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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

DARLENE LANDRETH et al.,

Plaintiffs and Appellants,

v.

CRESTWOOD CORPORATION et al.,

Defendants and Respondents.

E061394

(Super.Ct.No. CIVRS1004351)

OPINION

APPEAL from the Superior Court of San Bernardino County. Janet M. Frangie, Judge. Affirmed.

Alessi & Koenig and Thomas J. Bayard for Plaintiffs and Appellants.

Law Offices of James W. Bates and James W. Bates for Defendants and Respondents, Crestwood Corporation and Fairhaven Estates III, LP.

Plaintiffs and appellants Darlene Landreth and Peter Boese appeal from the trial court's order denying their motion to set aside summary judgment in favor of defendants and respondents Crestview Corporation and Fairhaven Estates III, LP. They argue that

the trial court erred when it ruled that Code of Civil Procedure section 473, subdivision (b)¹ did not apply to relieve them from summary judgment. We affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

1. *Trial Court Proceedings*

In April 2010, plaintiffs, a mother and her son, sued defendants and several others who are not parties to this appeal for fraud and other claims related to the sale of a house plaintiffs purchased together. During the course of the litigation, plaintiffs' lead attorney, Thomas Bayard, suffered from health problems that caused him to miss various deadlines and appearances. In November 2012, about two and a half years into the proceedings, plaintiffs filed a notice that, due to Mr. Bayard's health issues, he would no longer be serving as lead counsel and that Ryan Kerbow (an attorney from the same firm as Mr. Bayard) would take his place. After this filing, Mr. Kerbow made appearances on behalf of plaintiffs.

In May 2013, defendants filed a motion for summary judgment on the two causes of action that remained in the complaint. Plaintiffs did not file an opposition or appear at the hearing. The court granted the motion, entered judgment in favor of defendants, and awarded them approximately \$27,000 in attorney fees and costs.

¹ All further statutory references are to the Code of Civil Procedure.

Plaintiffs then filed a motion to set aside the summary judgment, arguing that they were entitled to relief under the “mandatory relief provision” of section 473, subdivision (b). This provision states that a party is entitled to relief from default or dismissal where the party’s attorney attests, in a “sworn affidavit,” that the judgment resulted from his or her “mistake, inadvertence, surprise, or neglect.” (§473, subd. (b).) Plaintiffs argued that their failure to oppose defendants’ motion for summary judgment was the result of Mr. Bayard’s health issues and ensuing neglect.

The hearing on plaintiffs’ motion took place on February 3, 2014. The trial court issued a tentative opinion in favor of defendants and heard argument from the parties. The court’s ruling, set forth in the minute order from the hearing (the February 3 order), mirrors the tentative. The court denied plaintiffs’ motion on the ground that they failed to make a showing that section 473, subdivision (b) applies. Specifically, it pointed out that the plaintiffs’ motion focused on the conduct of Mr. Bayard, who was no longer the lead attorney, and failed to include a declaration from Mr. Kerbow as to why he had not opposed defendants’ summary judgment motion. It stated, “while the court is sympathetic to the medical issues suffered by Thomas Bayard, Esq., . . . the record is devoid of any evidence that Mr. Bayard’s illness prevented Mr. Kerbow from opposing the motion for summary judgment.”

In addition to stating the basis for the court’s ruling, the February 3 order directs defendants to give notice of the ruling. That same day, defendants served a document

entitled “Notice of Ruling on Plaintiffs’ Motion to Set Aside Judgment in Favor of [Defendants].” Defendants attached a copy of the court’s tentative ruling to the notice. The tentative ruling was not file-stamped.

2. *Plaintiffs’ Previous Appeal*

On March 5, 2014, plaintiffs appealed the February 3 order.² On March 27, 2014, this court ordered plaintiffs to file and serve a file-stamped copy of the February 3 order. We stated that plaintiffs’ failure to do so within 15 days would result in dismissal of the appeal. Plaintiffs did not comply with the order, and we dismissed the appeal on April 18, 2014.³

About a month later, on May 12, 2014, plaintiffs filed an ex parte application with the trial court, asking it to issue a “signed order and judgment reflecting the Court’s denial of Plaintiff’s [*sic*] motion to set aside the Judgment which was heard and ruled upon on February 3, 2014.” The trial court granted the application and directed plaintiffs to “submit a proposed order for the court’s review which mirrors the court’s Minute Order of February 3, 2014.” The plaintiffs did so, and on June 9, 2014, the trial court issued an order based on plaintiffs’ proposed order (the June 9 order).

² Court of Appeal case No. E060735.

³ Court of Appeal case No. E060735 proceeded as to a separate issue, but was ultimately dismissed as untimely.

On June 17, 2014, plaintiffs filed the present appeal, which is based on the June 9 order.

II

ANALYSIS

1. *The Appeal is Timely*

Defendants argue that plaintiffs' appeal is untimely because although it is styled as an appeal of the June 9 order, it is in fact an appeal of the February 3 order, and the 60-day deadline to appeal that order has passed. Defendants correctly point out that a minute order that disposes of all the issues between the parties and contemplates no further action, "such as the preparation of another order or judgment," is a final, appealable judgment. (*Laraway v. Pasadena Unified School Dist.* (2002) 98 Cal.App.4th 579, 583; *Wright v. Groom* (1962) 206 Cal.App.2d 485, 487-488.) They are also correct that, once the time to appeal begins to run, it cannot be restarted or extended "by the filing of a subsequent judgment or appealable order *making the same decision*," which in this case would be the June 9 order. (*Laraway v. Pasadena Unified School Dist.*, *supra*, at p. 583, italics added.) In other words, the final, appealable order in this matter is the February 3 order, not the June 9 order.⁴

⁴ Plaintiffs did not file a reply brief.

However, in order for plaintiffs' appeal to be untimely, we would have to conclude that the 60-day deadline in rule 8.104(a)(1)(B) of the California Rules of Court applies in this case, as opposed to the 180-day deadline in rule 8.104(a)(1)(C). We conclude that the latter deadline applies and that the appeal is timely.

The 60-day deadline begins to run upon service of “a document entitled ‘Notice of Entry’ of judgment or a file-stamped copy of the judgment, accompanied by proof of service.” (Cal. Rules of Court, rule 8.104(a)(1)(B).) The provisions of rule 8.104 require “strict compliance.” (*In re Marriage of Lin* (2014) 225 Cal.App.4th 471, 476.) In order to trigger the 60-day deadline, defendants had to serve either (1) a document entitled “Notice of Entry of [judgment]” or (2) a file-stamped copy of the judgment, which here is the February 3 order. (See *Sunset Millennium Associates, LLC v. Le Songe, LLC* (2006) 138 Cal.App.4th 256, 259-260 [to trigger the 60-day deadline, the document had to be entitled “Notice of Entry”; the fact that there was “notice of entry language” in the body of the order was insufficient].)⁵

Defendants did neither: their notice was entitled “Notice of Ruling,” not “Notice of Entry [of judgment],” and they attached an unstamped tentative ruling instead of the February 3 order, i.e., the minute order. Had defendants either captioned their notice as a

⁵ This case interpreted the prior version of California Rules of Court, rule 8.104, which contained the same language regarding service of “a document entitled ‘Notice of Entry’ of judgment” as the current version. (Cal. Rules of Court, rule 2, renumbered rule 8.104, and amended, eff. Jan. 1, 2007.)

“Notice of Entry” of judgment, or attached the minute order instead of the tentative, the 60-day deadline would have been triggered and plaintiffs’ appeal would have been untimely because it was filed more than 60 days from the date of service (February 3, 2014). Because the notice did not trigger the 60-day deadline, the 180-day deadline in California Rules of Court, rule 8.104(a)(1)(C) applies. Under this provision, plaintiffs had 180 days from the date of entry of judgment, which here is the date of the minute order (February 3, 2014) to file their appeal. (See Cal. Rules of Court, rule 8.104(a)(1)(C); see also *In re Marriage of Bianco* (2013) 221 Cal.App.4th 826, 828, fn. 1; *Grable v. Martin* (1961) 193 Cal.App.2d 241, 243.) By filing on June 17, 2014, plaintiffs met this deadline.

2. Plaintiffs are not Entitled to Relief from Summary Judgment Under Section 473, Subdivision (b)

Plaintiffs argue that the mandatory relief provision of section 473, subdivision (b) applied to relieve them from summary judgment and that the trial court erred in ruling to the contrary. The standard of review is abuse of discretion (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 257), and we conclude that the trial court acted well within its discretion in denying plaintiffs’ motion to set aside the summary judgment.

California courts have held that section 473, subdivision (b)’s mandatory relief provision does not apply where, as here, a party is seeking relief from summary

judgment. (See, e.g., *Henderson v. Pacific Gas & Electric Co.* (2010) 187 Cal.App.4th 215, 227-228; *English v. IKON Business Solutions, Inc.* (2001) 94 Cal.App.4th 130, 147-148.) This is because the mandatory relief provision, by its plain terms, applies to a “default” or a “dismissal,” and a summary judgment, which is an adjudication based on the undisputed facts before the court, “is neither.” (*Henderson v. Pacific Gas & Electric Co.*, *supra*, at pp. 227-228.) This precedent is dispositive to plaintiffs’ appeal. Because they are not entitled to mandatory relief under section 473, subdivision (b), the trial court’s ruling is not an abuse of discretion.

Plaintiffs contend that although Mr. Kerbow “became lead counsel prior to the motion for summary judgment, Mr. Bayard remained the person responsible for the day to day aspects of the litigation.” Section 473, subdivision (b) also contains a “discretionary relief provision,” which is not limited to defaults and dismissals. On appeal, the only provision plaintiffs explicitly reference is the mandatory provision; however, we address the applicability of the discretionary provision in the event their references to section 473, subdivision (b) were intended to apply to that provision as well.

The discretionary provision states that a court “may” grant a party relief from “a judgment . . . taken against him or her through . . . mistake, inadvertence, surprise, or excusable neglect.” (§ 473, subd. (b).) For this provision to apply, the mistake, inadvertence, surprise, or neglect must have been reasonable. (See, e.g., *Henderson v. Pacific Gas & Electric Co.*, *supra*, 187 Cal.App.4th at p. 229.) “ ‘Conduct falling below

the professional standard of care, such as failure to timely object or properly advance an argument, is not . . . excusable.’ ” (*Ibid.*) Here, the record reflects that it was Mr. Kerbow’s neglect that caused plaintiffs’ failure to oppose defendant’s motion for summary judgment because he was the lead attorney in charge of the case at the time of the motion. Plaintiffs argue that it was in fact Mr. Bayard’s neglect that caused the failure. They assert that although Mr. Kerbow “became lead counsel prior to the motion for summary judgment, Mr. Bayard remained the person responsible for the day to day aspects of the litigation.”

We need not decide which attorney was responsible for opposing the motion because plaintiffs failed to present a reasonable excuse for either attorney. Regarding Mr. Kerbow, the record is devoid of any reason or excuse as to why he failed to oppose the motion, let alone a reasonable excuse. As for Mr. Bayard, he was aware of his health issues and the impact they were having on his ability to meet deadlines and make appearances well in advance of the motion.⁶ Given this awareness, his failure to assign the responsibilities associated with the motion to another attorney is unreasonable.

⁶ For example, the record contains a letter from Mr. Bayard to all parties dated May 14, 2012, notifying them of a recent heart attack and asking for “cooperation and patience in rescheduling . . . deadlines.”

The record contains no evidence that plaintiffs were entitled to relief under section 473, subdivision (b). The trial court's denial of plaintiffs' motion to set aside summary judgment was therefore not an abuse of discretion.

III

DISPOSITION

The judgment is affirmed. Respondents shall recover costs on appeal.

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CODRINGTON
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.