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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

UNITED GRAND CORPORATION, Plaintiff and Respondent, v. MALIBU HILLBILLIES, LLC, Defendant and Appellant.	B268544 (Los Angeles County Super. Ct. No. BC554172)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michelle R. Rosenblatt, Judge. Affirmed.

Law Office of D. Joshua Staub and D. Joshua Staub for Defendant and Appellant.

Cyrus Sanai for Plaintiff and Respondent.

* * * * * *

Appellant Malibu Hillbillies, LLC, appeals from the denial of its motion to vacate a default judgment pursuant to Code of Civil Procedure section 473, subdivision (b).[1] The court below found that the affidavit of fault in support of the motion was not credible because of evidence that the attorney who submitted it did not in fact represent appellant, but only appellant's codefendant. We hold that the trial court's finding was supported by substantial evidence, and affirm.

BACKGROUND

On August 8, 2014, respondent United Grand Corporation filed a complaint for breach of contract against appellant, Marcie Stollof (Stollof) (a member of appellant), and two other defendants. Respondent alleged that appellant owed unpaid rent for a repudiated lease, and that the other defendants were the alter egos of appellant.

The court entered default judgment against Stollof on February 11, 2015, and against appellant on April 13, 2015.

On July 13, 2015, Stollof filed a motion to vacate the default judgment against her under section 473, subdivision (b). She supported her motion with a declaration from David H. Cohen, an attorney licensed in Maryland. Cohen stated that he was Stollof's attorney, and that Stollof's failure to respond to the complaint was due to his mistake, inadvertence, surprise or neglect. The declaration made no reference to appellant.

Appellant filed its motion to vacate the default judgment about two weeks later, on July 31, 2015. It supported its motion with another declaration from Cohen. Several of the paragraphs

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

were nearly identical to paragraphs in the declaration in support of Stollof's motion, only now they included reference to appellant as well as Stollof. Cohen declared that appellant and Stollof were his clients "in relation to the subject matter of this lawsuit prior to, and after its filing." As he had in the earlier declaration, Cohen stated that it was his fault appellant had not responded to the complaint.

Respondent filed a combined opposition to both motions. Included was a declaration from respondent's counsel Cyrus Sanai. Below we describe the evidence in the declaration that we deem relevant to this appeal.

1. In a February 18, 2014 letter to respondent's president concerning the rent dispute, Attorney Eric H. Halvorson of Oxnard, California identified himself as representing both Stollof and appellant.

2. In a May 14, 2014 e-mail, Halvorson gave Sanai permission to speak directly to Stollof regarding settlement.

3. In a June 1, 2014 e-mail, Sheryl Stollof (per respondent, Stollof's sister) informed Sanai that Stollof was represented by Cohen, and told Sanai to communicate directly with him. The e-mail did not mention appellant.

4. In a June 2, 2014 letter from Cohen to Sanai, Cohen stated that he was "representing Marcie Stollof and will attempt to get local counsel in California." The letter did not mention appellant.

5. Sanai stated that in his first telephone call with Cohen he asked if Cohen was representing appellant as well as Stollof.[2]

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[2] Sanai's declaration does not state when this call took place, but it was sometime before the filing of the complaint on August 8, 2014.

According to Sanai, Cohen replied "that he was representing Stollof only, because of the potential for conflict of interest."

6. Eleven months later, in a May 4, 2015 e-mail chain, Halvorson informed Sanai that he no longer represented appellant or Stollof, had not spoken to Stollof in several months, and was "in the process of extricating [him]self as agent for service of process" for appellant.

Stollof filed a reply to respondent's opposition.[3] The reply, inter alia, pointed to the evidence and argument in the opposition confirming that Cohen represented Stollof in the dispute. The reply did not mention appellant, and appellant did not file its own reply.

After hearing argument, the court denied appellant's motion to vacate on October 2, 2015. In its ruling, the court summarized the contents of Cohen's declaration, then stated: "This declaration is not sufficient for purposes of section 473(b), because Plaintiff has presented information which shows that Malibu Hillbillies was separately represented and that [Stollof] did not want to use the same attorney for both. Additionally, the attorney, a member of the California Bar, was also the agent for service of process at the time.[4] No affidavit of fault is submitted by that attorney. Therefore, the declaration of Cohen that he was the attorney is not credible." The court signed an order reiterating the above on November 6, 2015.

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[3] Stollof filed evidentiary objections to Sanai's declaration and the two other declarations included with respondent's opposition. The court overruled the objections to the evidence listed above.

[4] Appellant acknowledges that this refers to Attorney Halvorson.

Appellant timely appealed.[5]

DISCUSSION

Appellant argues that the trial court erred in finding that Cohen's declaration was not credible. We reject this argument for the reasons discussed below.

Legal Standard

Section 473, subdivision (b) states, in relevant part, "Notwithstanding any other requirements of this section, the court shall, 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, vacate any . . . 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." The affidavit need not come from a party's attorney of record in the case in which the default judgment was entered; "the statute only requires the affidavit be executed by an attorney who represents the client and whose mistake, inadvertence, surprise or neglect in fact caused the client's default or dismissal." (*SJP Limited Partnership v. City of Los Angeles* (2006) 136 Cal.App.4th 511, 517-518 (*SJP*).)

A motion to vacate under section 473, subdivision (b), is left to the discretion of the trial court and will not be disturbed on appeal absent a clear showing of abuse of that discretion. (*Austin v. Los Angeles Unified School Dist.* (2016) 244 Cal.App.4th 918, 929.) However, "[b]ecause the law favors disposing of cases on

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[5] The court continued, then later granted, Stollof's motion to vacate the default judgment against her. That order is the subject of a separate appeal by the respondent in this case.

their merits, 'any doubts in applying section 473 must be resolved in favor of the party seeking relief from default [citations]. Therefore, a trial court order denying relief is scrutinized more carefully than an order permitting trial on the merits.' " (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 980.)

In conducting our review, we must accept the trial court's factual findings so long as they are supported by substantial evidence. (*Falahati v. Kondo* (2005) 127 Cal.App.4th 823, 828.) "It is the province of the trial court to determine the credibility of the declarants and to weigh the evidence." (*Ibid.*) Thus, on appellate review we " 'accept[] the evidence most favorable to the order as true and discard[] the unfavorable evidence as not having sufficient verity to be accepted by the trier of fact.' " (*In re Michael G.* (2012) 203 Cal.App.4th 580, 595 (*Michael G.*).) "Even though contrary findings *could* have been made, an appellate court should defer to the factual determinations made by the trial court when the evidence is in conflict. This is true whether the trial court's ruling is based on oral testimony or declarations." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479.)

Analysis

Here, the trial court's ruling was based on a factual finding, namely that Cohen was not appellant's attorney at the time of the events that led to the default judgment. Because section 473, subdivision (b) requires an affidavit of fault from an attorney who actually represents the defaulting party (*SJP, supra*, 136 Cal.App.4th at p. 517), a finding that Cohen was not appellant's attorney necessarily renders appellant's motion deficient. So long as the trial court's finding was based on substantial evidence, we must conclude that the trial court properly denied relief.

Here there was substantial evidence supporting the trial court's finding. Respondent's counsel Sanai's declaration stated that he asked Cohen whether Cohen was representing appellant as well as Stollof. This was a reasonable question, given that Attorney Halvorson previously had identified himself as representing both Stollof and appellant. According to Sanai, Cohen said he was only representing Stollof, to avoid a potential conflict of interest.[6] The trial court was entitled to accept Sanai's account over Cohen's, especially since appellant presented no other evidence to refute Sanai's claim. Appellant did not file a reply to respondent's opposition to its motion to vacate the default judgment, which would have been the logical opportunity to attack Sanai's veracity. The one reply that was filed, by Stollof, did not refer to appellant.

Nor did the record before the court otherwise suggest that Cohen represented anyone other than Stollof in the dispute. Cohen's first affidavit of fault in support of Stollof's motion to vacate the default judgment did not mention appellant at all, even though it was filed just two weeks before appellant filed its own motion along with Cohen's second affidavit. Cohen's letter to Sanai identifying himself as Stollof's attorney similarly did not mention appellant, much less that Cohen served as its attorney.

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[6] Appellant asserts, as it did unsuccessfully below, that Sanai's account of his conversation with Cohen lacks foundation, and that Cohen's statement to Sanai is hearsay. Appellant makes no arguments nor cites any authority supporting these assertions. Regardless, we disagree. Cohen's statement to Sanai is admissible as a prior inconsistent statement, in that it conflicts with Cohen's declaration claiming he represented appellant. (Evid. Code, § 1235.) And clearly there is foundation for Sanai to testify to conversations in which he participated.

Sheryl Stollof's e-mail to Sanai, in which she emphasized that Cohen was representing her sister, also said nothing about Cohen representing appellant.

Appellant argues that the evidence on which the trial court relied, particularly Sanai's statement that Cohen denied that he represented appellant, conflicted with other evidence (including other statements and writings by Sanai) and should be disregarded. But this argument asks us to reweigh the evidence, which, as discussed above, is beyond the scope of our review. Indeed, under the substantial evidence standard it is we that must disregard the evidence that conflicts with the trial court's finding. (*Michael G., supra*, 203 Cal.App.4th at p. 595.) It is for the trial court to determine matters of credibility, not us.

We hold that the trial court's finding that Cohen did not represent appellant was supported by substantial evidence. Thus, appellant's motion to vacate the default judgment lacked an affidavit of fault from appellant's own attorney and was properly denied.[7]

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[7] Appellant asserts the trial court further erred by finding (1) that Halvorson represented appellant as opposed to serving merely as agent for service of process, and (2) that appellant was required to submit an affidavit of fault from Halvorson. Even were we to accept appellant's characterization of the trial court's ruling, we need not address these contentions. Whether or not Halvorson was the proper affiant, substantial evidence supported the court's finding that Cohen, the actual affiant, was not.

DISPOSITION

The judgment below is affirmed. The parties are to bear their own costs on appeal.[8]

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.

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[8] We decline to address respondent's request for attorney fees. Respondent provides no legal basis for its assertion that this court can or should award fees "to avoid future frivolous dispute." This court may disregard contentions made without proper citation to legal authority. (*In re Marriage of Tharp* (2010) 188 Cal.App.4th 1295, 1310, fn. 3.)