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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

KIM M. KING,

Plaintiff and Appellant,

v.

DONALD J. THOMPSON et al.,

Defendants and Respondents.

2d Civ. No. B292168
(Super. Ct. No. 56-2015-
00470655-CU-PO-VTA)
(Ventura County)

In January 2015, Kim M. King was bitten by a dog owned by Donald J. Thompson and Debra Duffy Thompson. King sued the Thompsons for negligence and strict liability. Over the next two years, King requested and received eight trial continuances. On February 1, 2018, the trial court denied King's ex parte application for a ninth continuance. King was not ready to proceed to trial and, at the Thompsons' request, the court

dismissed the action without prejudice under Code of Civil Procedure section 581.¹

King retained an attorney, who moved to set aside the dismissal under section 473. The trial court denied the motion. King, who is appearing in propria persona, appeals both the order of dismissal and the order denying the section 473 motion. We dismiss the appeal from the first order as untimely and affirm the second order. In the absence of a reporter's transcript or suitable substitute, we must presume that what occurred at the hearing on the section 473 motion supports the trial court's order. (See *In re Marriage of Obrecht* (2016) 245 Cal.App.4th 1, 8-9; *Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1201.)

DISCUSSION

The Appeal from the Dismissal Order is Untimely

The notice of appeal from the dismissal order was filed on August 7, 2018. Defense counsel served a file-endorsed copy of the order on February 16, 2018. The Thompsons contend the service of that order started the 60-day clock to file the notice of appeal.² We agree.

The typical deadline for filing a notice of appeal is "60 days after the party filing the notice of appeal serves or is served by a party with a document entitled 'Notice of Entry' of judgment or a file-endorsed copy of the judgment, accompanied by proof of service." (Cal. Rules of Court, rule 8.104(a)(1)(B).) Section 581d provides that "[a]ll dismissals ordered by the court shall be in the form of a written order signed by the court and filed in the action

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

² After King filed her opening brief, we asked the Thompsons to discuss the timeliness of the appeal in their brief.

and those orders when so filed shall constitute judgments and be effective for all purposes” (See *Salas v. Sears, Roebuck & Co.* (1986) 42 Cal.3d 342, 345, fn. 3 [“[O]rders of dismissal ‘constitute judgments . . .’ (§ 581d) and hence are directly appealable”]; see also *Powell v. County of Orange* (2011) 197 Cal.App.4th 1573, 1577-1579.)

Here, the trial court signed the written dismissal order on February 8, 2018, and it was filed the next day. The 60-day period for filing a notice of appeal began to run on February 16, 2018, when defense counsel served King with the file-endorsed copy of the signed dismissal order. (Cal. Rules of Court, rule 8.104(a)(1)(B); *Keisha W. v. Marvin M.* (2014) 229 Cal.App.4th 581, 585.) King’s notice of appeal was filed months after the expiration of the 60-day deadline. The appeal from the dismissal order is therefore untimely and must be dismissed for lack of appellate jurisdiction. (Cal. Rules of Court, rule 8.104(b); *Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 113.)

*The Record is Inadequate to Review the
Order Denying the Section 473 Motion*

Section 473, subdivision (b) allows a trial court to set aside actions taken against a party through mistake, inadvertence, surprise or excusable neglect. “The standard for appellate review of an order denying a motion to set aside under section 473 is quite limited. A ruling on such a motion rests within the sound discretion of the trial court, and will not be disturbed on appeal in the absence of a clear showing of abuse of discretion, resulting in injury sufficiently grave as to amount to a manifest miscarriage of justice.” (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 118; accord *McClain v. Kissler* (2019) 39 Cal.App.5th 399, 413-414.)

As the Thompsons point out, the trial court's order does not state the court's reasons for denying the section 473 motion. There was no court reporter at the hearing, and King did not seek an agreed or settled statement. (See *Leslie v. Roe* (1974) 41 Cal.App.3d 104, 108; Cal. Rules of Court, rules 8.134, 8.137.)

A judgment or order challenged on appeal is presumed to be correct, and "it is the appellant's burden to affirmatively demonstrate error." (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 ["All intendments and presumptions are indulged to support [the judgment or order] on matters as to which the record is silent"].) These standards apply to litigants who act in propria persona as well as those represented by counsel. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1247.)

"As the party challenging a discretionary ruling, [King] had an affirmative obligation to provide an adequate record so that we could assess whether the [trial] court abused its discretion." (*Wagner v. Wagner* (2008) 162 Cal.App.4th 249, 259.) Her argument that the court erred by denying her section 473 motion is "thwarted by [her] failure to provide us with a transcript of the hearing on the motion" or suitable substitute. (*Wagner*, at p. 259.) "The absence of a record concerning what actually occurred at the hearing precludes a determination that the court abused its discretion." (*Ibid.*; see *Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 136-137 [trial court's exercise of discretion will not be disturbed when appellant fails to provide record explaining the court's reasoning].)

DISPOSITION

The appeal from the dismissal order is dismissed as untimely. The order denying the motion to set aside the

dismissal order is affirmed. The Thompsons shall recover their costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

Henry J. Walsh, Judge
Superior Court County of Ventura

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