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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

PETER KLEIDMAN,

Plaintiff and Appellant,

v.

JORDAN WALKER-
PEARLMAN et al.,

Defendants and Respondents.

B280625

(Los Angeles County
Super. Ct. No. BC599972)

APPEAL from orders of the Superior Court of Los Angeles
County. Malcolm H. Mackey, Judge. Reversed and remanded.

Peter Kleidman, in pro. per., for Plaintiff and Appellant.

No appearance for Defendants and Respondents.

* * * * *

Plaintiff and appellant Peter Kleidman brought this action for breach of contract against two defendants, Cinessence, LLC and Jordan Walker-Pearlman. Plaintiff served the agent for service of process for Cinessence and served Mr. Walker-Pearlman by publication. Neither defendant appeared in the action and plaintiff attempted to obtain a default judgment. Less than 15 months after the action was commenced, the court, on its own motion, dismissed plaintiff's action with prejudice for failure to obtain a default judgment. Plaintiff appeals from the judgment of dismissal.

We reverse and remand for further proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff filed this action in propria persona against Cinessence and Mr. Walker-Pearlman on November 2, 2015. The complaint stated three contract causes of action based on a written credit line agreement and a written security agreement, both of which were attached as exhibits to the complaint. At the time the action was commenced and up through the date of dismissal, plaintiff resided in the state of Oregon.

Plaintiff served the agent for service of process for Cinessence in December 2015. Cinessence did not appear in the action.

In February 2016, plaintiff filed an application requesting an order to serve Mr. Walker-Pearlman by publication. Plaintiff's application included his declaration, as well as the declarations of two other individuals (process server and skip tracer), attesting to their efforts to locate a current address for Mr. Walker-Pearlman. His last known address had been in Los Angeles. A current address could not be confirmed.

On March 1, 2016, plaintiff participated in the initial status conference, at which a March 2017 trial date was set.

On March 3, 2016, the court issued an order allowing plaintiff to serve Mr. Walker-Pearlman by publication in the Los Angeles Times.

On April 15, 2016, plaintiff filed a first amended complaint that added a common count as an alternative theory to plaintiff's first cause of action for breach of the credit line agreement and added some additional detail to the original causes of action. No new defendants were added. Plaintiff filed proof of service demonstrating service of the first amended complaint on Cinessence on April 21, 2016.

Service of summons by publication on Mr. Walker-Pearlman was published on four separate occasions in the Los Angeles Times (March 22 and 29, April 5 and 12, 2016). Plaintiff filed proof of publication on September 2, 2016.

Plaintiff submitted a request for entry of default form as to both defendants. The clerk entered default as to Cinessence on September 7, 2016. The clerk rejected the request for default as to Mr. Walker-Pearlman, noting "The proof of publication is on the complaint? The first amended complaint was filed on 4-15-16. The 1st date of publication is on 3-22-16?"

Plaintiff thereafter filed an ex parte application requesting an order from the court directing the clerks to enter the default of Mr. Walker-Pearlman because they were refusing to do so. Plaintiff submitted a declaration stating he had still not been able to ascertain Mr. Walker-Pearlman's whereabouts and that publishing a second round of notices would cost him \$1,300.

At the hearing on September 9, 2016, plaintiff appeared via CourtCall. He explained he was having trouble getting the default entered by the default clerk. The court said the fact plaintiff was attempting to do everything by mail instead of in-person was "creating a problem." The court denied plaintiff's application,

stating “there is no urgent need to enter default on an ex parte basis. Plaintiff is directed to make application through the Default Department.”

On October 26, 2016, plaintiff filed proof that service of summons on Mr. Walker-Pearlman by publication had been re-published in the Los Angeles Times on September 14, 21, and 28, and October 5, 2016. Mr. Walker-Pearlman did not appear in the action.

Plaintiff submitted a second request for entry of default as to Mr. Walker-Pearlman in November 2016, which was again rejected by the default clerk. The clerk noted that an order from the court was needed to accept the second service by publication.

Plaintiff filed a motion to vacate or continue the March 2017 trial date, explaining his difficulties in getting the default clerk to accept his request for entry of default on Mr. Walker-Pearlman.

On December 29, 2016, plaintiff appeared via CourtCall at the hearing on his motion to vacate or continue the trial date. The court denied the motion without prejudice, explaining “[t]here remains sufficient time before trial in March for Plaintiff to obtain default judgments, in resolution of his action.”

The court’s minute order of December 29 also set an “Order to Show Cause Hearing Regarding Failure to File Default Judgment” (OSC) for February 27, 2017. The order contained no other language regarding the nature of the OSC, and specifically did not give notice that the action could be dismissed as a sanction if a default judgment was not procured by that date.

On January 17, 2017, plaintiff filed his response to the court’s OSC. Plaintiff explained he had tried repeatedly to get the default entered as to Mr. Walker-Pearlman, but the default clerk said an order was needed from the court, and the court insisted he had to proceed first with the default clerk. Plaintiff stated he believed

liability for both defendants was joint and several and therefore he was waiting to present his default prove-up package as to both defendants once he could get default entered against Mr. Walker-Pearlman.

On January 25, 2017, the court heard plaintiff's ex parte application to advance the hearing date on the February 27 OSC. The court granted plaintiff's request and entertained argument from plaintiff, who again appeared via CourtCall, on the issue of why his default judgment paperwork had not been submitted to the court.

At that hearing, the court ordered the case dismissed forthwith for plaintiff's "failure to perfect default," failure to comply with prior orders and failure to timely prosecute the case, citing in part to Code of Civil Procedure section 575.2, section 583.410 and chapter 3 of the Los Angeles County Superior Court Local Rules.

This appeal followed.

DISCUSSION

We generally review an order of dismissal under the deferential abuse of discretion standard. (See, e.g., *Blank v. Kirwan* (1985) 39 Cal.3d 311, 331.) Plaintiff bore the burden of affirmatively showing an abuse of discretion. (*Ibid.*) However, "[a] grant of dismissal is subject to closer appellate scrutiny than is a denial of dismissal, with doubts resolved in favor of the plaintiff. The policy seeking to prevent unreasonable delays in litigation 'must sometimes yield to the more powerful policy which seeks to dispose of litigation on the merits.'" (6 Witkin, Cal. Procedure (5th ed. 2008) Proceedings Without Trial, § 471, p. 925.)

On its own motion, the trial court set an OSC hearing regarding plaintiff's "Failure to File Default Judgment." There is nothing in the OSC notice that provides notice to plaintiff that the court would consider dismissing the action as a sanction for failing

to procure a default judgment by that time. Nevertheless, the court dismissed plaintiff's action with prejudice at the OSC hearing on January 25, 2017, for failure to timely prosecute the case, citing in part to Code of Civil Procedure section 575.2, section 583.410 and chapter 3 of the Los Angeles Superior Court Local Rules. The dismissal was entered less than 15 months from the date the action was commenced.

By statute, a trial court is vested with discretion to dismiss an action for failure to prosecute. (Code Civ. Proc., § 583.130, § 583.410.) In such cases, “the policy favoring trial or other disposition of an action on the merits [is] generally to be preferred over the policy that requires dismissal for failure to proceed with reasonable diligence in the prosecution of an action in construing the provisions of this chapter.” (§ 583.130.) And, section 583.410 does not provide authority for a discretionary dismissal in an action that is less than two years old. (See, e.g., *Hawks v. Hawks* (2006) 141 Cal.App.4th 1435, 1437.)

Since it had been less than 15 months since the action was filed, dismissal for failure to prosecute under Code of Civil Procedure section 583.410 was not authorized.

Trial courts also have authority to impose dismissal as a sanction for failure to comply with the California Rules of Court, local superior court rules, or other orders of the court. (Code Civ. Proc., § 583.150 [“This chapter does not limit or affect the authority of a court to dismiss an action or impose other sanctions under a rule adopted by the court pursuant to Section 575.1 or by the Judicial Council pursuant to statute, or otherwise under inherent authority of the court.”].)

Code of Civil Procedure section 575.2 provides that no sanction, including dismissal, may be imposed for a violation of local court rules without “prior notice to, and an opportunity to be

heard by, the party against whom the penalty is sought to be imposed.” California Rules of Court, rule 2.30(c) provides, in relevant part, that the court, in a civil case, on its own motion may issue an order to show cause that must “(1) state the applicable rule that has been violated, (2) describe the specific conduct that appears to have violated the rule, and (3) direct the attorney, law firm, party, witness, or other person to show cause why sanctions should not be imposed against them for violation of the rule.”

Considering these statutes and rules together, it is plain that a trial court may impose sanctions, including dismissal, for failure to comply with local rules or court order “*but only after giving a party notice and an opportunity to be heard.*” (*Lee v. An* (2008) 168 Cal.App.4th 558, 564, italics added.)

The trial court here failed to give plaintiff notice that his case might be dismissed at the hearing on the OSC regarding plaintiff’s failure to timely procure a default judgment. The court only gave plaintiff notice that he must advise the court as to the reasons why he had not yet perfected his default judgment.

In response to the OSC notice, plaintiff set out in detail the reasons he had been unable to proceed with presenting default prove-up paperwork. Plaintiff had obtained entry of default against the entity, Cinessence. Thereafter, he obtained an order to serve summons on Mr. Walker-Pearlman by publication, and documented for the court that service by publication had been completed in March-April 2016, and again in September-October 2016. When the default clerk refused to enter default, indicating that a court order had to be obtained, plaintiff sought *ex parte* relief in accordance with local rules. (Super. Ct. L.A. County, Local Rules, rule 3.200(a) [where clerk rejects request for default and defect cannot be cured to the clerk’s satisfaction, “counsel may apply for *ex parte* relief to the direct calendar judge, Specialized Civil Court

judge, or supervising judge, whichever is appropriate”].) The court denied plaintiff’s ex parte, stating there was “no urgent need” for entry of default on an ex parte basis and referring plaintiff back to the default clerk. Plaintiff also advised the court he remained willing and able to provide a default package as to both defendants, if the court would enter the default of Mr. Walker-Pearlman. The court declined to do so and instead dismissed the action in its entirety.

The court acted in excess of its authority in dismissing the action without proper notice to plaintiff. Accordingly, we vacate the dismissal and remand for further proceedings consistent with this opinion, including entry of default against Mr. Walker-Pearlman and an order granting plaintiff a reasonable time period in which to present paperwork to attempt to prove-up his claims.

DISPOSITION

The judgment of dismissal entered January 25, 2017, is vacated. The action is remanded to the superior court for further proceedings consistent with this opinion.

Plaintiff and appellant Peter Kleidman shall recover his costs of appeal.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

DUNNING, J.*

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