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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

JEANETTA McDOWELL,

Plaintiff and Appellant,

v.

ANGELA ANN MERCIER,

Defendant and Respondent.

C071890

(Super. Ct. No. 34-2010-
00086665-CU-PA-GDS)

Appellant Jeanetta McDowell failed to file a compulsory cross-complaint under Code of Civil Procedure section 426.30 (unless otherwise stated, statutory references that follow are to the Code of Civil Procedure) when she answered a personal injury complaint filed by respondent Angela Ann Mercier against McDowell arising from a car accident between the women (Mercier action). Instead, days before the Mercier action settled, McDowell filed a separate lawsuit against Mercier based on the same accident (McDowell action).

After settling the Mercier action, Mercier dismissed the case with prejudice. Mercier later moved--successfully--for summary judgment in the McDowell action, arguing that under section 426.30 McDowell's failure to file a compulsory cross-complaint in the Mercier action barred McDowell's later lawsuit. The trial court later denied McDowell's motion to set aside the summary judgment pursuant to section 473 arguing mistake and excusable neglect in failing to file the cross-complaint.

On appeal, McDowell contends the trial court erred in granting summary judgment and in denying her section 473 motion to set aside that judgment. Based on language contained in a Full Release of All Claims (Release), which Mercier signed to settle the Mercier action, McDowell argues the court should have either judicially or equitably estopped Mercier from defending against the McDowell complaint by asserting that McDowell's failure to file a compulsory cross-complaint in the Mercier matter was a defense to the McDowell action. She also argues the court should have relieved her of the failure to comply with section 426.30. Finding no error, we affirm the judgment.

FACTS AND PROCEEDINGS

A. The Mercier Action

In May 2009, Mercier and McDowell were involved in a car accident. The next month Mercier filed a complaint for personal injuries arising from the accident against McDowell (the Mercier action). McDowell answered the complaint but did not include a cross-complaint against Mercier for any injuries she allegedly suffered in the accident. McDowell was represented by Debra Fitzsimmons, an attorney employed by McDowell's insurance company.

B. The McDowell Action

On August 31, 2010, while Fitzsimmons was negotiating to settle the Mercier action, McDowell retained a second attorney, John Hallissy, for the purpose of filing a personal injury complaint against Mercier based on the May 2009 car accident. Two

days later, on September 2, Hallissy filed a complaint on McDowell's behalf against Mercier (the McDowell action).

C. Settlement and Dismissal of the Mercier Action

On September 5, Fitzsimmons wrote to Mercier's counsel confirming the terms of a settlement the parties had reached in the Mercier action. Mercier agreed to accept the \$30,000 policy limit from McDowell's insurance company in exchange for a release and dismissal of the action against McDowell with prejudice.

On September 7, Hallissy wrote to Fitzsimmons about the failure to file a compulsory cross-complaint in the Mercier action and urged her not to settle the Mercier action until the two cases could be consolidated or the cross-complaint issue resolved. On September 10, Mercier filed a "Notice of Settlement of Entire Case" in the Mercier action.

In October, Mercier executed a document drafted by Fitzsimmons entitled "Full Release of All Claims (Release)" in the Mercier action. Paragraph 6 of the Release provides: "No Admission of Liability. This general release is a compromise of the disputes arising out of the claim and should not be treated as an admission of liability by any party for any purpose. This release does not limit or in any way affect the right of Jeanetta McDowell to pursue any affirmative claims against Plaintiff."

Pursuant to the terms of the parties' settlement, on November 8, Mercier filed a request for dismissal of the Mercier action with prejudice. Neither Fitzsimmons nor Hallissy moved for leave to file a dilatory cross-complaint in the Mercier action or to consolidate the two cases before the Mercier action was dismissed with prejudice.

D. Trial Proceedings in the McDowell Action

On September 30, 2010, before the Mercier action was dismissed, Mercier answered the complaint in the McDowell action. Mercier's answer denied the allegations and asserted 11 affirmative defenses not including an affirmative defense alleging that

section 426.30 barred McDowell from maintaining her action. A year later, in September 2011, Mercier retained new counsel in the McDowell action, and the next month moved to amend her answer to include an affirmative defense based on section 426.30.

In opposing the motion, McDowell argued that Mercier had unreasonably delayed in moving to amend, but she did not argue Mercier had waived the right to raise such a defense by executing the Release in the Mercier action. Instead, despite dismissal of the Mercier action with prejudice nearly a year earlier and the fact that the case was pending before a different judge when it was active, she requested that the court reopen the Mercier action to allow McDowell to file a compulsory cross-complaint and then consolidate the cases if the court granted Mercier's motion to amend her answer. It is apparent from the record that the court granted Mercier's motion to amend her answer because, on December 1, 2011, Mercier filed her amended answer, now alleging as an affirmative defense that McDowell's claim was barred by section 426.30. The order granting the motion to amend, however, is not included in the appellate record.

Two months later, in February 2012, Mercier moved for summary judgment in the McDowell action based on the newly added section 426.30 affirmative defense. McDowell opposed the motion, arguing the language in Paragraph 6 of the Release estopped Mercier from asserting as an affirmative defense McDowell's failure to file a compulsory cross-complaint in the Mercier action. After considering the parties' papers and hearing argument on the matter, the court granted the motion for summary judgment, finding the Release did not waive Mercier's right to assert any affirmative defenses to the McDowell action and that the compulsory cross-complaint statute barred McDowell's lawsuit.

The court entered judgment in the McDowell action in favor of Mercier and against McDowell in June 2012. Two months later, McDowell filed a motion to set aside the judgment under section 473, claiming summary judgment was granted based on the excusable neglect and mistakes of both her counsel, Fitzsimmons in the Mercier action

and Hallissy in the McDowell action. Neither the notice of motion nor the points and authorities specified whether McDowell sought relief under the mandatory or discretionary provisions of section 473. At the hearing on the motion, McDowell's counsel argued she was entitled to relief under both. After considering the parties arguments, the court denied the motion.

McDowell timely appealed the judgment and the order denying her section 473 motion to set aside the judgment.

DISCUSSION

I

Standard of Review

Summary judgment is proper “if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” (§ 437c, subd. (c).) In ruling on a summary judgment motion, courts consider all of the evidence set forth in the papers, except that to which objections were made and sustained by the court. (*Ibid.*) To support summary judgment for a defendant, it must appear from the record either that the plaintiff cannot establish one or more of the elements of a cause of action or that the plaintiff cannot refute an affirmative defense established by the defendant. (§ 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849 (*Aguilar*).

When a defendant supports a motion for summary judgment by affidavits and declarations sufficient to sustain the motion the burden shifts to the plaintiff to show the existence of a triable issue of material fact. (*Aguilar, supra*, 25 Cal.4th at p. 849.) An issue of fact is not created by speculation or conjecture; it can be created only by a conflict in the evidence submitted to the trial court in supporting or opposing the motion. (*Lyons v. Security Pacific Nat. Bank* (1995) 40 Cal.App.4th 1001, 1014 (*Lyons*)). An

issue of fact, moreover, is not raised by “ ‘ “cryptic, broadly phrased, and conclusory assertions” [citation], or mere possibilities [citation].’ ” (*Ibid.*)

On appeal, we review the record independently to determine whether the moving party met its burden of proof. (*Aguilar, supra*, 25 Cal.4th at p. 860.) Contrary to McDowell’s assertion, without citation, that an abuse of discretion standard governs, our review of the summary judgment is de novo. (*Ibid.*) McDowell is correct, however, that the trial court’s denial of her motion for discretionary relief under section 473 is reviewed for an abuse of discretion. (*Henderson v. Pacific Gas & Electric Co.* (2010) 187 Cal.App.4th 215, 230.)

II

Motion for Summary Judgment

McDowell first contends the court erred in granting summary judgment based on her failure to file a compulsory cross-complaint under section 426.30 in the Mercier action.

Section 426.30 provides that the filing of a cross-complaint is compulsory in specified cases: “(a) Except as otherwise provided by statute, if a party against whom a complaint has been filed and served fails to allege in a cross-complaint any related cause of action which (at the time of serving his answer to the complaint) he has against the plaintiff, such party may not thereafter in any other action assert against the plaintiff the related cause of action not pleaded.” (§ 426, subd. (a).) Section 426.30 does not apply if the court lacks personal jurisdiction over the person who failed to plead the related cause of action or if the person did not file an answer to the complaint against him. (§ 426.30, subd. (b)(1)-(2).)

For purposes of the statute, a “related cause of action” is one that “arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action which the plaintiff alleges in his complaint.” (§ 426.10, subd. (c).) The law is

intended to prevent piecemeal litigation. (*Carroll v. Import Motors, Inc.* (1995) 33 Cal.App.4th 1429, 1436.) Section 426.30 provides an affirmative defense that completely disposes of any cause of action to which it applies. (*Hulsey v. Koehler* (1990) 218 Cal.App.3d 1150, 1158 (*Hulsey*).

McDowell does not dispute that her purported injuries were from the same car accident that was the subject of the Mercier action, and, thus, were “related” to the cause of action alleged in Mercier’s earlier complaint. Nor does she dispute that she did not file a cross-complaint in the Mercier action.

McDowell’s argument for why the compulsory cross-complaint statute does not bar the present action, both in the trial court and on appeal, rests on the terms of the Release. According to McDowell, the trial court should have judicially or equitably estopped Mercier from asserting section 426.30 as an affirmative defense to the McDowell action based on paragraph 6 of the Release.

McDowell asserts that one sentence in paragraph 6 precludes Mercier from asserting her failure to file a compulsory cross-complaint in the Mercier action as a defense in this case. That sentence provides: “This release does not limit or in any way affect the right of Jeanetta McDowell to pursue any affirmative claims against plaintiff.” McDowell interprets the quoted language to mean Mercier waived her section 426.30 defense because it affects McDowell’s right to pursue her affirmative claims against Mercier.

The trial court rejected McDowell’s interpretation, finding that the Release language only reflected the parties’ intention regarding the effect of the Release itself. The Release, however, did not contain any language waiving Mercier’s potential affirmative defenses to the McDowell action, including statutory defenses such as section 426.30. In other words, paragraph 6 merely precluded Mercier from claiming the Release barred McDowell’s lawsuit. It did not bar Mercier from defending against the McDowell action by other means.

Although we interpret the meaning of the Release de novo and are not bound by the trial court's interpretation, we nevertheless agree with the lower court. (*Hernandez v. Siegel* (2014) 230 Cal.App.4th 165, 170 [questions of contract interpretation are generally subject to de novo review]; *Fair v. Bakhtiari* (2006) 40 Cal.4th 189, 202 [“ ‘[a] settlement agreement is a contract, and the legal principles which apply to contracts generally apply to settlement contracts’ ”].) We discern nothing in the plain language of paragraph 6 to indicate the parties intended for Mercier to waive any right to raise section 426.30 as an affirmative defense to the McDowell action.

“ ‘The fundamental rules of contract interpretation are based on the premise that the interpretation of a contract must give effect to the “mutual intention” of the parties. “Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. (Civ. Code, § 1636.) Such intent is to be inferred, if possible, solely from the written provisions of the contract. (*Id.*, § 1639.) The ‘clear and explicit’ meaning of these provisions, interpreted in their ‘ordinary and popular sense,’ unless ‘used by the parties in a technical sense or a special meaning is given to them by usage’ (*id.*, § 1644), controls judicial interpretation. (*Id.*, § 1638.)” ’ ” (*MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 647-648.)

In this case, had the parties intended to preclude Mercier from ever raising the section 426.30 affirmative defense they could have explicitly said so in the Release. They did not. Indeed, the record shows both of McDowell's counsel were keenly aware of the compulsory cross-complaint issue and the danger it posed to their client at least a month before Mercier signed the Release. Yet nothing in the Release specifically carves out the affirmative defense as something Mercier could not raise.

The fact that Mercier's original answer in the McDowell action did not allege the affirmative defense does not lead us to a contrary conclusion. As McDowell's counsel was likely aware, courts ordinarily “ ‘exercise liberality’ in permitting amendments at any stage of the proceeding.” (*Hulsey, supra*, 218 Cal.App.3d at p. 1159.) It is well

settled that “liberality should be displayed in allowing amendments to answers, for a defendant denied leave to amend is permanently deprived of a defense.” (*Ibid.*) Such liberal pleading amendment rules, then, made it distinctly possible that Mercier might later raise the affirmative defense. Thus, had the parties actually intended to prohibit Mercier from amending her answer or raising the section 426.30 defense they could have plainly said so. Like the trial court, we find such language decidedly absent from the Release.

The unreasonableness of McDowell’s interpretation of paragraph 6, moreover, becomes apparent upon recognizing that any defense Mercier raised, including those affirmative defenses in her original answer, could arguably “limit” or “affect” McDowell’s right to pursue her affirmative claims. Indeed, such an interpretation would preclude Mercier from defending against the McDowell action in any manner whatsoever. Interpreting the Release as McDowell urges calls into question Mercier’s right to raise those affirmative defenses even though Mercier had answered the McDowell complaint before she signed the Release in the Mercier action. Nothing in the Release’s plain language, however, indicates the parties intended such a draconian result. The only reasonable interpretation of the parties intent in including paragraph 6 in the Release is that the parties intended that the Release itself would not preclude McDowell from pursuing her own action arising out of the accident, not that Mercier would have no right to defend against it.

We also find *Manning v. Wymer* (1969) 273 Cal.App.2d 519 (*Manning*), on which McDowell principally relies, inapposite. In *Manning*, Wymer and Manning each filed suit claiming damages for personal injuries as the result of the other’s negligent driving after their cars collided. (*Id.* at p. 522.) Wymer, through his personal attorney, settled his action against Manning before either had answered the respective complaints. (*Id.* at pp. 522-523.) The parties agreed that the settlement would not prejudice Manning’s action. (*Id.* at p. 523.)

Although the parties had agreed Wymer would dismiss his action without prejudice, a dismissal with prejudice was inadvertently filed. (*Manning, supra*, 273 Cal.App.2d at p. 523.) Later, due to a miscommunication among counsel, the insurance counsel representing Wymer as a defendant in the Manning action filed an amended answer claiming her suit was barred by res judicata since Wymer's action had been dismissed with prejudice. (*Id.* at pp. 523-524.) The court, without knowledge of the parties' agreement, granted summary judgment based on the defense and later denied section 473 relief. (*Id.* at p. 523.)

The appellate court reversed. (*Manning, supra*, 273 Cal.App.2d at p. 528.) The court reasoned that the parties had specifically agreed Wymer's settlement and dismissal would not prejudice Manning's action, the attorneys representing the respective parties each submitted declarations confirming their agreement and declaring that the only reason Wymer's insurance counsel asserted the affirmative defense in summary judgment was due to a miscommunication, counsel also sought leave under section 473 to withdraw the dismissal with prejudice in the Wymer action and to file a dismissal without prejudice, which the trial court granted. (*Id.* at pp. 524-526.)

Based on the totality of the evidence presented, the court concluded that the parties were free to agree that Wymer's dismissal would not operate as a retraxit--a complete bar to any future action arising out of the same transaction--and that the parties in fact entered into such an agreement. (*Manning, supra*, 273 Cal.App.2d at p. 526.) Wymer, therefore, could not claim through his insurance counsel that Manning was estopped from maintaining her action. (*Id.* at p. 527.)

Several factors distinguish *Manning* from the present case. First, neither party filed an answer in *Manning* whereas McDowell did answer Mercier's complaint and failed to assert her compulsory cross-complaint as required by section 426.30. While the compulsory cross-complaint statute is directly at issue here, it was not implicated in *Manning*. (*Manning, supra*, 273 Cal.App.2d. at pp. 525-526.)

More importantly, however, was the multitude of evidence in *Manning* showing the parties' intent when negotiating and executing the settlement agreement. Not only did each of the attorneys submit declarations stating Wymer's dismissal was never intended to act as a retraxit, but also they evidenced their understanding by executing a stipulation which purported to nullify the dismissal with prejudice and substituted in its place a dismissal without prejudice. (*Manning, supra*, 273 Cal.App.2d at p. 526.)

Comparing the type of evidence presented in *Manning* with the relative dearth of evidence presented here regarding the parties' intent when executing the Release is telling. Fitzsimmons' declaration, submitted to oppose the motion for summary judgment, is the only one from an attorney with personal knowledge of the negotiation and execution of the Release, yet it says nothing of the parties' intent or even what she understood paragraph 6 of the Release to mean. Instead, Fitzsimmons merely declares that she drafted the Release and Mercier signed it. Thus, unlike in *Manning*, where all the attorneys ascribed the same meaning and effect to Wymer's settlement agreement and dismissal, the same cannot be said here.

McDowell's failure to present any evidence of the parties' intent as to the meaning of paragraph 6, other than conclusory statements that Mercier unequivocally granted McDowell the right to pursue her affirmative claims without defense was insufficient to create a triable issue of material fact. (*Lyons, supra*, 40 Cal.App.4th at p. 1014 [issue of fact is not created by speculation or conjecture, nor it is raised by broadly phrased or conclusory assertions].) And, without evidence showing that the parties intended paragraph 6 of the Release to bar Mercier from raising the section 426.30 defense, McDowell cannot show that Mercier took inconsistent positions as required to prove she is entitled to judicial estoppel (*International Engine Parts, Inc. v. Feddersen & Co.* (1998) 64 Cal.App.4th 345, 350), or that Mercier misled McDowell into relying on the Release for purposes of equitable estoppel, especially since McDowell's own counsel drafted the Release. (*Long Beach v. Mansell* (1970) 3 Cal.3d 462, 488; Evid. Code,

§ 623.) The trial court, therefore, did not err in granting Mercier summary judgment based on McDowell's admitted failure to comply with section 426.30.

III

Motion to Set Aside Judgment

McDowell next contends the trial court erred in denying her motion for relief under section 473, subdivision (b). Hallissy's failure to move to consolidate the two actions to correct the earlier mistake by her insurance counsel in the Mercier action, she argues, constitute an excusable mistake or neglect that warrants granting her relief from summary judgment.

"Section 473, subdivision (b) provides for two distinct types of relief--commonly differentiated as 'discretionary' and 'mandatory'--from certain prior actions or proceedings in the trial court." (*Luri v. Greenwald* (2003) 107 Cal.App.4th 1119, 1124 (*Luri*)). "Under the discretionary relief provision, on a showing of "mistake, inadvertence, surprise, or excusable neglect," the court has discretion to allow relief from a "judgment, dismissal, order, or other proceeding taken against" a party or his or her attorney. Under the mandatory relief provision, on the other hand, upon a showing by attorney declaration of "mistake, inadvertence, surprise, or neglect," the court shall vacate any "resulting default judgment or dismissal entered." ' ' (*Ibid.*)

While McDowell does not specifically identify the type of relief--mandatory or discretionary--she seeks, she appears to focus her appellate argument on section 473, subdivision (b)'s discretionary provision. Because this court has previously concluded the mandatory provision of section 473, subdivision (b) does not apply to summary judgments (*English v. IKON Business Solutions, Inc.* (2001) 94 Cal.App.4th 130, 142-143), we do the same. (*Id.* at p. 149 ["In the appropriate circumstances, of course, relief from a summary judgment may be available to either a plaintiff or a defendant under the discretionary provision of section 473(b)"].)

“ ‘[T]o qualify for [discretionary] relief under section 473, the moving party must act diligently in seeking relief and must submit affidavits or testimony demonstrating a reasonable cause for the default.’ ” (*Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1419 (*Huh*)). The court may exercise its discretion under the statute “ ‘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, within any applicable time limits.’ ” (*Ibid.*) A copy of the answer or other pleading proposed to be filed must accompany the request for relief, “otherwise the application shall not be granted.” (§ 473, subd. (b).) A party must apply for relief within a reasonable time, and in no case exceeding six months after the judgment, dismissal, order or proceeding was taken. (*Ibid.*)

A party seeking discretionary relief based on his or her attorney’s error must demonstrate that the error was excusable, since counsel’s negligence is imputed to the client. (*Huh, supra*, 158 Cal.App.4th at p. 1419.) “ ‘Excusable neglect is that neglect which might have been the act of a reasonably prudent person under the same circumstances.’ ” (*Ibid.*) “ ‘The inexcusable neglect of an attorney is usually not a proper basis for granting the client’s motion under section 473.’ ” (*Ibid.*)

The moving party must also diligently seek relief once the mistake or neglect is discovered. (*Huh, supra*, 158 Cal.App.4th at p. 1420.) “ ‘ “The moving party has a double burden: He must show a satisfactory excuse for his default, and he must show diligence in making the motion after discovery of the default.” ’ ” (*Ibid.*) “Whether a party has acted diligently is a factual question for the trial court.” (*Ibid.*)

In denying McDowell’s motion here, the trial court, among other things, determined McDowell had not been diligent in seeking discretionary relief under section 473. The record amply supports the trial court’s finding.

The record reveals the following sequence of events: Hallissy, McDowell’s personal counsel in her own action, was aware of the compulsory cross-complaint issue in the Mercier action as early as September 7, 2010. This was nearly two months before

the Mercier case was dismissed with prejudice. It was also a month before Mercier signed the Release. Yet Hallissy did not move to consolidate the McDowell action with the Mercier action even after Fitzsimmons, McDowell's insurance counsel in the Mercier action, disregarded his request not to settle the Mercier action before the cases could be consolidated.

Mercier moved to amend her answer in the McDowell action to allege the section 426.30 defense in October 2011. After the court granted the motion, Mercier filed her amended answer in December 2011. In January 2012, Mercier's counsel requested that McDowell dismiss her lawsuit given the section 426.30 defense. McDowell's counsel refused, claiming his client would be entitled to section 473 relief from the failure to file the compulsory cross-complaint in the Mercier action.

In February 2012, Mercier moved for summary judgment based on section 426.30. A month later, McDowell opposed the motion and included an argument based on section 473. When ruling on the summary judgment motion in May 2012, the court declined to consider the section 473 issue because McDowell had not raised the request for relief in a separate motion. Notice of entry of the order granting summary judgment was served at the end of May. McDowell then waited approximately two and a half months before finally filing a motion for relief under section 473.

Nearly two years passed from the time McDowell knew Fitzsimmons failed to file a compulsory cross-complaint on her behalf and her request for relief from the error. And even after the court granted summary judgment against her on that precise issue, she still waited over two months before moving for relief. This undisputed factual timeline supports the trial court's finding that McDowell was not diligent in seeking section 473 relief.

Because substantial evidence supports the trial court's lack of diligence finding, we need not consider Mercier's other arguments for why McDowell was not entitled to discretionary relief under section 473.

DISPOSITION

The judgment is affirmed. Respondent is awarded her costs on appeal. (Cal. Rules of Court, rule 8.278, subd. (a)(1).)

_____ HULL _____, J.

We concur:

_____ NICHOLSON _____, Acting P. J.

_____ HOCH _____, J.