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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

DAVID NICHOLSON et al.,

Plaintiffs and Respondents,

v.

EHAB A. MOHAMED, M.D. et al.,

Defendants and Appellants.

B238392

(Los Angeles County
Super. Ct. No. LC092242)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bert Glennon, Jr., Judge. Affirmed.

Makram F. Gharib and Ashley S. Feder for Defendants and Appellants.

Stone, Dolginer & Wenzel, Robert N. Stone; Law Offices of Robert H. Pourvali and Robert H. Pourvali for Plaintiffs and Respondents.

INTRODUCTION

Defendants and appellants Ehab A. Mohamed, M.D. (Mohamed), Ehab A. Mohamed Medical Corporation, Inc. (Medical Center), and Beverly Hills Advanced Laser-Newport Beach, L.L.C. (Beverly Hills Laser) appeal from a default judgment in favor of plaintiffs and respondents David Nicholson, Jennifer Carpenter and Christopher Cook. Defendants contend that the trial court erred in denying their motion for relief from default. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs filed a complaint against defendants alleging causes of action for medical negligence and battery arising out of the death of plaintiffs' decedent following her surgical procedure conducted by defendants. Plaintiffs alleged that defendants Medical Center and Beverly Hills Laser were the alter egos of defendant Mohamed.¹ Defendants, through counsel, filed an answer to the complaint asserting a general denial and several affirmative defenses.

On June 24, 2011, plaintiffs' filed a motion to compel the taking of Mohamed's deposition by videotape and production of documents, and requesting that the trial court impose sanctions against Mohamed. The motion to compel was served on defendants' counsel and was scheduled to be heard on August 4, 2011. Plaintiffs' counsel submitted a declaration in support of the motion to compel stating that Mohamed failed to attend his deposition and produce documents despite the service of three notices of deposition, numerous communications between the parties' respective counsel regarding Mohamed's availability to be deposed, and the granting of two continuances of the deposition. Plaintiffs' counsel declared that on June 14, 2011, defendants' counsel had filed a motion to be relieved as defendants' counsel, and the motion was scheduled to be heard on July

¹ Neither we nor the parties distinguish between defendants in connection with the issues regarding this appeal.

19, 2011. The trial court granted defendants' counsel motion to be relieved as defendants' counsel.

On August 4, 2011, the trial court issued a minute order stating that defendants failed to appear at the hearing on plaintiffs' motion to compel. The trial court granted the motion to compel, ordered that Mohamed appear for his videotaped deposition and produce documents within 30 days of the minute order, and sanctioned Mohamed \$1,750. The trial court issued an order to show cause (OSC) why it should not strike defendants' answer to the complaint for their failure to appear, and scheduled the hearing on the OSC for August 26, 2011. According to the proof of service attached to a notice of the trial court's August 4, 2011, ruling, on August 4, 2012, plaintiffs served Mohamed by mail, both at a street address and at an address for a correctional facility, with the notice of ruling.

On August 26, 2011, defendants failed to appear at the hearing. On that date, the trial court issued a minute order stating that defendants failed to appear at the OSC hearing and ordered that their answer to the complaint be stricken, and set a hearing on an OSC regarding entry of default. On September 26, 2011, plaintiffs served Mohamed by mail with a request for entry of default, and on September 27, 2011, the trial court entered default.

On October 6, 2011, Makram F. Gharib filed a substitution of attorney, becoming counsel of record for defendants. On October 11, 2011, defendants, through Gharib, filed a motion for relief from default. The motion was made pursuant to Code of Civil Procedure sections 473.5² on the ground of "lack of notice," and 473, subdivision (b), on the ground of "excusable neglect." Defendants contended that Mohamed was not notified of the hearings on August 4, 2011 and August 26, 2001, and could not have attended those hearings because he was in jail. Defendants said that, "Under these circumstances, the reasonably prudent person would have acted similarly [to defendants' actions]"

² All statutory citations are to the Code of Civil Procedure unless otherwise noted.

The only declaration in support of the motion for relief from default was Gharib's declaration stating, inter alia, that Mohamed did not know of the August 4, 2011, hearing on plaintiffs' motion to compel. According to Gharib, Mohamed had been incarcerated since July 22, 2011, and defendants' prior counsel forwarded a copy of plaintiffs' motion to compel to Mohamed at his home address. Gharib declared that Mohamed never knew of plaintiffs' motion to compel or of the hearing on the motion. Gharib also declared that Mohamed failed to appear at the August 26, 2011, hearing on the OSC regarding why defendants' answer should not be stricken because Mohamed was incarcerated, and that he did not know of the hearing.

Plaintiffs' opposed defendants' motion for relief from default, objecting to Gharib's declaration as constituting inadmissible hearsay, and contending that the motion was not supported by admissible evidence. Robert N. Stone, plaintiffs' counsel, submitted a declaration in support of the opposition stating that: (1) Mohamed had failed on numerous occasions to appear for this deposition and produce documents; (2) defendants' prior counsel told him that he was not getting cooperation from Mohamed and on July 19, 2011, the trial court heard and granted the motion of defendants' prior counsel to withdraw as counsel of record; (3) on July 14, 2011, plaintiffs' counsel personally served Mohamed at his residential address with a deposition subpoena for personal appearance and production of documents, scheduling the deposition for July 20, 2011, two days before Stone declared that Mohamed was incarcerated, but Mohamed failed to appear for his deposition; (4) and Mohamed knew of the August 26, 2011, hearing on the OSC regarding why defendants' answer should not be stricken because the proof of service attached to the notice of the trial court's August 4, 2011, ruling evidenced that plaintiffs served Mohamed with it by mail both at a street address and at an address for a correctional facility, and on August 22, 2011, Mohamed spoke with Stone's secretary, Kelli Fryer, advising her that he was aware of the August 26, 2011, hearing.

Fryer submitted a declaration in support of the opposition stating that on August 22, 2011, she accepted a collect telephone call from someone who identified himself as

Mohamed, who advised her that he was aware of the August 26, 2011, hearing, and requested that the hearing be continued. Fryer advised Mohamed that Stone gave her instructions that no further continuances were to be given in this case. Fryer obtained a copy of the invoice for Mohamed's collect call "from the Los Angeles County Twin Towers jail facility," which invoice evidences that the telephone call was made.

Defendants filed a reply to the opposition to the motion for relief from default, unsupported by any declaration. The reply requested that defendants be relieved from default because defendants' counsel learned for the first time from plaintiffs' opposition that Mohamed was in fact served "in jail" with notice of the August 26, 2011, hearing, and plaintiffs' counsel denied Mohamed's request that the hearing be continued. Defendants continued to contend that Mohamed did not receive actual notice of the August 4, 2011, hearing.

On November 22, 2011, the trial court denied defendants' motion for relief from default. At the commencement of the hearing, the trial court stated that "the tentative ruling is to grant the motion. The individual did not get—it seems that the individual apparently was in jail at the time on August 4 and August 26 and did not get notice of the hearing, despite proof of service showing that there was a mailing to him at the Twin Towers jail. He was pro per at the time and now has an attorney and claims that he made a collect call to the attorney's office on 8/21 requesting a continuance of the 8/26/11 hearing. . . . [¶] So the tentative ruling is to grant the motion to set aside the default."

On behalf of plaintiffs, Stone argued that the medical board found Mohamed guilty of gross negligence resulting in the death of plaintiffs' decedent; Mohamed failed to appear for his deposition, including after having been personally served with a deposition subpoena; defendants' prior counsel filed a motion to be relieved as counsel of record because Mohamed was not cooperating with him; Mohamed was arrested because he was selling medical equipment that he did not own on E-Bay; the immigration and naturalization service "put a hold on" Mohamed because they determined that he had been in the country illegally since 2006; the motion is not supported by admissible evidence because Gharib's declaration is inadmissible hearsay and Mohamed did not

provide a declaration in support of the motion; the trial court's August 2, 2011, sanctions award of \$1,750 against Mohamed has not been paid; Mohamed was provided notice of, and knew of, the August 26, 2011, hearing on the OSC regarding why defendants' answer should not be stricken; and Mohamed will continue to be obstreperous in this litigation if defendants' motion for relief from default is granted.

At the hearing, defendants' counsel contended that Mohamed did not know of the August 4, 2011, motion to compel hearing; and that Mohamed spoke by telephone to Stone's office requesting that the August 26, 2011, order to show cause hearing be continued so that Mohamed would be able to arrange for someone to represent him at the hearing. In denying the motion, the trial court stated, "All right. Well, given what I've heard this morning, I am not inclined to grant the motion. If there are other details that come forward, I am happy to revisit it, but at this point, based on what I have seen thus far, I am not going to grant the motion to set aside the default." Defendants did not act upon the trial court's invitation to provide it with any other details supporting defendants' position.

Thereafter, plaintiffs filed Stone's declaration in support of defendants' request that judgment be entered in their favor, and against defendants, in the amount of \$5,873,422.45, including \$5,000,000 in punitive damages. Judgment was entered as requested by plaintiffs.

DISCUSSION

A. Standard of Review

We review an order denying relief under section 473.5 for abuse of discretion. (*Ellard v. Conway* (2001) 94 Cal.App.4th 540, 547.) "A motion to vacate a default and set aside [a] judgment (§ 473) 'is addressed to the sound discretion of the trial court, and in the absence of a clear showing of abuse . . . the exercise of that discretion will not be disturbed on appeal.'" [Citation.] The appropriate test for abuse of discretion is whether

the trial court exceeded the bounds of reason. [Citation.]” (*Anastos v. Lee* (2004) 118 Cal.App.4th 1314, 1318-1319.)

A decision denying a motion to set aside a default is scrutinized more carefully than one granting relief because the law favors trial on the merits. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 980; *Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233, superseded by statute on other grounds as stated in *Tackett v. City of Huntington Beach* (1994) 22 Cal.App.4th 60, 64.) “[D]efault judgments, especially those in which punitive damages are awarded, are looked upon with disfavor. [Citation.]” (*Nicholson v. Rose* (1980) 106 Cal.App.3d 457, 462-463.) “[A] trial court[’s] . . . discretion to vacate the entry of a default or subsequent judgment . . . may be exercised only after the party seeking relief has shown that there is a proper ground for relief, and that the party has raised that ground in a procedurally proper manner” (*Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 495.)

B. Analysis

Defendants contend that the trial court erred in denying their motion for relief from default made pursuant to section 473.5. We disagree.

Mohamed filed a motion for relief from default pursuant to section 473.5 on the ground of “lack of notice” because Mohamed did not receive actual notice of the August 4, 2011, hearing. Section 473.5 provides in relevant part, “(a) When service of a summons has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered against him or her in the action, he or she may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the action. [¶] (b) A notice of motion to set aside a default or default judgment and for leave to defend the action . . . shall be accompanied by an affidavit showing under oath that the party’s lack of actual notice in time to defend the action was not caused by his or her avoidance of service or inexcusable neglect.”

Mohamed was not entitled to relief under section 473.5. Section 473.5 speaks in terms of “service of summons” on a party who is in the position of “defending” an action.

Plaintiffs' motion to compel and the accompanying notice that the hearing on the motion was scheduled to occur on August 4, 2011, was served on defendants' counsel and did not call for a service of summons on Mohamed.

A summons is issued in the course of judicial proceedings,³ (§17, subd. (b)(6)) and is signed by the clerk and issued under the seal of the court in which the action is pending. (§ 412.20, subd. (a).) It is required to have specified information (§ 412.20, subds. (a)(1)-(6)), including a notification to the person served with it that he or she has been sued. (§ 412.20, subd. (a)(6).) Section 412.20, provides, "(a) Except as otherwise required by statute, a summons . . . shall contain: [¶] . . . [¶] (6) The following introductory legend at the top of the summons above all other matter, in boldface type, in English and Spanish: [¶] 'Notice! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read information below.'"

Service of summons upon persons physically present in the forum state "suffice[s] to confer [personal] jurisdiction" (*Burnham v. Superior Court of Cal.* (1990) 495 U.S. 604, 612.) As the Supreme Court explained in *Solot v. Lynch* (1956) 46 Cal.2d 99, at page 105, relief under section 473a, the predecessor to section 473.5, is "predicated upon the assumption that personal jurisdiction of the defendant has not been obtained."

Defendants were not eligible for relief under section 473.5 because plaintiffs' motion to compel, which was scheduled to be heard on August 4, 2011, did not call for a service of summons, a prerequisite for a motion for relief under section 473.5. Even if defendants were eligible for relief under section 473.5, their motion was not based on competent evidence. The only declaration in support of the motion for relief from default was by defendants' counsel, stating that Mohamed did not know of the August 4, 2011, hearing on plaintiffs' motion to compel. Plaintiffs objected to the declaration of defendants' counsel, both in their opposition to the motion and at the hearing on the

³ On December 27, 2010, a summons was issued in this case, and on February 22, 2011, defendants filed an answer to the complaint.

motion, as constituting inadmissible hearsay, and contending that the motion was not supported by admissible evidence.⁴

Competent evidence is required to justify relief under section 473.5. Declarations containing inadmissible hearsay are insufficient. (*Anastos v. Lee, supra*, 118 Cal.App.4th at p. 1319 [“the declaration of counsel contained inadmissible hearsay and double-hearsay statements, and thus lacked proper foundation, i.e., personal knowledge, to establish the requisite showing required under section 473.5, subdivision (b)”]; see *Floveyor Internat., Ltd. v. Superior Court* (1997) 59 Cal.App.4th 789, 796.)

Defendants contend that the trial court erred in denying their motion for relief from default made pursuant to section 473. We disagree.

Defendants’ section 473 motion was made on the discretionary ground of defendants’ excusable neglect. Defendants contended they did not appear at the August 4, 2011, hearing because Mohamed did not receive actual notice of it and “the reasonably prudent person would have acted similarly”

Section 473, subsection (b) provides in pertinent part, “The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect.” Relief from default on this basis is discretionary. (*Henderson v. Pacific Gas & Electric Co.* (2010) 187 Cal.App.4th 215, 225.)

⁴ Although the trial court did not rule specifically on the objections, those objections are preserved for appeal. (See *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527, 532, 534.) Moreover, defendants do not dispute plaintiffs’ contention that the evidence was inadmissible or that plaintiffs cannot, on appeal, rely on the inadmissibility of that evidence. Even if the evidence was properly before the trial court, it does not establish that defendants did not receive notice of the August 4, 2011, hearing because the motion to compel providing notice that it was to be heard on August 4, 2011, was served on defendants’ counsel when he was acting in that capacity. In addition, as noted below, defendants had notice of the August 26, 2011, OSC hearing, and they did not provide a sufficient basis to vacate the default for defendants’ failure to appear at that hearing.

As with defendants' section 473.5 motion, their section 473 motion was not based on competent evidence that Mohamed did not receive notice of the August 4, 2011, hearing. In *Kendall v. Barker* (1988) 197 Cal.App.3d 619, 624, the court reversed the trial court's order granting the defendant's motion of relief from default pursuant to section 473, stating, "[The defendant's] entire substantive showing in support of his motion for relief [from default] consisted of a conclusory declaration by his counsel stating on information and belief that [the defendant's] previous attorney 'excusably neglected' to answer the complaint. A statement made without personal knowledge and solely upon information and belief is hearsay and no proof of the facts contained therein. (*Star Motor Imports Inc. v. Superior Court* (1979) 88 Cal.App.3d 201, 205 [151 Cal.Rptr. 721]; *Jeffers v. Screen Extras Guild, Inc.* (1955) 134 Cal.App.2d 622, 623 [286 P.2d 30].) Moreover, affidavits or declarations setting forth only conclusions, opinions or ultimate facts are insufficient. (*Greshko v. County of Los Angeles* (1987) 194 Cal.App.3d 822, 834 [239 Cal.Rptr. 846]; *Atiya v. Di Bartolo* (1976) 63 Cal.App.3d 121, 126 [133 Cal.Rptr. 611].) In other words, the declaration offered by [the defendant] in support of relief was not competent to prove anything. A fortiori, it did not meet the 'preponderance of the evidence' standard which is a predicate for the granting of a section 473 motion." (*Kendall v. Barker, supra*, 197 Cal.App.3d 619, 624.)

In defendants' reply to the opposition to their section 473 motion they contended that their failure to appear at the August 26, 2011, OSC hearing was excusable neglect because, as evidenced by Fryer's declaration in support of plaintiffs' opposition, four days prior to the hearing Mohamed contacted the office of plaintiffs' counsel and requested that the hearing be continued, but that request was denied. The parties do not dispute that Mohamed was incarcerated at the time of the August 26, 2011, OSC hearing.

Being incarcerated is not excusable neglect warranting relief from default without a showing greater than what was made by defendants. In *Fripp v. Moody* (1932) 126 Cal.App. 219, the court stated, "In making his motion to vacate his default the defendant attempted to proceed under section 473 of the Code of Civil Procedure. To excuse his neglect to appear and file his answer in due time he alleged that he was incarcerated in

the county jail when the summons was served on him. The mere fact that he was so incarcerated without the statement of additional facts showing that he was deprived of means to communicate with his attorney did not constitute an excuse for the defendant's failure to appear and plead after being served with the summons." (*Id.* at pp. 220-221.)

In *Aheroni v. Maxwell* (1988) 205 Cal.App.3d 284, the defendant failed to file an answer to a complaint. His default was entered, and the trial court entered default judgment against him and in favor of the plaintiff. (*Id.* at p. 289.) The defendant filed a motion to vacate the default judgment on the grounds that it was the result of, inter alia, his excusable neglect caused by his status as a prisoner. In reversing the trial court's order setting aside the default, the court stated, "[The] [d]efendant relied on conditions in the jail where he was confined to excuse his failure to prepare and file an answer. The record does not show those conditions were such as to establish excusable neglect on his part. . . ." (*Id.* at p. 293.) The defendant in *Aheroni* declared that he received books to prepare his answer but a flood in his cell destroyed the complaint, which he was required to answer; he filed an ex parte application for an extension of time to answer, and the trial court granted the application; and a few days before the expiration of his extended time to answer he was removed from the pro. per housing module and denied the use of legal materials and access to books in the jail law library. (*Ibid.*) The trial court stated that the defendant did not offer evidence indicating a reasonable excuse for his failure to prepare and file an answer before he was denied the use of the prison law library and other pro. per. privileges. (*Ibid.*) The court concluded, "The moving party has the burden of showing good cause for relief from a default or a default judgment. [Citation.] [The] [d]efendant failed to sustain that burden as to either of the grounds—extrinsic fraud and extrinsic mistake—on which he sought relief." (*Ibid.*)

Here, Mohamed contacted the office of plaintiffs' counsel four days prior to the August 26, 2011, OSC requesting that the hearing be continued. We take judicial notice

that August 26, 2011, was a Friday.⁵ There is no declaration in support of defendants' motion for relief from default, admissible or otherwise, to excuse Mohamed, albeit incarcerated, from preparing an application to continue the August 26, 2011, OSC hearing, or from otherwise attempting to contact the trial court, directly or indirectly, to advise the trial court of his inability to attend the hearing because he was incarcerated. Defendants failed to show that the default was a result of their excusable neglect and that the trial court abused its discretion by denying the motion.

Defendants rely on *Yarbrough v. Superior Court* (1985) 39 Cal.3d 197 and *Payne v. Superior Court* (1976) 17 Cal.3d 908 for the proposition that the trial court should have inquired whether Mohamed was indigent. “[A]s a matter of due process and equal protection under both the federal and California Constitutions an indigent prisoner who is a defendant in ‘a bona fide legal action threatening his interests’ is entitled to access to the courts to be heard in his defense.” (*Yarbrough v. Superior Court, supra*, 39 Cal.3d at p. 200, citing *Payne v. Superior Court, supra*, 17 Cal.3d 908.) *Yarbrough* and *Payne* are not controlling here.

In *Payne v. Superior Court, supra*, 17 Cal.3d 908, the Department of Corrections denied the request of the defendant, who was incarcerated and acting in pro per., to attend the civil trial of the action against him. In the defendant's absence, a default judgment was entered against defendant. The trial court denied the defendant's motion to vacate the default judgment, made in his pro per. capacity, on the grounds that he had been denied permission to attend the trial and had been denied his right to have counsel appointed for him. Because the defendant's motion to vacate the default judgment was based in part on his having been denied his right to the appointment of legal counsel, it “should have led the court to inquire whether [the defendant] was indigent.” (*Id.* at p. 926, fn.8.)

⁵ Evidence Code section 452, subdivision (h) provides that judicial notice may be taken of “[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.”

In *Yarbrough v. Superior Court*, *supra*, 39 Cal.3d 197, the defendant, acting in pro per., moved for appointment of counsel alleging that he was being sued for wrongful death; he was incarcerated, indigent, and uneducated; and he would suffer a default judgment as a result that could be avoided by appointment of counsel. The county contested the motion only insofar as the county might be required to compensate counsel. The court issued a peremptory writ of mandate directing the trial court to conduct further proceedings and consider, at a minimum, the defendant's indigency, the feasibility of a continuance, whether defendant's interests were actually at stake, and whether counsel would be helpful under the circumstances of the case.

Defendants' motion for relief from default was not based on Mohamed being an indigent prisoner, nor did defendants make such an argument at the hearing. Defendants contend on appeal that the trial court should have inquired whether Mohamed was indigent because there was evidence that he may be indigent based on plaintiffs' attorney declaration stating that the defendants' prior counsel declared in support of his motion to withdraw as counsel for defendants that "Mohamed failed to pay legal fees," and plaintiffs' counsel spoke to defendants' prior counsel who said Mohamed had given him two checks that were returned for insufficient funds. These facts do not establish indigency at the time of the hearing. And, as noted, counsel for Mohamed did not raise in connection with the motion for relief from default the issue of indigency or failure to inquire about indigency.

Unlike the defendants in *Yarbrough v. Superior Court*, *supra*, 39 Cal.3d 197, and *Payne v. Superior Court*, *supra*, 17 Cal.3d 908, who acted in pro per. when they filed their respective motions, defendants here were represented by counsel in the filing and appearance at the hearing on defendants' motion for relief from default. Defendants had legal representation for the purpose of justifying defendants' failure to appear at the OSC hearing.

Defendants rely on *Evarone v. Twentieth Century Hosts, Inc.* (1979) 98 Cal.App.3d 90, for the proposition, "Virtually all the cases in which the sanction of dismissal has been reviewed on appeal involve refusal to obey discovery orders. While

dismissal or the striking of a pleading is authorized by statute for such refusal (Code Civ. Proc., § 2034, subd. (b) (2)), the appellate courts have upheld the imposition of such a sanction only when there has been a flagrant, inexcusable disregard of the judicial process. [Citations.]” (*Id.* at p. 95.)

Here, the appeal concerns the denial of defendants’ motion for relief from default, not the sanctions that were imposed based on plaintiffs’ motion to compel. In addition, trial court did not strike defendants’ answer as a sanction for discovery abuse alone. The trial court struck defendants’ answer after they failed to appear at the hearing in response to the issuance of an OSC.

Defendants assert that default judgments in which punitive damages are awarded are looked upon with disfavor and therefore the default judgment here, which contains an award of punitive damages, should be set aside. But defendants do not assert that the punitive damage award itself is unconstitutional or otherwise invalid, challenge the sufficiency of the evidence to support the award, or claim there was any procedural defect in awarding punitive damages, other than to contend that they were not present at the hearing. Defendants have failed to provide any basis to obtain relief from default. Although default judgments in which punitive damages are awarded are looked upon with “disfavor” (*Nicholson v. Rose, supra*, 106 Cal.App.3d at pp. 462-463), they are not subject to being set aside automatically.

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOSK, J.

We concur:

ARMSTRONG, Acting P. J.

KRIEGLER, J.