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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

DOUGLAS C. LEE, Plaintiff and Respondent, v. DUREFORT, LLC et al., Defendants and Appellants; KEVIN SINGER, as Partition Referee, etc., Respondent.	A164344 (Alameda County Super. Ct. No. RG20073568)
DOUGLAS C. LEE, Plaintiff and Respondent, v. DUREFORT, LLC, Defendant and Appellant; KEVIN SINGER, as Partition Referee, etc., Respondent.	A172214 (Alameda County Super. Ct. No. RG20073568)

This consolidated appeal arises from an action filed by plaintiff Douglas Lee (Douglas) for partition by sale, where defaults were entered against

defendants Patricia Lee (Patricia) and Durefort, LLC (Durefort).[1] Patricia and Durefort each moved to set aside their defaults based on attorney "mistake, inadvertence, surprise, or excusable neglect" pursuant to Code of Civil Procedure section 473, subdivision (b) (section 473(b)).[2] The trial court denied the motions. Over two years later, Durefort filed another motion to set aside its default on the same statutory basis. The trial court again denied the motion. Defendants appealed, arguing that the trial court abused its discretion in declining to set aside their defaults. We disagree and affirm.

BACKGROUND

I.

Douglas filed a complaint for partition by sale of a multi-unit property in September 2020. The complaint alleged that Douglas owned a 25 percent interest in the property, and Durefort (an entity owned by Patricia, Douglas's sister) held the remaining 75 percent interest. Douglas filed requests for entry of default as to both Durefort and Patricia in February 2021. The trial court entered the defaults, and appointed respondent Kevin Singer (Referee) as partition referee for the property.

In July 2021, Patricia and Durefort each filed a motion to quash service of the summons and complaint. The trial court denied the motions. As to Patricia, it found there was sufficient evidence to establish she had been properly served by a process server. As to Durefort, the court rejected the argument that service on Patricia was sufficient to constitute service on Durefort because official records indicated there was a managing member of the entity who had not been served. But the court nonetheless denied the

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[1] We refer to parties by their first names to avoid confusion. No disrespect is intended.

[2] Undesignated statutory references are to the Code of Civil Procedure.

motion to quash because Durefort was a suspended corporation and therefore not authorized to participate in the action. (See Rev. & Tax. Code, § 23301 [providing that "powers, rights, and privileges of a domestic taxpayer may be suspended" if certain conditions are met, including failure to pay taxes]; *Bourhis v. Lord* (2013) 56 Cal.4th 320, 324 ["In general, a 'corporation may not prosecute or defend an action, nor appeal from an adverse judgment in an action while its corporate rights are suspended for failure to pay taxes' "].)

II.

In October 2021, Patricia and Durefort each filed a motion to set aside the defaults pursuant to section 473(b) based on their counsel's "mistake, inadvertence, surprise, or excusable neglect" in failing to prevail on the motions to quash. Durefort's motion papers also included an exhibit reflecting correspondence between Patricia and the Franchise Tax Board regarding Durefort's tax issues.

The trial court denied both motions. It found that neither Patricia nor Durefort had made any showing that the failure to timely respond to the complaint was due to attorney mistake, inadvertence, surprise, or excusable neglect. It explained that the failure to prevail on the July 2021 motions to quash did not justify setting aside the February 2021 default from failing to timely respond to the complaint. As to Durefort, the court also denied the motion to set aside the default because the entity was still not authorized to participate in the action, based on official records and the correspondence presented with the motion that Durefort was still a suspended corporation.

Patricia and Durefort filed a notice of appeal on January 6, 2022.

III.

The trial court authorized Referee to sell the property in February 2022. The sale of the property closed in March 2022. The trial court entered

an order approving and settling Referee's final report and accounting in July 2022.

IV.

Over two years later, in October 2024, Durefort filed another motion to set aside its default. It again sought relief under section 473(b) based on counsel's "mistake, inadvertence, surprise, or excusable neglect" in failing to prevail on the motion to quash.

Durefort then argued the court erred in denying its first motion to set aside the default based on the entity's suspension. It claimed "Durefort was indeed a California corporation in good standing and should have been granted the right to defend itself in the action."

The motion papers included an exhibit reflecting a letter from the Franchise Tax Board dated November 17, 2022 that was partially redacted. The unredacted portion of the letter stated Durefort had originally been issued a registration number as a foreign (Utah) limited liability corporation, but was then issued a new number once converted to a domestic (California) limited liability corporation. It referenced a payment that had been made on June 1, 2017 under the original, inactive registration number. The letter stated the Franchise Tax Board had now made an adjustment to apply the payment to Durefort's current registration number and restored its status back to active.

Douglas and Referee opposed the motion on several grounds. Among other things, they argued that the trial court lacked jurisdiction under section 916 to consider the motion because of the pending appeal challenging the denial of the prior motions in 2021. (§ 916, subd. (a) [providing that, with certain statutory exceptions not relevant here, "perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or

upon the matters embraced therein or affected thereby, including enforcement of the judgment or order"].) Douglas also argued the motion was barred by laches because "this is a partition action, and Durefort waited until all of the property at issue had been sold and disposed of before filing the Motion."

In its reply brief, Durefort argued for the first time that it was seeking relief under section 473, subdivision (d) (section 473(d)). It contended the Franchise Tax Board had made a "clerical error" in its accounting and Durefort was never a suspended corporation, so the default and default judgment should be set aside as void. (See § 473(d) [providing for motion to correct "clerical mistakes" in judgment or orders, and to "set aside any void judgment or order"].) The reply brief stated in a footnote that Durefort did not oppose an opportunity for Douglas or Referee to file a supplemental brief to respond to this new argument.

At the hearing on the motion, Douglas's counsel argued that section 473(d) relief should not be considered because it was raised on reply but, even if were considered, the evidence fell far short of establishing any "clerical mistake" to trigger that provision. The only evidence submitted by Durefort was the redacted letter from the Franchise Tax Board showing a payment was made under one registration number and Durefort wanted it applied to a different registration number, and was accordingly adjusted by request. It did not show "anyone made a mistake here other than Durefort, itself." Douglas's counsel also noted Durefort had waited two years from receiving the letter to raise the request. The trial court asked when Durefort received the letter, and why it had waited so long to raise it. Durefort's counsel responded that it had received the letter in December 2022 but was delayed in bringing the motion because of work being done in the pending appeal. He

stated that the new motion was brought to get a ruling from the trial court on the "full spectrum of arguments" to be presented in that appeal, including "all of the options under [section] 473(d)" as well as those previously raised under section 473(b).

The trial court denied the motion. It found the motion was untimely because it was not made within six months after the default was taken and Durefort had not shown diligence in bringing the motion. The court then found the motion had not provided any factual showing of mistake, inadvertence, surprise, or excusable neglect for relief under section 473(b), or to explain why Durefort had waited two years to file the motion after receiving the Franchise Tax Board letter. It also denied the motion "based on the additional arguments raised in [Douglas] and [] Referee's respective oppositions and in court, including, without limitation, that the motion is precluded by operation of [section] 916." Finally, the court rejected Durefort's new section 473(d) argument as forfeited because it was raised for the first time on reply. Even if not forfeited, the court found "no compelling basis for granting relief under Section 473(d) for the reasons articulated by Plaintiff's counsel at the hearing."

Durefort filed a notice of appeal on December 30, 2024. We granted defendants' motion to consolidate the two appeals.

DISCUSSION

I.

Defendants' briefing on appeal is not a model of clarity and raises two preliminary issues that we address before turning to the merits of the arguments presented here.

First, the extent to which Patricia is participating in the arguments is unclear. The January 6, 2022 notice of appeal identifies Patricia as an

appellant in that appeal. The opening brief, however, states that "DUREFORT, LLC, brings this appeal to contest the default and default judgment against it" and requests, on remand, that Durefort "be entitled to participate in such proceedings anew." Given the briefing sporadically refers to "appellants" in the plural form and in an abundance of caution, we address any arguments directed at the denial of defendants' motions to set aside their defaults in 2021 as made by both Patricia and Durefort.

Second, the opening brief does not provide a clear statement of appealability. (Cal. Rules of Court, rule 8.204(a)(2)(B) [brief must "[s]tate that the judgment appealed from is final, or explain why the order appealed from is appealable"].) Defendants concede that an order denying a motion to set aside a default is not independently appealable, but instead appealable from the ensuing judgment. (§ 904.1, subd. (a)(1); *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981 (*Rappleyea*).) The January 6, 2022 notice of appeal characterizes that appeal as taken from the December 14, 2021 "default judgment," presumably referring to the trial court's order authorizing Referee to sell remove, store, and sell abandoned personal property. The opening brief, however, offers two other "possibilities" for rulings that could be considered an appealable judgment: (1) the February 22, 2022 order authorizing the sale of the multi-unit property, or (2) the July 26, 2022 order approving and settling Referee's final report and accounting. (§ 904.1, subd. (a)(9) [appeal can be taken from interlocutory judgment "in an action for partition determining the rights and interests of the respective parties and directing partition to be made"]; *Stockton v. Rattner* (1972) 22 Cal.App.3d 965, 968 [interlocutory judgment is otherwise appealable when it "*has the effect of a final determination of property rights*"]; *Schreiber v. Ditch Road Investors* (1980) 105 Cal.App.3d 675, 677, fn. 1 ["An order approving a

receiver's account is appealable as a final judgment determining matters which are collateral to the main action"].) The December 30, 2024 notice of appeal filed by Durefort characterizes that appeal as taken from the October 29, 2024 order denying its motion to set aside the default. Durefort argues this is an appealable post-judgment order. (§ 904.1, subd. (a)(2).)

Douglas responds that, because defendants treat this "sequence of events" as "the equivalent of entry of default judgments" and his counsel "is not aware of any case law discussing this distinction," he "will assume, for the sake of argument, that default judgments were effectively entered through entry of the [partition] decree." Referee offers no response, appearing to defer to Douglas on the point. We thus deem any specific appealability challenges waived. (Cal. Rules of Court, rule 8.204(a)(1)(B) [each brief must state each point under separate heading or subheading]; *OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 844, fn. 3 (*OCM Principal Opportunities Fund, L.P.*) [contentions waived for failure to present argument and appropriate legal authorities].)

Even assuming appealability, however, we are not persuaded by the merits of the arguments made here. We turn first to defendants' arguments regarding section 473(b), and then to Durefort's arguments regarding section 473(d).

II.

Section 473(b) provides, in relevant part, that the court "may, upon any terms as may be just," relieve a party from a judgment, dismissal, order, or other proceeding taken against the party by "mistake, inadvertence, surprise, or excusable neglect." We review the denial of relief under section 473(b) for abuse of discretion. (*Rappleyea*, *supra*, 8 Cal.4th at p. 981.)

As to the denial of the motions filed in 2021, defendants now argue the trial court abused its discretion because they did show attorney mistake for relief under section 473(b). They contend their counsel had an "apparently erroneous impression" that the court would grant their motions if Douglas refused to stipulate to setting the defaults aside. We deem the argument forfeited for failure to raise it in the trial court below. (*Gray1 CPB, LLC v. SCC Acquisitions, Inc.* (2015) 233 Cal.App.4th 882, 897 (*Gray1*) [" ' " ' " '[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court.' Thus, 'we ignore arguments, authority and facts not presented and litigated in the trial court' " ' " ' "].) Here, defendants' motions to set aside the defaults had instead argued for relief based on their attorney's purported "mistake" in failing to prevail on the motions to quash.

Even if not forfeited, we conclude the trial court did not abuse its discretion in determining defendants had made no factual showing of any mistake. The declarations submitted with defendants' motions stated only that defendants' counsel had sent a proposed stipulation to Douglas's counsel to set aside the defaults, and Douglas had declined to execute it. And the record shows the trial court merely directed defendants to file motions to set aside the defaults if they could not obtain a stipulation. There is nothing to show defendants' counsel had any mistaken impression that Douglas was going to stipulate to set aside the default, or that the trial court would be granting their motions if they could not obtain such a stipulation. And in any event, defendants have not shown how such a mistaken impression, even if it existed, would have constituted a basis for the court to grant the motions.

In the trial court, defendants identified the basis for the motions as their counsel's failure, through "inadvertence, surprise, mistake, or excusable

neglect," to prevail in their earlier motions to quash service of summons. They did not explain how that failure, however, was the result of some error by their counsel. And regardless, the trial court did not abuse its discretion in concluding that any attorney mistake regarding the July 2021 motions to quash (or the October 2021 motions to set aside the defaults) did not justify setting aside the earlier February 2021 defaults under section 473(b). Defendants' own cited authority makes clear they were required to show mistake, inadvertence, surprise, or excusable neglect causing their failure to timely respond to the *complaint*, which led to the trial court's entry of the defaults against them. (*Lasalle v. Vogel* (2019) 36 Cal.App.5th 127, 131, 141 [concluding that attorney neglect in failing to respond to complaint was excusable and trial court abused its discretion in declining to set aside default]; *Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 694 [concluding Permatex was entitled to relief under section 473(b) because its failure to file a response to the complaint was the result of mistake, inadvertence, or excusable neglect after sending to insurance carrier for handling].) Defendants have not shown, let alone argued, any such mistake.

As to the order denying Durefort's 2024 motion under section 473(b), we conclude the trial court did not abuse its discretion in finding the motion was untimely. (§ 473, subd. (b) [application "shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken"]; *Arega v. Bay Area Rapid Transit Dist.* (2022) 83 Cal.App.5th 308, 316 [moving party must establish motion was made in "reasonable time" within six-month limit, which "depends on the circumstances of each case 'but definitively requires a showing of diligence in making the motion after the discovery of the default' "].) The motion was filed years after the default and the purported default judgment were

entered. Durefort does not challenge this finding of untimeliness under section 473(b) on appeal. The argument is forfeited. (Cal. Rules of Court, rule 8.204(a)(1)(B); *OCM Principal Opportunities Fund, L.P.*, *supra*, 157 Cal.App.4th at p. 844, fn. 3.)[3]

III.

Section 473(d) provides that the "court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order." When reviewing a denial of relief under section 473(d), we consider de novo whether the judgment is void and, if it is, then determine whether the trial court abused its discretion in not setting it aside. (*Nixon Peabody LLP v. Superior Court* (2014) 230 Cal.App.4th 818, 822.)

Durefort appears to present two theories on appeal to support its position that the default and default judgment should have been set aside as void. First, it contends they are void because Durefort was not properly served with the summons and complaint. But beyond passing references to improper service in its reply brief below, Durefort did not specifically argue this point in the trial court. Again, issues raised for the first time on appeal are typically deemed forfeited. (*Gray1*, *supra*, 233 Cal.App.4th at p. 897.)

Durefort contends that an argument to set aside a void judgment under section 473(d) based on improper service may be raised at any time. But Durefort cites no authority supporting its position that an appellate court must consider such an argument when raised for the first time on appeal.

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[3] Given this conclusion, we need not and do not address Durefort's arguments regarding the trial court's additional grounds for denying its 2024 motion under section 473(b), including lack of jurisdiction under section 916 and laches.

(*California Capital Ins. Co. v. Hoehn* (2024) 17 Cal.5th 207, 212–213 (*California Capital*) [considering timeliness of section 473(d) motion for lack of proper service that was filed in trial court]; *People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 657, 663, fn. 8 [concluding premature summary judgment was voidable, not void, and party made no argument that section 473 applied]; *McKinny v. Board of Trustees* (1982) 31 Cal.3d 79, 90 [considering new argument on appeal regarding plaintiffs' lack of standing because it cannot be waived under §430.80].)

Even if not forfeited, and accepting Durefort's premise that the default judgment was void because Durefort was not properly served (*California Capital*, *supra*, 17 Cal.5th at p. 214), we nonetheless conclude the trial court did not abuse its discretion in declining to set it aside here.[4] Appellate courts have reached the same conclusion on the denial of section 473(d) relief under similar circumstances. In *W. Bradley Electric, Inc. v. Mitchell Engineering* (2024) 100 Cal.App.5th 1, for example, a cross-complainant's attorney executed a stipulation for settlement without express client authorization and the cross-complaint was subsequently dismissed. (*Id.* at p. 7.) The cross-complainant moved to set aside the dismissal. (*Id.* at p. 9.) The appellate court affirmed the denial of the motion under section 473(d), concluding that the cross-complainant had failed to demonstrate an abuse of discretion even if the dismissal was void. (*Id.* at pp. 16–17.) It determined there was substantial evidence that the cross-complainant knew or should have known the dismissal was going to be entered well before he sought to vacate it, but neglected to bring the matter to the trial court's attention despite

[4] Given this conclusion, we need not and do not address Douglas's alternative response to this theory that the judgment is not void because he completed substitute service on Durefort under section 415.20.

participating in the action. (*Id.* at p. 17.) It also explained that the cross-complainant had waited nearly six months after entry of the dismissal before bringing the motion, when "the case was essentially over." (*Ibid.*)

The same reasoning applies here with even greater force: Durefort knew of the February 2021 default by at least July 2021, when it filed its motion to quash. Durefort subsequently attempted to participate in the proceedings, filing its first section 473(b) motion in October 2021. It did not raise any argument in that motion that the default should be set aside as void for lack of proper service. The court then entered its February 22, 2022 order authorizing the sale of the multi-unit property, and its July 26, 2022 order approving and settling Referee's final report and accounting. After that, the partition proceedings were essentially over.

Durefort then waited almost *two years* before requesting relief under section 473(d) in its October 2024 reply brief. While Durefort may have been previously hampered from raising the issue as a suspended corporation not authorized to participate in the proceedings, Durefort confirmed receipt of the Franchise Tax Board letter restoring its status in December 2022. Durefort took no action. Instead, as statements by counsel at the October 2024 hearing suggest, Durefort waited and later decided to request relief under section 473(d) not because of any mistake or discovery in the interim, but in an attempt to expand the issues in the pending appeal regarding defendants' motions filed three years prior. We see no abuse of discretion in denying Durefort's request for section 473(d) relief under such circumstances. (Cf. *California Capital*, *supra*, 17 Cal.5th at pp. 213, 225, fn. 11 [declining to decide whether a showing of reasonable diligence is always required under section 473(d), but concluding that the defendant acted diligently by "promptly contact[ing] an attorney" to file the motion].)

For its second theory, Durefort repeats the argument made in its reply brief below that the default judgment is void because the Franchise Tax Board made a clerical mistake in its accounting and Durefort was never a suspended entity. Although the trial court found that the argument was "not properly before the court" since it had been raised only in reply, we need not dwell on that point because the court nonetheless considered and rejected the argument on the merits. (Cf. *Grappo v. McMills* (2017) 11 Cal.App.5th 996, 1009–1010 [trial court had discretion to consider section 473(d) argument made for first time in reply brief and exercise of discretion was apt where party had shown no notice of existence of default or application for default judgment].) We see no abuse of discretion in that decision. We are not persuaded by Durefort's contention that the November 17, 2022 Franchise Tax Board letter was sufficient evidence of clerical mistake to warrant relief.[5] As Lee's counsel argued at the hearing, the unredacted portion of the letter showed only that a tax payment was made under Durefort's prior registration number instead of its current one. It does not show any clerical mistake.

Durefort alternatively argues that, even if the default and default judgment were not void, they should have been set aside on the grounds of "extrinsic fraud or mistake." (See *Rappleyea*, *supra*, 8 Cal.4th at pp. 981–982 [explaining party can move to vacate a default or default judgment on equitable grounds, including extrinsic mistake and extrinsic fraud, where statutory relief is unavailable].) Because Durefort bases its claim of

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[5] We deny defendants' request for judicial notice of materials regarding legibility of the appellate record as unnecessary and unhelpful to our resolution of this appeal. (See *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 748, fn. 6.) Defendants do not sufficiently explain why such materials are relevant to the issue of clerical mistake raised here, arguing only that it took counsel's time and attention to address.

"extrinsic mistake" on either the purported (but unexplained) attorney mistake in failing to succeed on the motions after default or the purported Franchise Tax Board clerical mistake, we again see no abuse of discretion in the trial court's finding that Durefort had not shown any such mistake.

In sum, we conclude the trial court did not abuse its discretion in denying defendants' motions to set aside the defaults. Given this conclusion, we need not consider the parties' arguments regarding (1) Referee's actions after the defaults were entered, or (2) prejudice resulting from the defaults.

DISPOSITION

The judgment is affirmed. Respondents are entitled to recover their costs on appeal.

GOLDMAN, J.

WE CONCUR:

STREETER, Acting P. J.
MOORMAN, J. *

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