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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JOE ORTIZ, Plaintiff and Appellant, v. MURRAY GOLDSTEIN, Defendant and Respondent.	B269183 (Los Angeles County Super. Ct. No. SC113628)

APPEAL from an order of the Superior Court of Los Angeles County, Michelle Williams Court, Judge. Affirmed.

Law Offices of Donald A. Hilland, Donald A. Hilland and Armando M. Galvan for Plaintiff and Appellant.

McClaugherty & Associates, Jay S. McClaugherty, Anthony L. Perez and Christian E. Sanne for Defendant and Respondent.

INTRODUCTION

Plaintiff Joe Ortiz appeals from the order of the trial court denying his post-judgment motion to set aside the dismissal of his personal injury lawsuit against defendant Murray Goldstein. He contends that the trial court erred because his motion was timely. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs Ortiz and Jon R. Montes sued Goldstein for damages arising from an automobile accident. Trial was originally scheduled for July 8, 2013. The parties stipulated numerous times to continuation of the trial. Plaintiff Montes was dismissed from the action in the spring of 2014.[1]

On January 16, 2015, the trial court called the scheduled final settlement conference (FSC). Goldstein appeared, but Ortiz did not. The court trailed the FSC to the January 26, 2015 trial date and set the matter for an "OSC re: abandonment." The court called the case for trial on January 26, 2015, but Ortiz failed to appear and provided no excuse. The court granted Goldstein's request to dismiss the case, without prejudice, on January 26, 2015. Goldstein served a notice of entry of dismissal on Ortiz's attorney, Paul H. Ottosi, on January 27, 2015.

On July 28, 2015, 183 days after the case was dismissed, a notice of motion and motion to set aside the dismissal was filed by Attorney Donald Arthur Hilland, apparently on behalf of plaintiff Montes only, notwithstanding Montes had already been voluntarily dismissed from the action following his settlement

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[1] As a result of his dismissal, Montes is not a party to this appeal.

with Goldstein.[2] As excusable neglect, Hilland argued that Attorney Ottosi was hospitalized on January 2, 2015, where he had undergone surgery and hence was unable to represent plaintiffs when trial was called on January 26, 2015. Hilland explained he was scheduled to substitute into Ottosi's cases but had difficulty communicating with Ottosi, who could not speak well and was easily fatigued. Hilland also had trouble locating Ottosi's files and so he first learned of this case when he visited Ottosi on June 23, 2015. Hilland argued that Ottosi's illness, hospitalization, and legal unavailability "qualifie[d] as excusable neglect under [Code of Civil Procedure section] 473[, subdivision] (b)."

Ottosi's attached declaration explained that he has been suffering from gastrointestinal issues for a long time and began suffering "significant symptoms in August 2014." He underwent a kidney transplant at the end of January 2015, and was awaiting another kidney transplant. According to his physicians, Ottosi would likely be unavailable to continue with the case for six months to a year.[3] On September 14, 2015, plaintiffs filed an amended notice of motion and motion to set aside the dismissal. The motion purportedly included Ortiz's declaration, although no such declaration was attached.

Goldstein opposed the set-aside motion on the grounds it was untimely, it was procedurally defective, and the excuse did not justify relief. Goldstein observed that at least two other

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[2] Hilland was suspended from the practice of law from July 23, 2017 to July 23, 2018.

[3] Ortiz indicated in his brief on appeal that Ottosi has since passed away.

attorneys besides Hilland were associated with Ottosi and so, Goldstein argued, it was difficult to believe that the dismissal went unnoticed for more than half a year.

The trial court denied the set-aside motion because it was brought more than six months after the dismissal. The court determined that the motion was intended to be brought by Ortiz, notwithstanding the amended motion and errata identified only Montes as represented. Ortiz filed a timely appeal.[4]

CONTENTION

Ortiz contends that the trial court committed reversible error in denying the set-aside motion.

DISCUSSION

A dismissal entered against a party through that party's "mistake, inadvertence, surprise, or excusable neglect" may be set aside under Code of Civil Procedure section 473, subdivision (b),[5]

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[4] "Generally, orders denying motions to vacate are not appealable. However, an order denying a statutory motion under section 473 to vacate the judgment is appealable as an order after judgment. [Citation.]" (*Prieto v. Loyola Marymount University* (2005) 132 Cal.App.4th 290, 294, fn. 4; *Burnette v. La Casa Dana Apartments* (2007) 148 Cal.App.4th 1262, 1265-1266.)

[5] Section 473, subdivision (b) reads in relevant part: "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment . . . 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,*

but only if the motion is timely. A motion brought under the discretionary provision of section 473, subdivision (b) must be brought no more than six months after entry of the default. (*Manson, Iver & York v. Black* (2009) 176 Cal.App.4th 36, 42.) Likewise, under the mandatory provision, the motion must be brought " 'no more than six months *after entry of judgment*.' " (*Sugasawara v. Newland* (1994) 27 Cal.App.4th 294, 297.)

It appears that the motion here was brought under the discretionary provision because the declaration claimed "excusable neglect." (See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2017) ¶ 5.388, p. 5-113 [if motion is accompanied by declarations establishing " 'excusable neglect,' " the relief sought is discretionary].) However, regardless of which provision Ortiz relied on, the same result obtains because his motion was untimely.

The dismissal of this case was entered by the trial court on January 26, 2015, not January 27, 2015, as Ortiz contends. (Code Civ. Proc., § 581d.) The statutory six months, calculated as 182 days (Gov. Code, § 6803 [" 'half year,' " means "182 days"]),

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in no case exceeding six months, after the judgment, . . . or proceeding was taken. . . . 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 (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) *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." (Italics added.)

expired on Monday, July 27, 2015. Counsel filed the set-aside motion on Tuesday, July 28, 2015, one day late. The six-month period of section 473, subdivision (b) of the Code of Civil Procedure is jurisdictional. (*Manson, Iver & York v. Black*, *supra*, 176 Cal.App.4th at p. 42; *Arambula v. Union Carbide Corp*. (2005) 128 Cal.App.4th 333, 344 [court has no authority to grant relief when a party fails to comply with statute's time limits].) The words of the statute are clear. Thus, the trial court could not liberally construe the time limits in section 473, Ortiz's contention to the contrary notwithstanding. As the motion was untimely, the trial court had no jurisdiction to grant statutory relief.

Even had the trial court considered the merits of the motion to set aside the judgment, the result would have been the same because the motion did not make the necessary showing. Ottosi had been ill for years before January 2015 and began experiencing "significant symptoms in August 2014," some five months before the scheduled trial date. Plaintiffs provided no explanation why another attorney was not substituted or associated in for Ottosi when he knew he was ill, or why the dismissal, which Goldstein served on Ottosi's office, went unnoticed for five months. An order vacating the judgment is not warranted when the explanation for failure to attend trial was counsel's prolonged illness. (*Ekel v. Swift* (1874) 47 Cal. 619.)

DISPOSITION

The order denying the motion to set aside the dismissal is affirmed.

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DHANIDINA, J.*

We concur:

EDMON, P. J.

LAVIN, J.

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