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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

D/K MECHANICAL CONTRACTORS,
INC., et al.,

Plaintiffs and Appellants,

v.

MICHAEL JAY BERGER,

Defendant and Respondent.

G049340

(Super. Ct. No. 30-2012-00603143)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, David R. Chaffee, Judge. Affirmed.

Shulman Hodges & Bastian, Ronald S. Hodges and J. Ronald Ignatuk for Plaintiffs and Appellants.

Law Offices of Michael Jay Berger and Michael Jay Berger for Defendant and Respondent.

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Plaintiffs and appellants D/K Mechanical Contractors, Inc. (D/K), DGB Contractor Services, Inc. (DGB), and BGD Enterprises, Inc. (BGD; collectively plaintiffs) obtained a \$10 million default judgment against defendant and respondent Michael Jay Berger. The court granted defendant's motion to set aside the default and the default judgment, the former pursuant to the court's equitable powers and the latter under Code of Civil Procedure section 473, subdivision (b) (section 473(b)). Plaintiffs appeal, arguing defendant did not show a meritorious defense or the required elements for equitable relief.

We conclude the court did not abuse its discretion in setting aside the default or the default judgment and therefore affirm the order.

FACTS AND PROCEDURAL HISTORY

Plaintiffs were related companies in the construction industry. D/K and DGB were mechanical contractors and BGD owned title to some of the vehicles the other two plaintiffs used. In October 2011, D/K or DGB or both were parties to about 50 contracts with a contract value over \$100 million. All their vendor invoices were paid current and they were not in default on any of their contracts. D/K's line of credit had just recently been increased from \$3.5 to \$4.4 million.

At that time, because of a short term cash flow problem, plaintiffs were concerned about whether they could meet a \$500,000 obligation to labor unions which was due in the next several weeks. Therefore they consulted with defendant, a certified bankruptcy specialist, as to whether bankruptcy would solve the problem. Defendant represented to plaintiffs he had experience handling construction companies, and their relationships with unions and bonding companies, and that he understood the consequences of plaintiffs filing bankruptcy.

After being retained by plaintiffs, defendant filed chapter 11 petitions for D/K and DGB and a chapter 7 petition for BGD. Five days thereafter, plaintiffs substituted in their current counsel, who filed motions to dismiss the bankruptcies.

Plaintiffs state they were severely damaged by the bankruptcy filings. Almost all the contracts to which they were parties, including loan agreements and surety bonds, went into default as a result. Payments under contract began being paid to the surety company, and all parties with whom plaintiffs had contracts had the right to terminate. Two multimillion dollar contracts for which plaintiffs had successfully bid were not consummated because plaintiffs could not obtain a surety bond. Plaintiffs claimed additional damages.

In October 2012 plaintiffs filed suit alleging causes of action for breach of contract, legal malpractice, and fraud, seeking damages in excess of \$10 million and restitution of payments to defendant. Defendant was personally served on October 15. On November 13, the day before the answer was due, plaintiffs' lawyer granted defendant a two-week extension to answer, making a response due on November 21. When defendant did not answer, on December 4 default was entered. On December 20, plaintiffs' counsel informed defendant he could not stipulate to set aside his default.

On February 15, 2013, plaintiffs filed their documents to prove up the default judgment. After an evidentiary hearing in June, in July the court entered a default judgment in favor of D/K for just over \$4 million, in favor of DGB for just over \$6 million, and in favor of BGD for \$410 (collectively \$10 million judgment).

In August defendant filed a motion to set aside the default and judgment. In his declaration, defendant stated that on December 4 he personally tried to file a demurrer to the complaint at the filing window. It was refused because e-filing was required. He instructed his paralegal to e-file the demurrer. On December 7 the court clerk notified him his e-filed demurrer had been rejected because his filing fee was insufficient.

Defendant further declared he had "good defenses" to the complaint, stating he had performed everything required of him under the fee agreements and believed filing the bankruptcy had been in plaintiffs' best interest. He stated that he decided not to

file a motion to set aside the default but wait until a judgment was entered. He pointed out plaintiffs had delayed seeking the \$10 million judgment.

Defendant admitted making several mistakes, being surprised, and “perhaps committed excusable neglect,” although not inexcusable neglect, in defending the action. These included trying to file the demurrer at the window instead of e-filing, the insufficient fee when e-filing, his belief plaintiffs’ counsel would stipulate to set aside the default, and waiting to file one motion, rather than having to bring a second if judgment was entered while his first motion was pending. He stated he was a bankruptcy lawyer without expertise in state civil litigation.

In opposition, plaintiffs argued the court lacked jurisdiction under section 473(b) because defendant waited more than six months to file his motion. Further, they claimed defendant had not shown diligence or mistake, surprise, inadvertence, or excusable neglect.

In his declaration in reply to the opposition, defendant attached a copy of plaintiffs’ authorization to file bankruptcy stating D/K and DGB could not pay their debts as they came due; a list showing millions of dollars plaintiffs owed to their unsecured creditors; and a list showing almost \$4.5 million in overdue accounts payable for D/K and \$2.5 million owed by DGB. In addition he stated plaintiffs owed over \$800,000 on union contracts.

Defendant also argued he should be granted equitable relief; the clerk should have filed his demurrer at the counter because he was in propria persona; plaintiffs filed false declarations as to their financial condition to prove up the \$10 million judgment; plaintiffs’ expert regarding the standard of care was their lawyer; his delay in filing the motion until after the \$10 million judgment was entered was a mistake of law; plaintiffs improperly delayed in securing the \$10 million judgment; because he was an attorney, he could file an affidavit of fault; and his conduct was excusable based on the severe anxiety the action had caused.

The court found the motion to set aside the \$10 million judgment was timely, but as to the default, it had no jurisdiction to set it aside under section 473(b) because the motion was filed more than six months after default had been entered. Given the amount of the \$10 million judgment, the court was considering setting aside the default on equitable grounds.

After supplemental briefing on that issue, the court granted defendant's motion. It set aside the \$10 million judgment under section 473(b) based on defendant's excusable neglect. As to the default, it found there was no extrinsic fraud but defendant had "arguably show[n] extrinsic mistake."

In support of the order the court relied on the following factors: The \$10 million judgment; as a matter of courtesy plaintiffs should have warned defendant they were taking his default; and defendant was only two weeks late in attempting to file his demurrer, not a "significant" delay. Further, plaintiffs refused to stipulate to set aside the default after defendant's prompt request.

In addition, defendant appeared to have a meritorious defense. Based on plaintiffs' complex financial situation, attorneys could reasonably give different advice. Further, because the case is fresh plaintiffs will still have access to the evidence necessary to try it.

The court was concerned about defendant's admittedly "[q]uestionable [j]udgment" in delaying the filing of his motion to set aside the default, based on his belief judgment would be entered immediately so that he could file one motion. It gave some credence to plaintiffs' argument that defeated the requirements of both diligence and a reasonable excuse for delay, noting in other circumstances it might defeat the motion. But based on the amount of the \$10 million judgment and after "[w]eighing the totality of the circumstances," the court determined trial on the merits was warranted and exercised its discretion to set aside the default and the \$10 million judgment.

DISCUSSION

1. Introduction

Under section 473(b), the court may set aside a default or a default judgment within a reasonable time, but no later than six months after it was entered, based on a defendant's "mistake, inadvertence, surprise, or excusable neglect." The six-month period is mandatory. (*Manson, Iver & York v. Black* (2009) 176 Cal.App.4th 36, 42.) After the six-month period has lapsed, the court may grant equitable relief from default based on extrinsic fraud or extrinsic mistake. (*Id.* at p. 47.) We review the order granting relief from the default and the default judgment for abuse of discretion. (*Id.* at p. 42.)

2. The Elements for Equitable Relief Were Established.

The court based its finding of equitable relief on extrinsic mistake. "“Extrinsic mistake involves the excusable neglect of a party. [Citation.] When this neglect results in an unjust judgment, without a fair adversary hearing, and the basis for equitable relief is present, this is extrinsic mistake. [Citation.]”” (*Moghaddam v. Bone* (2006) 142 Cal.App.4th 283, 290.) To recover on this basis defendant must show three elements: 1) a meritorious defense; 2) an adequate excuse for failing to defend the action; and 3) after discovery of the default, diligence in seeking to set it aside. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 982; *Rappleyea*.) The court found defendant had met these requirements and we see no basis for reversal.

As to the meritorious defense, defendant stated he had performed what was required in the retainer agreement and believed bankruptcy was the best course of action for plaintiffs. He produced evidence of millions of dollars plaintiffs owed creditors and plaintiffs' bankruptcy documentations where they stated they could not pay their debts as they came due.

The court found reasonable attorneys could differ as to the best course of action to be taken on plaintiffs' behalf, given their complex financial situation. "We will

not disturb the trial court's determination of controverted facts. [Citation.]" (*Purdum v. Holmes* (2010) 187 Cal.App.4th 916, 922.) The court did not abuse its discretion in finding defendant had shown a meritorious defense.

We also concur defendant sufficiently met the other two elements, i.e., an adequate excuse for failing to defend the case and diligence in seeking to set aside the default upon learning of it. When defendant sought an extension to respond, plaintiffs granted him two weeks. Defendant had logistical problems trying to file his demurrer based on the e-filing requirement and confusion over filing fees. Two weeks after the due date, plaintiffs took defendant's default without warning. As the court noted, although there is no legal duty, there is an ethical duty to notify counsel before requesting entry of default. (*Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 701, 702.) And while failure to warn does not require a court to set aside the default, it is a strong factor falling on the side of relief. "“The quiet speed of plaintiffs' attorney in seeking a default judgment without the knowledge of defendants' counsel is not to be commended.” [Citations.]” (*Id.* at p. 701.)

Plaintiffs stress that defendant does not explain the gap between the due date and the date he attempted to file his demurrer. We agree with the court that, under the circumstances of this case, a two-week delay in filing a response is not unreasonable.

When defendant learned of the default, he promptly contacted plaintiffs, asking they stipulate to set it aside. Plaintiffs refused to do so, despite the fact the default had just been entered. (*Rogalski v. Nabers Cadillac* (1992) 11 Cal.App.4th 816, 822 [a stipulation to set aside the default would have averted any of the plaintiff's alleged prejudice].) Again, while plaintiffs were not required to set it aside, the court did not err in considering this factor.

The court was concerned that, believing judgment was “imminent,” defendant waited to file his motion to set aside the default until after judgment was entered to avoid having to file two motions. Defendant admitted this was a mistake and

we cannot disagree. Plaintiffs justifiably argue this admitted delay discredits defendant's argument he met the two elements of diligence and reasonable excuse.

But in reviewing the record we do not see that the court abused its discretion in electing to set aside the default and judgment in spite of this mistake.

We are not persuaded by the cases on which plaintiffs rely to support their claim defendant did not satisfy the diligence and reasonable excuse elements. In each of them there was no, or merely a perfunctory, explanation of excuse or diligence.

(*Schwartz v. Smookler* (1962) 202 Cal.App.2d 76, 83 [other business in the office]; *Fallon & Co. v. United States Overseas Airlines, Inc.* (1961) 194 Cal.App.2d 546, 550 [defendant's "almost a complete indifference" to the matter]; *Benjamin v. Dalmo Mfg. Co.* (1948) 31 Cal.2d 523, 526 [three-and-a-half-month delay not explained].)

Cruz v. Fagor America, Inc. (2007) 146 Cal.App.4th 488, 503 held there was an abuse of discretion in setting aside the default because there was nothing in the record supporting the court's findings of an adequate defense and diligence in seeking relief. Here, by contrast, the court made extensive findings about both.

Finally, plaintiffs will not be prejudiced by setting aside the default and judgment. (*Fasuyi v. Permatex, Inc., supra*, 167 Cal.App.4th at p. 695.) Merely having to try the case is no more than would otherwise be required.

We reject plaintiffs' argument the court acted arbitrarily or capriciously in setting aside the default because defendant did not meet these three criteria. While the court acknowledged the reasonableness of certain of plaintiffs' arguments, it carefully weighed the evidence and balanced plaintiffs' arguments against defendant's. It came down on the side of defendant. Although there is a policy that supports the finality of judgments (*Rappleyea, supra*, 8 Cal.4th at p. 982), there is an equally strong if not stronger policy favoring trial on the merits (*id.* at p. 980). "[A]ny doubts in applying section 473 must be resolved in favor of the party seeking relief from default [citations]." (*Ibid.*) The remedy under section 473(b) is "highly favored and is liberally

applied.’ [Citation.]” (*Fasuyi v. Permatex, Inc.*, *supra*, 167 Cal.App.4th at p. 696.) The court did not abuse its discretion.

3. The Remaining Arguments Do Not Support Reversal.

Plaintiffs quibble over some of the grounds on which the court relied, i.e., the size of the judgment; plaintiffs’ failure to warn defendant they would take his default; defendant’s attempt to obtain a stipulation to set aside the default and plaintiffs’ refusal to do so; the judgment could be set aside under section 473(b); and judgment was recent. They claim they found no case where these factors were sufficient without the requisite showing of the three necessary elements. But the relief the court granted was equitable, and it was proper to consider a wide variety of factors.

Plaintiffs also argue they did not perpetrate a fraud on the court as to the timing of the dissolution of DGB or by filing a false declaration in support of the prove-up. The court did not find fraud or rely on these arguments for setting aside the default, and neither do we.

Plaintiffs further contend defendant is not entitled to mandatory relief under section 473(b) based on attorney mistake or neglect because that provision does not apply to an attorney appearing in propria persona. But the court did not rely on the mandatory relief provisions of section 473(b) either.

Finally, while acknowledging neither the court nor defendant relied on this ground, plaintiffs argue the amount of the judgment did not exceed damages requested in the complaint. Since this is not the basis of the court’s order, we have no need to address this argument.

DISPOSITION

The order is affirmed. Defendant is entitled to costs on appeal.

THOMPSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.