Filed 9/7/18 S.B. v. L.S. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

S.B., a Minor, etc., Plaintiff and Respondent, v. L.S., a Minor, Defendant and Appellant.	B280852 (Los Angeles County Super. Ct. No. BS165526)

Appeal from an order of the Superior Court of Los Angeles County, Carol Boas Goodson, Judge. Reversed.

Christian Schank and Associates and William D. Evans for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

INTRODUCTION

L.S. appeals from the order of the trial court denying her motion to set aside the civil harassment restraining order issued against her. (Code Civ. Proc., § 527.6.)[1] She contends she satisfied the prerequisites under the attorney fault provision of section 473, subdivision (b) mandating relief. We agree and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

S.B. and L.S. were 7th graders at the same middle school where they shared one class, physical education. In November 2016, S.B. petitioned ex parte for a civil harassment restraining order (§ 527.6) seeking to enjoin L.S. from bullying her. The petition alleged that L.S., who weighs 100 pounds more than S.B., repeatedly uttered racial slurs, such as " 'You nigger. Nigger bitch. I hope you and your whole nigger family get deported,' " pushed S.B. against the wall, and has threatened to harass S.B. again. This conduct caused S.B. physical and "emotional pain and anxiety," sleeplessness, and agitation about going to school. The petition alleged that the school's dean neither followed the investigating and reporting requirements for hate crimes on campus nor set up a safety plan. The trial court issued a temporary restraining order and set a hearing for December 1, 2016.

---

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

L.S.'s father retained attorney Derek Riley of Christian Schank & Associates who told L.S. that it was unnecessary to leave school to attend the hearing because he planned to invoke his client's right to a continuance of the hearing to investigate the matter and prepare an informed response under section 527.6, subdivision (o).

At the December 1, 2016 hearing, the trial court recognized L.S. wanted a continuance. However, S.B.'s counsel argued that L.S. was not present, there was no signed substitution of attorney, and the response to the petition was signed by L.S.'s father, not by the client. The court agreed and struck the response. S.B.'s counsel, her mother and a family law attorney, also had not substituted into the case. But, because S.B. was present, the court gave her the attorney substitution form to sign. The court then proceeded with a "prove up" hearing and took S.B.'s evidence. The court commented that that it could not kick L.S. out of school, "which they should do. But that's a personal opinion" and issued the requested civil harassment order.

The minute order from that day indicates that L.S. made no appearance. The minute order also states: "The court notes that the Response filed this day by [L.S.'s attorney] is not signed by the Respondent and no guardian ad litem has been appointed for the Respondent. Therefore, the non original [response] containing a signature of [L.S.'s father] is not valid. The court orders the answer submitted/filed this date stricken."

The very next day, attorney William D. Evans filed a motion to vacate the restraining order based on the mandatory provision of section 473, subdivision (b) for attorney Riley's "mistaken belief that no Substitution of Attorney, [or] signed response was required or appearance by my retained client was necessary to obtain the first continuance of the matter to which she was entitled as a matter of law pursuant to" section 527.6, subdivision (o).[2]

Attached to the motion was attorney Riley's declaration stating he did not believe that L.S. had to be present that day simply to request a continuance as of right. (§ 527.6, subd. (o).) Counsel did not have a signed response or substitution of attorney believing those documents were unnecessary. "[M]y . . . understanding of the law was that a Substitution of Attorney was not required, because the temporary restraining order against my client was issued *ex parte* and without notice and no prior appearance had ever been made by my client *in pro per* or by any other attorney or law firm."

The trial court denied L.S.'s motion to set aside the restraining order. The court stated that the failure of attorney Riley to file a substitution of attorney at the first appearance was not the kind of attorney error applicable under section 473 because, where no response had been filed, and where L.S. did not appear, a substitution of attorney was required. The court stated that "these are mistakes that are so basic that, frankly, anyone should know it." L.S. filed her timely appeal.

---

[2] Subdivision (o) of section 527.6 reads: "The respondent shall be entitled, as a matter of course, to one continuance, for a reasonable period, to respond to the petition."

DISCUSSION

Mandatory relief under the attorney fault provision of section 473, subdivision (b) reads, "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 court shall, whenever relief is granted based on an attorney's affidavit of fault, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties." (§ 473, subd. (b), italics added.) "Where, as here, the applicability of the mandatory relief provision does not turn on disputed facts and presents a pure question of law, our review is de novo." (*SJP Limited Partnership v. City of Los Angeles* (2006) 136 Cal.App.4th 511, 516 (*SJP*).)

The aim of the mandatory provision is "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." (*Rodriguez v. Brill* (2015) 234 Cal.App.4th 715, 723.)

If the conditions for relief under the mandatory provision of section 473, subdivision (b) are met, relief is compulsory (*Younessi v. Woolf* (2016) 244 Cal.App.4th 1137, 1147), and the "trial court does not have discretion to refuse relief." (*SJP*, *supra*, 136 Cal.App.4th at p. 516.)

As L.S. observes, the trial court denied the motion for relief because, although it agreed there was attorney error, it did not deem the mistake to be excusable under section 473 and stated that L.S. instead had a malpractice action against her counsel.

But, since 1988, relief under the attorney fault provision is obligatory when the order is due to attorney fault, "*whether excusable or not*." (*Standard Microsystems Corp. v. Winbond Electronics Corp*. (2009) 179 Cal.App.4th 868, 894, italics added, disapproved on other grounds in *Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 844; see also *State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 608; *J.A.T. Entertainment, Inc. v. Reed* (1998) 62 Cal.App.4th 1485, 1492; *Lorenz v. Commercial Acceptance Ins. Co*. (1995) 40 Cal.App.4th 981, 989; *Cisneros v. Vueve* (1995) 37 Cal.App.4th 906, 909; *Todd v. Thrifty Corp*. (1995) 34 Cal.App.4th 986, 991; *Metropolitan Service Corp. v. Casa de Palms, Ltd*. (1995) 31 Cal.App.4th 1481, 1487.) Courts "at most demand an attorney's candid, full, and straightforward acknowledgment of his or her error; they do not speak to the reasons for those errors." (*Martin Potts & Associates, Inc. v. Corsair, LLC* (2016) 244 Cal.App.4th 432, 441.)

Indeed, the attorney fault "provision was manifestly intended to end the prior regime insofar as it had relegated victims of inexcusable attorney neglect to a separate action for malpractice." (*Standard Microsystems Corp. v. Winbond Electronics Corp*., *supra*, 179 Cal.App.4th at p. 894.)

L.S.'s motion for relief was timely filed. Attorney Riley fell on his sword. Therefore, the motion satisfied the conditions mandating relief under the attorney fault provision of section 473, subdivision (b). The trial court had no discretion in the matter. The denial of mandatory relief deprived L.S. of her day in court.

DISPOSITION

The order denying L.S.'s motion to vacate the civil harassment restraining order is reversed. L.S. to recover costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KALRA, J.*

We concur:

EDMON, P. J.

EGERTON, J.

---

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