argument in opposition to the motion to dismiss." (*Leader, supra,* 89 Cal.App.4th at p. 621.) Some courts have granted mandatory relief when the facts show that the parties did not contribute to the conduct which caused the default or dismissal. (See *Rodriguez v. Brill, supra,* ___ Cal.App.4th at p. ___ [15 D.A.R. 2060] and cases cited therein; see *Solv-All v. Superior Court* (2005) 131 Cal.App.4th 1003, 1010.) Other courts have held that relief may be granted when the client is partially responsible, but is not guilty of intentional misconduct. (E.g. *SJP Limited Partnership v. City of Los Angeles* (2006) 136 Cal.App.4th 511, 520*; Benedict v. Danner Press* (2001) 87 Cal.App.4th 923, 932.)

The declaration submitted by Seven Arts' trial counsel was sufficient to show attorney fault under the mandatory relief portion of section 473, subdivision (b). Although the attorney's declaration in this case takes the entirety of the blame for filing the motion to stay or dismiss, the issue does become more complicated because Hoffman, Seven Arts' counsel of record, is himself a corporate officer, "the President and Chief Executive Officer" of Seven Arts. This factual situation was discussed in *Gutierrez v. G & M Oil Company, Inc*. (2010) 184 Cal.App.4th 551. There the court found that because the in-house attorney was not acting as a corporate officer in filing the non-responsive pleading, and concealed the matter from his fellow corporate officers, he was not acting as a corporate officer. (*Id*. at pp. 555-556.) Likewise here, Hoffman's declaration stated that in September 2011, all of Seven Arts' capital stock was acquired by an English corporation and Seven Arts was now subject to involuntary creditor proceedings in England and managed by a liquidator. Hoffman stated that he made the decision to file the motion to stay or dismiss on his own and did not consult with the owners of Seven Arts or the liquidator. Because of this decision, Seven Arts had no opportunity to present argument in opposition to the motion to stay or dismiss. As a result, Seven Arts was entitled to mandatory relief from default.

DISPOSITION

The order denying relief under section 473, subdivision (b), is reversed, and the trial court is directed to grant the motion for relief and allow Kremlin to file a responsive pleading to the complaint. Defendant Seven Arts shall recover its costs on appeal.

WOODS, J.

We concur:

PERLUSS, P. J. **ZELON, J.**