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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

RICHARD P. TOWNE,

Appellant,

v.

MARIA JOAQUIN,

Plaintiff and Respondent.

2d Civil No. B222077  
(Super. Ct. No. 56-2008-00319756-CU-  
OE-SIM)  
(Ventura County)

Attorney Richard P. Towne appeals from an order awarding Maria Joaquin \$3,270 attorney fees and costs after the trial court granted Towne's motion to vacate a default and default judgment against his client based on an attorney affidavit of fault. (Code Civ. Proc., § 473, subd. (b).)<sup>1</sup> We affirm.

On June 2, 2008 Joaquin sued Daniel's Design House, Inc. for overtime wages, meal and rest breaks, statutory penalties, and restitution. Daniel's attorney, Towne, failed to answer the complaint or respond to discovery, resulting in a default and \$51,968 default judgment on May 29, 2009.

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<sup>1</sup> All statutory references are to the Code of Civil Procedure.

On November 13, 2009, Towne moved to set aside the default and default judgment based on an attorney affidavit of fault. (§ 473, subd. (b).) Joaquin filed late opposition and argued that she had incurred \$3,270 attorney's fees and costs.<sup>2</sup>

The trial court vacated the default and default judgment, ordering Towne to pay \$3,270 fees/costs. (§ 473, subd. (b).) Towne complained that he had seen the opposition papers and urged the court to "[m]ake the fees due and payable within 45 days. . . . If we determine there is a basis to challenge it, then [we] can file a new motion. That will resolve the matter as of today." The trial court stated: "Based on what I see here, the likelihood of your convincing me that this number should be reduced is slim. If you want the opportunity to do that, I will give it to you. But I will indicate that, you know, unless something dramatic happens, the cost of appearing for the second hearing is going to be added to the total as well."

#### *Fair Notice*

Towne asserts that he was not provided notice or a reasonable opportunity to be heard.<sup>3</sup> Towne, however, knew that fees and costs are mandatory where section 473 relief is based on an attorney affidavit of fault. (See *Luri v. Greenwald* (2003) 107 Cal.App.4th 1119, 1124; Rylaarsdam & Edmon, Cal. Practice Guide, Civil Procedure Before Trial (The Rutter Group 2011) § 5:306, p. 5-82.) Section 473, subdivision (b) states in pertinent part: "The court shall, whenever relief is granted based on an attorney's affidavit of fault, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties."

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<sup>2</sup> Joaquin's trial attorney declared that his customary rate was \$375/hour and he billed Joaquin at the reduced rate of \$275/hour. Joaquin incurred \$1,705 in fees (6.2 hours x \$275/hour) for the default and default judgment prove up and another \$1,375 in fees (5 hours x \$275/hour) opposing the motion to vacate plus \$190 costs.

<sup>3</sup> Joaquin has not filed a respondent's brief. The rule we follow in such circumstances "is to examine the record on the basis of appellant's brief and to reverse only if prejudicial error is found. [Citation.]" (*Votaw Precision Tool Co. v. Air Canada* (1976) 60 Cal.App.3d 52, 55.)

Towne's motion freed his client of a \$51,968 default judgment but came at a cost. (See Civ. Code, § 3521 ["He who takes the benefit must bear the burden."].) The award of fees and costs is consistent with section 473, subdivision (b) which "is to relieve the innocent client of the burden of the attorney's fault, to impose the burden on the erring attorney, and to avoid precipitating more litigation in the form of malpractice suits. [Citation.]" (*Metropolitan Service Corp. v. Casa de Palms, Ltd.* (1995) 31 Cal.App.4th 1481, 1487.)

Towne asserts that the opposition papers were not timely filed and served, which is tantamount to a waiver of fees/costs. But Joaquin explained the reason for the delay. Towne called Joaquin's attorney in early October 2009, and learned that counsel was traveling to Australia and would not return until November 9, 2009. Towne went ahead and filed the motion, setting it for a November 13, 2009 hearing.

Counsel returned to California the evening of November 9, 2009 and prepared the opposition papers the next day. Because November 11, 2009, was a court holiday (Veteran's Day), the first available day to file opposition papers was November 12, 2009. Counsel appeared at the November 13, 2009 hearing and apologized for the late opposition.

Towne cites *Sexton v. Superior Court* (1997) 58 Cal.App.4th 1403 for the principle that a trial court should disregard late opposition papers. Towne, however, knew that Joaquin was entitled to fees and costs and asked for 45 days to "to make arrangements for the payment as well as determine, given the amount, the legal basis for [the award]." The trial court granted the request. The order may not be disturbed on appeal absent a clear abuse of discretion and miscarriage of justice. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) "This fundamental restriction on the power of appellate courts is amplified by Code of Civil Procedure section 475, which states that trial court error is reversible only where it affects ' . . . the substantial rights of the parties . . . ,' . . . and that a different result would have been probable if such error . . . had not occurred or existed." (*Walter v. TJD, Inc.* (1993) 12 Cal.App.4th 830, 833.)

We reject the argument that the trial court erred in awarding \$3,270 fees/costs subject to the condition that Towne could bring a motion within 45 days to reconsider the fee amount.

The judgment is affirmed. Joaquin is awarded costs on appeal.

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YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

David Worley, Judge  
Superior Court County of Ventura

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Richard P. Towne, in pro per, Appellant

No appearance for Respondent.