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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

PACIFIC WESTERN BANK,

Plaintiff and Appellant,

v.

KIJY, INC., et al.,

Defendants.

B284633

(Los Angeles County
Super. Ct. No. PC046223)

APPEAL from an order of the Superior Court of
Los Angeles County. Stephen P. Pfahler, Judge. Reversed.

Frandzel Robins Bloom & Csato, Hal D. Goldflam and Brad
R. Becker for Plaintiff and Appellant.

No appearance for Defendants.

Appellant and judgment creditor Pacific Western Bank (Bank) appeals from the trial court's order granting a motion by judgment debtors Chris Shah (Shah) and Jyotibala Patel-Shah (J. Shah)¹ to amend a previous order denying a claim of exemption from enforcement of a money judgment under Code of Civil Procedure sections 703.580 and 704.115.² We reverse the trial court's order.

BACKGROUND

Judgment, levy, and order denying claim of exemption

As the assignee of a \$631,834.55 money judgment against Shah, his spouse J. Shah, and KIJY, Inc.³ (the judgment), the Bank levied a writ of execution on two ROTH individual retirement accounts held by Shah. One account had a \$70 balance, and the other had a balance of \$86,558.

After the Bank levied on the accounts, Shah asserted a claim of exemption pursuant to section 704.115, which exempts from enforcement amounts held in a private retirement plan that are necessary to provide for the support of the judgment debtor in retirement and for the spouse and dependents of the judgment debtor. (§704.115, subds. (b), (e).) The Bank opposed the claim of exemption, arguing that Shah failed to meet his burden of establishing that the accounts levied upon were exempt; the claim was procedurally defective because Shah failed to comply with the requirements of section 703.530, which sets forth the

¹ Neither Shah nor J. Shah filed a respondent's brief in this appeal. Shah and J. Shah are referred to collectively as the Shahs.

² All further statutory references are to the Code of Civil Procedure.

³ KIJY, Inc. is not involved in this appeal.

procedures for claiming an exemption under section 704.115; statements made in a declaration submitted by Shah in support of the claim were contradicted by the exhibits attached to that declaration; and the financial statement required by section 703.530 failed to disclose Shah's assets and income.

Following an April 10, 2017 hearing on Shah's claim of exemption, the trial court entered a written order denying the claim. The trial court found that the Shahs had not signed the documents submitted to the court in support of the claim of exemption as required by sections 703.520, subdivision (b)(6) and 703.530, subdivision (c), and that even if the documents had been properly executed, the statements made by Shah in his declaration were either unsupported or contradicted by the exhibits attached thereto, the financial statement submitted failed to disclose all assets and income as required and contained various other deficiencies and inconsistencies, and even if the funds in the accounts qualified as exempt, the Shahs had failed to establish that the funds were necessary for their support. The trial court sustained the Bank's evidentiary objections to Shah's declaration. The April 10, 2017 order denying the claim of exemption directed that the funds held in the subject accounts be released by the levying officer to the Bank, and that the funds be applied to partial satisfaction of the judgment.

On April 26 and 27, 2017, the Sheriff disbursed the levied funds to the Bank.

Order amending 4/10/17 order denying claim of exemption

On April 28, 2017, the Shahs filed an ex parte application for an order amending the April 10, 2017 order, requesting, under section 704.115, subdivision (e), a credit for income taxes they

would owe on the levied funds.⁴ The trial court denied ex parte relief, set the matter for a hearing on June 21, 2017, and ordered the Shahs to refile their ex parte application as a noticed motion.

On May 12, 2017, the Shahs filed a noticed motion to amend the April 10, 2017 order to allow them an amount from the levied account necessary to pay any federal or state income taxes they would owe as the result of applying the levied funds to the satisfaction of the judgment. The motion was supported by the declarations of Shah, Shah's current attorney, Harvinder Anand, and a certified public accountant named Anthony Bonenfant.

Shah stated in his declaration that he had not requested a tax liability exemption under section 704.115, subdivision (e) in his prior claim of exemption because his previous attorney, Michael Berger, had not raised the issue with him. Shah further stated: "If my prior attorney had raised this issue with me when he filed papers on my behalf, I would have instructed Mr. Berger to pursue the credit described in Section 704.115(e)."

Bonenfant stated in his declaration that based on his review of the Shahs' tax returns and other relevant documents,

⁴ As discussed, section 704.115, subdivision (e) exempts from enforcement amounts held in self-employed retirement plans and individual retirement accounts "to the extent necessary to provide for the support of the judgment debtor when the judgment debtor retires and for the support of the spouse and dependents of the judgment debtor." The statute further provides that "[i]n determining the amount to be exempt under this subdivision, the court shall allow the judgment debtor such additional amount as is necessary to pay any federal and state income taxes payable as a result of the applying of an amount . . . [from a self-employed retirement plan or individual retirement account] to the satisfaction of the money judgment." (§ 704.115, subd. (e).)

the Shahs would owe \$29,012 in estimated federal and state taxes as the result of the \$86,865.99 distribution from Shah's individual retirement account.

The Bank opposed the motion and filed evidentiary objections to the Shah and Bonenfant declarations as well as a request for judicial notice.

At a June 21, 2017 hearing, the trial court overruled the Bank's evidentiary objections and granted the motion to amend the April 10, 2017 order. The court found that the Shahs presented sufficient evidence to establish that the account containing \$86,865.99 qualified as a traditional IRA exempt from enforcement under section 704.115, subdivision (a)(3), and that the resulting tax liability would be \$29,012. The trial court further found that the Shahs established that they failed to raise the tax credit issue in their prior claim of exemption as a result of mistake, inadvertence, surprise, or excusable neglect under section 473, subdivision (b). The court ordered "that the above payment must be used to pay the above federal and state tax payments," and that the Shahs "serve documentary proof on the [Bank] of the above federal and state tax payments within 30 days after said payment or by February 15, 2018, whichever occurs sooner."

On August 9, 2017, the Bank filed an ex parte application for an order clarifying the June 21, 2017 order and determining the amount of undertaking, if any, required to stay enforcement of the order pending appeal. In an August 9, 2017 minute order, the trial court clarified that the Bank "is ordered to return the subject amount to the Judgment Debtors within 90 days from today's date."

The Bank appeals from the June 21, 2017 order, as clarified by the August 9, 2017 minute order.

DISCUSSION

The Bank contends the trial court improperly granted relief under section 473 based on mistake, inadvertence, or excusable neglect by the Shahs' previous attorney.

I. Applicable law and standard of review

A judgment debtor who fails to make a claim of exemption from a money judgment in the requisite time and manner may obtain relief from such failure by filing a request for relief under section 473. Section 703.030, subdivision (c) authorizes a court to grant such relief: "Nothing in this section limits the authority of the court pursuant to Section 473 to relieve a person upon such terms as may be just from failure to claim an exemption within the time and in the manner prescribed in the applicable enforcement procedure."

As relevant here, the discretionary relief provision of section 473, subdivision (b) provides: "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect."

"A party who seeks relief under section 473 on the basis of mistake or inadvertence of counsel must demonstrate that such mistake, inadvertence, or general neglect was excusable because the negligence of the attorney is imputed to his client and may not be offered by the latter as a basis for relief.' [Citation.] In determining whether the attorney's mistake or inadvertence was excusable, 'the court inquires whether "a reasonably prudent *person* under the same or similar circumstances" might have made the same error.' [Citation.] In other words, the discretionary relief provision of section 473 only permits relief from attorney error 'fairly imputable to the client, i.e., mistakes anyone could have made.' [Citation.] 'Conduct falling below the

professional standard of care, such as failure to timely object or to properly advance an argument, is not therefore excusable. To hold otherwise would be to eliminate the express statutory requirement of excusability and effectively eviscerate the concept of attorney malpractice.’ [Citation.]” (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 258 (*Zamora*).)

An order granting relief under section 473 and section 703.030, subdivision (c) is reviewed for abuse of discretion. (*Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 685.) A trial court has discretion to grant relief under section 473, however, only if a party has shown an order was entered against him as the result of mistake, inadvertence, surprise, or excusable neglect. Absent such a showing, a court has no discretion to grant such relief. (*Iott v. Franklin* (1988) 206 Cal.App.3d 521, 528.)

II. Relief was improperly granted under section 473

Shah’s declaration in support of the motion to amend the April 10, 2017 order does not establish excusable error as a basis for relief under section 473. The declaration states that Shah failed to claim the exemption accorded by section 704.115, subdivision (e) for federal and state income tax liability because his previous attorney did not raise with him the possibility of asserting such a claim. An attorney’s failure to properly advance a legal argument is not excusable error. (*Zamora, supra*, 28 Cal.4th at p. 258.)

Counsel error has been deemed excusable when it is “clerical or ministerial” in nature. (*Zamora, supra*, 28 Cal.4th at p. 259.) For example, in *Zamora*, the California Supreme Court affirmed the trial court’s finding that a typographical error in a section 998 settlement offer (substitution of the word “against” for “in favor of” so that the offer’s terms were inverted), was the kind of error that anyone could have made. (*Ibid.*) Analogous clerical or ministerial errors include an attorney’s mistakenly

checking the “with prejudice” box in a form pleading, an associate attorney’s misinterpretation of a lead attorney’s instructions, a legal secretary’s loss of a pleading (*ibid.*), and an isolated, inadvertent error in calendaring the date for filing a claim or pleading. (*Comunidad en Accion v. Los Angeles City Council* (2013) 219 Cal.App.4th 1116, 1135.)

The error purportedly committed by Shah’s previous counsel is materially distinguishable from these cases. The kind of error claimed to have been made by the attorney was within his professional capacity and was not a proper basis for granting relief under section 473. (*Zamora, supra*, 28 Cal.4th at p. 258.)

DISPOSITION

The June 21, 2017 order, as clarified by the August 9, 2017 minute order, is reversed. The Bank is awarded its costs on appeal.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT