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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

OLD REPUBLIC INSURANCE
COMPANY,

Plaintiff and Appellant,

v.

SHIRLEY MECWAN, et al.,

Defendants and Respondents.

G051202

(Super. Ct. No. CIVRS802268)

O P I N I O N

Appeal from an order of the Superior Court of San Bernardino County,
Pamela P. King, Judge. Affirmed.

Hollinslaw and Ronnie Chow, for Plaintiff and Appellant

No appearance for Defendants and Respondents

* * *

Plaintiff and appellant Old Republic Insurance Company (Old Republic) appeals from an order denying its motion for relief under Code of Civil Procedure section 473, subdivision (b) (section 473(b)) from the allegedly mistaken filing of a notice of satisfaction of judgment in favor of defendant Shirley Mecwan. We affirm.

As we will explain, Old Republic is not entitled to relief under the mandatory provision of section 473(b) because that provision does not apply to an acknowledgment of satisfaction of judgment. Further, Old Republic is not entitled to relief under the discretionary provision of section 473(b) because the court did not abuse its discretion by rejecting Old Republic's excusable neglect claim.

FACTS

On June 24, 2014, Old Republic filed a notice of full satisfaction of judgment, identifying the judgment debtor as "Shirley Mecwan" at a specified address. A month later, Old Republic filed a motion (motion) pursuant to section 473(b), seeking to set aside the notice of satisfaction of judgment. The motion sought relief on the basis of attorney error and excusable neglect.

The motion was supported by a declaration which recited Old Republic filed the notice of satisfaction of judgment as a result of clerical error. Shirley Mecwan had not satisfied the judgment Old Republic had obtained against her. Instead, it was her codefendant, Jaykumar Mecwan, who had *settled* with Old Republic and then made the payments required under the settlement agreement.

The declaration explained it was "the two debtors with the same last name, one who entered into a settlement and dutifully made payment and one who defaulted, [that] caused confusion and resulted in our mistake." Similarly, the points and authorities filed in support of the motion argued Old Republic "mistakenly filed an Acknowledgment of Satisfaction of Judgment *for the entire case* when J. Mecwan's final payment was made on the settlement." (Italics added.)

No opposition was filed.

At the hearing, the court noted the motion was the *third time* Old Republic had sought relief from an act that released Shirley Mecwan from the case: “On the first occasion you indicate that the prior counsel had not obtained the consent of the plaintiff when they filed the request for dismissal relative to Shirley Mecwan on 9/18/08. And so on April 29 of ’09, based on the representations of counsel, the Court granted relief pursuant to 473. [¶] Then on June 12 of ’09, another request for dismissal of the entire action was filed by your office. [¶] And then in October of ’09, your office filed a motion to set aside the dismissal. . . . [¶] . . . [T]he Court granted your motion under section 473. [¶] So now we are back again for a third time. And now you’re asking the Court to set aside the satisfaction of judgment that was filed on June 24th.”

The court pointed out the notice of acknowledgment is “not ambiguous as to who you intended to have it apply to. The only defendant listed is Shirley Mecwan. Jaykumar Mecwan is not listed.” The court concluded it could not find excusable neglect under those circumstances. “If I found excusable neglect in this instance, I would have to acknowledge that essentially there’s no such thing as inexcusable neglect. And I think this pushes the envelope too far. I can’t see where the interest of justice and excusable neglect justify the Court setting this aside.”

DISCUSSION

Old Republic first contends it was entitled to relief under the mandatory provision of section 473(b) which states: “Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney’s sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney’s mistake, inadvertence, surprise, or neglect.”

However, the mandatory relief provision does not apply unless the attorney's error resulted in a default, a default judgment or a dismissal. (*English v. IKON Business Solutions, Inc.* (2001) 94 Cal.App.4th 130.) Old Republic does not address this point squarely, and instead cites *Cason v. Glass Bottle Blowers Ass'n of United States and Canada* (1952) 113 Cal.App.2d 263 (*Cason*), for the proposition that "[a] satisfaction of judgment, which had been filed and entered, may be set aside by appropriate proceedings for proper cause." We agree with that general proposition, but *Cason* says nothing about obtaining such relief under the mandatory relief provision of section 473(b), which was enacted in 1991, nearly 40 years after *Cason* was decided. (Stats. 1991, ch. 1003, § 1 p. 4662; *Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 682.)

Old Republic next contends it was entitled to relief under the discretionary mandatory provision of Section 473(b) which states: "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." (Italics added.) Under this provision, "the court inquires whether 'a reasonably prudent person under the same or similar circumstances' might have made the same error." (*Bettencourt v. Los Rios Community College Dist.* (1986) 42 Cal.3d 270, 276.) But, "[a] ruling on a motion for discretionary relief under section 473 shall not be disturbed on appeal absent a clear showing of abuse." (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 257.)

Old Republic has made no clear showing of abuse here. The court either determined the notice of satisfaction of judgment was not a mistake, or it was a mistake but it was not excusable. Neither determination constitutes an abuse of discretion. As to the former, Old Republic has failed to even address the court's apparent skepticism about the credibility of its claim of mistake. Nowhere does Old Republic acknowledge on appeal that the notice of satisfaction of judgment it seeks relief from represented the *third time* it released Shirley Mecwan from this litigation, always purportedly by mistake.

Nor does Old Republic satisfactorily explain, either at the trial level or on appeal, how it came to file a notice of satisfaction which identified Shirley Mecwan specifically, if it had not intended to at least include her in the notice. In the trial court, Old Republic simply characterized its notice as acknowledging a “[s]atisfaction of [j]udgment for the entire case” – as though its mistake had been in the use of overly generic phrasing, when the opposite was true.

In this court, Old Republic claims that when Jaykumar Meckwan completed his settlement payments, “counsel was unaware judgment was entered against S. Mecwan in 2010. Counsel who filed the Acknowledgment of Satisfaction was not the same counsel who entered judgment or the one who was handling this file in 2010 [and] made a clerical error by failing to realize judgment was entered against a *different* MECWAN, i.e., S. MECWAN, rather than J. MECWAN.”

This argument does not explain why, if the attorney overseeing completion of Jaykumar Mecwan’s settlement did not know the judgment against Shirley Mecwan even existed, he believed it necessary to file a satisfaction of judgment at all. A notice of satisfaction of judgment is generally not required to complete a settlement. And if the attorney was unaware of the judgment against Shirley Mecwan, why was she – and not Jaykumar Mecwan – the only defendant named in the notice of satisfaction of judgment?

Under these circumstances, the court did not abuse its discretion by disbelieving Old Republic’s claim of mistake. As this court noted in *Johnson v. Pratt & Whitney Canada, Inc.* (1994) 28 Cal.App.4th 613, the trial court is free to disbelieve counsel’s declaration in support of a motion under section 473(b), and we are bound by that determination on appeal. “Credibility is an issue for the factfinder.” (*Id.* at p. 622.)

Likewise, we cannot say the court abused its discretion by finding the alleged mistake was not excusable under the reasonably prudent person standard. By the time Old Republic filed the subject notice of satisfaction of judgment, it had already mistakenly dismissed Shirley Mecwan from this lawsuit, not once but twice.

Having thus twice avoided apparent disaster, a reasonably prudent person would have paid close attention to Shirley Mecwan's status as a judgment debtor. And yet according to Old Republic, it was the very fact the judgment against Shirley Mecwan had been forgotten that caused its claimed error in filing the notice of satisfaction of judgment. Under these circumstances, the trial court did not err in denying relief.

DISPOSITION

The order is affirmed. As Shirley Mecwan has made no appearance on appeal, no costs are awarded.

THOMPSON, J.

WE CONCUR:

ARONSON, ACTING P. J.

IKOLA, J.