

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

KELLY K. TATA,

Plaintiff and Appellant,

v.

LA TOSCANA RESORT & SPA,

Defendant and Respondent.

E053239

(Super.Ct.No. RIC480130)

OPINION

APPEAL from the Superior Court of Riverside County. John Vineyard, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Law Offices of David E. Wheeler and David E. Wheeler for Plaintiff and Appellant.

Law Offices of Belofsky & Hanker, David A. Belofsky and Drew T. Hanker for Defendant and Respondent.

Plaintiff and appellant Kelly Tata (Tata) sued defendant and respondent La Toscana Resort & Spa (the Resort) for (1) negligence; (2) premises liability; (3) assault and battery; (4) negligent supervision and retention; (5) intentional infliction of

emotional distress; (6) violation of the Unruh Civil Rights Act (Civ. Code, § 51); (7) false imprisonment; (8) sexual battery; and (9) invasion of privacy. Tata was initially represented by an attorney, C. Donald Amamgbo (Amamgbo). A substitution of attorney was filed during the case, placing Tata in the status of a self-represented litigant. Tata asserts she was unaware the substitution of attorney placed her in the status of a self-represented litigant. Approximately seven months after the substitution of attorney, the trial court granted summary judgment against Tata, in favor of the Resort. No appearance was made on behalf of Tata at the summary judgment hearing.

After discovering summary judgment had been granted, Tata hired a different attorney, David Wheeler (Wheeler), and moved to vacate the summary judgment ruling on the basis of a mistaken default, i.e., Tata did not know she was self-represented at the time of the summary judgment motion. The trial court denied Tata’s motion to vacate. Tata contends the trial court erred by denying her motion to vacate. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. FIRST AMENDED COMPLAINT

Tata filed a first amended complaint (FAC) on April 18, 2008. The facts in this subsection are taken from the allegations in the FAC. The Resort is located in Desert Hot Springs. On the Resort’s website it invites people to stay at the Resort by offering “a relaxing, refreshing and rejuvenating experience,” which Tata believed created an “alluring sense of safety.” Johnny Alvarado (Alvarado) was a Resort employee and a registered sexual offender.

On March 27, 2006, Tata was a guest at the Resort. On March 27, Alvarado approached Tata at the Resort, grabbed her upper arms, and forced her into the backseat of a car. Alvarado laid on top of Tata, attempted to remove her underwear, touched her vaginal area several times, and struck her abdomen with his fists. Tata struggled with Alvarado, and was able to free herself and run into one of the Resort's buildings for help. Tata suffered injuries as a result of the incident with Alvarado, and was unable to work.

The Resort was aware that Alvarado was a registered sexual offender with a prior record for criminal assault. Tata's assault and battery was only "one in a series of such incidents" at the Resort, and the Resort was aware of the prior incidents. The Resort did not provide any protective measures to prevent such assaults from occurring.

B. SUBSTITUTION OF COUNSEL

On April 14, 2009, a substitution of attorney was filed, removing Amamgbo as Tata's attorney, and placing her in self-represented status.

C. MOTION FOR SUMMARY JUDGMENT¹

On June 19, 2009, the Resort filed a motion for summary judgment. In the motion, the Resort asserted Alvarado was hired in August 2001 by the former owner of the Resort, Mineral Springs. The Resort retained Alvarado when it took over operations

¹ Appellant's motion to augment the record, filed with the court on June 25, 2012, is granted; the concurrently filed volume of exhibits is deemed part of the record on appeal pursuant to California Rules of Court, rule 8.155(a)(2).

of the facility in January 2005.² Alvarado had a 1996 conviction for indecent exposure. The offense took place in a residential setting. Alvarado did not include the conviction on his job application because it occurred five years prior to applying for the job. Alvarado denied attacking Tata, and the district attorney dismissed the criminal case against him. The Resort argued it had no duty to Tata because (1) Alvarado's alleged conduct was outside the scope of his employment; and (2) no prior similar assaults were offered by Tata. It appears an opposition to the motion for summary judgment was not filed.

D. RULING

The trial court granted summary judgment in favor of the Resort on October 20, 2009. The Resort appeared at the hearing, but Tata did not. The court ordered the Resort to provide Tata with notice. On January 22, 2010, the parties did not appear in court, and the trial court dismissed the entire action.

E. SECOND SUBSTITUTION AND MOTION TO VACATE

On November 19, 2010, Tata filed a second substitution of attorney. Tata changed from being self-represented to being represented by Wheeler. That same day, Tata moved to vacate the orders granting summary judgment and dismissing the entire action. Tata asserted her motions should be granted on the ground of extrinsic mistake. Tata argued that when she signed the first substitution of attorney form, in April 2009, Amamgbo did not tell her she would be self-represented; rather, Amamgbo told Tata he

² In portions of the motion for summary judgment, the name "Alvarez" is used. We infer the Resort is referring to Alvarado.

needed to have a heart transplant and he might not be able to handle her case, so she needed to sign the substitution form in the event another attorney had to take over the case. Tata was emotional and crying when she signed the substitution form and did not read it. Amamgbo asked Tata to give him six months to recover, and if he did not then another attorney would handle the case. When Tata left Amamgbo's office that day, she believed he was still her attorney.

In her declaration, Tata wrote that in September 2009 she received notice the summary judgment hearing had been continued to October 20, 2009. Tata called Amamgbo's office and asked if she needed to appear at the October 20 hearing. Tata was told by a person named Nancy that "they were handling it" and Tata did not need to attend the hearing. Tata would have attended the hearing if Nancy had told her she was self-represented. Tata called Amamgbo's office several other times, but her calls were not answered, she was hung-up on, or her voicemails were not returned.

In September 2010, Wheeler, a family friend of the Tatas, offered to find out the status of Tata's case. On October 1, 2010, Wheeler discovered summary judgment was granted in favor of the Resort and the FAC was dismissed. Wheeler informed Tata of his discovery and that she was self-represented. Tata first learned she was self-represented when Wheeler informed her. On October 21, 2010, Tata hired Wheeler to "get [her] case going again."

F. OPPOSITION TO MOTION TO VACATE

The Resort opposed Tata's motion to vacate. First, the Resort argued the motion was time barred because it was filed 14 months after the entry of summary judgment.

(Code Civ. Proc., § 473, subd. (b).)³ Second, the Resort asserted there was not an extrinsic mistake because a proper substitution of attorney form was filed. Third, the Resort argued Tata's lawsuit did not have merit because there was no evidence supporting Tata's claims. Fourth, the Resort asserted Tata was not diligent in following-up on her case. Fifth, the Resort argued it would be inequitable and prejudicial to grant the motion, since ownership of the resort facility had again changed and several employee witnesses "were leaving or about to leave." The Resort asserted Tata should pursue a malpractice claim against Amamgbo.

Attached to the Resort's opposition was a copy of the notice of ruling related to the summary judgment. The notice had been filed on December 21, 2009. A declaration attached to the notice reflected it was mailed to "all interested parties" on December 15, 2009, and referenced an "attached service list." A page following the declaration included mailing addresses for Alvarado's attorney and Tata.

G. REPLY TO OPPOSITION

Tata filed a reply to the Resort's opposition. Tata explained that she was seeking relief under the court's equitable powers, not pursuant to section 473. Tata argued the trial court could vacate the judgment if (1) she had a meritorious case; (2) she had a satisfactory excuse for not presenting her case; and (3) she demonstrated diligence in seeking to set aside the judgment once she discovered it. Tata argued that she satisfied

³ All subsequent statutory references will be to the Code of Civil Procedure unless otherwise indicated.

all three criteria. Further, Tata argued the Resort did not show it would suffer prejudice, because the Resort did not submit any declarations.

H. HEARING

On January 24, 2011, the trial court held a hearing on Tata’s motion to vacate. At the beginning of the hearing, the trial court announced its tentative opinion. The trial court stated there were three factors for equitable relief: (1) a meritorious case, (2) a satisfactory excuse, and (3) diligence; and Tata failed to satisfy two of the factors. The trial court said, “Give her the benefit of the doubt that there’s a meritorious claim or defense, I don’t see a satisfactory excuse for waiting as long as she did. And I don’t see that she was—and these overlap somewhat—in being diligent in seeking relief from the order. [¶] Tentative is to deny the motion on all grounds.”

Wheeler argued Tata was never served with the substitution of attorney form after it was filed, and thus she could not have become the attorney of record because the form was not properly served. The trial court responded, “Even if I assume all of that is true, I have no reason to believe it’s not—in December when she got notice of the ruling of the summary judgment motion against her, why didn’t she act then?” Wheeler asserted Tata did not recall receiving the notice of summary judgment ruling and that there was no proof she received it. The trial court pointed out there was a proof of service. Wheeler again argued Tata did not recall receiving the notice of summary judgment ruling, and that there was no proof she knew of the ruling prior to October 1, 2010.

The trial court informed Wheeler there is a rebuttable presumption created by the proof of service that service actually occurred. Wheeler asserted Tata's declaration rebutted the presumption. The court responded, "She has rebutted [*sic*] but saying, 'I don't recall having received it' is not sufficient to rebut that presumption. Has to be more than that.'" Wheeler argued that even if Tata had received the notice, she was unaware that she was self-represented, and thus did not know she had to respond to anything. Wheeler asserted Amamgbo's employee's statement that Tata did not need to attend the summary judgment hearing created an extrinsic mistake.

The trial court then asked how Tata acted diligently. The trial court pointed to the proof of service of the notice of summary judgment ruling. Wheeler argued the presumption was rebutted by Tata's statements that she did not know about the judgment and did not recall receiving the notice. The trial court said, "Counsel, this is a close call for me. It appears she was misled or misunderstood, miscommunicated, at the least with the prior attorney. I'm close on the tentative." The trial court asked to hear from the Resort.

The Resort argued the summary judgment motion and notice of motion were served on Tata at her home address, so she had notice of the original motion. The Resort asserted Tata was lying when she claimed Amamgbo's office said it would take care of the summary judgment hearing, because the motion was never served on Amamgbo's office. The Resort argued, "a person who has essentially abandoned their case" should not be able to "come[] before the Court and with absolutely nothing more but a declaration of, 'I'm sorry. I never received this document,'" be permitted to

revive a dismissed action. The Resort asserted the proof of service rebuttable presumption could not be overcome by “making a naked declaration of ‘I’m sorry. I didn’t get it.’” The Resort contended Tata’s declaration “goes against every single properly noticed document [i]n this file.” Wheeler contended this case involved an extrinsic mistake—positive misconduct by counsel—a situation where Tata was “tricked” by Amamgbo.

In announcing its ruling, the trial court slightly modified its tentative, but not the outcome. The trial court found there was a meritorious claim and “at least potential for satisfactory excuse”; however, the court found Tata had notice of the ruling and therefore failed on the diligence factor. The court found Tata was on notice of the adverse ruling in December 2009 and she was not diligent in pursuing relief. The court denied Tata’s motion to vacate the order granting summary judgment.

DISCUSSION

Tata contends the trial court erred by denying her motion to vacate. Tata asserts she met all the requirements for equitable relief. We disagree.

Where relief is no longer available under statutory provisions, a trial court generally retains the inherent power to vacate a judgment on equitable grounds where a party establishes the judgment or order resulted from extrinsic fraud or mistake. (*County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1228.) “To set aside a judgment based upon extrinsic mistake one must satisfy three elements. First, the defaulted party must demonstrate that it has a meritorious case. Second[], the party seeking to set aside the [judgment] must articulate a satisfactory excuse for not

presenting a defense to the original action. Last[], the moving party must demonstrate diligence in seeking to set aside the [judgment] once . . . discovered.’ [Citation.]” (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 982 (*Rappleyea*)). “We review a challenge to a trial court’s order denying a motion to vacate a default on equitable grounds as we would a decision under section 473: for an abuse of discretion. [Citations.]” (*Id.* at p. 981.)

We start with the third factor—diligence—since that is the issue the trial court based its decision upon. “It has been held that the filing of a proof of service creates a rebuttable presumption that the service was proper. [Citations.]” (*Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1441-1442 [Fourth Dist., Div. Two].) The rebuttable presumption can be overcome by a detailed and credible declaration that actual notice was not received. (See *Bonzer v. City of Huntington Park* (1993) 20 Cal.App.4th 1474, 1481 (*Bonzer*)).

In Tata’s declaration, she wrote, “I do not recall ever before seeing Exhibit B—the Notice of Ruling re Motion for Summary Judgment and Entry of Judgment. If I had seen it, I would have taken steps to see what legal options I had to reverse it. [¶] . . . I did not know that summary judgment had been entered in favor of [the Resort] until my October 1, 2010, meeting with David Wheeler.”

The trial court could reasonably conclude that Tata's declaration was not sufficiently detailed to overcome the rebuttable presumption. For example, Tata did not explain if she checked her mail every day, if she was out of the country, or if she was ill. There is nothing indicating why she may or may not have recalled receiving the notice. There is nothing indicating if she searched her home to determine if she misplaced the notice. Further, the record reflects Tata should have also received notice of an OSC re sanctions for failing to appear at the trial setting conference. Tata does not explain how the OSC notice and the ruling notice could have both missed her. Moreover, Tata does not explain why she did not act sooner when Amamgbo began not answering her calls, hanging up on her, and not returning her voicemails. Given the various deficiencies in Tata's declarations, we conclude the trial court was within reason in finding Tata did not act with diligence. Thus, the trial court did not err by denying the motion to vacate, because the third factor was not satisfied.

Tata asserts the trial court committed an error of law by applying the rebuttable presumption because such presumptions are not applicable to equitable motions. Tata string cites various cases to support this proposition. We do not find Tata's citations to be persuasive because they are primarily cases involving motions to vacate that do not directly address the proof of service presumption issue. (*Weitz v. Yankosky* (1966) 63 Cal.2d 849, 858 [discussing whether a defendant could reasonably rely on another party to take necessary steps on his behalf]; *Manson, Iver & York v. Black* (2009) 176 Cal.App.4th 36, 49 [discussing a party receiving inaccurate legal advice]; *Lee v. An* (2008) 168 Cal.App.4th 558, 565 ["Respondents' counsel mailed [appellant] a copy of

the default judgment on April 20, 2005. Appellant did not move to vacate the judgment until July 2007, more than two years later. This does not reflect the diligence necessary for equitable relief.”].)

In a second argument, Tata asserts the trial court abused its discretion by denying her motion to vacate because her declaration was sufficient to overcome the rebuttable notice presumption. In support of this assertion, Tata relies on *Bonzer, supra*, 20 Cal.App.4th at page 1474. In *Bonzer*, the City of Huntington Park failed to appear at a hearing and Police Officer Bonzer’s petition for a writ of mandate was granted. The writ required the City to set a hearing on Officer Bonzer’s administrative appeal. (*Id.* at pp. 1476-1477.) When the City received notice the writ had been granted, the City’s counsel informed Officer Bonzer’s counsel that he had been unaware of the hearing. The City moved under section 473 to set aside the judgment and recall the writ. (*Id.* at p. 1477.)

In support of its motion, the City included six declarations. (*Bonzer, supra*, 20 Cal.App.4th at p. 1477.) The chief of police declared his secretary received his mail and promptly gave it to him, but he had no recollection of receiving notice of the hearing. In the secretary’s declaration she explained her process of opening the mail, date stamping it, and giving it to the chief. The secretary also did not recall receiving the notice. The city clerk also provided a declaration reflecting she would have immediately routed any legal notice in the case to the City’s chief administrative officer. The chief administrative officer and his secretary also provided declarations concerning searching for the notice to determine if it had been received. (*Id.* at pp. 1479-1480.)

We do not find Tata's reliance on *Bonzer* to be persuasive because Tata's declaration that she does not recall receiving the notice is not nearly as detailed or informative as the declarations provided in *Bonzer*. *Bonzer* reflects the rule that a detailed and credible declaration must be provided in order to overcome the notice presumption. The trial court could reasonably conclude that Tata's declaration was not sufficiently detailed to overcome the presumption, because she did not explain her process of receiving mail, any search she performed for the notice, or why she did not investigate the matter sooner when Amamgbo began refusing her telephone calls.

In a third argument, Tata asserts her burden of proving diligent action is lessened by the fact that the Resort has not suffered prejudice as a result of the lack of diligence. Our Supreme Court has explained, "Of the three items a defendant must show to win equitable relief from default, diligence is the most inextricably intertwined with prejudice. If heightened prejudice strengthens the burden of proving diligence, so must reduced prejudice weaken it." (*Rappleyea, supra*, 8 Cal.4th at pp. 983-984.) As an example, the Supreme Court wrote, "Prejudice to a plaintiff is obviously less if judgment has not been entered when a defendant seeks equitable relief." (*Id.* at p. 984.)

In the instant case, summary judgment was granted in favor of the Resort on October 20, 2009, the summary judgment order was issued on November 19, 2009, and Tata's FAC was dismissed on January 22, 2010. Tata's motion to vacate was filed one year after the summary judgment ruling, on November 19, 2010. Reopening a case one year after a final ruling is prejudicial to the defendant, because there had been a complete conclusion to the case and a sense of finality—protecting the Resort from

endless litigation. (See *In re Marriage of Doud* (1986) 181 Cal.App.3d 510, 522 [protect from endless litigation].) Restarting a case after the entire case has been dismissed for a year's time would cause the Resort to incur greater legal expenses as well as hardship in finding evidence. In sum, there would be prejudice to the Resort, such that Tata would still need to prove she acted with diligence.

Tata asserts that in 2008 the Resort's answers to interrogatories reflected it did not have basic information such as (1) the identities of the employees on the premises at the time of the alleged assault, and (2) actions taken by the Resort following the alleged assault. Thus, Tata reasons the Resort is in no worse position than it was in 2008, because it had no greater access to information in 2008 than it does now.

We do not find Tata's argument to be persuasive, because the Resort's interrogatory responses reflect that diligent pursuit of the case could have improved the chances of gathering evidence. For example, Tata asked the Resort to name the employees who were present on the premises at the time of the alleged assault. The Resort responded that ownership of the facility had changed and it no longer possessed the necessary records. If Tata had acted with diligence, it is possible the records could have been more easily recovered or that memories of who was working that day would be fresher and more accurate. In sum, we are not persuaded that Tata's lack of diligence resulted in little to no prejudice to the Resort.

DISPOSITION

The judgment is affirmed. Respondent, La Toscana Resort and Spa, is awarded its costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

RAMIREZ
P. J.

KING
J.