

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

ROBERT McCRICKARD,

Plaintiff and Appellant,

v.

PACIFIC BELL TELEPHONE COMPANY
et al.,

Defendants and Respondents.

A131224

(Solano County
Super. Ct. No. FS 032484)

Plaintiff and appellant Robert McCrickard (plaintiff) appeals the trial court's entry of judgment in favor of defendants and respondents Pacific Bell Telephone Company and the City of Vacaville (City), after the trial court granted defendant's motion for judgment on the pleadings on his complaint for injuries and damages arising from a trip-and-fall accident. The trial court granted defendants' motion for judgment on the pleadings after denying plaintiff's motion to withdraw requests for admissions deemed admitted, filed pursuant to Code of Civil Procedure, sections 2033.300 and 473, subdivision (b).¹ We affirm the judgment for the reasons set forth below.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2009, plaintiff filed a first amended complaint against defendants alleging negligence and premises liability for injuries and damages sustained during a trip-and-fall accident. In January 2010, defendant, Pacific Bell, (Pacific Bell) answered the first

¹ Further statutory references are to the Code of Civil Procedure unless otherwise indicated.

amended complaint² and served its first set of requests for admissions, asking plaintiff to admit the following: “Pacific Bell Telephone Company and its employees did not cause [plaintiff’s] injuries. [Plaintiff and his] agents, servants, attorneys and investigators have no evidence to support [his] claim that Pacific Bell caused [the plaintiff’s] injuries. [¶] [Plaintiff’s] comparative fault contributed to [his] injuries. [¶] [Plaintiff] did not suffer any damages as a result of the incident (incident includes the circumstances and events surrounding the alleged accident, injury, or other occurrence or breach of contract giving rise to this action or proceeding) alleged in [his] complaint. [¶] [Plaintiff has] fully recovered from [his] injuries.”

Plaintiff’s counsel, Robert Kitay,³ requested and received a continuance to respond to Pacific Bell’s discovery request. Kitay avers the parties stipulated to the continuance so that defendants could depose plaintiff before Kitay furnished plaintiff’s responses to the requests for admissions. Kitay further avers plaintiff was deposed on or about April 28, 2010, and thereafter his office made repeated attempts to contact plaintiff in order to complete responses to the requests for admissions but did not succeed in contacting him. Subsequently, Kitay learned from plaintiff’s mother that on or about May 2, 2010, plaintiff had absconded on the first day of his criminal trial on felony charges and a bench warrant had been issued for his arrest.

After plaintiff failed to timely respond to the requests for admissions, Pacific Bell filed a motion to compel, which included a request that the facts in the request for admissions be deemed admitted. Plaintiff did not submit responses to the requests for admissions by the date of the scheduled court hearing on the motion to compel, failed to file an opposition to the motion, and did not appear at the hearing on the motion held on May 20, 2010. At the conclusion of the hearing, the trial court granted Pacific Bell’s motion and entered an order that the requests were deemed admitted.

² The answer was filed by “Pacific Bell Telephone Company, erroneously sued as AT&T.”

³ Mr. Kitay serves as both trial and appellate counsel.

Plaintiff sought relief from the court's ruling by filing a "Notice of Motion and Motion to Withdraw and/or Amend Deemed Admitted Request for Admissions, Set One," under section 2033.300, subdivision (a) and (b). In support of his motion, plaintiff's counsel provided a declaration in which he averred that plaintiff was unavailable to respond to Pacific Bell's requests for admissions prior to the trial court's hearing on the motion because he had sequestered himself to avoid felony charges and arrest. Plaintiff's counsel also explained that he failed to oppose or attend the hearing on the motion, and did not request a continuance before the trial court's hearing on the motion, because he did not know the failure to respond to the requests for admissions could result in the requests being deemed admitted. Prior to the hearing on the motion to withdraw, however, plaintiff's counsel submitted unverified responses to Pacific Bell's requests for admissions.⁴

Following a hearing on the matter, the trial court denied plaintiff's motion to withdraw the admissions. The trial court ruled that Plaintiff's actions in absenting himself to avoid felony charges and arrest did not constitute "mistake, inadvertence or excusable neglect," under section 2033.300, or "mistake, inadvertence, surprise, or excusable neglect," under section 473, subdivision (b). The trial court also rejected Plaintiff's counsel's confession of mistake in not opposing Pacific Bell's motion for deemed admissions. The court found that plaintiff's absence prevented his counsel from successfully opposing the motion in compliance with section 2033.280,⁵ and thus the court "cannot find that the order for deemed admissions was entered due to the mistake of [Plaintiff's] attorney." Following denial of plaintiff's motion to withdraw, defendants

⁴ On July 1, 2010, five weeks after the trial court granted AT&T's motion to deem the requests admitted, plaintiff's attorney attempted to submit proposed, unverified responses to the requests for admissions. However, an unverified response is equivalent to no response at all. (*Zorro Inv. Co. v. Great Pacific Securities Corp.* (1977) 69 Cal.App.3d 907, 914.)

⁵ Under section 2033.280, subdivision (c), the court will grant the requesting party's motion for deemed admissions unless "the party to whom the request for admissions have been directed has served, before the hearing on the motion, a proposed response to the requests for admission that is in substantial compliance with 2033.220."

filed separate motions for judgment on the pleadings, relying in large part on the facts deemed admitted by the court. Plaintiff did not request oral argument on the motions for judgment on the pleadings and did not appear at the hearing on the motions. Following the hearing, the court granted defendants' motions for judgment on the pleadings and subsequently entered an order on December 16, 2010, dismissing plaintiff's complaint with prejudice. On February 15, 2011, plaintiff filed a timely notice of appeal from the trial court's order granting defendant's motion for judgment on the pleadings.

DISCUSSION

A. Applicable Legal Standards

Section 2033.010 permits a party to serve on a party to the action written requests to admit “the genuineness of specified documents, or the truth of specified matters of fact, opinion relating to fact, or application of law to fact.”⁶ (§ 2033.010.) After service is properly effected, the responding party must provide complete responses within thirty days of service. (See § 2033.250, subd. (a).) A party's failure to timely respond to request for admissions, in turn, waives any objection thereto and allows the serving party to move for an order that the requests be deemed admitted. (§ 2033.280, subd. (b).) The trial court must grant a motion for an order that the requests be deemed admitted unless the responding party serves proper responses before the hearing on the motion. (§ 2033.280, subd. (c).) However, a party may move to withdraw an admission and the court *may* grant such motion “only if it determines that that the admission was the result of mistake, inadvertence, or excusable neglect, and that the party who obtained the admission will not be substantially prejudiced in maintaining that party's action or defense on the merits.” (§ 2033.300, subds. (a)-(b) [*italics added*].)

“The trial court's discretion in ruling on a motion to withdraw . . . an admission is not unlimited, but must be exercised in conformity with the spirit of the law and in a manner that serves the interests of justice. Because the law strongly favors trial and

⁶ Facts admitted in response to requests for admission are conclusively established. (See § 2033.410, subd. (a).)

disposition on the merits, any doubts in applying section 2033.300 must be resolved in favor of the party seeking relief. Accordingly, the court's discretion to deny a motion under the statute is limited to circumstances where it is clear that the mistake, inadvertence, or neglect was inexcusable, or where it is clear that the withdrawal or amendment would substantially prejudice the party who obtained the admission in maintaining that party's action or defense on the merits." (*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1420-1421.)

Because the provision governing relief from deemed admissions under section 2033.300 subdivision (b) substantially mirrors the provision governing discretionary relief from judgments or orders under section 473, subdivision (b), California appellate courts have ascribed the same meaning to "excusable neglect" under both statutes. (See, e.g., *New Albertsons, supra*, 168 Cal.App.4th at pp. 1418-1419 [The statutory language used in section 2033.300 subdivision (b) "is identical to some of the language used in section 473, subdivision (b). . . . The use of identical terms in two different statutes serving similar purposes suggests that the Legislature intended those terms to have the same meaning in both statutes. [Citation]].") However, unlike section 2033.300, section 473 subdivision (b) also contains a mandatory provision that requires the trial court to grant relief based on an attorney declaration of fault, even if the neglect is inexcusable. (*Lang v. Hochman* (2000) 77 Cal.App.4th 1225, 1248 (*Lang*)). The purpose of the mandatory relief provision is "to alleviate the hardship on parties who lose their day in court due solely to an inexcusable failure to act on the part of their attorneys. [Citation.]" (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 257 (*Zamora*) italics omitted.)

B. Analysis

Plaintiff contends the trial court erred in denying his motion to withdraw the deemed admissions because his failure to respond to Pacific Bell's requests for admissions was due to "mistake, inadvertence, or excusable neglect" and defendant would not suffer substantial prejudice if the admissions were withdrawn, entitling him to discretionary relief under section 2033.300. In the alternative, plaintiff argues that the

trial court was compelled to grant mandatory relief under section 473, subdivision (b), due to his counsel's "mistake, inadvertence, surprise or neglect." We address each contention below.

1. Discretionary relief under Section 2033.300

Plaintiff suggests two reasons why his failure to respond to the request for admissions should be viewed as the result of mistake, inadvertence, or excusable neglect. First, he states his counsel did not appreciate or understand the legal consequences of failing to timely respond to the requests and therefore made the mistake of failing to either oppose the motion that the requests be deemed admitted or seek a continuance on the motion in order to locate plaintiff. Second, plaintiff suggests the failure to respond to the requests for admissions was due to plaintiff's unavailability to assist in the preparation of his responses. However, neither reason supports a finding of excusable neglect.

Counsel's confession of mistake in misapprehending the legal implications of his failure to oppose defendant's motion to have the requests deemed admitted offers no safe harbor. The law provides that an attorney's "[m]istake is not a ground for relief . . . when '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 [Citation.]' " (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1206 (*Hearn*)). Moreover, "[t]he duty of competence imposed on attorneys includes the obligation to know 'those plain and elementary principles of law which are commonly known by well informed attorneys,' and also 'to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques.' (Citations.)" (*Hopkins & Carley v. Gens* (2011) 200 Cal.App.4th 1401, 1414.) In our view, any attorney who engages in civil litigation has a duty of competence to understand the rules of discovery. Plaintiff's counsel's confession of mistake—he did not know the discovery statutes permit a requesting party to move to have the requests deemed admitted where no timely response is forthcoming—falls below the duty of competency expected of a reasonably competent attorney. Accordingly, it provides no grounds for excusable neglect. (See *Hearn, supra*, 177 Cal.App.4th at p. 1206; cf. *Ambrose v.*

Michelin North America, Inc. (2005) 134 Cal.App.4th 1350, 1354-1355 [relief from default judgment denied because attorney’s failure “to include an essential request for continuance and an accompanying affidavit in an opposition to a summary judgment motion” was conduct falling below the professional standard of care and not excusable].)

In any event, plaintiff’s voluntary decision to absent himself at a crucial point in his civil lawsuit when his attorney required his assistance prevented counsel from opposing Pacific Bell’s request to have the already overdue responses to requests for admissions deemed admitted. . To allow plaintiff to establish excusable neglect on this basis would allow the defendant to manipulate the discovery statutes in a manner inconsistent with the goals of the discovery statutes, among which are to ascertain the facts, to expedite litigation, to prevent delay and to simplify and narrow the issues. (See *McCoy v. Gustafson* (2009) 180 Cal.App.4th 56, 95.)

In sum, on this record, we conclude the trial court did not abuse its discretion in denying plaintiff relief from the deemed admissions under section 2033.300 on the grounds that he failed to demonstrate excusable neglect.⁷

2. Mandatory Relief under Section 473, subdivision (b)

Plaintiff also argues that the trial court abused its discretion in failing to grant mandatory relief under section 473, subdivision (b) for his attorney’s fault in failing to respond to the requests for admissions. Under section 473, subdivision (b), the trial court is mandated to grant relief, “unless it finds that the default was not in fact caused by lawyer error.” (*Milton v. Perceptual Development Corp.* (1997) 53 Cal.App.4th 861, 867.) In making this determination, the trial court assesses both the attorney’s credibility and whether the attorney’s inaction was a casual factor. (*Ibid.*) However, in order to grant mandatory relief “[a] trial court’s finding on the causation issue will be affirmed so

⁷ Having concluded the trial court did not err in finding plaintiff failed to demonstrate “mistake, inadvertence or excusable neglect,” we need not reach the issue of whether defendant would be “substantially prejudiced” if the deemed admissions were permitted to be withdrawn. (§ 2033.300, subd. (b); see also *Gribin Von Dyl & Associates Inc. v. Kovalsky* (1986) 185 Cal.App.3d 653, 660 [noting that lack of prejudice does not by itself justify relief from admissions].)

long as it is supported by substantial evidence. [Citations.] If the evidence gives rise to conflicting inferences, one of which supports the trial court’s findings, [the appellate court] must affirm. [Citations.] [¶] . . . [A] lawyer’s negligence need not be the only proximate cause of a client’s injury so long as there is causation in fact.” (*Ibid.*) However, section 473, subdivision (b), “protects only the innocent client” and it does not provide relief for the “culpable client who participates in conduct which led to the default or dismissal.” (*Lang, supra*, 77 Cal.App.4th at pp. 1251-1252.)

Here, we conclude the trial court did not err when it declined to grant mandatory relief to plaintiff under section 473, subdivision (b). First, the mandatory relief section applies in cases where counsel’s error caused the default. Here, the record fails to support this crucial finding. On the contrary, the record shows that plaintiff’s own unavailability to assist counsel in responding to defendant’s requests or to verify the requests, not lawyer error, caused the failure to respond here. Moreover, plaintiff’s conduct in sequestering himself to avoid a criminal proceeding makes him a “culpable client who participates in conduct which led to the default or dismissal” and provides a further reason why he is not entitled to mandatory relief under section 473, subdivision (b).⁸ (*Lang, supra*, 77 Cal.App.4th at pp. 1251-1252.)

In sum, for the reasons set forth above, the trial court did not err in denying plaintiff’s motion to withdraw his admissions pursuant to section 2033.300 and section 473, subdivision (b).

DISPOSITION

The judgment of the trial court is affirmed. Costs are awarded to Pacific Bell and the City of Vacaville.

⁸ Defendants also contend plaintiff, as a matter of law, is not entitled to relief under section 473, subdivision (b), because the mandatory relief provision is limited to defaults, default judgments and dismissals, and does not extend to judgments on the pleadings. However, having concluded the trial court did not abuse its discretion in denying mandatory relief, we need not reach this contention.

Jenkins, J.

We concur:

McGuinness, P. J.

Pollak, J.