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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

MARION FRANKLIN MILLER,

Plaintiff and Appellant,

v.

MATTIE L. DRAWN,

Defendant and Respondent.

B268038

(Los Angeles County
Super. Ct. No. BC565639)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Elizabeth Allen White, Judge. Reversed and remanded.

Marion Franklin Miller, in pro. per., for Plaintiff and Appellant.

No appearance by Defendants and Respondents.

Marion Miller was an incarcerated, self-represented civil plaintiff, whose action was dismissed for failure to prosecute. As it appears that his failure to prosecute was not willful, but was instead the product of his incarceration, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

On December 1, 2014, Miller filed a complaint against numerous defendants, alleging they embezzled property from his aunt while she was suffering from dementia prior to her death. Miller's request for a fee waiver was granted.

On January 26, 2015, Miller wrote the court requesting a conformed copy of the complaint. The next day, he received notice that a case management conference was set for May 11, 2015. On February 16, 2015, plaintiff wrote the court again, having not yet received the conformed copy of the complaint and needing it so that he could serve defendants in advance of the case management conference.

A conformed copy of the complaint was finally sent to Miller. On April 10, 2015, he sent copies of the filed complaint to the sheriff, requesting the sheriff to serve defendants.

On April 24, Miller filed his case management statement, representing that service was not yet complete but that he had recently requested service from the sheriff. As he was in prison and would be unable to attend the case management conference in person, Miller also attempted to file a notice of intent to appear by telephone and a request for telephone appearance, based on his imprisonment. All three documents were mailed together to the court, but it appears that only the case management statement and notice of intent to appear by phone were filed. The notice of intent to appear by telephone is a form which, by its own terms, is intended only to provide notice to the court and parties. The request for telephone appearance, which requests a ruling, was not filed by the court, and the trial court made no ruling on it.

On April 29, the sheriff's department wrote plaintiff stating that it had not served the complaint on any defendants. The letter explained, "We are unable to serve this process as the Judicial Officer has ordered on the Case Management Conference that all parties be served no later than 30 [days] before the Case Management Conference. Also,

no fees or fee waiver was included with your request. You may resubmit your request for service once a new hearing date has been obtained along with all necessary fees . . . or a court issued fee waiver for this case.”

Defendant did not appear at the case management conference. The court issued an order to show cause why the matter should not be dismissed and/or sanctions imposed for failure to appear at the case management conference and for failure to serve defendants.¹ The hearing on the order to show cause was set for June 10, 2015.

Plaintiff filed an opposition to the order to show cause, explaining that he could not have appeared at the case management conference because the court never ruled on his request to appear by telephone. He also explained that his failure to serve defendants with the action was due to his delayed receipt of a conformed copy of the complaint. As before, he mailed to the court both a notice of intent to appear by phone and a request for telephone appearance. The notice of intent to appear by phone was filed. The request for telephone appearance was stamped “Received.” Again, the court did not rule on the request for telephone appearance.

The hearing on the order to show cause was held on June 10. The court’s minute order states, “There being no appearances, the case is ordered dismissed pursuant to Code of Civil Procedure Section 583.410.” That provision allows a court, in its discretion, to dismiss for a delay in prosecution. The clerk mailed a copy of the signed dismissal to plaintiff.

Plaintiff immediately filed an ex parte notice of motion for reconsideration, arguing that his incarceration had made it impossible for him to appear absent an order granting a request to appear by phone, and that, although he had requested such orders, none had been granted. The court set the motion for hearing on September 4, 2015 at 8:30 a.m. The court deemed plaintiff’s ex parte filing to be moving papers. The court’s order stated, “Plaintiff is ordered to make arrangements to appear by telephone through CourtCall at (213) 888-882-6878.” We note that this telephone number is erroneous, apparently indicating two different area codes.

¹ We take judicial notice of the superior court file.

Plaintiff did not believe he could use CourtCall as directed in the court's minute order. He sent the court a notice of non-appearance, requesting the court to grant his motion for reconsideration on his moving papers alone. He explained in a declaration that, among other problems, he could not attend an 8:30 a.m. hearing by CourtCall because he could not access prison correctional counselors, necessary to facilitate the call, prior to 10:00 a.m. In the alternative, in the hopes that the court would reschedule the hearing for a time when he could utilize CourtCall, Miller also sent the court a notice of intent to appear by phone. The court filed the notice of intent to appear by phone, but not the notice of non-appearance.

At the September 4, 2015 hearing, on its own motion, the court continued the hearing to September 25, 2015, again at 8:30 a.m. Plaintiff was again "ordered to make arrangements to appear via CourtCall," but the court corrected the error in the CourtCall telephone number.

On September 17, 2015, plaintiff filed a notice of intent to appear by telephone. He also filed a notice of non-appearance and request for court order facilitating telephone appearance. He specifically requested the court to issue an order directing prison officials "to allow and facilitate Plaintiff CourtCall telephone appearance for the September 25, 2015, hearing." He explained that he could not initiate a call to CourtCall without the cooperation of prison officials, and that such cooperation is impossible before 9:30 a.m., when staff is generally available.² Miller again asked the court to either rule on his written submissions for reconsideration or facilitate his telephone appearance. Although this document was filed, the court never ruled on it.

The hearing was held on September 25, 2015. The court's minute order states, "The court notes that plaintiff is not present via CourtCall. [¶] There being no appearances, plaintiff Marion F. Miller's motion for reconsideration is ordered off calendar."

² Miller also explained that he would have to pay for the call through his prepay account, although he did not specifically state that he lacked the funds for the call.

On October 14, 2015, Miller filed a notice of appeal from the underlying dismissal and the postjudgment order removing his reconsideration motion from calendar.³

DISCUSSION

On appeal, Miller contends he was denied meaningful access to the court. We agree.

1. *Governing Law*

“[I]ndigent prisoners who are plaintiffs in bona fide civil actions still have a protected interest in meaningful court access.” (*Apollo v. Gyaami* (2008) 167 Cal.App.4th 1468, 1482 (*Apollo*)). Meaningful access is the keystone; no particular remedy is necessary to secure access. (*Id.* at p. 1483.) “Remedies to secure access may include: (1) deferral of the action until the prisoner is released [citation]; (2) appointment of counsel for the prisoner [citations]; (3) transfer of the prisoner to court [citations]; (4) utilization of depositions in lieu of personal appearances [citations]; (5) holding of trial in prison [citation]; (6) conduct of status and settlement conferences, hearings on motions and other pretrial proceedings by telephone [citation]; (7) propounding of written discovery; (8) use of closed circuit television or other modern electronic media; and (9) implementation of other innovative, imaginative procedures [citations].” (*Wantuch v. Davis* (1995) 32 Cal.App.4th 786, 792-793 [fn. omitted].) “In determining the appropriate remedy to secure access, the trial court should consider the nature of the action, the potential effect on the prisoner’s property, the necessity for the prisoner’s presence, the prisoner’s role in the action, the prisoner’s literacy, intelligence and competence to represent himself or herself, the stage of the proceedings, the access of the prisoner to a law library and legal materials, the length of the sentence, the feasibility of transferring the prisoner to court and the cost and inconvenience to the prison and judicial systems. [Citations.]” (*Id.* at p. 793.)

³ The notice of appeal is timely. Although the clerk of the court mailed Miller a copy of the June 10, 2015 dismissal, it was not a filed-endorsed copy. As such, he had 180 days to file his notice of appeal. (Cal. Rules of Court, rule 8.104(a).)

“Generally, a trial court has discretion to choose among these and other remedies in safeguarding a prisoner litigant’s right of meaningful access to the courts to prosecute or defend against a civil action threatening his or her interests. [Citations.] However, a trial court does not have discretion to choose *no remedy* in cases where the prisoner’s civil action is bona fide and his or her access to the courts is being impeded.” (*Apollo, supra*, 167 Cal.App.4th at pp. 1483-1484.)

When a court allows an indigent prisoner to appear telephonically, the court may not dismiss the action based on the prisoner’s failure to appear unless the court finds, based on the record, that the prisoner “has willfully failed to avail himself of the right to appear telephonically.” (*Jameson v. Desta* (2009) 179 Cal.App.4th 672, 675 (*Jameson*)). While a court may, in its discretion, select telephonic access as a way to safeguard the prisoner’s right of meaningful access, the court must nonetheless make sure that this method “actually provides meaningful access.” (*Id.* at p. 684.) “[T]he court may wish to communicate itself, telephonically and/or by letter, with prison personnel to determine what logistical arrangements are necessary to enable [the inmate] to appear telephonically, and ensure that both court staff and prison personnel make those arrangements.” (*Ibid.*)

2. *Miller was Denied Meaningful Access*

In this case, Miller requested to appear by telephone at the case management conference and the hearing on the order to show cause; the court did not rule on these requests. When Miller filed his motion for reconsideration, the court for the first time indicated that Miller could appear via CourtCall at the 8:30 a.m. hearing. Miller immediately explained that he could not use CourtCall that early, as prison officials would not be available at that time to facilitate his use of the phone. Miller therefore requested the court to either rule on his written submissions or move the hearing to a time he could appear. The court, on its own motion, continued the hearing, but again scheduled it at 8:30 a.m., when Miller could not use the telephone. He requested a court order directing prison officials to facilitate his appearance or, in the alternative, asked the court to simply rule on his moving papers. The court did neither, and instead took the

matter off calendar because Miller failed to appear by telephone. As the *Jameson* court observed, *permitting* an inmate to appear by telephone does not itself satisfy the inmate's right of meaningful access when prison officials do not allow the inmate to appear.

Although we realize that scheduling hearings involving incarcerated self-represented litigants creates unusual obstacles and the trial court undoubtedly did its best based on the incomplete information it had available, the trial court nevertheless erred in both dismissing the action and in effectively denying Miller's motion for reconsideration. Dismissal was not available as a remedy unless Miller's failure to appear at the case management conference and hearing on the order to show cause was willful; there is no evidence that it was. Miller had requested telephonic appearances, but the court had not ruled on those requests.⁴ Similarly, Miller's motion for reconsideration was not denied on the merits; the court took it off calendar because Miller did not appear by CourtCall, even though Miller had twice informed the court that he could not make a telephonic appearance without the assistance of prison officials, who were not available before 9:30 a.m.

3. *Remedy*

In cases in which a prisoner plaintiff is denied meaningful access to the court, the matter is remanded to the trial court to provide such access. This involves a three-part inquiry. The trial court must first confirm whether the inmate is indigent. Second, the court must determine whether the lawsuit involves a bona fide threat to the prisoner's personal or property interests. If those two elements are resolved in the plaintiff's favor, the court must exercise its sound discretion to select the appropriate measures to protect the plaintiff's right of meaningful access. (*Apollo, supra*, 167 Cal.App.4th at pp. 1485-1487.) This remedy may not be necessary in this case because, while the matter was pending on appeal, Miller apparently was released from prison on parole as he has submitted an address change notice to this court. Thus, it is no longer necessary for the

⁴ Nor was there evidence that Miller's failure to serve defendants had been willful; he diligently sought a conformed copy of the complaint, and sought service through the sheriff.

trial court to protect Miller's right of meaningful access. However, as he was deprived of meaningful access, the dismissal must be reversed and Miller be given an opportunity to pursue his action.

DISPOSITION

The order of dismissal is reversed and the matter remanded to the trial court with directions that Miller be granted a reasonable time in which to serve his complaint and a new case management conference be scheduled. Miller is to bear his own costs, if any, on appeal, subject to any applicable fee waiver.

The clerk of this court is directed to serve a copy of this opinion and the remittitur on defendant at the following address:

- | | | | |
|----|-------------------------------------------------------------|----|------------------------------------------------------------------------------------|
| 1. | Mattie Drawn
459 E Loma Alta Drive
Altadena, CA 90001 | 2. | Parole Office
Southern Parole Region
18002 Sky Park Cir.
Irvine, CA 92614 |
|----|-------------------------------------------------------------|----|------------------------------------------------------------------------------------|

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.