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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JARVIS ENTERPRISES, INC.,

Plaintiff and Respondent,

v.

COAST METALS, INC.,

Defendant and Appellant.

G048734

(Super. Ct. No. 30-2012-00579513)

O P I N I O N

Appeal from a judgment and postjudgment order of the Superior Court of Orange County, Sheila Fell, Judge. Affirmed.

The Law Office of Rose Spellman, Inc., and Rose Spellman; Law Offices of N. Joe P. Inumerable and N. Joe Inumerable, for Defendant and Appellant.

Reed & Reed, APC, and Darren G. Reed for Plaintiff and Respondent.

The trial court determined Coast Metals Inc. (Coast) owed Jarvis Enterprises Inc. (Jarvis) money for scrap metal, and that Jarvis must return several metal bins to Coast once the money has been paid. On appeal, Coast asserts Jarvis is not the real party in interest, and the court abused its discretion in refusing to grant its motion to set aside the judgment based on evidence of excusable neglect. Finding both contentions meritless, we affirm the court's judgment and order denying the motion to set aside the judgment.

I

On March 12, 2012, Coast filed a small claims action against Orange Precision Metal to recover several metal bins (hereafter referred to as Case #1). Several weeks later, on April 3, 2012, Orange Precision Inc., filed a breach of contract action against Coast in superior court, alleging Coast orally agreed to purchase scrap metal and failed to pay for it (hereafter referred to as Case #2). The following month, on May 10, 2012, Coast filed a motion to dismiss Case #2 on the grounds Orange Precision Inc., was a suspended corporation and lacked authority to file the action.

On May 14, 2012, Orange Precision Inc.'s counsel, Natela Shenon, sent Coast's counsel a letter stating, "[I]t has just come to our attention that the [p]laintiff in this matter was erroneously named as Orange Precision Inc., when in fact Orange Precision [Inc.] is a d.b.a. of Jarvis Enterprises Inc., which is an active entity." Shenon filed a notice of errata with the court stating the true name of the plaintiff in the action was Jarvis Enterprises Inc. (Jarvis) and not "Orange Precision [Inc.]" Shenon apologized for the clerical error. Coast filed a motion to disqualify Shenon and requested sanctions.

On June 21, 2012, the trial court (Judge Kirk H. Nakamura) issued a minute order dismissing the case without prejudice and granting the motion to disqualify Shenon and the firm Treyzon & Associates. With respect to the dismissal, the court noted the parties agreed "Orange Precision, Inc." was a suspended entity that cannot prosecute or defend legal actions. The court concluded Jarvis could not replace Orange Precision Inc.,

because Jarvis “was a suspended corporation at the time the [c]omplaint was filed.” The court wrote in its minute order, “It can be reasonably inferred from the timing of the change from ‘suspended’ to ‘good standing’ status that Jarvis . . . was resurrected solely so that it could be substituted in as plaintiff in this action. However, Jarvis . . . is not the real party in interest. The true dba of Jarvis . . . is Orange Precision Metal Fabrication, not Orange Precision, Inc. . . . The allegations in the [c]omplaint are that [Coast] purchased scrap metal from Orange Precision, Inc., not from Orange Precision Metal Fabrication.” The superior court ordered Case #1 be returned to the small claims department to be heard.

Five days later, Jarvis “dba Orange Precision” filed a breach of contract complaint against Coast (hereafter Case #3), containing the same allegations as Case #2. Coast filed a general denial, raising several affirmative defenses such as res judicata. It also filed a “notice of related case” indicating Case #2 was dismissed. Case #3 was assigned to Judge Sheila Fell.

On the first day of trial, March 26, 2013, Coast’s counsel, Thomas R. Chapin requested a continuance. He explained Coast’s president, Igor Khodorkovsky, was sick and the only witness available was Coast’s production manager, Adrian Manriquez. Chapin stated he did not know what was wrong with his client or whether he had been hospitalized. Chapin stated, “[H]e’s just a disconnect, he’s disappeared. . . .”

The court replied, “But what I had indicated yesterday when you said he was not well was that I needed some sort of a doctor’s note or some sort of explanation or an admission slip from the hospital.” Chapin stated he was not able to get a doctor’s note because he was unsure about his client’s location and the last contact he had with Khodorkovsky was the “morning yesterday.” The court denied the continuance request.

Chapin submitted a \$58,000 invoice, stating it represented the amount Coast owed. Next Chapin stipulated there were documents showing \$30,000 was wire

transferred to a company in the Caribbean to pay the invoice. Chapin submitted the lawsuit was actually a dispute over \$28,000.

The trial started and Jarvis's counsel, Darren G. Reed called Boris Katz to the witness stand. Katz testified he worked for Orange Precision Inc., buying and selling scrap metal. Katz stated Jarvis is the same business as Orange Precision Inc. He recalled doing business with Coast for over two years and Coast owed Jarvis \$28,394.

On cross-examination, Katz stated scrap metal customers mostly made cash payments but sometimes he would receive checks or wire transfers. He remembered Jarvis continued doing business with Coast for several months after Khodorkovsky failed to pay the invoice in dispute, and all subsequent invoices were paid with cash or checks.

Katz admitted he kept three of Coast's bins that were used to pick up scrap metal. Katz explained he intended to return the bins after Khodorkovsky paid his bill. Katz stated his company was sued in small claims court for return of the bins (Case #1). He estimated the three bins were worth approximately \$5,000. Katz stated he did not know whether his company attempted to sue Khodorkovsky and Coast in another lawsuit.

At the close of Jarvis's case, Chapin moved to dismiss the lawsuit on the grounds of collateral estoppel. He explained Judge Nakamura dismissed Jarvis's prior action (Case #2) on the grounds Jarvis was not the real party in interest. Judge Fell replied, "Okay, so far nobody has introduced that, anything about that. . . ." Chapin asked the court to take judicial notice of Judge Nakamura's prior ruling involving the same parties. The court deferred ruling on the issue, stating the parties should present argument on this point at the end of trial.

The case proceeded with Coast's sole witness, Manriquez. He had worked as Coast's production manager for over five years. Manriquez was responsible for shipping and receiving, sales, managing yard workers, and other office duties. Manriquez stated he recognized Katz, who had visited Coast's facilities. He recalled overhearing Katz and Khodorkovsky discuss the preferred method of payment.

However, he had never heard of Orange Precision Metal Fabrication or Jarvis.

Manriquez stated that to his knowledge, Khodorkovsky always paid his customers on time. Manriquez stated he received no telephone calls seeking payment of the disputed \$28,000.

During closing arguments, Reed stated Case #2 was dismissed without prejudice and, therefore, there was no collateral estoppel or res judicata issue. The issue of who was the real party in interest was not litigated. As for the breach of contract action, Reed asserted there was no evidence presented suggesting any of the money owed was paid.

Chapin argued Case #2 was dismissed for two reasons. First, Jarvis and Orange Precision Inc. were suspended corporations at the time of litigation. Second, Judge Nakamura determined Jarvis was not a real party in interest because its dba was Orange Precision Metal Fabrication and they had sued using a different name, Orange Precision, Inc. With respect to the underlying breach of contract claim, Chapin asserted there was ample evidence of payment because it was the custom and practice of the business to pay in cash, and there was no prior notification money was owed before Jarvis sued.

The court questioned the parties about whether Jarvis was the proper plaintiff in the dispute. Reed acknowledged the invoice stated "Orange Precision Metals" but claimed "there was no dispute as to who was doing the business." Chapin stated the invoice proves Orange Precision Metal Fabrication is a different entity from the one bringing the lawsuit and this was the reason why Judge Nakamura dismissed Case #2.

The court disagreed stating, "The problem is the invoice was prepared by your client [Coast]. If your client got the name wrong it's not really the plaintiff's problem." Chapin replied there had been no evidence regarding Katz's "position in the company" or proving "he's actually a principal, they receive all payments for the company, or anything along those lines." The court countered, "Nobody asked him."

The court took the matter under submission. The following day, it issued a minute order awarding Jarvis \$28,394. On April 25, 2013, the court entered a judgment awarding \$28,394 plus \$560 in costs (total \$28,954), and ordered Jarvis to return the bins to Coast upon payment of the judgment.

Coast retained new legal counsel. On May 10, 2013, Coast moved to set aside the judgment pursuant to Code of Civil Procedure section 473.¹ Coast argued it did not have an opportunity to defend itself because its president, Khodorkovsky, was incapacitated and unable to appear at trial due to an illness. It submitted a medical certificate stating Khodorkovsky was under the medical care of Dr. Max Ghannadi for the medical condition of having a “kidney stone with severe back pain.” The doctor’s note stated Khodorkovsky could “return to work in 2 weeks or when he feels better.” Khodorkovsky declared that based on his doctor’s diagnosis on March 22, 2013, he advised his trial counsel on Monday morning, March 25 the trial should be continued because he was in too much pain to go to court.

In the motion, Coast maintained the court held the hearing “having before it solely Jarvis’s documents and witnesses” and erroneously determined Coast did not meet its burden of proving it made payment of the balance in dispute. On this basis, Coast asked the court to set aside the judgment.

The court denied the motion, stating in its minute order there was no “competent evidence” of Khodorkovsky’s illness. On the record, the trial court reminded counsel that it trailed the matter for one day to give Khodorkovsky an opportunity to produce a doctor’s note. Khodorkovsky failed to do so, and the medical certificate attached to the section 473 motion was “not good enough.” The court stated the note was

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

signed by the office manager, not a doctor. The court explained the note needed to be from someone who could give an actual diagnosis.²

II

Coast raises two issues on appeal. First, Coast asserts the trial court erred in refusing to dismiss the case knowing the prior judgment dismissed an identical case on the basis Jarvis was not the real party in interest. Second, Coast maintains it was an abuse of discretion not to vacate the judgment on the basis of excusable neglect under section 473. We conclude both arguments lack merit.

A. Real Party in Interest

Coast asserts that because the facts are undisputed we must review de novo whether the case was filed by someone other than the real party in interest and it must be dismissed. Citing section 367, Coast explains every action must be prosecuted by the real party in interest, and “a general demurrer lies” if the plaintiff is not the real party in interest. In its brief, Coast also provides a general legal definition of who may qualify as a real party in interest.

Following this brief discussion of legal authority, Coast provides this court the following six sentences of legal analysis regarding why the case must be reversed: “A [d]emurrer [l]ies as a [m]atter of [l]aw. Judge Nakamura’s ruling was issued on June 21, 2012, and is now final and firm, as Jarvis did not appeal the [j]udge’s factual determination that as to [Coast], Jarvis is not the real party in interest. In the [j]udge’s words, ‘It can reasonably be inferred from the timing of the change from “suspended” to “good standing” status that Jarvis . . . was resurrected solely so that it could be substituted in as plaintiff in this action. However, Jarvis . . . is not a real party in interest.’ . . . [¶] The record shows that the Judge [Fell] did not even remember the filing of the [n]otice of

² We note the medical note Khodorkovsky relied on below and on appeal is not included in the appellant’s appendix. Respondent provided us with a complete copy of the section 473 motion and the office manager’s medical note in its appendix.

[r]elated [c]ase indicating the aforementioned facts. The case should be dismissed.”
(Underline and bold emphasis omitted.)

In a nutshell, Coast is asserting on appeal that the current action should have been dismissed (via a demurrer) because the trial judge in a prior action determined Jarvis was not the real party in interest. Certainly a court may preclude the relitigation of claims and issues pursuant to the principles of res judicata or collateral estoppel. And we see the record shows Coast raised the issue of collateral estoppel during the trial. However, Coast offers no authority or analysis to support its assertion the trial court erred in rejecting the collateral estoppel defense. Moreover, Coast’s assertion a “[d]emurrer [l]ies as a [m]atter of [l]aw” is puzzling given that our record contains no indication Coast filed a demurrer raising the issues of collateral estoppel or res judicata.

One of the most fundamental rules of appellate review is that the appealed judgment or order is “presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness.” (*Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 718; *State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610.) Error must be affirmatively shown. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

The appellant has the burden to overcome the presumption of correctness. An appellant meets this burden in two ways. First, the appellant must provide this court with an adequate appellate record demonstrating the alleged error. Failure to provide an adequate record on a particular issue requires that the issue be resolved against the appellant. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296.)

Second, an appellant has the obligation to present argument and legal authority on each point raised. “This requires more than simply stating a bare assertion that the judgment, or a part of it, is erroneous and leaving it to the appellate court to figure out why.” (Eisenberg, et al., *Cal. Practice Guide: Civil Appeals and Writs* (The Rutter Group 2003) ¶ 8:17.1, pp. 8-5 to 8-6.) “[I]t is not the appellate court’s role to

construct theories or arguments that would undermine the judgment and defeat the presumption of correctness.” (*Id.* at p. 8-6.) When the appellant asserts a point but fails to support the point with reasoned argument and citations to authority, the appellate court may treat the point as waived and pass it without consideration. (*Ibid.*, citing *Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416; *People v. Stanley* (1995) 10 Cal.4th 764, 793; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.)

Coast offers no authority or analysis to support its contention the prior ruling controls in this case or Judge Fell erred in this case by failing to sustain a demurrer (not contained in our record) and denying the dismissal request. We deem the issue waived by the failure to cite to or discuss any relevant legal authority regarding collateral estoppel, res judicata, or demurrers.

B. Section 473

In determining whether to grant relief from default under section 473, subdivision (b), for “mistake, inadvertence, surprise, or excusable neglect,” courts should inquire whether “““a reasonably prudent person with no special skill or training under the same or similar circumstances might have made such an error.”” [Citation.]” (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 258.) But courts are not “guardians for those who are grossly careless with their affairs.” (*Conway v. Municipal Court* (1980) 107 Cal.App.3d 1009, 1018.) Accordingly, mistake, inadvertence, surprise, or neglect will only justify relief if “upon consideration of all of the evidence it is found to be of the excusable variety.” (*Id.* at p. 1017.) Of course, the party seeking relief under section 473 bears the burden of establishing that the mistake, inadvertence, surprise, or neglect “that led to his default was excusable.” (*Ibid.*) We review the trial court’s order either granting or denying section 473 relief from default under an abuse of discretion standard. (*Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 897-898.)

Coast asserted its president, Khodorkovsky, was incapacitated and could not appear at trial because he was ill. On appeal, Coast provides case authority holding an “incapacitating illness of counsel” may constitute excusable neglect. (Citing *Transit Ads, Inc. v. Tanner Motor Livery, Ltd.* (1969) 270 Cal.App.2d 275, 280 [excusable neglect if counsel moves promptly for relief].) It also provides several old dusty cases holding a court may set aside a default judgment entered during a defendant’s illness. (*Patterson v. Keeney* (1913) 165 Cal. 465; *Salsberry v. Julian*, (1929) 98 Cal.App. 638; *The Fink & Schindler Company v. Gavros* (1925) 72 Cal.App. 688.) And finally, Coast asserts there is one case on point—*Pacific Gas & Electric Co. v. Taylor* (1921) 52 Cal.App. 307 (*Pacific*). However, *Pacific* did not concern section 473 motions. It held the trial court abused its discretion in refusing to grant a continuance due to defendant’s absence in an eminent domain action. Defendant’s attorney had filed a declaration attesting his client was detained in Boston due to a serious illness and that he had gone to Boston for important business before the case had been set for trial. (*Pacific, supra*, 52 Cal.App. at p. 308.)

None of the above authority is relevant. The court denied both the continuance and the section 473 motion due to the lack of evidence of an incapacitating illness. Coast’s legal authority and briefing fails to address this legal scenario. Was it an abuse of discretion for the court to deny the motion due to lack of evidence of excusable neglect? We think not.

We conclude the trial court correctly gave Coast one day to produce a doctor’s note regarding Khodorkovsky’s condition. Coast’s counsel arrived the next day without a note or any personal knowledge of his client’s whereabouts or type of illness. After trial, Coast’s section 473 motion contained Khodorkovsky’s declaration and a medical note both discussing a kidney stone medical condition. The court reasonably concluded the note was not sufficient evidence of illness because it was not signed by a doctor. It was issued by an office manager, who indicated Khodorkovsky was being

treated for a kidney stone who recommended rest from March 22, 2013 (four days before trial occurred) to April 5, 2013. There was no explanation offered as to why a doctor's note could not have been timely provided to the trial court on March 25 or March 26.

Khodorkovsky's declaration and his counsel's representations to the court were conflicting. Khodorkovsky said he told counsel about his debilitating medical condition. Chapin told the court he had no idea what was wrong with his client, where he was, or whether Khodorkovsky was being treated. The court could reasonably find Khodorkovsky's declaration lacked credibility and was self serving. And it cannot be said the court abused its discretion in determining the office manager's note was inadequate evidence of an incapacitating illness. We affirm the court's ruling.

III

The judgment and postjudgment order are affirmed. Respondent shall recover its costs on appeal.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

ARONSON, J.