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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

BEATRICE WARD et al.,

Plaintiffs and Appellants,

v.

ALLSTATE INSURANCE
COMPANY,

Defendant and Respondent.

B275908

(Los Angeles County
Super. Ct. No. BC572252)

APPEAL from orders of the Superior Court of Los Angeles County, William F. Fahey, Judge. Affirmed in part and dismissed in part with directions.

Abir Coehn Treyzon Salo, Boris Treyzon, and Cynthia Goodman for Plaintiffs and Appellants.

MacGregor & Berthel, Gregory Michael MacGregor, Deborah A. Berthel, and Joshua N. Willis for Defendant and Respondent.

Plaintiffs and appellants Beatrice Ward and Karyn Ward challenge the trial court's order denying their motion to vacate the voluntary dismissal of their case under Code of Civil Procedure section 473, subdivision (b),¹ based on a mistake of law. They also appeal the order granting defendant and respondent Allstate Insurance Company's motion for summary adjudication. As we shall explain, the court did not err in denying the motion to vacate the dismissal because plaintiffs failed to demonstrate that their counsel made a reasonable and honest mistake of law. In addition, we dismiss the appeal of the order granting summary adjudication because it is not appealable.

FACTUAL AND PROCEDURAL SUMMARY²

In 2010, plaintiffs filed a claim with defendant, their homeowner's insurance company, after a broken water pipe caused damage to plaintiffs' home. Unsatisfied with the resolution of the claim, plaintiffs filed a complaint against defendant asserting breach of contract and insurance bad faith.

In late 2015, defendant filed a motion for summary judgment, or in the alternative, summary adjudication. On February 16, 2016, the trial court granted summary adjudication on the bad faith cause of action.³ Following the ruling, and before the final status conference (FSC), counsel for the parties entered an oral agreement that if plaintiffs voluntarily dismissed the remaining breach of contract claim

¹ All statutory references are to the Code of Civil Procedure.

² Only the facts and procedural history relevant to the disposition of this appeal are described herein.

³ On February 22, 2016, the trial court entered an amended order, which did not substantively change the court's initial order.

without prejudice defendant would waive costs. And they agreed that in the event the Court of Appeal reversed the summary adjudication order, the statute of limitations on the voluntarily dismissed contract claim would “relate back to the time of the filing of the original complaint,” allowing plaintiffs to revive the breach of contract claim. Plaintiffs believed that the voluntary dismissal of the contract claim would end the case in the trial court and permit an immediate appeal of the court’s order granting summary adjudication. Thereafter at the FSC on February 23, 2016, plaintiffs’ counsel informed the court that he planned to dismiss the contract claim without prejudice, and the trial court granted the request to dismiss.

While preparing to file a notice of appeal, plaintiffs’ counsel discovered *Kurwa v. Kislinger* (2013) 57 Cal.4th 1097 (*Kurwa*), in which the California Supreme Court held that no appealable order or judgment results when the parties agree to dismiss some claims without prejudice and to waive the operation of the statute of limitations as to those claims while the parties pursue an appeal of other claims that the court had previously dismissed with prejudice. (*Id.* at p. 1100.)

On April 22, 2016, believing that *Kurwa* foreclosed the appeal, plaintiffs filed a motion to set aside the voluntary dismissal under the discretionary relief provision of section 473, subdivision (b) based on a mistake of law. Plaintiffs’ counsel acknowledged that he had failed to discover *Kurwa* and therefore he had erroneously dismissed the case based on an excusable mistake of law. Plaintiffs also informed the court that if it set-aside the dismissal, they would agree to waive damages on the contract claim; and then the court could enter a final judgment in favor of defendant in the case which would allow plaintiffs to appeal.

On June 1, 2016, the trial court denied the motion to vacate the dismissal, concluding that plaintiffs had failed to establish a mistake of law warranting relief under section 473, subdivision (b). The court found that plaintiffs' counsel was an experienced lawyer and that he had failed to explain why he was unaware of the applicable law when he dismissed the case. The court further concluded that the situation was not complex and that governing law was clear and not unsettled.

On June 16, 2016, plaintiffs filed a notice of appeal of the order denying their motion for relief under section 473, subdivision (b), and the order granting the summary adjudication.

DISCUSSION

A. The Court Did Not Abuse Its Discretion When It Denied the Motion to Vacate the Voluntary Dismissal Based on Mistake of Law.

A trial court has discretion to grant relief from the judgment on the grounds of “mistake, inadvertence, surprise, or excusable neglect.” (§ 473, subd. (b).) This court reviews the denial of a motion to vacate the judgment under section 473 for abuse of discretion. (*Uriarte v. United States Pipe & Foundry Co.* (1996) 51 Cal.App.4th 780, 787-790.)

An honest mistake of law is a valid ground for discretionary relief when the legal problem posed is “complex and debatable” but not when the mistake results from a general ignorance of the law. (*Toho-Towa Co., Ltd. v. Morgan Creek Productions, Inc.* (2013) 217 Cal.App.4th 1096, 1111; *Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1206; 8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 155, p. 749 [“Where the court finds that the ‘mistake’ is simply the result of professional incompetence, general ignorance of the law, or unjustifiable negligence in discovering the

law, relief will be denied.”].) Whether a mistake in law constitutes excusable neglect will depend on the reasonableness of the misconception and the justifiability of lack of determination of the correct law. “ ‘[I]gnorance of the law coupled with negligence in ascertaining it will certainly sustain a finding denying relief.’ ” (*Robbins v. Los Angeles Unified School Dist.* (1992) 3 Cal.App.4th 313, 319, superseded by statute on another ground as stated in *Scott Co. v. United States Fidelity & Guaranty Ins. Co.* (2003) 107 Cal.App.4th 197, 208, disapproved on other grounds in *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1107 & fn. 5.)

The trial court here did not abuse its discretion when it concluded that plaintiffs had failed to show the mistake of law that warranted relief under section 473, subdivision (b). Plaintiffs’ counsel’s mistake did not involve a complex or debatable legal problem or unsettled law. *Kurwa*, which the California Supreme Court decided in 2013, clearly holds that when the trial court has resolved some causes of action and thereafter the parties agree to voluntarily dismiss the rest without prejudice and also agree to toll or waive the statute of limitations on the voluntarily dismissed counts for potential litigation upon the conclusion of the appeal, the resulting order is not appealable. (*Kurwa, supra*, 57 Cal.4th at p. 1105.)

In reaching this decision, the *Kurwa* Court acknowledged and endorsed a line of Court of Appeal decisions which reached the same conclusion, including *Don Jose’s Restaurant, Inc. v. Truck Ins. Exchange* (1997) 53 Cal.App.4th 115 (*Don Jose’s Restaurant*), [following an order granting summary adjudication, counsel for the parties agreed to toll the statute of limitations for the remaining causes of action and dismiss them without prejudice so that the plaintiff could immediately appeal from the judgment]. The parties further agreed, as they did here, that in the event

the plaintiffs' appeal from the trial court's order of the motion for summary adjudication was successful and the matter was remanded, the plaintiffs could revive the voluntarily dismissed claims. (*Id.* at p. 117.) The *Don Jose's Restaurant* court dismissed the appeal, concluding that it lacked jurisdiction because the judgment was not final. (*Id.* at pp. 118-119.) *Don Jose's Restaurant* is indistinguishable from plaintiffs' situation. And based on *Kurwa* and *Don Jose's Restaurant*, plaintiffs' voluntary dismissal of their contract claim without prejudice did not result in an appealable order.

Plaintiffs' counsel has offered no justification for failing to discover *Kurwa* or *Don Jose's Restaurant* before he voluntarily dismissed the remaining claim. Nor has counsel shown that he acted under a reasonable misconception of the law to warrant relief under section 473, subdivision (b). Consequently, the trial court did not err when it denied plaintiffs' motion to vacate the voluntary dismissal based on counsel's legal mistake.

B. The Order Granting the Motion for Summary Adjudication must be Dismissed.

In addition to the appeal from the order denying the motion to vacate, plaintiffs also appeal from the order granting summary adjudication for defendant.⁴ That order, however, is not appealable and is subject to dismissal. (*Fisherman's Wharf Bay Cruise Corp. v. Superior Court* (2003) 114 Cal.App.4th 309, 319 [an order granting

⁴ Plaintiffs did not directly appeal from the order voluntarily dismissing the case. Had they done so, *Kurwa* would have required that we dismiss the appeal from that order.

partial summary judgment, or summary adjudication, is not an appealable order].)⁵

Under the circumstances, plaintiffs' case currently resides in an appellate netherworld. On the one hand, plaintiffs cannot pursue an appeal of the merits of the order granting summary adjudication. On the other hand, having voluntarily dismissed the remaining contract cause of action in the trial court, they cannot now litigate that claim to obtain a final appealable judgment in the case.

The parties in *Kurwa* faced the same dilemma after the California Supreme Court remanded with directions to dismiss the appeal. When the case returned to the California Supreme Court, *Kurwa v. Kislinger* (2017) 4 Cal.5th 109, 111, 116-118 (*Kurwa II*), the Court provided further guidance on the proper recourse when parties improperly "attempt to secure appellate review of a trial court's nonfinal judgment" (*id.* at p. 118) by entering into an "agreement holding some causes of action in abeyance for possible future litigation after an appeal from the trial court's judgment on others." (*Id.* at p. 113.) The Court explained that because neither a final judgment nor an appealable order had been entered in the case, the trial court retained jurisdiction to vacate both the defective dismissal order and the underlying stipulation related to the statute of limitations. (*Id.* at p. 118.) Thus, the Court in *Kurwa II* concluded that the appellate court must dismiss the appeal to allow the parties to return to the trial court to dispose of the remaining claims, by dismissing them with prejudice or pursuing them to judgment, and

⁵ Under certain circumstances, parties can obtain appellate review of an order granting summary adjudication by filing a petition for a writ of mandate. (See *Field Research Corp. v. Superior Court* (1969) 71 Cal.2d 110, 111.) Plaintiffs here did not avail themselves of that opportunity for appellate review.

thereafter the trial court could issue a final judgment from which an appeal could be taken. (*Id.* at pp. 118-119.)

Consequently, we dismiss the appeal from the order granting the summary adjudication and following *Kurwa II*, we remand this case with directions to the trial court to vacate the order dismissing the case so that the plaintiffs can resolve the remaining contract claim and obtain a final appealable judgment.

DISPOSITION

The order granting summary adjudication is dismissed, and the case is remanded for further proceedings consist with this opinion. The order denying the motion to vacate the voluntary dismissal is affirmed. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur.

JOHNSON, J.

BENDIX, J.