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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

LOUIS AYALA,

Plaintiff and Appellant,

v.

CALIFORNIA STATE UNIVERSITY
FRESNO,

Defendant and Respondent.

F068067

(Super. Ct. No. 11CECG02867)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Donald S. Black, Judge.

Louis Ayala, in pro. per., for Plaintiff and Appellant.

Deutinger & Wells and David J. Wells for Defendant and Respondent.

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* Before Levy, Acting P.J., Detjen, J. and Franson, J.

Plaintiff Louis Ayala filed a personal injury lawsuit against the Board of Trustees of the California State University (the Board).¹ The Board filed a demurrer to Ayala's first amended complaint, which the trial court sustained without leave to amend.

Ayala had not filed an opposition to the demurrer or attended the hearing. Over six months after the judgment of dismissal was filed, Ayala filed a motion for relief under Code of Civil Procedure section 473.² The trial court denied the motion as untimely.

On appeal, Ayala contends the six-month period for filing a section 473 motion should have been extended by five days pursuant to section 1013 because the notice of entry of the judgment was served on him by mail. We disagree. The six-month period begins to run from the entry of the judgment or dismissal in cases that do not involve a default.

We therefore affirm the judgment.

FACTS AND PROCEEDINGS

On November 13, 2010, Ayala and his mother attended a Fresno State football game. Because Ayala's mother was in a wheelchair, they were directed by Fresno State staff to sit in the handicap section. Ayala was provided a folding chair because there was no other seating. During the third quarter, Ayala's chair collapsed, causing him to fall on his back and hit his head, which he alleges caused him serious injury. Ayala was taken from the stadium to St. Agnes Hospital by ambulance.

In August 2011, Ayala filed a complaint against the Board, which Ayala erroneously names as California State University Fresno.

The trial court sustained a demurrer to Ayala's original complaint and granted him leave to amend. Ayala filed a first amended complaint. The Board filed another demurrer and set the hearing date for June 26, 2012.

¹ Ayala erroneously named the defendant as California State University Fresno.

² All further statutory references are to the Code of Civil Procedure.

On June 26, 2012, the Board's demurrer came on regularly for a hearing. Ayala filed no opposition to the demurrer and did not request oral argument after the tentative was posted. In addition, Ayala did not appear in court on the date scheduled.

The trial court's tentative ruling and minute order from the June 26, 2012, hearing are not part of the appellate record. The docket entry indicates that the trial court sustained the demurrer, indicated its tentative ruling would become the order of the court, and directed counsel for the Board to prepare a proposed judgment.

The order and judgment prepared by defense counsel was signed and filed by the trial court on July 6, 2012. It stated that the demurrer was sustained without leave to amend as to all causes of action and the action was dismissed.

On July 19, 2012, the Board filed a notice of entry of order and judgment. The attached proof of service stated the notice was served on Ayala by mail.

On January 23, 2013, Ayala filed a motion to set aside entry of order and judgment sustaining demurrer. Attached to the motion was a proposed second amended complaint that attempted to state causes of action for negligence and premises liability.

In April 2013, the trial court held a hearing on the motion and entered a minute order denying relief. The court stated that the motion for relief had not been served until after the expiration of the mandatory six-month period specified in section 473.

On April 25, 2013, Ayala filed a motion to vacate and enter new judgment that cited section 663. Ayala contended that his motion for relief under section 473 was timely because the July 19, 2012, notice of entry of order and judgment was mailed to him and, under the five-day extension for mailing provided in section 1013, the six-month period did not begin to run until July 24, 2012. Using this starting date, Ayala contended his section 473 motion filed was timely because it was filed on January 23, 2013.

The Board opposed the motion, arguing it was really a motion for reconsideration and failed to comply with the requirements for such a motion.

The trial court denied Ayala’s motion to vacate under section 663 and Ayala filed a notice of appeal.

DISCUSSION

I. STANDARD OF REVIEW

Generally, a superior court’s ruling on a motion for discretionary relief under section 473, subdivision (b) is reviewed on appeal for an abuse of discretion. (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 257.)

The abuse of discretion standard, however, calls for varying levels of deference depending on the aspect of the trial court’s ruling under review. (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711.) For example, the trial court’s resolution of a question of law is subject to independent (i.e., de novo) review. (*Id.* at pp. 711-712.) The interpretation of a statute and the application of that interpretation to a set of undisputed facts are questions of law subject to independent review on appeal. (*Grayson Services, Inc. v. Wells Fargo Bank* (2011) 199 Cal.App.4th 563, 570.)

II. APPLICABLE PRINCIPLES OF LAW

A. Statutory Text

Section 473, subdivision (b) provides for discretionary relief by stating that 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.” The statute further provides that an application for relief “shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken.” (§ 473, subd. (b).)

B. Elements for Relief

The application of this statutory text to Ayala’s motion presents at least three issues. The first question is whether his error in failing to oppose the demurrer qualifies

as a “mistake, inadvertence, surprise, or excusable neglect.” (§ 473, subd. (b).)

Ordinarily, an error meets this standard if a reasonably prudent person placed in the same or similar circumstances might have made the same error. (*Solv-All v. Superior Court* (2005) 131 Cal.App.4th 1003, 1007.)

The second question is whether there is a causal connection between the challenged judgment of dismissal and Ayala’s error—the statutory language involved in this question is the term “through” in the phrase “through his ... mistake” (§ 473, subd. (b).) For example, if a demurrer is sustained because the complaint fails to state a cause of action and a judgment of dismissal is entered, a plaintiff’s failure to oppose the demurrer or appear at the hearing might have had no effect on the trial court’s decision.³

The third question—the question that is dispositive of this appeal—is whether Ayala’s application for relief was timely. The moving party’s application for relief “shall be made within a reasonable time, in no case exceeding six months, after the judgment ... was taken.” (§ 473, subd. (b).) The reasonable time requirement means a moving party must show that he or she acted diligently once learning of the judgment. (*Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1420.) Whether a party has acted diligently is a question of fact for the trial court. (*Ibid.*) Regardless of diligence, the statutory six-month period establishes a deadline for filing a motion for relief under section 473, subdivision (b).

C. The Six-Month Limit

“The six-month time limit for granting relief under section 473 is jurisdictional and relief cannot be granted under section 473 if the application for such relief is instituted more than six months after the entry of the judgment, order or proceeding from

³ California Rules of Court, rule 3.1320(f) provides that when a party does not appear for a hearing on a demurrer, the court must dispose of the demurrer on the merits, unless there is good cause for continuing the hearing. In other words, a court may not sustain a demurrer based on a plaintiff’s failure to appear; the court still must consider the allegations in the pleading and determine whether they state a cause of action.

which relief is sought.” (*Aldrich v. San Fernando Valley Lumber Co.* (1985) 170 Cal.App.3d 725, 735, fn. 3; see 8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 175, p. 773 [“a court has no authority under C.C.P. 473(b) to excuse a party’s noncompliance with the 6-month limit”].) The California Supreme Court has considered the statutory time limit and stated that where more than six months have elapsed from the entry of default, relief under section 473 is unavailable.

(*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 980, citing to *Aldrich v. San Fernando Valley Lumber Co.*, *supra*, 170 Cal.App.3d 725.)

To calculate whether the application for relief was made within the six-month period, a court must identify (1) the date on which the period begins to run—that is, when the judgment or dismissal was “taken”—and (2) the date on which the application for relief was “made.” If the second date is more than six months after the first date, the inquiry ends and the motion for relief under section 473, subdivision (b) must be denied.

As to the starting date, when a motion for relief seeks to set aside a *default*, California courts have held that the six-month period runs from entry of default, not entry of judgment. (*Manson, Iver & York v. Black* (2009) 176 Cal.App.4th 36, 42; *Koski v. U-Haul Co.* (1963) 212 Cal.App.2d 640, 643.) In contrast, when there is no default (as in this case), the six-month period is calculated from the entry of judgment. (*Thompson v. Vallembois* (1963) 216 Cal.App.2d 21, 24 [in a case dismissed for failing to respond to written discovery, more than nine months elapsed between the entry of judgment and the making of the motion and, therefore, the trial court lacked jurisdiction to set aside the dismissal].)

As to the end date, an “application for relief under the statute is deemed to be made upon filing in court of a notice of motion and service of the notice of motion on the adverse party.” (*Arambula v. Union Carbide Corp.* (2005) 128 Cal.App.4th 333, 341.)

III. STARTING DATE FOR AYALA'S SIX-MONTH PERIOD

Here, Ayala's motion for relief was filed on January 23, 2013. The trial court filed its order and judgment on July 6, 2012. The Board filed and served the notice of entry of order and judgment on July 19, 2012. Thus, if either of the July filing dates marks the beginning of the six-month period, Ayala's motion was late.

Ayala's legal theory is that the six-month period was not triggered until July 24, 2012, because section 1013 provides an extra five days when service is done by mail.

Ayala has cited no cases or secondary authorities to support his interpretation of section 473 regarding when the six-month period begins to run. We have located no published case in which the start of the six-month period contained in section 473 was delayed five days pursuant to section 1013.

In contrast, we have found a case in which the California Supreme Court stated that the word "taken" as used in section 473 was "used in the same sense as the words 'render' or 'rendition,' when used with reference to a judgment." (*Brownell v. Superior Court* (1910) 157 Cal. 703, 707; 8 Witkin, Cal. Procedure, *supra*, Attack on Judgment in Trial Court, § 176, p. 774 [when time begins to run].) Applying this definition of "taken," the court in *In re Marriage of Jacobs* (1982) 128 Cal.App.3d 273 determined that the measuring event for purposes of section 473 was the date of the entry of interlocutory judgment and not the earlier date when the parties entered into the oral stipulation upon which the judgment was based. The court concluded that the motion, which was filed one day less than six months after entry of the interlocutory judgment, was timely. (*Id.* at p. 280.)

Based on these cases' discussion of the meaning of "taken" and the reference in *Aldrich v. San Fernando Valley Lumber Co.*, *supra*, 170 Cal.App.3d at page 735, footnote 3 to the "the entry of the judgment," we conclude that, at a minimum, the judgment was "taken" in this case when notice of entry of the judgment was filed on July

19, 2012. Therefore, Ayala's January 23, 2013, motion for relief was untimely as it was filed on more than six months after the notice of entry of judgment was filed.

Because Ayala failed to act within the six-month period, the trial court lacked jurisdiction to grant relief under section 473, subdivision (b). As a result, we affirm the trial court's order denying Ayala's motion.

In addition, it follows that the trial court had no authority to grant Ayala's subsequent motion to vacate the order denying his motion for relief under section 473. Because the court was required by law to deny the section 473 motion for relief as untimely, there was no valid ground for vacating that order.

DISPOSITION

The postjudgment orders denying Ayala's motions are affirmed. The Board shall recover its costs on appeal.