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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

IHSAN N. SHAMAAN,

Plaintiff and Respondent,

v.

MONEX CREDIT COMPANY et al.,

Defendants and Appellants.

G046132

(Super. Ct. No. 30-2008-00114986)

O P I N I O N

Appeal from an order of the Superior Court of Orange County,
Franz E. Miller, Judge. Affirmed.

Farella Braun & Martel, Neil A. Goteiner and Deborah K. Barron for
Defendants and Appellants.

The Law Offices of Mark Joseph Valencia and Mark Joseph Valencia for
Plaintiff and Respondent.

* * *

INTRODUCTION

Defendants Monex Credit Company (Monex) and Louis E. Carabini (together, Appellants) appeal from an order granting Ihsan N. Shamaan equitable relief from the dismissal of his lawsuit.¹ The trial court granted the motion on the ground of extrinsic mistake and specifically found that counsel had abandoned Shamaan, that Shamaan had diligently sought relief from dismissal, and that Appellants would suffer no prejudice.

We affirm. After confirming our jurisdiction, we conclude the trial court did not abuse its discretion by granting Shamaan equitable relief from the dismissal. Substantial evidence supported the trial court's findings, which satisfied the legal criteria for extrinsic mistake based on counsel's misconduct. Because we affirm on the ground of extrinsic mistake, we do not address the parties' arguments on extrinsic fraud.

FACTS AND PROCEDURAL HISTORY

I.

Shamaan's Lawsuit and Arbitration Claim Against Appellants

Shamaan retained the Law Offices of Fred Rucker to represent him in a lawsuit against Appellants, Gala, and Patel. We refer to Appellants, Gala, and Patel collectively as Defendants. In November 2008, Shamaan, with Fred Rucker as counsel of record, filed a complaint against Defendants, asserting various causes of action, including breach of oral contract and fraud.

The complaint alleged Monex is in the business of buying and selling precious metals, including gold and silver, and Shamaan entered into an agreement with Defendants by which he would purchase bars of precious metals having a fair market

¹ Shamaan's lawsuit also named David Gala and Atulkumar Patel as defendants. Gala is not identified as an appellant in the notice of appeal, which identifies only Monex and Carabini as the appealing parties. Patel passed away in November 2010, after dismissal of the lawsuit but before Shamaan moved for relief from the dismissal.

value of \$1.2 million. As part of the agreement, Defendants would act as the custodian of the bars until Shamaan decided either to sell or to take physical possession of them. Defendants breached the agreement by refusing to deliver the bars to Shamaan and demanding he pay an additional \$200,000.

The complaint alleged that after Shamaan entered into this agreement and purchased the bars of precious metals, Defendants informed him for the first time that the bars of precious metals were security for a loan in Shamaan's favor, and, as a result, "there were interest charges, commissions and 'rent' charges related to the subject transactions." Defendants informed Shamaan he had purchased the bars in a "margin" or leveraged account, the bars had declined in value, and he would have to pay Defendants \$200,000 to avoid losing his rights to the bars. The complaint alleged Shamaan was unable to pay the additional money demanded and, as a consequence, Shamaan's investment was "wiped-out."

In March 2009, the trial court granted Defendants' motion to compel arbitration and stayed the case pending resolution of the arbitration. Shamaan's arbitration claim was filed with the Judicial Arbitration and Mediation Service (JAMS) later that month. The parties selected an arbitrator, and the matter was set for arbitration in January 2010.

Thereafter, Rucker participated in discovery and, on at least one occasion, accompanied Shamaan to the offices of Defendants' counsel to inspect documents. The arbitrator conducted hearings on discovery disputes on October 29 and November 18, 2009. It is unclear from the record whether Rucker attended those hearings. In November 2009, Rucker told Shamaan that Defendants wanted to take Shamaan's deposition. However, from late 2009 to early 2010, Defendants' counsel did not hear from Rucker.

At some point, the arbitration dates were taken off calendar by stipulation of the parties. JAMS placed an administrative hold on the arbitration, apparently due to

outstanding balances in other cases in which Rucker had been involved. In February 2010, JAMS received a request from Defendants' counsel to set new hearing dates for the arbitration. A JAMS case manager contacted Rucker and advised him the case could not be set for hearing until she received permission from the JAMS finance department, due to the hold. JAMS later determined it should not have placed the hold.

II.

Dismissal of Shamaan's Lawsuit and Claim in Arbitration

The trial court conducted an alternative dispute resolution (ADR) review hearing on September 8, 2009. Rucker did not appear. The court continued the hearing to March 1, 2010. When neither Rucker nor Shamaan appeared on March 1, the court continued the review hearing to April 5, 2010, issued an order to show cause (OSC) regarding sanctions or dismissal against Shamaan for failure to appear, and ordered Rucker to appear on April 5. Rucker failed to appear for the review hearing on that date. As a consequence, the trial court ordered the complaint dismissed with prejudice.

Rucker did not inform Shamaan of the dismissal. From January through December 2010, Shamaan telephoned Rucker about once a month to ask about the status of the case. Rucker consistently told him, "we are waiting for the arbitrator" or "the action is still in arbitration."

Defendants' counsel informed the arbitrator of the dismissal of Shamaan's complaint and, apparently, sought dismissal of the arbitration. In a letter to the arbitrator, dated December 8, 2010, Rucker argued that, "as a matter of law," the dismissal of the complaint "had no effect on the obligation of the parties to arbitrate this dispute." Rucker requested a status conference to set new hearing dates for the arbitration. In a letter to the arbitrator, dated December 28, 2010, Rucker responded to assertions made by Appellants and Gala in a letter dated December 16, 2010.

The arbitrator set a telephonic conference call for February 9, 2011, to discuss dismissal of the arbitration. Rucker prepared and sent to the arbitrator a

three-page letter brief, dated February 18, 2011, “in further response to the ‘motion’ of [Appellants and Gala] to dismiss the pending arbitration.” Rucker argued the arbitration should not be dismissed because any delay was caused by JAMS’s error in issuing an administrative hold.

On March 9, 2011, the arbitrator issued an order dismissing the claim in arbitration. The arbitrator concluded: “A dismissal with prejudice is generally accepted as a judgment based on the merits of the action. It must be noted that the dismissal ordered by the Superior Court in the Underlying Action was in the nature of a sanction for failure to comply with a Court Order. Such an order preempts any requirement for further consideration of the merits of the substantive claims made in the Underlying Action. Claimant[’]s remedy under such circumstances is to seek relief from the Court making the order and not to ignore that order and its impact on the ability to pursue the claims.”

Rucker did not inform Shamaan of the dismissal of the claim in arbitration. From February through July 2011, Shamaan telephoned Rucker approximately 20 times regarding the lawsuit against Appellants and Gala, but was unable to speak with him. On April 28, 2011, Shamaan sent Rucker an e-mail stating: “Please Mr[.] Rucker call me back I hope you are not abandoning me. I need to know about the Monex case I have never heard any thing from you about that case. [T]he case has been filed [for] almost 3 years. [Y]ou have to inform me. As you know this was my life savings for twenty years, and you know they have fooled me. [P]lease, please call me back.” (Some capitalization omitted.) On May 31, 2011, Shamaan sent Rucker another e-mail stating: “[T]here is an issue we have to resolve. [T]his is the [M]onex issue. [Y]ou have not told me anything since you filed the case. [D]id you do anything without my knowledge. Did you abandon me without my knowledge. Did you make any agreement without my knowledge. You have to come out clean you need to tell me the status with Monex.”

In October 2010 and June 2011, the State Bar of California filed a total of 22 counts of alleged misconduct against Rucker, including “failure to respond to client inquiries,” “failure to perform with competence,” “failure to communicate with client,” and “failure to inform client of significant developments” (capitalization omitted). In February 2011, Rucker was deemed “Not Eligible To Practice Law.” In a decision issued in June 2011, the California State Bar Court recommended that Rucker be suspended from the practice of law for a period of two years.

III.

Shamaan’s Motion for Equitable Relief from the Dismissal

Shamaan retained new counsel on July 25, 2011. On August 5, 2011, just 11 days after being retained, new counsel filed a “motion to attain equitable relief from dismissal with prejudice” (capitalization omitted). The motion was based on “the equitable power of the Court, the presence of extrinsic fraud and mistake, and significant case authority.” Appellants and Gala filed opposition to the motion.

On September 29, 2011, the trial court issued a minute order granting the motion. In the order, the court explained its ruling at length: “Usually mere attorney neglect is insufficient grounds to set aside a dismissal, but in extreme cases where the attorney conduct amounts to an abandonment of the client, relief may be granted if the client is relatively free of negligence. (*Seacall Dev., Ltd. v. Santa Monica Rent Control Bd.* (1999) 73 Cal.App.4th 201, 205.) Attorney Rucker effectively abandoned plaintiff by allowing the case to be dismissed via multiple missed appearances, failing to move to set aside the dismissal, and telling plaintiff the arbitration was still pending. [¶] That statement was technically true, but in fact the arbitration was effectively dead after the dismissal. When plaintiff learned the true facts, he promptly retained new counsel and brought this motion. He was not negligent; he was the victim of the attorney lies. [¶] The court must also consider prejudice to the defendants. (See *Seacall Dev., Ltd. v. Santa*

Monica Rent Control Bd., supra, 73 Cal.App.4th at p. 507.) Defendants claim that precious metals have appreciated substantially since the case should have been adjudicated. But an arbitrator could take that into account when making an award, if any.”

APPELLATE JURISDICTION

Notice of entry of the order setting aside the dismissal of Shamaan’s complaint was served in November 2011. Appellants timely appealed from the order. As we have noted, Gala was not identified as an appealing party in the notice of appeal. “To appeal from a superior court judgment or an appealable order of a superior court . . . , an appellant must serve and file a notice of appeal in that superior court. . . .” (Cal. Rules of Court, rule 8.100(a)(1).) The notice of appeal states: “Defendants MONEX CREDIT COMPANY and LOUIS E. CARABINI appeal from the Order Setting Aside the Dismissal entered in this case” Gala therefore is not a party to this appeal.

The underlying dismissal with prejudice was not signed by the trial court as is required for judgments of dismissal pursuant to Code of Civil Procedure section 581d. For that reason, we issued an order inviting the parties to submit letter briefs addressing the proper disposition of this matter in light of *Powell v. County of Orange* (2011) 197 Cal.App.4th 1573, whether the appeal must be dismissed and whether this court can grant effective appellate relief. In response, Appellants obtained from the trial court a signed order of dismissal with prejudice nunc pro tunc and requested that we take judicial notice of the signed order. We granted the request for judicial notice. Having considered the nunc pro tunc order, we conclude it satisfies section 581d and confirm appellate jurisdiction over this matter.

STANDARD OF REVIEW

We review an order granting equitable relief from a judgment or order under the abuse of discretion standard. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981; *In re Marriage of Grissom* (1994) 30 Cal.App.4th 40, 46; *In re Marriage of Mansell*

(1989) 217 Cal.App.3d 219, 225-226; *Bailey v. Roberts* (1969) 271 Cal.App.2d 282, 285-286; *Shields v. Siegel* (1966) 246 Cal.App.2d 334, 337-338.)

The abuse of discretion standard has been described in these general terms: “The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason.” (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478.) A trial court exceeds the bounds of reason when, in light of the evidence and the applicable law, the court’s decision was not a permissible option. “The abuse of discretion standard . . . measures whether, given the established evidence, the act of the lower tribunal falls within the permissible range of options set forth by the legal criteria. ‘The scope of discretion always resides in the particular law being applied, i.e., in the “legal principles governing the subject of [the] action” Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an “abuse” of discretion.’” (*Department of Parks & Recreation v. State Personnel Bd.* (1991) 233 Cal.App.3d 813, 831.)

In applying the abuse of discretion standard, we determine whether the trial court’s factual findings are supported by substantial evidence and independently review its legal conclusions. (*County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1230.) “When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.” (*Shamblin v. Brattain, supra*, 44 Cal.3d at pp. 478-479.)

DISCUSSION

I.

Legal Principles: Equitable Relief from a Judgment or Dismissal Based on Extrinsic Mistake

Code of Civil Procedure section 473, subdivision (b) grants a trial court authority to vacate a judgment or dismissal on the grounds of mistake, inadvertence, surprise, or excusable neglect if the application for relief is filed no later than six months

after entry of the judgment or dismissal. When statutory relief is no longer available, a trial court retains inherent equitable power to set aside a judgment or dismissal on the ground of extrinsic fraud or mistake. (*Olivera v. Grace* (1942) 19 Cal.2d 570, 576-577; *County of San Diego v. Gorham*, *supra*, 186 Cal.App.4th at p. 1228; *Moghaddam v. Bone* (2006) 142 Cal.App.4th 283, 290.)

The term “extrinsic mistake” has been “broadly applied when circumstances extrinsic to the litigation have unfairly cost a party a hearing on the merits.” (*Rappleyea v. Campbell*, *supra*, 8 Cal.4th at p. 981.) “[T]he terms ‘fraud’ and ‘mistake’ have been given a broad meaning by the courts, and tend to encompass almost any set of extrinsic circumstances which deprive a party of a fair adversary hearing. [Citation.] The term ‘extrinsic’ refers to matters outside of the issues framed by the pleadings, or the issues adjudicated. [Citation.]” (*Aldrich v. San Fernando Valley Lumber Co.* (1985) 170 Cal.App.3d 725, 738 (*Aldrich*)).

Extrinsic mistake has been found when the attorney’s positive misconduct deprives his or her client of a hearing. (*Aldrich*, *supra*, 170 Cal.App.3d at pp. 738-739). “Positive misconduct is found where there is a total failure on the part of counsel to represent his client.” (*Id.* at p. 739.)

A client’s redress for inexcusable neglect by counsel is usually an action for malpractice. (*Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 898 (*Carroll*)). In *Carroll*, the California Supreme Court recognized an exception to that rule in those instances in which ““the attorney’s neglect is of that extreme degree amounting to *positive misconduct*, and the person seeking relief is relatively free from negligence.”” (*Ibid.*) In that situation, ““the attorney’s conduct, in effect, *obliterates the existence of the attorney-client relationship*, and for this reason his negligence should not be imputed to the client.” (Italics added.) [Citations.]” (*Ibid.*)

In *Orange Empire Nat. Bank v. Kirk* (1968) 259 Cal.App.2d 347, 352-356 (*Orange Empire*), the Court of Appeal reversed the trial court’s denial of a motion for

equitable relief from a default judgment where the cross-defendant's attorney failed to file an answer and appear at trial. The cross-defendant had contacted his attorney many times, and the attorney assured him he was defending the case and would take care of the trial. (*Id.* at p. 350.) After a substantial judgment was entered against the cross-defendant, his attorney failed to seek relief from the judgment within the statutory period. (*Id.* at pp. 350-352.) The Court of Appeal, holding the trial court should have granted the cross-defendant equitable relief from the judgment, stated: "Although the law ordinarily charges the client with the inexcusable neglect of his attorney, and gives him redress against his counsel [citation], there are exceptional cases in which the client who is relatively free from personal neglect will be relieved from a default or dismissal attributable to the inaction or procrastination of his counsel. [Citations.] This is particularly true where the attorney's failure to represent the client amounts to positive misconduct. [Citation.] An attorney's authority to bind his client does not permit him to impair or destroy the client's cause of action or defense. [Citation.]" (*Id.* at p. 353.) Relief in that situation is warranted if the client acted with due diligence in seeking relief after discovery of the attorney's neglect, and the opposing party will suffer no prejudice if relief is granted. (*Ibid.*)

In *Aldrich, supra*, 170 Cal.App.3d at pages 731-732, the Court of Appeal held the trial court did not err in granting a plaintiff relief from dismissal on equitable grounds because the plaintiff's lawyer failed to respond to discovery requests, failed to oppose a motion to dismiss for failure to respond, and was suspended from the practice of law shortly before the dismissal was granted. The court explained that although inexcusable neglect is usually imputed to the client, "in a case where the client is relatively free from negligence, and the attorney's neglect is of an extreme degree amounting to positive misconduct, the attorney's conduct is said to obliterate the existence of the attorney-client relationship." (*Id.* at p. 738.) Equitable relief from the dismissal was warranted, the court concluded, because "the positive misconduct

necessary to absolve a client of responsibility for his attorney's inexcusable negligence [was] present." (*Id.* at p. 739.)

In *People v. One Parcel of Land* (1991) 235 Cal.App.3d 579, 584, the Court of Appeal affirmed an order granting equitable relief from a default judgment because the respondent's attorney displayed "a total failure to represent his client" by failing to return the respondent's telephone calls and to oppose the default judgment motion.

The trial court in this case relied on *Seacall Development, Ltd. v. Santa Monica Rent Control Bd.* (1999) 73 Cal.App.4th 201, 204-208 (*Seacall*), in which the Court of Appeal reversed the trial court's order denying equitable relief from dismissal. In *Seacall*, the plaintiff's attorney failed to prosecute the case and failed to oppose the motion to dismiss. (*Id.* at pp. 203-204, 206.) Although an attorney's negligence usually is imputed to the client, and therefore offers no ground for equitable relief, the Court of Appeal explained that "[i]mputation of the attorney's neglect to the client ceases at the point where 'abandonment of the client appears.'" (*Id.* at pp. 204-205.) Abandonment requires both the "total failure on the part of counsel to represent the client" and "an absence of fault and due diligence on the part of the client." (*Id.* at p. 208.) The evidence showed that the plaintiff's attorney "sat on the case and did nothing to represent [the plaintiff]." (*Ibid.*) The plaintiff had not contacted the attorney in the two years between filing the action and the dismissal; nonetheless, the appellate court concluded the plaintiff was justified under the circumstances in relying on the attorney. (*Id.* at p. 206.) A more significant factor was, the court concluded, the plaintiff's diligence in retaining new counsel who filed a motion for relief after learning of the dismissal. (*Id.* at pp. 206-207.)

In sum, these cases establish that equitable relief from a judgment or dismissal based on an attorney's positive conduct may be granted when (1) the attorney's positive misconduct amounts to abandonment of or total failure to represent the client; (2) the client is relatively free of fault and acted with due diligence in seeking relief after

discovery of the attorney's neglect; and (3) the party opposing relief will suffer no prejudice if relief is granted.

II.

Application of Standard of Review: The Trial Court Did Not Abuse Its Discretion.

Returning to the abuse of discretion standard of review, we ask whether, in light of the evidence and the applicable law, the trial court exceeded its permissible discretion by granting Shamaan's motion for equitable relief from the dismissal. (*Shamblin v. Brattain*, *supra*, 44 Cal.3d at p. 479.) The trial court had inherent equitable authority to relieve Shamaan of the dismissal on the ground of his trial counsel's positive misconduct. *Carroll*, *Orange Empire*, *Aldrich*, *Seacall*, and other cases set forth the legal criteria for granting equitable relief based on counsel misconduct. Did the trial court's order granting relief fall within the permissible range of options set forth by the legal criteria?

A. Substantial Evidence Supported the Trial Court's Findings.

The trial court made a factual finding on each criterion necessary for granting Shamaan equitable relief. The trial court found (1) "Attorney Rucker effectively abandoned plaintiff"; (2) Shamaan "was not negligent," was "the victim of the attorney lies," and "promptly retained new counsel and brought this motion"; and (3) Appellants would not suffer prejudice if Shamaan were granted relief from the dismissal.

1. Abandonment or Total Failure to Represent the Client

Substantial evidence supported the finding that Rucker totally failed to represent Shamaan or abandoned him. The evidence before the trial court established that Rucker failed to appear for the ADR review hearings on September 8, 2009 and March 1 and April 5, 2010, and failed to respond to the OSC regarding sanctions or dismissal. In his declaration, Shamaan stated he contacted Rucker about once a month from January through December 2010, and Rucker consistently told Shamaan, "we are

waiting for the arbitrator” or “the action is still in arbitration.” Rucker did not inform Shamaan of the dismissal of this lawsuit and took no action to seek relief from it. In opposition to the motion for relief, Appellants’ counsel submitted a declaration confirming that he did not hear from Rucker between late 2009 and early 2010.

Shamaan declared that from February 2011 through July 2011, he called Rucker about 20 times but was unable to speak with him. Shamaan sent Rucker e-mails on April 28 and May 31, 2011, pleading with him to call back and asking whether Rucker had abandoned him. From this evidence, the trial court reasonably could draw the inference that Rucker had abandoned or totally failed to represent Shamaan.

This case bears similarities to *Seacall, supra*, 73 Cal.App.4th 201, in which the plaintiff’s attorney failed to prosecute the case and failed to oppose the motion to dismiss; to *Aldrich, supra*, 170 Cal.App.3d 725, in which the plaintiff’s lawyer failed to respond to discovery requests, failed to oppose a motion to dismiss for failure to respond, and was suspended from the practice of law shortly before the dismissal was granted; and to *Orange Empire, supra*, 259 Cal.App.2d 347, in which the attorney failed to defend but assured the cross-defendant he was defending the case and would take care of the trial. In each of those cases, the Court of Appeal concluded relief from the dismissal was warranted. Here, Rucker ceased prosecuting the case in late 2009, failed to appear for the ADR review hearings, failed to respond to the OSC regarding dismissal, assured Shamaan the action was still in arbitration and failed to inform him of the dismissal, and took no action to set aside the dismissal.

Appellants argue the evidence in the record supports a contrary inference. Declarations and exhibits before the trial court showed that Rucker filed the complaint, opposed the motion to compel arbitration, filed a claim in arbitration, engaged in discovery early in the litigation, spoke with a JAMS case manager in February 2010, communicated with the arbitrator, and filed letter briefs opposing Appellants’ motion to dismiss the claim in arbitration. This evidence, Appellants assert, establishes at most that

Rucker engaged in excusable neglect, for which Shamaan's remedy is a malpractice lawsuit against Rucker.

Assuming that is a fair deduction from the evidence, the standard of review nonetheless compels us to accept the trial court's finding. When the evidence supports more than one reasonable inference, the reviewing court accepts the inference drawn by the trial court. (*Shamblin v. Brattain, supra*, 44 Cal.3d at pp. 478-479.) From the evidence, the trial court drew the inference that Rucker had abandoned Shamaan. That inference, though perhaps not the only one possible, was reasonable.

Appellants rely on *Freedman v. Pacific Gas & Electric Co.* (1987) 196 Cal.App.3d 696 (*Freedman*) as supporting a finding that Rucker's misconduct did not constitute abandonment. In *Freedman*, the plaintiffs' counsel failed to prosecute the case to trial due, in large part, to his arrest and later conviction of grand theft, and counsel repeatedly assured the plaintiffs their case was proceeding "with all deliberate speed." (*Id.* at pp. 701-702, 707.) The trial court dismissed the case for delay in bringing the case to trial within three years. (*Id.* at p. 703.) Appealing from the dismissal, the plaintiffs argued they should not have been charged with their attorney's delay. (*Id.* at pp. 702, 704.) Based on the record, the Court of Appeal upheld the trial court's express finding that the performance of the plaintiffs' counsel did not fall within the narrow exception defined in *Carroll, supra*, 32 Cal.3d 892. (*Freedman, supra*, at p. 706.)

In this case, unlike *Freedman*, the trial court expressly found the performance of Shamaan's counsel fell within the narrow exception defined in *Carroll*. Our task is, as was that of the appellate court in *Freedman*, to determine whether the record supports the trial court's findings; here, as in *Freedman*, we conclude the record supports those findings. While *Freedman* might lend support to an inference from the evidence in this case that Rucker did not abandon Shamaan, *Freedman* does not compel that inference, and we accept the reasonable inference deduced by the trial court.

2. *Lack of Fault and Diligence*

Substantial evidence supported the trial court's finding that Shamaan was not negligent and "promptly retained new counsel and brought this motion." Shamaan was relatively free of fault for the dismissal of his lawsuit. The evidence established that throughout 2010, Shamaan contacted Rucker on a monthly basis, but he assured Shamaan the case was in arbitration, did not inform him of the dismissal, and then became incommunicado from February 2011 onward. Shamaan did not learn of the dismissal until July 2011. It is arguable that Shamaan could and should have done more, but "a client should not be required to act as a 'hawklike inquisitor' of his own counsel, nor perform incessant checking on counsel." (*Aldrich, supra*, 170 Cal.App.3d at p. 740.) In *Seacall, supra*, 73 Cal.App.4th at page 206, the Court of Appeal concluded the client's failure to contact counsel during a two-year period was not sufficient ground to deny relief. In contrast, Shamaan at least attempted to contact Rucker on a regular basis.

More significant than the client's diligence in acting before receiving notice of the dismissal is the client's diligence in taking action after receiving notice. (*Seacall, supra*, 73 Cal.App.4th at p. 206.) When Shamaan learned his lawsuit had been dismissed with prejudice, he promptly hired new counsel, who filed the motion for relief on August 5, 2011—just 11 days after being retained. In *Seacall, supra*, 73 Cal.App.4th at pages 206-207, the court concluded the plaintiff acted diligently in moving to set aside the dismissal when new counsel filed the motion for relief 19 days after the plaintiff learned of the dismissal. In *People v. One Parcel of Land, supra*, 235 Cal.App.3d at page 584, the respondent's new counsel brought a motion to set aside the default judgment within a month after the respondent discovered it. Shamaan sought relief from dismissal within a similar timeframe.

3. *Prejudice*

Lastly, the trial court did not err by finding relief from the dismissal would not cause Appellants to suffer prejudice. Appellants argue they would suffer prejudice if

now forced to litigate this case “as the result of the dimming memories of potential witnesses who have knowledge of events that occurred nearly four years ago, and the post-dismissal death of one of the named defendants in this action, . . . Patel, a sales representative for Monex.” (Fn. omitted.) At oral argument, Appellants’ counsel argued Patel was Appellants’ primary witness and the complaint mentioned him nine times.

We granted Appellants’ request for judicial notice of the death certificate for Patel and, we acknowledge, his passing would deprive Appellants of a potential witness. Shamaan’s complaint alleged that in March and September 2008, Patel made several misrepresentations to Shamaan about the status of his investment with Monex. Patel passed away in November 2010, after dismissal of Shamaan’s lawsuit but before Shamaan learned of that dismissal and filed the motion for relief.

Appellants did not submit a declaration or other evidence to the trial court in support of their claim of prejudice. The single declaration submitted by Appellants, that of their counsel, Aaron C. Watts, set forth no facts relating to prejudice. “[A]ppellants’ single declaration in opposition to respondent’s motion did not set forth substantial evidence of missing witnesses, evidence destroyed, and the like, to establish prejudice.” (*Aldrich, supra*, 170 Cal.App.3d at p. 740.) Appellants submitted to the trial court no evidence that would show Patel’s role in the transaction with Shamaan, what the substance and nature of Patel’s testimony would have been, whether Appellants had alternate sources of evidence, or how Appellants would suffer prejudice without Patel’s testimony.

B. The Trial Court Acted Within Its Range of Options.

When the legal criteria for extrinsic mistake based on misconduct of counsel are satisfied, the trial court’s range of options includes granting equitable relief from a judgment or dismissal. Because substantial evidence supported the trial court’s findings, the trial court acted within its range of options by relieving Shamaan of the dismissal.

We are, as was the Court of Appeal in *Seacall*, “aware of the tension between a policy which punishes the innocent client for the sins of his or her attorney and a policy which, in a sense, rewards the attorney for his or her incompetence.” (*Seacall*, *supra*, 73 Cal.App.4th at pp. 207-208.) The California Supreme Court in *Carroll*, *supra*, 32 Cal.3d at page 900, expressed concern over this tension and resolved it by holding the exception to the rule of imputed negligence was justified only by a “total failure on the part of counsel to represent the client,” due diligence by the party seeking relief, and lack of prejudice to the party opposing relief. The abandonment exception should be “narrowly applied,” the *Carroll* court explained, “lest negligent attorneys find that the simplest way to gain the twin goals of rescuing clients from defaults and themselves from malpractice liability, is to rise to ever greater heights of incompetence and professional irresponsibility while, nonetheless, maintaining a beatific attorney-client relationship.” (*Ibid.*)

Affirming the order granting equitable relief would not implicate the concerns raised by *Carroll* because the trial court made an express finding on each of the factors identified in that case for invoking the narrow exception to the rule of imputed negligence. Substantial evidence supported those findings. Nothing in the record suggests that Rucker engaged in positive misconduct or abandoned Shamaan in order to avoid his own malpractice liability. In granting equitable relief, the trial court acted within its range of options set forth by the legal criteria and therefore did not abuse its discretion.

DISPOSITION

The order granting equitable relief from dismissal is affirmed. Shamaan shall recover costs incurred on appeal.

Pursuant to canon 3D(2) of the California Code of Judicial Ethics, we hereby report Attorney Fred Rucker, former counsel for plaintiff and respondent Ihsan N. Shamaan, to the State Bar of California for his misconduct as described in this opinion.

The clerk of this court is directed to send copies of this opinion to the State Bar of California and to Mr. Rucker at his address listed by the State Bar.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.