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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

KWAKU AGYEI-FOSU,

Plaintiff and Appellant,

v.

EMPLOYMENT DEVELOPMENT
DEPARTMENT,

Defendant and Respondent.

E061156

(Super.Ct.No. CIVDS1113213)

OPINION

APPEAL from the Superior Court of San Bernardino County. David Cohn, Judge.

Affirmed.

Kwaku Agyei-Fosu, in pro. per., for Plaintiff and Appellant.

Kamala D. Harris, Attorney General, Julie Weng-Guiterrez, Assistant Attorney General, Richard T. Waldow, and Gregory M. Cribbs, Deputy Attorneys General, for Defendant and Respondent.

I

INTRODUCTION

Plaintiff Kwaku Agyei-Fosu (Fosu) is attempting to recover \$800 in unemployment insurance benefits, which he claims the California Employment Development Department (EDD) should have paid him in 2008. In 2014, Fosu filed a motion to set aside dismissal of Fosu's petition for writ of mandate, seeking payment of the \$800 in benefits. Fosu appeals the trial court's ruling on March 11, 2014, in which the trial court denied as untimely Fosu's motion to set aside the 2012 dismissal of his writ petition. Fosu argues he delayed filing his motion to set aside dismissal through no fault of his own, and therefore the trial court should have set aside dismissal of his writ petition.

EDD requests this court to dismiss EDD from Fosu's appeal because EDD is not a proper party to the appeal. EDD's involvement in the proceedings ended when the March 8, 2012 order dismissing Fosu's writ petition became final. Therefore EDD did not oppose Fosu's motion to set aside dismissal.

We conclude Fosu has not established the trial court abused its discretion in denying his motion to set aside the 2012 order dismissing his writ petition. We therefore affirm the judgment. We further conclude EDD's request for dismissal from the instant appeal is moot since this court is affirming the trial court's order denying Fosu's motion to set aside dismissal.

II

FACTS AND PROCEDURAL BACKGROUND

In June 2008, Fosu's driver's license was revoked and his car was impounded. This resulted in the loss of his employment in November 2008. Fosu applied for unemployment insurance benefits. In July 2008, he began receiving \$194 a week in unemployment insurance benefits.¹ Kelly Educational Staffing and adjustor Kathy Young provided the EDD with incorrect data from which Fosu's EDD benefits were calculated. Fosu discovered EDD miscalculated his benefits. EDD recalculated Fosu's EDD benefits, increasing them from \$194 to \$257 a week. EDD determined Fosu was entitled to benefits of \$257 a week from July 2008 through January 2009. Fosu believed the amount of weekly benefits, however, should have been \$267, and his benefits should have been extended beyond January 2009. Fosu requested he be paid based on the correct amount of \$267. Nevertheless, Fosu continued to receive \$257 a week in benefits.

Fosu filed a claim with the EDD, alleging insufficient benefits, which were calculated based on his wages received during the March 2008 employment quarter. Fosu requested \$800, the difference between the amount of unemployment insurance benefits paid, \$257 a week, and the amount he should have been paid, \$267 a week for 80

¹ It is unclear why he began receiving unemployment insurance benefits in July 2008, when he claims he lost his job later, in November 2008.

weeks. The administrative law judge (ALJ) remanded the matter back to the EDD, ruling that EDD should recalculate Fosu's weekly benefits based on the new data submitted. The ALJ, however, further determined that Fosu was not entitled to extended benefits. Fosu appealed the decision. In March 2011, the EDD California Unemployment Insurance Board of Appeals (Appeals Board) affirmed the ALJ's decision.

2011 Petition for Writ of Mandate

In November 2011, Fosu filed in the San Bernardino County Superior Court a petition for writ of mandate against EDD and Kathy Young (2011 writ petition), requesting payment of \$800 in back-pay or arrears for unpaid unemployment insurance benefits, based on the weekly benefit amount of \$267. In support of Fosu's writ petition, Fosu filed a supporting declaration stating that, based on the EDD unemployment insurance benefits table, Fosu was entitled to weekly benefits of \$267, whereas EDD paid Fosu \$257 in weekly benefits over an 80-week period. Fosu concluded he was therefore entitled to recover \$800 in unpaid benefits.

EDD demurred to Fosu's 2011 writ petition. EDD argued it used the correct data provided by Kelly Educational Staffing to compute Fosu's unemployment insurance benefits. On January 31, 2012, the trial court sustained EDD's demurrer, with 30 days leave to amend. On March 5, 2012, Fosu filed a declaration, which is not included in the clerk's transcript on appeal. Therefore this court cannot consider any statements made in the declaration.

On March 7, 2012, EDD filed an ex parte application for an order dismissing the 2011 writ petition on the ground Fosu failed to file an amended writ petition. The following day, March 8, 2012, the trial court granted EDD's ex parte application. Fosu was not present at the hearing and did not file opposition. The trial court dismissed with prejudice Fosu's 2011 writ petition pursuant to Code of Civil Procedure section 581, subdivision (f)(2),² on the following grounds: "The court has reviewed petitioner's 'declaration' filed 3/5/12. The declaration is unsigned and is not designated as a petition nor does it constitute an amended petition. The court proceeds with dismissal order for failure to timely amend the petition following sustaining of demurrer thereto."

On April 9, 2012, Fosu filed a notice of appeal of the March 8, 2012 ruling dismissing his 2011 writ petition. On April 27, 2012, this court mailed a notice of appeal default for failure to timely designate the record on appeal. The notice sent to Fosu's address of record was returned and forwarded to an address on Pumalo. That notice was also returned, undelivered, with no notice of a forwarding address. Fosu's appeal was dismissed on July 12, 2012. Remittitur of the case back to the trial court was issued the following day.

² Unless otherwise noted, all statutory references are to the Code of Civil Procedure.

Motion to Set Aside Dismissal of 2011 Writ Petition

Almost two years later, on February 25, 2014, Fosu filed a motion to set aside dismissal of the writ petition on March 8, 2012. Fosu requested the court to set aside the March 8, 2012 ruling under section 473, subdivision (b), based on mistake, inadvertence, surprise, and excusable neglect. Fosu stated in his supporting declaration that he did not appear at the hearing on March 8, 2012, because he was detained that entire day at the West Valley Detention Center for taking a picture of his students. Further details were not provided. Fosu filed a request for judicial notice, in which Fosu argued EDD had failed to pay him \$800 in unemployment insurance benefits. Fosu further asserted his case was not barred by the statute of limitations because EDD's failure to pay him owed benefits had been ongoing since 2008. Fosu did not request judicial notice of any attached documents.

On March 11, 2014, the trial court heard and denied Fosu's motion to set aside dismissal on the grounds "[Fosu's] last hearing was on 3/8/12. [Fosu] did not file this motion within the statutory time." No party or counsel, other than Fosu, appeared at the hearing. During the hearing, the court explained that six months was the maximum time to bring Fosu's motion to set aside the March 8, 2012 ruling. The court noted that, if Fosu was incarcerated during the day of March 8, 2012, that would have been good cause for not appearing in court that day but nothing prevented Fosu from coming into court thereafter. The trial court explained it was denying Fosu's motion because Fosu failed to

show that he was unable to seek relief within six months after the March 8, 2012 dismissal.

Fosu responded that after he was arrested, he was sick and went to the hospital. Without giving a case citation, Fosu cited *Elgels v. Taylor*, in which Fosu said the court granted relief from an order after over two years delay in seeking relief. The trial court in the instant case stated that Fosu had not offered a satisfactory explanation for delaying two years in bringing his motion to set aside the dismissal. The court added that six months was the limit for delaying bringing such a motion. Therefore the court denied Fosu's motion.

In May 2013, Fosu filed a notice of appeal, without indicating what he was appealing. This court notified Fosu in July 2014, that he had failed to indicate in his notice of appeal what order or judgment he was appealing. This court further stated Fosu could not appeal the March 8, 2012 order of dismissal because such an appeal was untimely. As to the March 11, 2014 order, this court directed Fosu to explain whether the order was appealable under one of the exceptions to the rule of nonappealability, and how the exception applied.

Fosu responded that he filed a timely notice of appeal on April 9, 2012. Therefore the trial court should not have denied his motion to set aside dismissal on March 11, 2014. Fosu further indicated the order of dismissal on March 8, 2012, was appealable because it was a signed order. Fosu stated that unfortunately this court's communications (notices) were returned even though he was at the same address.

On August 8, 2013, this court notified Fosu that an appeal from the March 8, 2012 order was not timely and would not be considered.³ This court noted Fosu's previous April 9, 2012, appeal was dismissed for failure to pay the appellate filing fee. Fosu was permitted to proceed with the instant appeal only as to the March 11, 2014, order denying his motion to set aside dismissal.

III

DENIAL OF MOTION TO SET ASIDE DISMISSAL

Fosu makes numerous factual statements which are not supported by the record. This court cannot consider such facts. Fosu has failed to provide any citations to the record in support of his factual statements or arguments raised on appeal, in violation of California Rules of Court, rule 8.204(a)(1)(C), which provides that a brief filed in this court must “[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears.” If a brief does not comply with this rule, the court clerk may decline to file it or, “[i]f the brief is filed, the reviewing court may, on its own or a party's motion, with or without notice: [¶] (A) Order the brief returned for corrections and refiling within a specified time; [¶] (B) Strike the brief with leave to file a new brief within a specified time; or [¶] (C) Disregard the noncompliance.” (Cal. Rules of Court, rule 8.204(e)(2).) The clerk's transcript, as

³ The second paragraph, last sentence of this court's August 8, 2014 order contains a typographical error: Reference to the “March 8, 2014, order of dismissal” should be to the March 8, 2012, order of dismissal.

designated by defendants, is also incomplete in that Fosu has not included in the clerk's transcript the EDD's responsive pleadings or the administrative record.

To avoid additional delay, this court has disregarded Fosu's noncompliance with the citation requirements, rather than rejecting Fosu's appellate briefs. Fosu's failure to cite to the record has caused this court unnecessary expenditure of time and effort in attempting to locate documents and facts Fosu relies on in his appeal. Because of Fosu's noncompliance with record citation requirements, he "cannot be heard to complain that we have overlooked any disputed or undisputed material facts. [Citation.]" (*Lopez v. C.G.M. Development, Inc.* (2002) 101 Cal.App.4th 430, 435, fn. 2.)

A. Applicable Law

Fosu contends the trial court abused its discretion in denying his motion to set aside dismissal brought under section 473, subdivision (b). On March 11, 2014, the trial court denied Fosu's motion on the ground it was untimely. We agree the motion was too late.

Section 473, subdivision (b), provides in relevant part: "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable

time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken.”

The section 473 six month time limit ““is simply a limitation upon the power of the court to grant any relief, regardless of any question either as to the merits of the application, or as to whether or not the application was made within what might be held to be a reasonable time under the circumstances. Under this statute, in addition to being made within the six months’ period, the application must be made within a ‘reasonable time’ and what is a reasonable time in any case depends upon the circumstances of that particular case.” While in “the determination of that question, a large discretion is necessarily confided to [the trial] court” . . . there must be some showing—some evidence—as the basis for the exercise of such discretion.” (*Carrasco v. Craft* (1985) 164 Cal.App.3d 796, 805; in accord, *Caldwell v. Methodist Hospital* (1994) 24 Cal.App.4th 1521, 1524.) “It is settled that the law favors a trial on the merits [citations] and therefore liberally construes section 473. [Citation.] Doubts in applying section 473 are resolved in favor of the party seeking relief from default [citation] and if that party has moved promptly for default relief only slight evidence will justify an order granting such relief.” (*Iott v. Franklin* (1988) 206 Cal.App.3d 521, 526.)

Here, the signed order of dismissal and judgment were entered on or about March 8, 2012, and Fosu filed his motion to set aside the dismissal on February 25, 2014, almost two years later. The issue presented here by this appeal therefore is not the sufficiency of the excuse offered by Fosu in his motion to set aside dismissal but whether the motion

was filed in a timely manner. Fosú admits he received notice of dismissal. When the court asked why the lengthy delay in filing the motion, he responded that he was incarcerated on the day of the hearing on EDD's motion to dismiss and thereafter was ill and hospitalized. Fosú did not provide any evidence substantiating this or establish he was incapacitated during the entire six-month period. Fosú therefore failed to establish that he was prevented from timely filing his motion to set aside dismissal within the six-month limitation period. He also has not established any applicable exception to the limitation period for bringing his motion. Fosú has not met his burden of establishing due diligence in seeking section 473 relief or shown that the trial court abused its discretion in denying his motion to set aside dismissal.

IV

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs, if any, on appeal.

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CODRINGTON

J.

We concur:

McKINSTER

Acting P. J.

MILLER

J.