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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

US CAPITAL EQUIPMENT LEASING,
INC., et al.,

Plaintiffs and Respondents,

v.

LIVE UNIVERSE et al.,

Defendants and Appellants.

B226193

(Los Angeles County
Super. Ct. Nos. BC 400459,
BC413221)

APPEALS from a judgment and order of the Superior Court of Los Angeles County. Jane Johnson and Coleman A. Swart, Judges. Affirmed and dismissed.

Alison Minet Adams for Defendants and Appellants.

Wilson, Elser, Moskowitz, Edelman & Dicker, Sean M. Bryn, Robert Cooper for Plaintiff and Respondent Relational, LLC.

No appearance for Plaintiff and Respondent US Capital Equipment Leasing, Inc.

Defendants appeal from the trial court's denial of their motion for relief from a default judgment entered in favor of plaintiff and respondent Relational, LLC (Relational). We affirm the order denying the motion and dismiss the appeal to the extent that it addresses the default judgment and other, earlier matters.

Defendants also appeal from a separate judgment entered in favor of plaintiff and respondent US Capital Equipment Leasing, Inc. (US Capital). Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In March 2007, appellant Live Universe, Inc. (Live Universe) entered into a lease agreement with US Capital wherein Live Universe agreed to pay US Capital for rental of computer-related equipment. Around the same time, a "lease guaranty" was given to US Capital. The lease guaranty provided that all amounts owing by Live Universe to US Capital (and its successors and assigns) would be fully guaranteed by appellant Brad Greenspan, the president of and a principal investor in Live Universe.

The lease agreement contained an assignment clause. Pursuant to that clause, US Capital assigned the lease and sold the underlying equipment to respondent Relational, LLC (Relational) in March 2008.

Live Universe defaulted on its payment obligations. In October 2008, US Capital and Relational sued Live Universe for breach of the lease agreement, and Greenspan for breach of the guaranty. US Capital sought to recover rents and other amounts that accrued prior to its assignment to Relational, and Relational sought to recover amounts that accrued following the assignment.

Relational's default judgment

After initiating its lawsuit, Relational served written discovery requests on both defendants and noticed Greenspan's deposition. Relational was unable to obtain responses to the written discovery, and Greenspan failed to appear at deposition. Consequently, Relational filed at least six separate discovery motions. The trial court ordered Greenspan to appear for deposition and required defendants to serve written discovery responses and produce documents.

Following the court's orders, defendants served deficient discovery responses, and Relational was forced to file further motions to compel. Soon after filing these motions, Relational filed a separate motion for terminating sanctions based on defendants' failure to comply with the trial court's discovery orders. On October 16, 2009, the trial court granted the motion for terminating sanctions. The court struck defendants' answers to Live Universe's complaint and entered default against them.

Defendants subsequently filed a motion for reconsideration of the order granting terminating sanctions. The trial court denied the motion. A default judgment awarding a total of \$674,653.06 against both defendants, jointly and severally, was entered on December 23, 2009, and notice of entry was served the same day.

Five months later, on May 27, 2010, defendants filed a motion pursuant to Code of Civil Procedure section 473, subdivision (b),¹ seeking to set aside the default judgment. Defendants argued that the October 16, 2009 entry of default was improper because Relational's motion for terminating sanctions was intentionally noticed for a date on which defendants' counsel was unavailable, as evidenced by a notice of unavailability. Defendants were represented at the October 2009 hearing by appearance counsel. According to defendants, if their regular counsel had been available to attend the hearing, terminating sanctions would not have been entered.

On July 15, 2010, the trial court denied defendants' motion for relief from the default judgment. Soon after, defendants filed a notice of appeal, seeking to challenge the order denying their motion for relief, the judgment, and "all intermediate orders, rulings, and decisions embraced within it."

The US Capital trial and judgment

The US Capital case was not determined by discovery sanctions and a default judgment. Instead, the case proceeded somewhat regularly to trial. However, with a trial date looming, defendants' counsel moved for and was granted relief to withdraw as

¹ Unless otherwise noted, all further statutory references are to the Code of Civil Procedure.

counsel for defendants. Apparently, concurrent with counsel's withdrawal, the trial date was continued by at least a week to allow defendants to retain other counsel. It appears that defendants were not able to find replacement counsel, and Greenspan appeared himself on the first day of trial and requested another trial continuance, which was granted, for another week.²

Trial was then set to begin on March 22, 2010. Greenspan again appeared, and again asked for a continuance to find counsel. This time, the trial court denied his request. It admonished him that, as a nonlawyer, he could not represent Live Universe. The matter proceeded as a bench trial, with US Capital presenting its case-in-chief. Over the next day and a half, US Capital called several witnesses, each of whom was cross-examined by Greenspan.

On the morning of March 23, 2010, Greenspan again requested a continuance, which was denied. Plaintiffs finished presenting their case-in-chief by the noon break. By the time of the afternoon session, Greenspan had found counsel to represent Live Universe. Live Universe's new counsel, Joel Bennett, was allowed to substitute into the case, and he represented Live Universe for the duration of the trial. As soon as he appeared, Bennett requested a continuance of the trial on behalf of Live Universe. The court denied the request because the parties were already in the middle of trial.

Over approximately the next four and a half days, defendants presented their case. The defense was handled primarily by Greenspan, who examined witnesses, including himself. Although Greenspan's questioning was frequently ineffective and improper, and objections to it were often sustained, Greenspan managed to present some evidence for

² The motion to be relieved as counsel and corresponding order were not included in the record on appeal. Neither was the first order continuing the trial, nor the second. This Court has attempted to reconstruct the procedural history from oblique references in the trial court docket and the trial reporter's transcript. To the extent, if any, that this procedural history contains errors, the fault lies solely with appellants for their failure to submit an adequate record.

defendants. Among other things, Greenspan attempted to prove that his signature on the guaranty document had been forged.

After the parties rested, the trial court ruled from the bench. The court stated that the “primary issue” in the case was “the credibility of Mr. Greenspan.” The court found that Greenspan’s claim that his signature on the guaranty was forged was not credible for several reasons. One was the answer filed by defendants. Although it contained 36 affirmative defenses, none of them was based on forgery. The court also referenced an e-mail from February 2008, in which Greenspan acknowledged his obligations under the guaranty. Finally, the court referenced a cross-complaint filed by Greenspan. Greenspan’s cross-complaint stated that he had signed the guaranty. The court found that US Capital had met its burden of proof by a preponderance of the evidence and found in its favor against both Live Universe and Greenspan.

On June 29, 2010, judgment was entered in favor of US Capital and against Greenspan and Live Universe in the total amount of \$323,814.97.

DISCUSSION

I. Appeal as to Relational

Defendants attempt to appeal not only from the trial court’s order denying their motion to set aside the default judgment, but also from the default judgment itself, the entry of default, and the order awarding terminating sanctions. While the appeal from the order denying relief from the judgment is procedurally proper, jurisdictional roadblocks prevent appellate consideration of all prior matters in the Relational case.

This Court has no jurisdiction to consider a late-filed appeal, and, in the absence of statutory authorization, we may not extend the time for filing a notice of appeal. (*Maynard v. Brandon* (2005) 36 Cal.4th 364, 372-373.) An untimely appeal must be dismissed, either on a party’s motion or on the court’s own motion. (Cal. Rules of Court, rule 8.104(b); *Estate of Hanley* (1943) 23 Cal.2d 120, 123.)

The default judgment against defendants was entered on December 23, 2009, and notice of entry was served the same day. A notice of appeal generally must be filed within the earliest of 60 days after service of notice of entry of judgment or a file stamped

copy of the judgment, or 180 days after entry of judgment. (Cal. Rules of Court, rule 8.104(a).) Defendants did not file their notice of appeal in this matter until July 27, 2010, well after the 60-day deadline, and later even than the 180-day deadline. Although case law has held that the time to appeal a judgment may be extended by a motion to set aside a default judgment (see *Shapiro v. Clark* (2008) 164 Cal.App.4th 1128, 1136), there is no authority for the proposition that the deadline can be extended beyond the 180-day outer limit. Therefore, insofar as defendants seek to appeal from the default judgment (and intermediate rulings and orders encompassed within it), the appeal is untimely, and we have no jurisdiction to consider it. (*Id.* at p. 1137.)

On the other hand, defendants may challenge the July 15, 2010 order denying their motion to set aside the default judgment, which is regarded as an order after judgment made appealable by section 904.1, subdivision (a)(2). (*Generale Bank Nederland v. Eyes of the Beholder Ltd.* (1998) 61 Cal.App.4th 1384, 1394.)

It is well established that “[a] motion for relief under section 473 is addressed to the sound discretion of the trial court and an appellate court will not interfere unless there is a clear showing of an abuse.” (*Davis v. Thayer* (1980) 113 Cal.App.3d 892, 904.) The moving party on such a motion bears the burden of showing good cause. (*Ibid.*) Generally, the law favors, whenever possible, a hearing of a case on the merits. (*Stafford v. Mach* (1998) 64 Cal.App.4th 1174, 1181.) Nevertheless, there are limits to that preference, and a motion for relief will not be granted when the requirements of section 473 are not met. (See *Ibid.*)

Section 473, subdivision (b) provides, in pertinent part: “The court may, upon any terms as may be just, relieve a party . . . from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken.”

We find that the trial court did not abuse its discretion in denying defendants' motion for relief. First, the trial court properly found that the motion for relief was not made "within a reasonable time." The issue raised in defendants' motion for relief—the scheduling of the hearing on the motion for terminating sanctions despite defendants' counsel's notice of nonavailability—occurred more than seven months before defendants brought the motion for relief. Although defendants did bring the motion within six months of entry of judgment,³ they provided no reason for waiting so long to raise the matter. The measure of a "reasonable time" is dependent on the circumstances of each individual case, but in all cases it "definitively requires a showing of diligence in making the motion after the discovery of the default." (*Stafford v. Mach*, *supra*, 64 Cal.App.4th at p. 1181.) Here, no showing of diligence was made. Indeed, the objective facts evidenced a lack of diligence.

Second, even if the motion were timely brought, it would not have been meritorious. Defendants have argued that terminating sanctions were granted and default was entered because of the absence of their regular counsel at the October 2009 hearing. This claim finds no support in the record. On the contrary, terminating sanctions were sought and granted because defendants failed to properly engage in the process of discovery and violated the trial court's discovery orders. There is no reason to suspect that if regular counsel (instead of appearance counsel) had argued at the October 2009 hearing, the trial court would have found any differently.⁴ There was no "mistake, inadvertence, surprise, or excusable neglect" to explain defendants' disregard for their

³ Just barely—the motion was filed more than five months after entry of judgment.

⁴ Even if the absence of regular counsel at the hearing were relevant, defendants have not shown that this absence was unavoidable. Defendants had plenty of advance notice of the hearing date, and could have sought to continue the hearing by ex parte application or other means. The record does not reflect that any such attempt was made.

discovery obligations and the court's orders. Thus, there is no basis to find that the trial court abused its discretion in denying defendants' motion for relief.⁵

II. Appeal as to US Capital

Defendants make several arguments in their appeal of the judgment in favor of US Capital. They contend that (i) the trial court unreasonably denied trial continuances that would have allowed them to find counsel, (ii) the court unreasonably precluded evidence supporting the defense that signatures on key documents were forged, (iii) the court improperly refused to permit Greenspan to testify in narrative format, and (iv) the court erroneously found Greenspan not credible.

US Capital did not submit a respondent's brief in this appeal. Nevertheless, defendants, as appellants, still have the affirmative burden of showing error. (*Miles v. Speidel* (1989) 211 Cal.App.3d 879, 881.) We find that they have not met their burden.

A. Denial of trial continuances

A trial court's denial of a request for a continuance is reviewed for an abuse of discretion. (*Color-Vue, Inc. v. Abrams* (1996) 44 Cal.App.4th 1599, 1603.) There is no policy "of indulgence or liberality in favor of parties seeking continuances." (*County of San Bernardino v. Doria Mining & Engineering Corp.* (1977) 72 Cal.App.3d 776, 781.) "To ensure the prompt disposition of civil cases, the dates assigned for a trial are firm. All parties and their counsel must regard the date set for trial as certain." (Cal. Rules of Court, rule 3.1332(a).) A party seeking a continuance of the trial date is required to make the request by noticed motion or an ex parte application, with supporting declarations. (Cal. Rules of Court, rule 3.1332(b).) "The party must make the motion or application as soon as reasonably practical once the necessity for the continuance is discovered." (*Ibid.*)

⁵ Since we find that the court properly denied defendants' motion for relief from the default judgment, we decline to dismiss Live Universe's appeal on the basis that it is a suspended corporation or dismiss Greenspan's appeal based on the disentitlement doctrine, as requested by Relational.

We find that the trial court did not abuse its discretion by denying defendants' multiple verbal requests at trial for a continuance. Defendants argue that a continuance should have been granted so that they could find trial counsel. They gloss over the fact that the trial court had already granted two prior continuances for just that purpose. The trial court was not obligated to continually grant defendants' requests until they finally obtained counsel, no matter how long it took. Defendant Live Universe was eventually able to find an attorney to represent it at trial, and that attorney was present for all but the first day and a half of trial. Having already shown leniency by granting two last-minute requests for trial continuances, the trial court did not abuse its discretion by denying further requests.

Furthermore, defendants point to no part of the record in which a proper request for a continuance—either by noticed motion or ex parte application—was made. For the trial court to grant defendants' verbal requests it would have to disregard California Rules of Court, rule 3.1332(b). We can hardly say that the trial court abused its discretion when a contrary ruling would have conflicted with this rule, which requires that requests for continuances be made in writing.

B. Exclusion of witnesses

Defendants next assert that the trial court erred by prohibiting them from calling two witnesses who would have testified regarding Greenspan's signature. One of these witnesses was described by defendants as a lay witness familiar with Greenspan's signature, and the other was described as an expert witness.

The lay witness was prevented from testifying because, prior to the time defendants attempted to call him at trial, he had never been disclosed as a potential witness and was not listed on a witness list. Indeed, defendants never filed or exchanged a trial witness list. This failure was in direct violation of Superior Court of Los Angeles County, Local Rules, former rule 7.9(h) (current rule 3.25(h)(1)), which requires trial witness lists to be filed and served at least five days before the final status conference. The rule provides that failure to comply with its terms "may result in not being able to call witnesses." (*Ibid.*)

The trial court did not err by preventing the lay witness from testifying. Trial courts possess “inherent power . . . to exercise reasonable control over all proceedings connected with pending litigation . . . in order to insure the orderly administration of justice.” (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1351.) This authority includes the “inherent power to implement and enforce effective conduct of judicial [pretrial] proceedings.” (*Mellone v. Lewis* (1965) 233 Cal.App.2d 4, 12.) Defendants provide no explanation for their failure to disclose the potential witness before trial, including by exchange of a witness list. It appears from the record (which, again, is incomplete) that all parties were specifically ordered by the court to exchange witness lists. It should not have been difficult for defendants to comply with this order, since only a few witnesses were called. Nevertheless, defendants did not comply, and the trial court was justified in preventing the testimony of their witness.

Nor did the trial court err by disallowing the testimony of defendants’ putative expert witness, who was not disclosed on a witness list or by expert designation. Section 2034.300 provides that the trial court “shall” exclude the expert opinion of a witness if a party has unreasonably failed to list that witness as an expert. Although section 2034.310 allows a party under limited circumstances to call an expert witness who was not previously designated, none of those circumstances was present here. A trial court’s order excluding an expert’s opinion is generally reviewed for an abuse of discretion. (*Boston v. Penny Lane Centers, Inc.* (2009) 170 Cal.App.4th 936, 950.) We discern no abuse of discretion in the trial court’s decision to exclude an expert witness who was not disclosed until the parties were in the midst of trial.

C. Sustained objections to narrative testimony

Defendants cite no case law supporting their argument that the trial court was required to allow Greenspan to testify in narrative format, and our own research reveals no authority supporting the position. The trial court has the power to “provide for the orderly conduct of proceedings before it.” (§ 128, subd. (a)(3).) By requiring Greenspan to testify in question and answer format, instead of allowing a lengthy narrative, the trial court employed the same procedural standard present at nearly any trial.

The trial court properly did not allow Greenspan to disregard the rules of procedure simply because he chose to represent himself. As with any party, litigants appearing in propria person must follow the procedural rules; they are not to be held to a more lenient standard. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246-1247.) Allowing Greenspan to testify by narrative would have provided him with an unusually lenient method of making his case. The trial court did not err by refusing to bend the rules in Greenspan's favor.

D. The trial court's credibility finding

Finally, defendants argue that the trial court wrongly found that Greenspan lacked credibility. In general, a witness's credibility is a matter for the trier of fact to determine, and we do not second-guess that determination. (*Leff v. Gunter* (1983) 33 Cal.3d 508, 518; *Eidsmore v. RBB, Inc.* (1994) 25 Cal.App.4th 189, 195.) Here, even if we were to reexamine the trial court's determination, we would find that substantial evidence supported the finding that Greenspan was not credible in claiming that the signature on the guaranty was forged. The trial court relied on several pieces of evidence in making this determination, including that defendants' answer contained no mention of forgery, and that Greenspan wrote an e-mail acknowledging the guaranty well before the case was initiated.

Defendants take issue with the third basis for the trial court's finding—that Greenspan's cross-complaint stated that he signed the guaranty. Allegations in a complaint may constitute judicial admissions binding on the maker. (*Castillo v. Barrera* (2007) 146 Cal.App.4th 1317, 1324.) But "a mere conclusion, or a 'mixed factual-legal conclusion' in a complaint, is not considered a binding judicial admission." (*Ibid.*) Greenspan's statement in his cross-complaint that he signed the guaranty appears to be simply a factual allegation, and so could be considered a binding judicial admission. We need not decide whether this allegation was sufficient in itself to support the finding that Greenspan signed the guaranty, however, because other evidence (as recognized by the trial court) amply supports this conclusion. Since there was substantial evidence for the trial court's determination, there are no grounds for reversal.

DISPOSITION

The July 15, 2010 order denying defendants' motion to set aside Relational's default judgment is affirmed. To the extent that defendants seek to appeal the default judgment in favor of Relational or any earlier rulings pertaining to Relational, the appeal is dismissed.

The judgment in favor of US Capital is affirmed.

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BOREN, P.J.

We concur:

DOI TODD, J.

ASHMANN-GERST, J.