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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ALEKSANDRA ERIKSSON,

Plaintiff and Appellant,

v.

IVY HOTEL SAN DIEGO, LLC,

Defendant and Respondent.

D061096

(Super. Ct. No.  
37-2010-00094625-CU-OE-CTL)

APPEAL from an order of the Superior Court of San Diego County, Ronald S. Prager, Judge. Affirmed.

Law Offices of Hall & Lim, Timothy A. Hall and Ani Aghajani for Plaintiff and Appellant.

McKenna Long & Aldridge, Charles A. Bird and Mark Hagarty for Defendant and Respondent.

Plaintiff Aleksandra Eriksson (Eriksson) appeals a postjudgment order granting the motion of defendant Ivy Hotel San Diego, LLC (Ivy) to set aside a monetary default

judgment and impliedly the entry of default entered against it in Eriksson's favor. She contends the court's decision to vacate the default judgment was an abuse of discretion because it was not supported by the evidence.

#### FACTUAL AND PROCEDURAL BACKGROUND

Eriksson is a professional model. According to Eriksson, in November 2008, Ivy approached the modeling agency that employed her, seeking to hire her for a photo shoot. Eriksson was hired through her modeling agency to model for an advertising project for Ivy for \$3,000. After completing the assignment, Eriksson was not paid for more than three months, despite her repeated requests for payment.

Almost 15 months after receiving full payment for her services, Eriksson sued "Ivy Hotel San Diego, LLC, a California corporation," alleging in her complaint it employed her for modeling services but paid her late. Eriksson alleged that, under Labor Code section 203, she was entitled to waiting time penalties for the delayed payment from Ivy. Eriksson sought an award of \$90,000 in penalties, plus reasonable attorney fees and costs. Eriksson served the summons and complaint on Michael K. Marks, Ivy's general counsel and designated agent for service of process. Marks did not take any action to respond to the complaint.

In August 2010, Eriksson served Marks with a request for entry of default. Marks did not take action, and the superior court clerk entered a default against Ivy. Eriksson then served a default prove-up brief on Marks, in which she sought the same relief as in the complaint. Two weeks later, Eriksson served Marks with a request for court judgment. Marks never responded.

In December 2010, the court held a default prove-up hearing. The court considered Eriksson's default prove-up brief and request for court judgment. No one appeared on behalf of Ivy, and the court entered judgment for Eriksson against Ivy for \$90,000 in damages, \$5,010 in attorney fees, and \$425 in costs, totaling \$95,435.

In April 2011, Eriksson obtained an order for Ivy to appear for a judgment debtor examination. Eriksson served Marks with the order on May 11, 2011; this was the first time Ivy learned about the lawsuit and default judgment against it. Marks did not appear at the scheduled examination, despite the court's finding that he was properly served with the judgment debtor examination order. The court issued a warrant for Marks's arrest.

In June 2011, Ivy filed an ex parte application to set aside the default judgment and vacate all orders against Marks. In the application, Ivy clarified the name of its business is "Ivy Hotel San Diego, LLC, a California limited liability company," and argued that the entity named in the complaint, "Ivy Hotel San Diego, LLC, a California corporation," does not exist. Ivy further noted the court entered the default judgment against "Ivy Hotel San Diego," leaving the identity of the defaulting party unclear. In support of its request that the court set aside the default judgment on equitable grounds, Ivy alleged it has no employees and never entered into a contractual or employment relationship with Eriksson. Ivy maintained that perhaps its tenant, Kelly Hospitality, LLC (Kelly), entered into a contractual relationship with a modeling agency for advertising services, but that arrangement was not on behalf of Ivy. Ivy further argued Marks did not determine whether the summons and complaint were properly filed against

Ivy, and his inaction should not provide Eriksson with a windfall at Ivy's expense.

Finally, Ivy requested the court vacate all orders and warrants against Marks.

The court held an ex parte hearing, attended by counsel for Eriksson, counsel for Ivy, and Marks. At the hearing, the court rescheduled the judgment debtor examination, set a noticed hearing on Ivy's motion to vacate the judgment, and dissolved the arrest warrant against Marks.

In July 2011, the court conducted the judgment debtor examination and Marks testified for Ivy. The court heard arguments about whether Eriksson could enforce a judgment for Labor Code penalties against a company that had no employees and no connection with Eriksson's modeling.

In September 2011, Ivy filed a notice of motion to set aside the default judgment, and a proposed answer to the complaint. In its motion, Ivy argued that, because it has no employees and never hired Eriksson, there was no legitimate Labor Code violation against it and the court should exercise its equitable powers to set aside the default judgment. It further argued that due process precludes enforcement of a judgment against a party not properly named in the complaint. Ivy also asserted it met the three elements supporting an order setting aside the default judgment: a meritorious defense, a legitimate excuse for not presenting its defense in the original action, and demonstrated diligence in seeking to set aside the default once discovered.

In his declaration in support of the motion to set aside the default, Marks stated Ivy is a special purpose entity that holds title to a parcel of real property leased to Kelly since 2002. Marks further stated Kelly is a company that operates the Andaz San Diego

Hotel, formerly known as the Ivy Hotel San Diego. Marks claimed Eriksson sued the wrong company, Kelly entered into a business arrangement with the modeling agency to use Eriksson's services as a model, and Ivy was not involved in this agreement. Marks asserted that Ivy neither had employees nor hired Eriksson. He argued Ivy is entitled to a hearing on the merits of Eriksson's Labor Code violation claim. Marks further argued he was responsible for Ivy's failure to respond to the complaint, and asserted the "error was not intentional and was mine alone."

Eriksson filed an opposition to Ivy's motion to set aside default judgment. She argued the court should deny the motion to set aside the default because equitable relief is only granted in exceptional circumstances, not present in this case. Eriksson maintained Ivy is accurately named in the complaint, despite its mischaracterization as a corporation instead of a company, and it therefore lacks a meritorious defense. She argued Marks's failure to respond to the suit after being personally served is not a satisfactory excuse, and Ivy did not exercise diligence in setting aside the default. She further argued that if the court set aside the judgment, she would be prejudiced because she relied on the award.

Ivy filed a reply in support of its motion to set aside the default. It argued Eriksson's allegations that Ivy employed her are not corroborated by any documentary evidence or by any witnesses. Ivy maintained Eriksson sued the wrong company.

In December 2011, the court held a hearing on the motion to set aside the default judgment and found Ivy satisfied the three elements supporting an order to vacate the judgment on equitable grounds based on extrinsic mistake. The court found Ivy presented evidence of: a meritorious defense because Ivy had no employees and never

entered into any relationship with Eriksson; a satisfactory excuse for not timely defending the action based on "positive misconduct" by Marks; and diligence in acting once it discovered the default judgment against it. The court granted Ivy's motion to vacate the default judgment.

## DISCUSSION

### I

#### *Standard of Review*

We review discretionary rulings for an abuse of discretion. (*Gonzales v. Nork* (1978) 20 Cal.3d 500, 507.) A challenge to a trial court's order vacating a default judgment on equitable grounds is reviewed for an abuse of discretion. (*Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 503; *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981.)

The abuse of discretion standard of review affords great deference to the trial court. (*Safeco Ins. Co. of America v. Superior Court* (2009) 173 Cal.App.4th 814, 832.) Under this standard, if there is a reasonable or debatable justification under the law for the court's decision, reversal is not required. (*Gonzales v. Nork, supra*, 20 Cal.3d at p. 507.) Discretion is abused when a court's decision " 'exceeds the bounds of reason' " considering the surrounding circumstances. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.)

## II

### *Motion to Vacate a Default Judgment*

A court may grant statutory relief from a default judgment entered against a party through its mistake or excusable neglect if the party seeks relief within six months of the entry of default. (Code Civ. Proc., § 473, subd. (b).) After the six-month period has passed, statutory relief is not available. (*Olivera v. Grace* (1942) 19 Cal.2d 570, 573-575.) Although there is a strong public policy favoring the finality of judgments when statutory relief is no longer available, relief may be granted in exceptional circumstances. (*Aheroni v. Maxwell* (1988) 205 Cal.App.3d 284, 291.) The law favors hearing cases on the merits, and "appellate courts are much more disposed to affirm an order where the result is to compel a trial upon the merits than they are when the judgment by default is allowed to stand and it appears that a substantial defense could be made." (*Weitz v. Yankosky* (1966) 63 Cal.2d 849, 854 (*Weitz*).)

A court may exercise its discretion and provide equitable relief on a motion to vacate a default judgment made more than six months after the entry of default if it finds the default was obtained through extrinsic fraud or mistake. (*Weitz, supra*, 63 Cal.2d at p. 855.) Extrinsic mistake occurs "when circumstances extrinsic to the litigation have unfairly cost a party a hearing on the merits." (*Rappleyea v. Campbell, supra*, 8 Cal.4th at p. 981.) To qualify for equitable relief based on extrinsic mistake, a defaulted party must show: a meritorious case; a satisfactory excuse for not timely defending the action; and diligence in moving to vacate the default once discovered. (*Rappleyea*, at p. 982.)

### III

#### *Analysis*

Eriksson contends the court abused its discretion by granting the motion to set aside the default judgment because the evidence was insufficient to support equitable relief. Eriksson argues Ivy did not show the default was due to extrinsic mistake because it did not establish two of the three elements necessary to qualify for equitable relief: a satisfactory excuse for not timely presenting a defense in the original action, and diligence in seeking to set aside the default once discovered.

#### A

Eriksson contends Ivy did not present a satisfactory excuse for not timely responding to the action. She points out Ivy received many notices of the case against it, and Ivy's reliance on Marks's declaration, in which he stated the error in not responding to the action was his alone, is an insufficient excuse for an untimely response.

Eriksson argues Ivy did not raise Marks's "positive misconduct" as a defense but, instead, the court raised that theory and found it to be the reason for Ivy's failure to timely respond. She asserts Ivy did not establish Marks engaged in "positive misconduct" of the type illustrated by the cases the court cited in support of its order because it did not show Marks misrepresented or withheld information, or that it had no knowledge of the notices sent to Marks.

Positive misconduct exists "where there is a total failure on the part of counsel to represent his client." (*Aldrich v. San Fernando Valley Lumber Co.* (1985) 170 Cal.App.3d 725, 739.) A client who is "unknowingly deprived of effective

representation" due to counsel's inaction will not be held responsible for counsel's misconduct, provided the client diligently moves for relief after discovering the attorney's neglect. (*Orange Empire Nat. Bank v. Kirk* (1968) 259 Cal.App.2d 347, 353 (*Orange*).

Here, Ivy reasonably relied on Marks, its general counsel and designated agent for service of process, to attend to any legal matters on its behalf. By ignoring the numerous notices with which he was served regarding Eriksson's action against Ivy, his conduct constituted a total failure of counsel to represent Ivy. (*Aldrich v. San Fernando Valley Lumber Co.*, *supra*, 170 Cal.App.3d at p. 739.) Ivy was unaware of the pending lawsuit against it until almost a year after it was filed. However, once Ivy discovered Marks's misconduct and the default judgment against it, it promptly retained outside counsel and sought relief from the court. (*Orange*, *supra*, 259 Cal.App.2d at p. 353.)

The court reasonably found Ivy was unaware of the pending case against it. It was proper for the court to find Marks's inaction amounted to positive misconduct and constituted an extrinsic mistake, depriving Ivy of a hearing on the merits. The court acted within its discretion by finding Ivy presented a satisfactory excuse for not timely defending against this action.

## B

Eriksson asserts Ivy did not show diligence in seeking to set aside the default judgment once it discovered the judgment against it. She argues that in determining Ivy's diligence, the court unreasonably relied on Marks's statement that Ivy did not learn of the pending case until almost one year after the suit commenced. Eriksson further argues Ivy did not deny receiving the numerous notices, each warning it of the impending default.

Eriksson maintains the amount of time Ivy waited to respond to the suit, nearly one year, does not show diligence.

Where a client discovers misconduct by his or her attorney resulting in a default, a delay of several months in moving to set aside the judgment on equitable grounds is not excessive. (*Orange, supra*, 259 Cal.App.2d at p. 355.) In determining if a party acted diligently in seeking to set aside a default judgment, a court will consider whether, considering the circumstances known to the defaulted party, he or she acted unreasonably in not moving to set aside the default earlier. (*Weitz, supra*, 63 Cal.2d at p. 857.) The law does not require a client to track an attorney's every move to ensure adequate representation. (*Orange*, at p. 355.)

Marks assumed responsibility for not responding to the action and maintained Ivy was unaware of the action until after the default judgment was entered against it. The court could properly find that Ivy was justified in relying on Marks to respond to any legal issues on its behalf until it learned of the default judgment against it resulting from Marks's oversight. Within less than six weeks after discovering the default, Ivy retained outside counsel and sought relief from the default judgment. Under the circumstances, it was reasonable for the court to find Ivy diligently sought relief and filed the motion to vacate the default judgment within a reasonable time. Even in the absence of a strong showing of diligence, it is not unreasonable for a court to resolve any doubt in favor of allowing an adjudication on the merits. (*Weitz, supra*, 63 Cal.2d at p. 858.) We conclude the court did not abuse its discretion by finding that Ivy presented a sufficient equitable

excuse for not timely defending against the action and therefore vacating the default judgment.

DISPOSITION

The order is affirmed; the entry of default and default judgment are vacated. Ivy is entitled to costs on appeal.

McDONALD, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McINTYRE, J.