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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

FRESNO TRUCK CENTER,

Plaintiff and Respondent,

v.

DMITRIY KSENDZOVSKY,

Defendant, cross-Complainant and
Appellant;

LEE FINANCIAL SERVICES,

Cross-defendant and Respondent.

H041019

(Santa Clara County

Super. Ct. No. 111-CV212489)

Dmitriy Ksendzovsky appeals from a judgment entered against him and his business, Iwerty, Inc. (Iwerty), arising out of Iwerty's failure to pay for trucks purchased from plaintiff Fresno Truck Center (Fresno) through Fresno's affiliate, Golden Gate Truck Center (Golden Gate) and Fresno's financing company, Lee Financial Services (Lee). Representing himself on appeal, as he did throughout the proceedings below, appellant contends that the court abused its discretion in (1) granting summary judgment to Fresno on Fresno's complaint for breach of contract and (2) granting summary adjudication to Golden Gate and Lee on appellant's cross-complaint against them. Appellant further asserts abuse of discretion in the court's denial of his motion to vacate

the judgment under Code of Civil Procedure section 473.¹ We find no error and therefore affirm the judgment.

Background

On July 26, 2010, Iwerty purchased three “Freightliner” trucks from Golden Gate through Lee, the financing company for both Golden Gate and Fresno. In addition to signing the “Retail Installment Contract – Security Agreement” on behalf of the corporation, appellant signed a personal guaranty for the payment of Iwerty’s debt. The total deferred payment price for the three trucks and associated charges was \$314,567.76.

By September 20, 2011, Iwerty was in default on its monthly installment payments. After two default notices sent to both Iwerty and appellant, Lee notified Iwerty that the trucks would be sold at a private sale on December 31, 2012. That month the trucks were repossessed, but none was sold at the private sale.

Meanwhile, Fresno brought this action against both Iwerty and appellant on November 3, 2011, alleging breach of the security agreement by Iwerty, breach of the guaranty by appellant, and conversion against both defendants.² Appellant did not answer the complaint. His default was entered in February 2012, and on April 3, 2012, default judgment was entered. Appellant successfully moved to set aside the judgment, however, and on June 7, 2012, he answered the complaint.

On July 25, 2012, appellant filed a cross-complaint. After demurrers were twice sustained, Golden Gate and Lee answered the second amended complaint. Trial was set for January 13, 2014.

On September 19, 2013 Lee assigned all of its rights under the contracts to Fresno. The amount claimed to be due at that time was \$226, 635.18. On September 23, 2013, Fresno moved for summary judgment on its complaint, and the next day Golden Gate and

¹ All further statutory references are to the Code of Civil Procedure except as otherwise indicated.

² Fresno later obtained a voluntary dismissal of the conversion claim.

Lee moved for summary adjudication of the amended cross-complaint. Both motions were set for hearing on December 12, 2013. Instead of filing a timely opposition to these motions, however, appellant moved for judgment on the pleadings on November 20, 2013, to be heard the same day as the previously set hearing. On November 27, 2013—the deadline for filing opposition to the summary judgment and summary adjudication motions—appellant applied *ex parte* for an order vacating and striking those motions, or alternatively, to shorten time for such a motion. That application was denied the same day.

On December 2, 2013, Fresno filed a “Notice of Non-Opposition” of Iwerty and appellant to its summary judgment motion. Cross-defendants Golden Gate and Lee filed a similar notice that appellant had not opposed their motion for summary adjudication. On December 6, 2013, appellant filed opposition to the motions, without leave of the court. On December 12, 2013, without considering the untimely opposition, the court granted both of the motions and denied appellant’s motion for judgment on the pleadings.

On February 3, 2014, appellant filed “Opposition to Case Dismissal and Entry of Summary Judgment,” asking the court to delay entry of judgment to enable him to file a motion to vacate the summary judgment and summary adjudication orders under sections 473, subdivision (b), and 473.1, based on “mistake, inadvertence, surprise, and excusable neglect.” Appellant claimed that he had been sick “for a large part of October” and that he was “surprised” by the outcome of his *ex parte* motion because he “thought that Fresno Truck Center and Lee Financial Services would not be allowed to maintain the action until issues with Fictitious Business Name [were] resolved.” Appellant added the excuse that he “lack[ed] litigation experience to have known strict rules that relate to opposition of Summary Judgment Motions.”

In response, Fresno submitted a string of e-mail messages to show that during the time he claimed to have been sick, appellant “was active in the litigation process . . . and even took the time to prepare his own Motion for Judgment on the Pleadings, as well as

the Ex Parte Application that he mentions in his moving papers. Clearly, he was not incapable of preparing an opposition to the Motion for Summary Judgment, and he was also aware of his need to do so.” Fresno also pointed out that appellant’s current motion was untimely; it was filed only 10 days before it was scheduled to be heard. Fresno further disputed appellant’s reliance on “surprise” to justify relief, because “surprise cannot be a result of the party’s own fault.” Here, Fresno argued, appellant had admitted that the asserted surprise “was his own fault”; he had made an affirmative decision not to prepare an opposition to the summary judgment and summary adjudication motions and “simply assumed” that the court would grant his ex parte motion to vacate and strike those motions. Finally, Fresno refuted appellant’s reliance on his lack of litigation experience, noting that ignorance of legal procedures does not afford a basis for relief from an unfavorable outcome. (See *Hopkins & Carley v. Gens* (2011) 200 Cal.App.4th 1401, 1414 [“The ‘naïveté’ of lay litigants in ‘rely[ing] on themselves to protect their substantial legal interests’ does not afford a ground for relief from adverse results”].)

On February 5, 2014, the court filed a judgment based on its prior summary adjudication and summary judgment rulings. On Fresno’s complaint, the court entered judgment against both appellant and Iwerty for \$226,635.18, plus interest, attorney fees, and costs. It also entered judgment in favor of Golden Gate and Lee on appellant’s cross-complaint.

On March 28, 2014, appellant filed an ex parte motion for “a formal determination that final Judgment has not yet been entered” and that the February 5 judgment was only an interlocutory one, because his motion to vacate the summary judgment order was still pending. Alternatively, if the court believed that the February 5, 2014 *was* a final judgment, appellant asked the court “for a temporary stay of that Judgment per CCP Sections 916 AND 918” and an opportunity to file a “formal motion” under those sections.

The court agreed to stay enforcement of the judgment pending a hearing set for April 17, 2014. Appellant had until April 1, 2014 to file the requested motion. On that date, he filed a “Motion for Order to Vacate and Set Aside Order on Motion for Summary Judgment and Summary Adjudication.” In his motion he asserted the following reasons for granting him relief from those rulings: (1) he had “underestimated the time required to prepare the opposition to [the] motions for Summary Judgment and Summary Adjudication,” because he believed that “a simple explanation” would be enough and “opposition could be easily argued”; (2) he was “sick on and off for a large part of October and November [of 2013]”; (3) it was a mistake not to “realize in time the amount of work that needed to be completed” to address tasks presented by discovery, and then ask for relief when he realized that his opposition would not be timely; (4) it was a mistake to oppose Fresno’s summary judgment motion in the form of a motion for judgment on the pleadings; and (5) it was a mistake not to ask for an extension of time to file opposition during the ex parte hearing. He also renewed his assertion of surprise, in that he had believed opposition to summary judgment and summary adjudication unnecessary because Business and Professions Code section 17918 would have prevented Fresno and Lee from maintaining the action. He was, after all, “not an attorney and could not have reasonably assumed that section 17918 would not be enforced.”

Fresno, Golden Gate, and Lee opposed appellant’s motion to vacate the summary judgment and summary adjudication order. They again pointed out that appellant had not been too sick to file two of his own motions (one for judgment on the pleadings and an ex parte application) instead of opposing their motions. They argued that none of appellant’s asserted mistakes amounted to legal justification for relief under section 473, and that relief for surprise cannot be accorded a litigant by that party’s own fault—in this case, appellant’s “decision [not to] prepare an opposition and place all of his hope in his ex parte motion. He simply assumed that the Court would grant the relief he was asking for . . . [T]his hardly constitutes surprise that is either ‘unexpected’ or ‘without any fault

of his own.’ ” Finally, the opposition included a discussion of the merits of appellant’s proposed opposition, which, in the view of Fresno and the cross-defendants, raised no triable issue of fact.

Appellant filed a late reply on April 14, 2014, which the court agreed to consider upon appellant’s ex parte application. Appellant’s motion to vacate was heard three days later. At the end of that hearing, the court denied the motion, thoroughly explaining the background of the case and the reasons for the court’s decision in a detailed minute order.

On April 24, 2014, appellant applied ex parte under sections 916 and 918 for a “temporary stay of enforcement of Judgment,” to enable him to file another motion to vacate the judgment, this time under section 475 rather than section 473.³ In addition to his own mistakes in understanding and tracking past procedural events, appellant cited error in the amount awarded in the February 5 judgment. He also sought an order “scheduling motions for new trial and judgment notwithstanding the verdict (JNOV).”

The court denied the application that day, finding “no good cause shown” for a motion to vacate the judgment under section 475, and declining to hear the motions for a new trial or JNOV. This appeal followed.

Discussion

Appellant filed his notice of appeal on May 15, 2014, ostensibly from “Judgment after an order granting a summary judgment motion.” In his “Statement of Appealability” he states that he is appealing from “a final judgment . . . following [the] summary judgment and summary adjudication motions of [Fresno, Golden Gate, and Lee].” The substance of his appellate briefs, however, appears to be directed at three judicial acts: (1) the November 27, 2013 order denying his “Ex Party [*sic*] Application For Order Shortening Time For Motion To Vacate and Motion To Strike,” filed the same day, which sought to vacate the hearing on the summary judgment and summary adjudication motions and to strike those motions; (2) the court’s refusal to consider his

³ Section 475 requires the court to disregard nonprejudicial pleading defects.

motion for judgment on the pleadings and ex parte application as his opposition to the summary judgment and summary adjudication motions, or to consider his “late filed opposition” to the motions; and (3) the denial of his April 1, 2014 motion under section 473 to set aside the December 2013 summary judgment and summary adjudication orders.

Appellant contends that in all of these rulings the court abused its discretion. He recognizes that it is his burden to establish such abuse—that is, to demonstrate to this court that the superior court exceeded the bounds of reason and that a miscarriage of justice resulted. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) His first argument cannot overcome that standard of review. To the extent that he is complaining that the court should have granted his ex parte request to allow him to move to strike Fresno’s complaint, appellant simply failed to convince the court that his delay while he prepared that request – instead of formulating an opposition to the summary judgment and summary adjudication motions—was justified. Likewise, appellant offered an excuse the court found insufficient to continue the hearing on those motions: that Lee was improperly litigating under a fictitious business name and that Fresno, as Lee’s assignee, therefore lacked “standing” to pursue the action. The court acted well within its discretion in rejecting appellant’s request for time to file a motion to vacate the impending hearing and to strike the summary judgment and summary adjudication motions.

The denial of a motion for judgment on the pleadings, the subject of appellant’s second argument on appeal, is normally subject to an independent standard of review. (*Bufile v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1202.) Here, however, as respondents pointed out and the court found, appellant’s November 20, 2013 motion was untimely under section 1005. Second, the motion did not disclose defects that were apparent on the face of Fresno’s complaint or by judicially noticeable facts. (§ 438, subd. (d).) In his motion appellant relied on evidence derived from

interrogatories. That evidence should instead have been included in a timely opposition to Fresno's summary judgment motion, or in a summary judgment motion of his own. That the court did not simply treat the motion for judgment on the pleadings as meeting his obligation in opposition to summary judgment does not evince error; indeed, the record does not indicate that appellant even made such a request, much less a timely one.

Moreover, even if appellant had asked the court to consider his motion as opposition to summary judgment, it would not have accomplished the result he sought, to obtain judgment in his favor. The basis of appellant's motion for judgment on the pleadings was that Fresno's complaint misstated its role in the "Continuing Personal Guaranty." That document, he pointed out, was signed by Lee, not Fresno; consequently, "the complaint is missing facts to constitute a cause of action." In addition to resisting the motion as untimely and based on improper evidence, Fresno addressed the merits, noting that it was an authorized California corporation and that it had received an assignment of Lee's rights under appellant's personal guaranty. The superior court thus did not err, either in declining to treat appellant's motion for judgment on the pleadings as his opposition to summary judgment and summary adjudication or in denying the motion itself.

Finally, appellant speculates that "there may have been a mistake made by the trial Court" because it did not acknowledge the existence of the opposition; in other words, he suggests, perhaps the court did not even exercise its discretion. We see no failure to exercise discretion or abuse thereof on the record before us. Appellant's opposition to both Fresno's motion and that of Golden Gate and Lee was filed just one week before the summary judgment and summary adjudication hearing, significantly less than the 14 days permitted by section 437c, subdivision (b)(2). "[C]ase law has been strict in requiring good cause to be shown before late filed [opposition] papers will be accepted" in a summary judgment proceeding. (*Hobson v. Raychem Corp.* (1999) 73 Cal.App.4th 614, 625 disapproved on another point in *Colmenares v. Braemar Country Club, Inc.* (2003)

29 Cal.4th 1019, 1031, fn. 6.) As in *Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 765, respondents “followed all the rules and were entitled to expect the trial court to enforce them. [Appellant] did not invoke any of the available procedures to obtain a court order permitting her to file late papers.” Accordingly, “[w]e cannot find any reason to conclude [that] the trial court abused its discretion.” (*Ibid.*)

Appellant correctly observes that his motion for relief under section 473, subdivision (b), the subject of his third argument on appeal, was again a matter for the superior court’s sound discretion. “ ‘A ruling on a motion for discretionary relief under section 473 shall not be disturbed on appeal absent a clear showing of abuse.’ [Citation.]” (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 257.) We find no such clear abuse.

Section 473, subdivision (b), provides 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.” Although appellant urged mistake, surprise, and excusable neglect below (with an emphasis on his litigation mistakes), on appeal he relies only on “surprise” as an excuse for his failure to submit timely opposition to Fresno’s summary judgment motion. Consistent with his argument below, appellant’s contention is that he was “surprised” that his November 27, 2013 ex parte motion was rejected. He had relied on Business and Professions Code section 17918 to prevent Fresno and Lee from “maintaining action in [superior] court and therefore would make formal opposition of motions for summary judgment not necessary. Ksendzovsky was further surprised that motion for shortening time for motion to strike was also denied giving [appellant] no opportunity to make the argument for lack of standing, except on the late filed opposition.”⁴

⁴ Business and Professions Code section 17918 bars a corporation from maintaining a contract action in court if it has not filed a “fictitious business name (continued)

In its minute order the court explained that being surprised to lose an ex parte application “is not the type of surprise contemplated as giving rise to relief under section 473. If it were, every unsuccessful litigant would be allowed to vacate an unfavorable ruling.” The court’s ruling and its reasoning were both sound. Surprise, for purposes of relief under section 473, is often defined as “some condition or situation in which a party to a cause is unexpectedly placed to his injury, without any default or negligence of his own, which ordinary prudence could not have guarded against.” (*Miller v. Lee* (1942) 52 Cal.App.2d 10, 16; accord, *Elms v. Elms* (1946) 72 Cal.App.2d 508, 514 [relief requires “a surprise which reasonable precaution could not have prevented”]; compare *State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 611 [rejecting assertion of surprise at dismissal of interpleader action] with *County of Los Angeles v. Financial Casualty & Surety Inc.* (2015) 236 Cal.App.4th 37, 44 [surprise established where court clerk misinformed surety’s counsel that its motion had already been granted, causing counsel to leave the courtroom].)

statement” under sections 17910 and 17915 of that code. Business and Professions Code section 17918 states, in pertinent part: “No person transacting business under a fictitious business name contrary to the provisions of this chapter, or his assignee, may maintain any action upon or on account of any contract made, or transaction had, in the fictitious business name in any court of this state until the fictitious business name statement has been executed, filed, and published as required by this chapter. . . .” It is not necessary that registration be completed when the action is commenced; the statute provides for abatement of the action until compliance is achieved, rather than outright dismissal. (*Rudneck v. Southern California Metal & Rubber Co.* (1920) 184 Cal. 274, 282; see also *Kadota Fig Assn. v. Case-Swayne Co.* (1946) 73 Cal.App.2d 796, 804 [noncompliance with filing requirement “is a mere matter of abatement pending the trial, which has the result of suspending the trial until the statute is complied with. It is not jurisdictional”].) The argument should not be raised by demurrer—or as here, by a motion for judgment on the pleadings—but by a special plea in abatement. (*Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 994, fn. 4.) Moreover, a plea in abatement on the ground that a corporation lacks capacity to sue is disfavored; it therefore “‘is to be strictly construed and must be supported by facts warranting the abatement’ at the time of the plea. [Citation.]” (*Traub Co. v. Coffee Break Service, Inc.* (1967) 66 Cal.2d 368, 370; *Cal-Western Business Services, Inc. v. Corning Capital Group* (2013) 221 Cal.App.4th 304, 312.)

Although section 473 reflects this state’s policy to give a party the opportunity to present a meritorious defense or try a case on its merits, (*Hodge Sheet Metal Products v. Palm Springs Riviera Hotel* (1961) 189 Cal.App.2d 653, 657) “nevertheless, the policy of the courts is to relieve parties from their defaults only when a *proper* showing is made warranting such relief.” (*Hughes v. Wright* (1944) 64 Cal.App.2d 897, 903.) *Porter v. Anderson* (1910) 14 Cal.App. 716, 726 (*Porter*) illustrates the weakness of appellant’s argument. There the attorney for his client invoked section 473 to demand relief based on his surprise that the court had found his client’s complaint insufficient to state a cause of action. That was “very clearly not the ‘surprise’ referred to and contemplated by section 473 of the Code of Civil Procedure. He merely had an erroneous view of the requisites of a sufficient complaint in this kind of action, and the last ruling of the court upon that question was a disappointment rather than the ‘surprise’ contemplated by said section.” (*Porter, supra*, at p. 726.) The court emphasized that “it would be the very limit of unreasonableness to hold that where a party, under the advice of his attorney, has acted upon an erroneous conception of the law, and suffers the injury which would be the natural and inevitable result thereof, he may be relieved of his untoward situation on the ground that he was taken by “surprise” by reason of the fatal error into which he had thus been led.” (*Id.* at pp. 726-27.)

Likewise, here appellant simply misjudged the merit of his position on Fresno and Lee’s standing and relied on that position to his detriment, instead of taking affirmative steps to protect himself against an unfavorable ruling by filing the appropriate opposition papers. Summary judgment was inevitable. The superior court did not abuse its broad discretion in denying appellant’s motion to vacate the judgment entered against him.

Disposition

The judgment is affirmed.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

WALSH, J.*

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*Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.