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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CARMEN M. WYNS-BILLS,

Plaintiff and Respondent,

v.

STEVEN H. MARCUS,

Defendant and Appellant.

B242818

(Los Angeles County Super. Ct.
No. PC050868)

APPEAL from a judgment of the Superior Court of Los Angeles County, Melvin D. Sandvig, Judge. Affirmed.

Barnholtz & Kugler and Brad C. Barnholtz for Defendant and Appellant.

Talisman Law, P.C., and Donald E. Chomiak for Plaintiff and Respondent.

Defendant and appellant Steven H. Marcus appeals from the default judgment entered in favor of plaintiff and respondent Carmen M. Wyns-Bills in this action for damages. Marcus argues on appeal that the trial court erred in denying successive motions for mandatory and discretionary relief under Code of Civil Procedure section 473, subdivision (b), and the judgment is void for lack of proper service of the first amended complaint (FAC). We affirm.

BACKGROUND

Wyns-Bills filed a complaint on May 27, 2011, alleging causes of action for breach of contract, breach of the covenant of good faith and fair dealing, quantum meruit, fraud, intentional infliction of emotional distress, and injunctive relief. The complaint contained factual allegations that Wyns-Bills and Marcus met online and developed a relationship, during which Wyns-Bills performed decorating and design services for Marcus. When the relationship failed, Marcus failed to pay Wyns-Bills for her work.

Marcus, an attorney representing himself, filed a demurrer and motion to strike portions of the complaint on July 18, 2011. On October 12, 2011, a “Notice of Limited Scope Representation” was filed by Attorney Thomas Feuerman, indicating he would represent Marcus “[f]or purposes of preparing, filing, and appearing at the Discovery Motions of December 13, 2011.” Also on October 12, Feuerman filed a motion to compel further responses to special interrogatories and a motion to compel request for production of documents.

Hearing on the demurrer was set for November 30, 2011. Upon receiving the trial court’s tentative decision, Marcus and counsel for Wyns-Bills agreed to submit without argument. The court sustained the demurrer as to the causes of action for breach of the covenant of good faith and fair dealing, intentional infliction of emotional distress, and injunctive relief. The motion to strike was denied. Leave to amend the complaint was granted.

Wyns-Bills filed the operative FAC on December 8, 2011, alleging causes of action for breach of oral contract, breach of written contract, quantum meruit, fraud, and conversion. Service was made by FedEx delivery of one copy of the amended complaint addressed to both Marcus and Feuerman at 28245 Avenue Crocker, Suite 106, Valencia, CA 91355, the address used by both attorneys on the pleadings.

On December 15, 2011, the trial court continued the two discovery motions to January 27, 2012. The court reasoned a continuance was proper because the motions had been filed prior to the FAC, which contained new and different allegations.

On January 6, 2012, Feuerman wrote to counsel for Wyns-Bills that “we require a review of your client’s discovery before responsive pleadings are filed. We will have responsive pleadings filed within two weeks of receiving the documents responsive to our discovery requests.” Counsel for Wyns-Bills responded by letter, dated January 9, 2012, advising Feuerman that “discovery responses have no bearing on your client’s obligations under the Code of Civil Procedure to timely respond to the First Amended Complaint.” Counsel noted Marcus had already demurred to all but one of the remaining claims and “lost the demurrer as to each claim. He can either file an answer or demur to the conversion claim that was added. I suggest he do so immediately. Otherwise, I will take all necessary actions to protect my client’s rights.” No responsive pleading was filed.

On January 19, 2012, the clerk entered Marcus’s default on Wyns-Bills’s request. Marcus wrote to counsel for Wyns-Bills on January 20, 2012, complaining that no discovery had been provided and demanding “that you produce all documents that are no longer in dispute.” Marcus stated that Wyns-Bills ignored the statement in Feuerman’s January 6 letter that discovery was required before an answer could be filed, as evidenced by the default entered “on a case in which you are fully aware is being defended.” Marcus described counsel for Wyns-Bills as “unprofessional and inappropriate” and repeated that an answer would be filed within two weeks of receipt of discovery. Marcus asked for confirmation that the default would be set aside.

Counsel for Wyns-Bills responded to Marcus’s January 20 letter on January 26, 2012. After disputing Marcus’s description of the state of discovery, counsel reminded

Marcus that Feuerman had been advised in his letter of January 9 of the obligation to file a responsive pleading to the complaint immediately or actions would be taken to protect the rights of Wyns-Bills. Counsel reminded Marcus of the requirements for filing a timely responsive pleading under the Code of Civil Procedure, noting the response was 17 days overdue. Under the California Rules of Court, Wyns-Bills was required to file a request for default within ten days after the deadline for a responsive pleading passed, and counsel had waited the full ten days before seeking entry of default.

On January 27, 2012, hearing on the motions to compel discovery were again continued “for at least 30 days.”

Marcus sent another letter to counsel for Wyns-Bills on January 31, 2012, again complaining that discovery had still not been provided. Marcus accused counsel for Wyns-Bills of “game playing” by taking a default in a cause being “vigorously defended” in an attempt to avoid a cross-complaint against his client. Marcus expressed the opinion that the trial judge “will not be pleased to find you wasting his time with a needless motion to set aside an obviously defended case while you are without our documents and fully informed that our responsive pleading would be filed promptly upon receipt of the documents you have been withholding without any justification.”

The Motion for Mandatory Relief from Default

On February 6, 2012, Feuerman filed a motion for relief from entry of default and any resulting default judgment on behalf of Marcus under the mandatory provision of section 473, subdivision (b), based on Feuerman’s attorney affidavit of fault. The affidavit detailed Feuerman’s review of perceived discovery issues and his mistaken belief that Wyns-Bills’s counsel would not file a default in a case being defended and where he had communicated an intent to file the responsive pleading within two weeks after discovery compliance. Feuerman intended to file a responsive pleading once discovery was completed. The motion was timely filed within six months of the default. Feuerman detailed the futile efforts to convince counsel for Wyns-Bills to withdraw the

default. In addition to all of the correspondence between the parties, Feuerman attached a proposed answer and cross-complaint to his declaration.

Wyns-Bills filed an opposition to the motion for mandatory relief from default. The opposition argued that relief was unavailable because Feuerman was counsel of record only for the purpose of discovery, and it was Marcus, not Feuerman, who was responsible for filing a responsive pleading. Moreover, Feuerman and Marcus were expressly warned the responsive pleading was due and that Wyns-Bills's counsel would protect her rights if the pleading was not filed. Feuerman and Marcus engaged in a litigation tactic of not filing the responsive pleading despite the clear requirement to do so under section 471.5 for the admitted purpose of delay while purportedly seeking discovery. They repeatedly stated they would file the pleading within two weeks of receiving discovery, even after being warned of the obligation to respond to the complaint. Marcus cannot rely on the mandatory relief provision of section 473, because the default is the result of his own willful misconduct. Marcus is not an innocent party and the failure to file the pleading was not the result of his attorney's neglect. In addition, Marcus could not succeed under the discretionary provision of section 473, because neither he nor Feuerman's mistake was excusable.

Marcus filed a reply to the opposition, beginning with complaints about discovery compliance. The argument that Feuerman was not Marcus's counsel was disingenuous, as counsel was aware of, and treated Feuerman as Marcus's attorney. Feuerman's declaration in support of the opposition stated he agreed as of December 15, 2011, to undertake unlimited representation of Marcus, which was adequate to establish he was Marcus's counsel and it was his fault the responsive pleading did not get filed.

The trial court issued a tentative decision on March 1, 2012, which it later adopted as its statement of decision. The court observed that Marcus filed the demurrer to the complaint, Feuerman was in the case on a limited basis, and Marcus was actively involved in his own defense. Because Marcus was responsible for filing the responsive pleading, the mandatory relief provision of section 473 did not apply. Even if Feuerman was responsible for filing the responsive pleading, the failure to do so was the result of a

conscious decision by Feuerman and Marcus, even after being warned by counsel for Wyns-Bills of the need to respond immediately. There is no legal authority to support Marcus's position that he was permitted to wait to complete discovery before filing a responsive pleading. He could have filed his responsive pleading and later sought leave to file a cross-complaint once discovery was complete. Finally, the court observed that although Marcus still claims not to have received the discovery, the motion for relief from default managed to include a proposed answer and cross-complaint.

The Motion for Discretionary Relief from Default

On March 5, 2012, Marcus filed a substitution of attorney, replacing Feuerman with himself, in propria persona. On March 6, Attorney Brad Barnholtz substituted in for Marcus as attorney of record.

On April 2, 2012, Barnholtz filed a motion on behalf of Marcus for relief from default under sections 473, subdivisions (b) and (d), and 128. The motion argued the default was taken without proper service and is therefore a void/voidable order, the default was the result of surprise and excusable neglect, and the trial court has inherent power to make orders that conform to law and justice. Marcus contended service of the FAC was inadequate because only one copy was mailed to Feuerman and Marcus at the same mailing address. Feuerman received and kept the only copy, never delivering it to Marcus. Marcus therefore was never properly served.

Wyns-Bills filed an opposition arguing that Marcus was properly served by express mail according to the provisions of section 1013, subdivision (c), because he had previously appeared in the lawsuit, and Marcus cited no authority showing the service was improper. Even if the trial court were to determine the service was technically improper, service was still satisfactory because of substantial compliance with the service requirements. Feuerman was Marcus's agent for purpose of service. Failure to file a responsive pleading was not due to excusable neglect; instead, it was the result of Marcus's willful misconduct. The letters from Feuerman and Marcus openly admit their

intentional plan to ignore the Code of Civil Procedure by not filing a timely responsive pleading. Counsel for Wyns-Bills expressly warned Feuerman of the need to file a responsive pleading in his letter of January 9, 2012. The default was not filed until January 19, 2012, the last permissible day under the requirements of California Rules of Court, rule 3.110(g).

The trial court denied the motion. The court ruled the motion was an improper motion for reconsideration, and Marcus provided no explanation why these grounds were not asserted in the first motion for relief from default. On the merits, the court ruled that Marcus failed to show service was improper but if technically so, the court found that Marcus knew of the FAC. Marcus wrote letters acknowledging his part in the plan to wait for discovery before filing the responsive pleading. There is no showing of surprise, mistake, inadvertence, or excusable neglect.

Judgment

On May 29, 2012, the trial court entered a judgment in favor of Wyns-Bills in the amount of \$36,281.27. On July 17, 2012, Marcus filed a timely notice of appeal.

DISCUSSION

Mandatory Relief from Default

Marcus argues the trial court erred in denying mandatory relief under section 473 based upon Feuerman's affidavit of fault. He contends the court's ruling that Marcus represented himself in the action and was responsible for filing the responsive pleading is not supported by substantial evidence, because Feuerman's uncontroverted declaration showed that Feuerman's status changed to unlimited counsel on December 15, 2011. Feuerman's conscious decision not to file a responsive pleading did not justify denial of relief, because neglect need not be excusable under the mandatory relief provision. The

finding that Marcus was aware of the delay and was partially responsible for the default as part of a plan is not supported by substantial evidence. The showing for mandatory relief was adequate based on Feuerman's admission of fault, even if Marcus shared some of the blame.

Standard of Review

“Section 473, subdivision (b), authorizes the trial court to relieve a party from a default judgment entered because of the party's or his or her attorney's mistake, inadvertence, surprise, or neglect. The section provides for both mandatory and discretionary relief. Mandatory relief is available ‘whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect’ (§ 473, subd. (b).) ‘[I]f the prerequisites for the application of the mandatory provision of section 473, subdivision (b) exist, the trial court does not have discretion to refuse relief.’ (*Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 612 (*Leader*).) Thus, to the extent that the applicability of the mandatory relief provision does not turn on disputed facts, but rather, presents a pure question of law, it is subject to de novo review. (*Ibid.*) Where the facts are in dispute as to whether or not the prerequisites of the mandatory relief provision of section 473, subdivision (b), have been met, we review the record to determine whether substantial evidence supports the trial court's findings. (See *Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631 [findings of fact reviewed for sufficiency].)” (*Carmel, Ltd. v. Tavoussi* (2009) 175 Cal.App.4th 393, 399.)

Analysis

The trial court resolved the motion for mandatory relief by making two factual determinations. The first factual finding was that Marcus was representing himself in

connection with defense of the action, other than discovery, and Marcus alone was responsible for filing the answer to the amended complaint. This finding is supported by substantial evidence. Marcus, an attorney, filed the demurrer to the original complaint. When Feuerman filed a substitution of attorney, it was expressly limited to his handling of discovery matters. Marcus's continued responsibility to file the answer, rather than Feuerman, is substantiated by his letters to counsel for Wyns-Bills shortly after the default was entered. On January 20, 2012, one day after entry of default, Marcus wrote to complain of the "unprofessional and inappropriate" conduct in filing the default when discovery was outstanding, and "we will file our answer and cross-complaint within two weeks of receipt of your discovery." If Marcus was not involved in defense of the action, there was no reason for him, rather than Feuerman, to challenge the entry of the default in that letter. On January 31, Marcus wrote again to counsel for Wyns-Bills complaining further about discovery and the entry of the default. At no point in these two letters did Marcus suggest that Feuerman was responsible for filing the responsive pleading that was overdue, nor did he attribute blame for failure to file the pleading on Feuerman.

Wyns-Bills and the trial court were entitled to rely on the limited substitution of counsel form indicating Feuerman was responsible only for discovery, which left Marcus alone responsible for filing responsive pleadings. "Litigants are not required to investigate the relationship between opposing attorneys of record and their clients. They and the courts have every right to rely on court records as binding on both litigants and the attorneys appearing of record on their behalf. (*People ex rel. Dept. Pub. Wks. v. Hook* (1967) 248 Cal.App.2d 618, 624.)" (*McMillan v. Shadow Ridge At Oak Park Homeowner's Assn.* (2008) 165 Cal.App.4th 960, 965.) Marcus is in no position to repudiate the limited scope substitution of attorney filed by Feuerman, since he took no steps to alert the court or Wyns-Bills of the purported change in status. There was no mention in the moving papers of the agreement that Feuerman would represent Marcus for all purposes, purportedly made on December 15, 2011. This agreement was mentioned for the first time in Feuerman's declaration attached to the reply to the opposition to the motion.

Because substantial evidence supports the finding that Marcus was responsible for filing the responsive pleading, the trial court did not err in ruling that Marcus could not rely on the mandatory relief provision of section 473. While Marcus is an attorney, he was representing himself in this action. Mandatory relief is not available to a self-represented litigant.

The trial court's second factual finding was that even if Feuerman was responsible for filing a responsive pleading, Feuerman and Marcus together made a conscious decision to deliberately avoid following the law in order to gain a tactical advantage in the litigation by pressing discovery demands and delaying the progress of the litigation. This second factual finding is also supported by substantial evidence. The various correspondences between counsel support the court's conclusion that Marcus and Feuerman together embarked on a course of action to flaunt California law by not filing a responsive pleading, even after being advised of the obligation to do so before the default was entered. Marcus and Feuerman repeatedly insisted that a responsive pleading would be filed on their schedule, without regard to California law. The mandatory relief provision of section 473 "protects only the innocent client. It provides no relief for the culpable client who participates in conduct which led to the default or dismissal. When deciding whether to grant relief, the court must resolve the issue whether attorney actions, or the misconduct of the parties themselves, actually caused the default or dismissal." (*Lang v. Hochman* (2000) 77 Cal.App.4th 1225, 1251-1252.)

Under the second factual finding of the trial court, it does not matter whether Feuerman was counsel of record for purpose of filing the responsive pleading. (See *SJP Ltd. Partnership v. City of Los Angeles* (2006) 136 Cal.App.4th 511, 516-520 ["We find nothing in the language of section 473, subdivision (b) to suggest that the Legislature intended the mandatory relief provision to be limited to those circumstances where the attorney affidavit of fault is signed by the defaulting or dismissed party's *attorney of record* in the civil case."].) The determinative factor is that the record contains substantial evidence the default resulted from Marcus's intentional participation in a scheme to avoid compliance with the Code of Civil Procedure. The mandatory relief

provision of section 473 is not applicable to a party who himself is not innocent of misconduct.

Discretionary Relief

Marcus next argues the trial court erred in deeming his second motion for relief—under the discretionary provisions of section 473—as a motion for reconsideration of the early motion for mandatory relief from default. He further argues the court was without jurisdiction to enter the default judgment because service was defective to the extent only one copy of the complaint was mailed to both Marcus and Feuerman. Finally, Marcus argues the court abused its discretion in failing to exercise its equitable power to set aside the default in order to effectuate justice and allow for a trial on the merits.

We need not address Marcus’s contention that the trial court erred in denying the motion for discretionary relief on the basis it was an improper motion for reconsideration under section 1008. The court also denied the motion on the merits, rulings we conclude do not rise to the level of abuse of discretion.

Adequacy of Service of the FAC

Marcus does not argue the FAC could not be properly served by express mail; in fact, he concedes service by mail is generally recognized as the correct procedure. Instead, he makes two technical arguments: (1) separate copies of the FAC should have been individually mailed to Marcus and Feuerman, instead of the one copy served by mail on both attorneys at the same location; and (2) even if the trial court was correct in finding that Marcus had notice of the existence of the FAC, he did not have notice of its contents. In Marcus’s view, the lack of proper service deprived the court of jurisdiction to enter a default judgment.

A trial court lacks jurisdiction to enter a default judgment against a defendant who was not served with a summons in the manner prescribed by statute. (*Hearn v. Howard*

(2009) 177 Cal.App.4th 1193, 1200.) The trial court may set aside a default judgment entered without proper service under section 473, subdivision (d). (*Ibid.*) “Where the question on appeal is whether the entry of default and the default judgment were void for lack of proper service of process, we review the trial court’s determination de novo. (*Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 495–496.)” (*Hearn, supra*, at p. 1200.)

The trial court ruled Marcus failed to demonstrate it was improper to mail only one copy of the FAC to both he and Feuerman, because they shared the same mailing address. We agree. Marcus concedes the FAC was delivered by FedEx to the office address he shared with Feuerman. He does not dispute that service by express mail is authorized by section 1013, subdivision (c). He further admits that he cannot locate any authority indicating the service, as effectuated in this case, was improper.

Assuming there was a defect in service by mailing one copy of the FAC, instead of two, to the correct address of both Marcus and Feuerman, we agree with the trial court that there was substantial compliance with the service requirements, which is sufficient to establish jurisdiction. As already noted, service by express mail of the FAC was authorized. We share the trial court’s justifiable skepticism of Marcus’s argument that he was unaware of the contents of the FAC. Marcus’s correspondence with counsel for Wyns-Bills demonstrates Marcus was fully aware of the amended pleading. Neither his letters nor those of Feuerman contain any protest over the form of service. Most importantly, Marcus’s letters make no mention of his purported lack of knowledge of the contents of the FAC. Marcus’s motion to vacate under the mandatory provisions of section 473 did not argue in any respect that he lacked notice or that service was defective. It was only after his first effort to set aside the judgment failed that it occurred to Marcus that he was not properly served. The court was not obligated to grant relief where there is substantial compliance with the service requirements under these circumstances. (See *Pasadena Medi-Center Associates v. Superior Court* (1973) 9 Cal.3d 773, 778; *Bein v. Brechtel-Jochim Group, Inc.* (1992) 6 Cal.App.4th 1387, 1394; *Biddle v. Superior Court* (1985) 170 Cal.App.3d 135, 137-138.)

Equitable Relief

Marcus also argues the trial court abused its discretion by refusing to set aside the judgment on equitable grounds pursuant to section 128, subdivision (a)(8). His contention is based on the arguments, rejected above, that proof of service was improper and he did not receive the FAC. He also relies on the concept of extrinsic fraud, citing *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981 (*Rappleyea*), without identifying the nature of the extrinsic fraud in this case.

The law favors resolution of litigation on the merits. But the law frowns upon those who trifle with settled rules of law in order to obtain a perceived tactical advantage. In this case, counsel for Wynn-Bills properly served the FAC and professionally urged Marcus to file the required responsive pleading. Marcus adamantly refused to comply with law, apparently believing delaying the progress of the litigation with discovery requests, rather than filing the responsive pleading required by law, somehow served his individual interests. Marcus made no compelling showing of entitlement to equitable relief in the trial court, and we cannot say the decision of the trial court exceeded the bound of reason in a way that constitutes an abuse of discretion. (*Rappleyea, supra*, 8 Cal.4th at p. 987.)

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to Carmen M. Wyns-Bills.

KRIEGLER, J.

We concur:

MOSK, Acting P. J.

KUMAR, J.*

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