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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

LISA R. OZAR et al.,

Plaintiffs, Cross-defendants and
Appellants,

v.

BERMUDA DESERT TOWN HOUSES
HOMEOWNERS' ASSOCIATION, INC.,

Defendant, Cross-complainant and
Respondent.

D069671

(Super. Ct. No. INC1202945)

APPEAL from an order and judgment of the Superior Court of Riverside County, John G. Evans, Judge and Mickie E. Reed, Commissioner. Affirmed and remanded for further proceedings.

La Quinta Law Group and Timothy L. Ewanyshyn, for Plaintiffs, Cross-defendants and Appellants.

Law Office of Eugene C. Gratz and Eugene C. Gratz, for Defendant, Cross-complainant and Respondent.

Lisa R. Ozar and Donald Friend, II (together appellants) appeal from an order granting defendant Bermuda Desert Town Houses Homeowners' Association, Inc. (Bermuda HOA) relief from an order granting terminating sanctions against it. They also appeal from the judgment, contending the trial court erred in finding that Bermuda HOA had authority to collect homeowners' association dues (dues) under covenants, conditions, and restrictions (CC&Rs) recorded by a different entity. We affirm the order and judgment and remand the case for further proceedings on Bermuda HOA's request for attorney fees on appeal.

FACTUAL AND PROCEDURAL BACKGROUND

In January 2011, appellants purchased a residence located in Bermuda Dunes Country Club in Bermuda Dunes, California. The title company hired by appellants represented that there were no liens recorded on the property and did not disclose Bermuda HOA as having any relationship to the property. Following the purchase, appellants discovered that Bermuda HOA claimed to have CC&Rs running with the property that consisted of unpaid dues owed by the seller as well as monthly dues owing in the amount of \$300 per month.

Bermuda HOA sued appellants in small claims court. In turn, appellants sued their title insurer. Appellants also sought declaratory relief and to quiet title as to Bermuda HOA, alleging Bermuda HOA lacked authority to collect dues from them. The cases were consolidated and appellants settled with their title insurer.

After Bermuda HOA purportedly failed to respond to discovery and an order compelling discovery, the trial court granted appellants' motion for terminating sanctions. The court later granted Bermuda HOA's motion to vacate the terminating sanctions (motion to vacate). The matter proceeded to trial, with the trial court granting a judgment in favor of

Bermuda HOA. Appellants timely appealed from the order vacating terminating sanctions and the judgment.

DISCUSSION

I. *Order Vacating Terminating Sanction*

A. Background

In February 2014, appellants brought a motion for terminating sanctions after Bermuda HOA purportedly failed to respond to an order issued in March 2013, compelling production of documents. Bermuda HOA had served verified responses without objection in July 2013 in response to the order, but appellants' counsel claimed he filed the motion for terminating sanctions because he never received these responses. Bermuda HOA did not oppose the motion or appear at the hearing on the motion for sanctions. The trial court granted terminating sanctions and issued monetary sanctions against Bermuda HOA in the amount of \$1,500. After counsel for Bermuda HOA received the notice of ruling, he filed the motion to vacate claiming he never received any notice of that hearing. Appellants opposed the motion to vacate arguing their counsel had properly served the motion for terminating sanctions and had noted at the February 27, 2014 case management conference that a "motion for sanctions" was pending that could resolve the entire case.

The trial court tentatively denied the motion to vacate noting that Bermuda HOA had not sought relief under subdivision (b) of Code of Civil Procedure section 473 (§ 437(b)) and did not file an attorney declaration of fault. (Undesignated statutory references are to the Code of Civil Procedure.) Thereafter, counsel for Bermuda HOA filed a sworn declaration stating he did not know why the motion for terminating sanctions did not arrive at his desk,

that he had referenced the possibility of its loss in his office and that the error "had to be a result of surprise, mistake, or inadvertence, also grounds for mandatory relief" set forth in section 473(b). Counsel admitted that if his office lost the motion that "would clearly be an instance of neglect for which [he] was responsible."

At the hearing on the motion to vacate, counsel for Bermuda HOA stated "something happened somewhere," either at the post office or his office as he never received the moving papers. The court thereafter questioned counsel for Bermuda HOA as to why he had not filed a sworn declaration making the ritual statement that the motion for terminating sanctions had been granted based on attorney mistake, inadvertence, surprise, or neglect. The court took the matter under submission. Later that day, counsel for Bermuda HOA filed a declaration stating he failed to oppose the motion for terminating sanctions based on his "mistake, inadvertence, surprise, or neglect." The court vacated the order granting terminating sanctions, but left in place the monetary sanctions.

B. Analysis

Appellants claim the trial court erred in vacating the terminating sanctions because the motion to vacate gave deficient notice of the relief sought and Bermuda HOA failed to demonstrate excusable neglect. We reject appellants' contentions.

A party is entitled to mandatory relief under section 473(b) for dismissals entered as a terminating sanction for discovery abuse. (*Rodriguez v. Brill* (2015) 234 Cal.App.4th 715, 726.) Relief is mandatory if the order was taken against a party based on the mistake, inadvertence, surprise or neglect of the party's attorney. (§ 473(b).) The only circumstance in which mandatory relief may be denied is when "the court finds that the default or dismissal

was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." (*Ibid.*) The mandatory relief provision serves "(1) 'to relieve the innocent client of the consequences of the attorney's fault' [citations]; (2) 'to place the burden on counsel' [citation]; and (3) 'to discourage additional litigation in the form of malpractice actions by the defaulted client against the errant attorney.' " (*Martin Potts and Associates, Inc. v. Corsair, LLC* (2016) 244 Cal.App.4th 432, 439 (*Martin Potts*)). The applicability of the mandatory relief provision is a question of law subject to de novo review, unless the determination turns on disputed facts. (*SJP Limited Partnership v. City of Los Angeles* (2006) 136 Cal.App.4th 511, 516.) We review for substantial evidence the trial court's findings on disputed facts. (*Carmel, Ltd. v. Tavoussi* (2009) 175 Cal.App.4th 393, 399.)

Appellants first complain that the moving papers did not state Bermuda HOA sought relief under section 473(b). A moving party must specify for the court and the opposing party the grounds upon which that party seeks relief. (*Luri v. Greenwald* (2003) 107 Cal.App.4th 1119, 1125, citing § 1010 & Cal. Rules of Court, rule 311 (now rule 3.1110).) Here, the motion to vacate filed by Bermuda HOA did not cite section 473(b) in its notice of motion, nor did it cite this section in its accompanying points and authorities. Bermuda HOA raised the mandatory relief provision of section 473(b) for the first time in its reply points and authorities, arguing the trial court granted terminating sanctions based on attorney inadvertence, mistake or surprise.

While the trial court *could* have rejected the motion to vacate as defective, its subsequent granting of the motion indicates it exercised its discretion to decide the matter on its merits. While Bermuda HOA never cited section 473(b) in its moving papers, it did

request that the terminating sanctions be vacated on the ground counsel never received the motion. Bermuda HOA argued section 473(b) in its reply brief and counsel filed a declaration stating the motion for terminating sanctions did not arrive on his desk and he was responsible for the negligence of his office. At the hearing on the motion to vacate, the court and counsel discussed section 473(b) and appellants never requested an opportunity to present further briefing on the matter. More importantly, appellants have not shown how they were prejudiced by the defective notice. (§ 475 ["No judgment, decision, or decree shall be reversed or affected by reason of any error . . . or defect, unless . . . [it] was prejudicial."].) On this record, the inadequate notice did not mandate denial of the motion to vacate.

Next, appellants complain the trial court erred in granting the motion to vacate because Bermuda HOA failed to show excusable neglect. Section 473(b), however, is written in the disjunctive and a party is entitled to mandatory relief upon a showing of "mistake, inadvertence, surprise, or neglect" by counsel. Moreover, where an attorney files a declaration of fault, counsel need only show neglect, not excusable neglect. (§ 473(b); *Martin Potts, supra*, 244 Cal.App.4th at p. 439. ["[T]he mandatory relief provision entitles a party to relief even when his or her attorney's error is inexcusable."].) Here, the sworn declarations submitted by counsel for Bermuda HOA showed that counsel failed to respond to the motion for terminating sanctions based on surprise (he did not know about the motion) and neglect (he is responsible if his office lost the motion). Based on these declarations, the trial court properly granted the motion to vacate.¹

¹ We note that the ruling issued by the trial court failed to make an explicit finding about the cause of the dismissal as required by section 473(b). (*Rodriguez v. Brill, supra*, 234 Cal.App.4th at p. 726.) Nonetheless, the failure to make such a finding does not result in an

Finally, appellants claim the trial court erred in failing to award them their attorney's fees and costs. Whenever relief is granted based on an attorney's declaration or affidavit of fault, the trial court is required by section 473(b) to "direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties." Appellants, however, failed to bring this purported defect to the attention of the trial court and forfeited the issue on appeal. (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 685.) In any event, we note that when the trial court vacated the terminating sanctions it left in place its prior order requiring that Bermuda HOA pay \$1,500 in monetary sanctions. We may infer the trial court deemed its prior order satisfied the requirement of section 473(b) and appellants have not made any showing to the contrary.

II. Judgment

A. Background

In their operative complaint, appellants sought declaratory relief and to quiet title as to Bermuda HOA, alleging Bermuda HOA had no authority to collect dues as it did not have valid CC&Rs on the property and could not enforce CC&Rs recorded by a different entity. Bermuda HOA filed a cross-complaint against appellants seeking damages for unpaid dues and breach of contract. The matter proceeded to trial, with the court hearing testimony and receiving numerous documents into evidence. After considering the arguments of counsel, the trial court took the matter under submission. In a written statement of decision, the trial court made findings of fact and conclusions of law, which we summarize below.

automatic reversal; rather, the appellant must demonstrate prejudice. (*Id.* at p. 727.) Here, appellants made no showing of prejudice.

In 1981, Gary W. Lyons, Inc., (Lyons Inc.) was formed and later took title to land known as the Bermuda Desert Town Houses subdivision (the property). Lyons, Inc. recorded CC&Rs that named Bermuda HOA as the "future association" and bestowed upon Bermuda HOA all powers to enforce the CC&Rs. The trial court found appellants' assertion that Lyons Inc. recorded the CC&Rs for Bermuda Desert Town Houses, Inc. to be incorrect. The CC&Rs provided that all owners and successive owners were members of Bermuda HOA and required to pay dues. In 2011, appellants acquired a unit in the property, but they failed to pay dues owed to Bermuda HOA. The court found that appellants failed to present evidence that a number of suspended corporations ever had any interest in the property or that Bermuda HOA lacked power to access and collect dues.

Based on the above findings of fact the court made conclusions of law, including that the suspended or dissolved corporations identified by appellants never had any interest in the property and were not relevant to any issue in the case. The CC&Rs clearly named Bermuda HOA as the homeowners' association and conferred upon it the right to enforce the CC&Rs. The CC&Rs were enforceable, appellants knew about the CC&Rs and were bound by them. Appellants failed to provide any authority that a homeowners' association incorporated after the final subdivision report issued lacks authority to enforce CC&Rs. Based on these legal conclusions, the trial court entered judgment in favor of Bermuda HOA on its cross-complaint against appellants and on appellants' complaint.

B. Analysis

Challenges to the trial court's factual findings and conclusions are reviewed under the substantial evidence standard of review. Under this standard we review the entire record to

determine whether there is substantial evidence supporting the factual determinations. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.) Our review is not limited to appraising "isolated bits of evidence selected by" the parties. (*Id.* at p. 873.) We are required to accept all evidence which supports the successful party, disregard the contrary evidence, and draw all reasonable inferences to uphold the verdict. (*Minelian v. Manzella* (1989) 215 Cal.App.3d 457, 463.) Thus, it is not our role to reweigh the evidence, redetermine the credibility of the witnesses, or resolve conflicts in the testimony, and we will not disturb the judgment if there is evidence to support it. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 766.) Credibility is an issue of fact for the finder of fact to resolve (*Johnson v. Pratt & Whitney Canada, Inc.* (1994) 28 Cal.App.4th 613, 622) and the testimony of a single witness, even that of a party, is sufficient to provide substantial evidence to support a finding of fact (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614).

As a preliminary matter, appellants did not challenge any of the trial court's factual findings. Accordingly, these findings are presumed correct and any issue regarding them is forfeited on appeal. (*Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125.)

Appellants argue Lyons Inc., the entity that recorded the CC&Rs, is the only entity that could enforce the CC&Rs and Bermuda HOA lacked the authority to enforce the CC&Rs. We disagree.

The Davis-Stirling Common Interest Development Act (the Act, Civ. Code, § 1350 et seq.) governs the creation and operation of common interest developments. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236

(*Pinnacle*.) Under the Act, a common interest development is created when a developer of land records a declaration of restrictions (also known as CC&Rs) and later conveys one of the units in the development. (*Id.* at pp. 232, 236-237.) "[T]he declaration must set forth a legal description of the development, the name of the [home]owners association that will own or operate the development's common areas and facilities, and the covenants and use restrictions that are intended to be enforceable equitable servitudes. (Civ. Code, §§ 1351, 1353.)" (*Id.* at p. 237.) "Once the first buyer manifests acceptance of the covenants and restrictions in the declaration by purchasing a unit, the common interest development is created (Civ. Code, § 1352), and all such terms become 'enforceable equitable servitudes, unless unreasonable' and 'inure to the benefit of and bind all owners of separate interests in the development.' (Civ. Code, § 1354, subd. (a); see Bus. & Prof. Code, § 11018.5, subd. (c).)" (*Ibid.*) "Under the law of equitable servitudes, courts may enforce a promise about the use of land even though the person who made the promise has transferred the land to another." (*Nahrstedt v. Lakeside Village Condo. Assn.* (1994) 8 Cal.4th 361, 379 (*Nahrstedt*.) Additionally, actual notice is not required to enforce the terms of a recorded declaration against subsequent purchasers; rather, the recording of the declaration " 'provides sufficient notice to permit the enforcement' " of the CC&Rs contained therein and purchasers are " 'deemed to agree' " with them. (*Pinnacle, supra*, 55 Cal.4th at p. 238.)

Here, the trial court concluded that the CC&Rs named Bermuda HOA as the homeowners' association and conferred upon it the right to enforce the CC&Rs. The court also found the CC&Rs were enforceable, appellants knew about the CC&Rs and were bound by them. Appellants do not challenge these conclusions and, in any event, they are supported

by the above law and the record. Appellants' primary contention appears to be that Bermuda HOA was not in existence when Lyons Inc. recorded the declaration; thus, Bermuda HOA could not enforce the CC&Rs. The Act, however, provides that the recorded declaration contain, among other things, the name of the association, not that the association must be in existence. (Civ. Code, § 4250, subd. (a).) Here, the CC&Rs recorded by Lyons, Inc. properly named Bermuda HOA is the original homeowners' association.

Notably, in *Pinnacle*, the CC&Rs recorded by the developer similarly provided for the later formation of a homeowners' association to maintain and manage the property. (*Pinnacle, supra*, 55 Cal.4th at p. 232.) At issue in *Pinnacle* was the enforceability of an arbitration provision in CC&Rs recorded by a developer on the not yet created homeowners' association. (*Ibid.*) Our high court found that the recording of CC&Rs was a valid means of creating an agreement to arbitrate and the fact privity of contract did not exist between the developer and the homeowners' association did not invalidate the consent of the homeowners' association to the arbitration provision in the CC&Rs. (*Id.* at pp. 237-238; *Nahrstedt, supra*, 8 Cal.4th at p. 380 ["[E]quitable servitudes permit courts to enforce promises restricting land use when there is no privity of contract between the party seeking to enforce the promise and the party resisting enforcement."].) This finding in *Pinnacle* disposes of appellants' argument that the CC&Rs were unenforceable because they were recorded by Lyons Inc., not Bermuda HOA. Simply put, under the Act, Lyons Inc.'s recording of CC&Rs naming Bermuda HOA as the homeowners' association with the power to collect assessments placed all purchasers on notice of this provision and bound them to it.

As a final matter, Bermuda HOA requests that it be awarded its costs and attorney's fees for this appeal. The CC&Rs provides for Bermuda HOA to collect "all costs and expenses, including attorney's fees incurred ... in collecting the delinquent assessment." "Fees, if recoverable at all either by statute or the parties' agreement, are available for services at trial and on appeal." (*Frog Creek Partners, LLC v. Vance Brown, Inc.* (2012) 206 Cal.App.4th 515, 547.) "Although [we have] the power to fix attorney fees on appeal, the better practice is to have the trial court determine such fees." (*Security Pacific National Bank v. Adamo* (1983) 142 Cal.App.3d 492, 498.) Accordingly, Bermuda HOA's claim for attorney fees on appeal shall be addressed by the trial court upon remand.

DISPOSITION

The order vacating terminating sanctions is affirmed. The judgment is affirmed. The matter is remanded to the trial court to address respondent's request for attorney fees incurred on appeal. Respondent is entitled to its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

PRAGER, J.*

WE CONCUR:

HUFFMAN, Acting P. J.

AARON, J.

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