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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

EARL J. DIECKMAN II,

Plaintiff and Appellant,

v.

ROXANNE LAMAR-REED,

Defendant and Respondent.

B282272

(Los Angeles County  
Super. Ct. No. BC 581489)

APPEAL from a judgment of the Superior Court of  
Los Angeles County, William D. Stewart, Judge. Affirmed  
as modified.

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Earl J. Dieckman II, in pro. per., for Plaintiff and  
Appellant.

LibertyBell Law Group, Alan Tavelman, and David S.  
Miller for Defendant and Respondent.

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Plaintiff and appellant Earl J. Dieckman II contends that the trial court erred by dismissing defendant and respondent Roxanne Lamar-Reed from Dieckman's personal injury suit with prejudice, after Dieckman had filed a pretrial request to dismiss Lamar-Reed without prejudice. We agree, and, accordingly, we modify the trial court's judgment to reflect a dismissal without prejudice.

### **FACTS AND PROCEEDINGS BELOW**

Dieckman and his co-plaintiff, Sirarpie Diratsouian, filed a personal injury suit in 2015 against several defendants, one of whom was Lamar-Reed. When Lamar-Reed failed to file a responsive pleading to Dieckman's June 2016 second amended complaint, Dieckman filed a request for entry of default, which the court clerk entered as requested. Dieckman then filed a request for default judgment, but while that request was pending, Lamar-Reed filed an ex parte application to set aside the default.

Before the trial court ruled on Lamar-Reed's application, Dieckman filed a request to dismiss Lamar-Reed from the case without prejudice, which the court clerk entered on January 5, 2017. Thereafter, the court proceeded to hold a hearing on Lamar-Reed's motion for relief from default. The court set aside the default against Lamar-Reed, then stated that "since [Dieckman] has shown an intent to dismiss [Lamar-Reed] from this case, and has requested same, the [c]ourt will dismiss" Lamar-Reed. In its minute order, the trial court did not specify whether the dismissal was with prejudice or without, but both parties to this appeal agree that the court dismissed Lamar-Reed with prejudice.

## DISCUSSION

Dieckman contends that because he timely requested to dismiss Lamar-Reed from the case without prejudice, the trial court was without authority to dismiss the case with prejudice. We agree, and we modify the trial court's judgment to state that the dismissal of Lamar-Reed was without prejudice.

Pursuant to Code of Civil Procedure section 581, subdivision (c), "[a] plaintiff may dismiss his or her complaint . . . in its entirety, or as to any defendant or defendants, with or without prejudice prior to the actual commencement of trial." When a case is dismissed without prejudice, the plaintiff may file a new claim based on the same allegations, subject to the appropriate statute of limitations. (*Cardiff Equities, Inc. v. Superior Court* (2008) 166 Cal.App.4th 1541, 1550.) "Subject to a few exceptions . . . and to the condition of timeliness . . . , the plaintiff has an *absolute right* to dismiss an action or special proceeding by following the procedure of [Code of Civil Procedure section] 581, and neither the clerk nor the court has any discretion in the matter." (6 Witkin, Cal. Procedure (5th ed. 2008) Proceedings Without Trial, § 283, pp. 737-738; accord, *Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 784.)

In general, a dismissal becomes effective when the clerk enters it. (See *Aetna Casualty & Surety Co. v. Humboldt Loaders, Inc.* (1988) 202 Cal.App.3d 921, 931; *Harris v. Billings* (1993) 16 Cal.App.4th 1396, 1405.) Here the record shows that appellant requested a dismissal without prejudice. Neither the transcript of the hearing or the minute order, however, specifies whether the dismissal was with or without prejudice. Accordingly, the order must be amended to show the dismissal, as requested by appellant, is without prejudice.

Appellant, however, argues that the trial court was not authorized to consider the motion to set aside the default before effectuating the dismissal. Because we will order the trial court to amend the order to a dismissal without prejudice, as appellant requested, the issue is moot.

### **DISPOSITION**

The judgment is affirmed and the trial court is ordered to amend the order of dismissal to show it is without prejudice. Each party to bear his or her own costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.