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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

NATIONAL COMMERCIAL RECOVERY, INC., Plaintiff and Appellant, v. JOSE B. MENDEZ et al., Defendants and Respondents.	B176646 (Los Angeles County Super. Ct. No. BC300926)

APPEAL from an order of the Superior Court of Los Angeles County, Thomas L. Willhite, Jr., Judge. Reversed with directions.

Glenn A. Besnyl for Plaintiff and Appellant.

No appearance for Defendants and Respondents.

Plaintiff and appellant National Commercial Recovery, Inc. (National) appeals an order granting a motion to set aside an entry of default and resulting default judgment against Jose B. Mendez, Jose Omar Mendez, Baldemar Mendez a/k/a Baldemar Romero and Tomatoes N Chiles R Us, a California corporation (collectively, defendants).[1] [2]

The trial court granted relief from the default and default judgment pursuant to the mandatory relief provision of Code of Civil Procedure section 473,[3] based on defense counsel's affidavit of fault.

The grant of relief was erroneous because there is no substantial evidence to support a finding the entry of default or default judgment was caused by any conduct or inaction of defense counsel. The affidavit of fault stated defense counsel was not employed by defendants until *after* the default judgment had been entered. Further, there was no assertion defense counsel was responsible for the entry of default or the default judgment against his clients. Therefore, the entry of default and default judgment are not attributable to defense counsel.

Accordingly, the order is reversed with directions to reinstate the default judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On August 18, 2003, National filed suit against defendants to collect $135,272.80 which they allegedly owed for wholesale produce they had purchased from National's

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[1] No respondent's brief has been filed. (Cal. Rules of Court, rule 17(a)(2).)

[2] According to the moving declarations below, one of the defendants, Baldemar Mendez aka Baldemar Romero, died in October 2003, before the default judgment was entered. His estate did not join in the motion to vacate the default and default judgment. Although we conclude the trial court erred in vacating the default and default judgment, and that the default judgment must be reinstated, the enforceability of the default judgment as against the estate of Baldemar Mendez is beyond the scope of this opinion and may have to be addressed at a later time.

[3] All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

assignor. There is no contention defendants were not duly served with the summons and complaint.

On October 30, 2003, National requested entry of defendants' default, and on that date, the clerk entered the default as requested.

On November 17, 2003, the matter proceeded to a default proveup. On that date, the trial court entered a default judgment against defendants in the sum of $135,272.80, as well as interest and attorney fees, for a total of $146,699.97.

On May 3, 2004, defendants, represented by counsel, filed a motion under section 473 to set aside the default judgment.[4] The motion asserted the defendants were not fluent in English, were not initially represented by counsel, and therefore failed to file an answer to the complaint. The motion invoked the ground of mistake under section 473, stating defendants "simply made a mistake in not timely responding to the . . . complaint."

The motion was supported by the declarations of Jose B. Mendez, Jose O. Mendez, and Patricia Mendez Romero. All three declarations stated: "I was quite confused when I was initially served with the summons and complaint in this case. First of all, I am not fluent in English and I was not initially represented by counsel. I did not understand that if I did not respond to the complaint that I would be responsible for the debts owing by the corporation, Mendez Distributing. As such, I did not file an answer to the Plaintiff's complaint."

National filed opposition papers, contending the motion was untimely because the entry of default occurred on October 30, 2003, and therefore the six-month period for seeking discretionary relief under section 473 expired on April 30, 2004. Further, defendants had failed to show their neglect was excusable. National pointed out the

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[4] In addition to the three surviving defendants, the motion was brought by Patricia Mendez Romero and Mendez Trucking, Inc. However, Patricia Mendez Romero and Mendez Trucking, Inc. were not named in either the entry of default or in the default judgment, and therefore were not proper parties to the motion to set aside the default judgment.

summons is printed in both English and Spanish,[5] and therefore defendants were well aware they had 30 days to answer the complaint.

On May 25, 2004, the matter came on for hearing. The trial court ruled the motion to vacate the default based on excusable neglect or mistake by the individual defendants was untimely. Because the entry of default occurred on October 30, 2003, defendants had 180 days, or until April 27, 2004, to bring the motion for relief from default, and the motion was not filed until May 3, 2004. Further, even assuming the motion were timely, "the summons is in Spanish and English," thereby undermining defendants' claim of excusable neglect or mistake.[6]

The trial court continued: "Having said all that, it appears to me . . . that if there were an affidavit of fault by counsel, this is a mandatory setting aside of the default judgment and the clerk's entry of default . . . . [¶] So essentially, as excuse, neglect, et cetera of the defense, the motion is just not meritorious. I think it would be meritorious with an attorney affidavit of fault. I would deem this motion to be such a motion, and I would allow you to supplement it with an attorney affidavit of fault."

Defense counsel, Rosendo Gonzalez (Gonzalez), then filed a supplemental declaration in support of the motion. The Gonzalez declaration stated, inter alia: "I was employed (in early December 2003) to represent the [moving] Defendants in this

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[5] The mandatory Judicial Council summons form which was used here provided the following advisement in both English and Spanish: "You have 30 CALENDAR DAYS after this summons is served on you to file a typewritten response at this court. [¶] . . . [¶] If you do not file your response on time, you may lose the case, and your wages, money and property may be taken from you without further warning from the court. [¶] There are other legal requirements. You may want to call an attorney right away. If you do not know any attorney, you may call an attorney referral service or a legal aid office (listed in the phone book.)"

[6] We agree with the trial court in this regard. In view of the fact the summons duly advised the defendants in Spanish of the necessity of filing an answer within 30 days, and the potential consequences of ignoring the complaint, defendants' claim of mistake, surprise, or excusable neglect was patently meritless.

lawsuit." Thus, Gonzalez was retained by the pertinent defendants several weeks *after* the default judgment was entered against them.

In the declaration, Gonzalez did not assert he was responsible for the entry of default or the default judgment against his clients. Rather, Gonzalez's focus was on the calendaring of the motion for relief from default. Gonzalez stated: "I mistakenly calendared this matter (for a motion to set aside . . .) using 6 months from November 17, 2003," the date of entry of the default judgment, rather than six months from October 30, 2003, the date of entry of default.

National filed supplemental opposition papers and the matter then was taken under submission.

On June 3, 2004, the trial court issued an order granting the motion to set aside the default and default judgment, and awarding National reasonable attorney fees in the sum of $2,000.00.

On July 1, 2004, National filed a timely notice of appeal from the order.[7]

CONTENTIONS

National contends an attorney cannot take the blame for the client in order to obtain relief from default and default judgment when the facts demonstrate the entry of the default was not actually the fault of the attorney.

DISCUSSION

1. *Trial court erred in granting relief under mandatory relief provision of section 473 because there is no evidence defense counsel was responsible for the entry of the default or default judgment.*

a. General principles.

As explained in *Benedict v. Danner Press* (2001) 87 Cal.App.4th 923, section 473, subdivision (b), provides for both discretionary and mandatory relief from entry of default and default judgment. (87 Cal.App.4th at p. 927.) The mandatory relief

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[7] The order is appealable as an order after judgment. (§ 904.1, subd. (a)(2); 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 154, p. 218.)

provision provides: "Notwithstanding any other requirements of this section, the court shall, [(i)] whenever an application for relief is made no more than six months after entry of judgment, [(ii)] is in proper form, and [(iii)] 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 . . . entered against his or her client, *unless the court finds that the default . . . was not in fact caused by the attorney's* mistake, inadvertence, surprise, or neglect." (Italics added.)

Prior to "its amendment in 1988, subdivision (b) of section 473 provided solely for discretionary relief and did not include this provision for mandatory relief. (See Stats. 1981, ch. 122, § 2, pp. 862-863.) In amending the statute to add a mandatory provision (see Stats. 1988, ch. 1131, § 1, p. 3631), [fn. omitted] the Legislature sought ' " 'to relieve the innocent client of the burden of the attorney's fault, to impose the burden on the erring attorney, and to avoid precipitating more litigation in the form of malpractice suits.' [Citations.]" [Citation.]' [Citation.] As a result, relief under the mandatory provision is available whether or not the attorney's neglect is excusable. [Citations.]" (*Benedict, supra,* 87 Cal.App.4th at p. 927.)

b. *The motion for relief, insofar as it was directed at the mandatory relief provision of section 473, was timely but was meritless.*

A motion for mandatory relief under section 473 is timely if filed "no more than six months after entry of judgment . . . ." (§ 473, subd. (b).) Here, the default judgment was entered November 17, 2003, and the motion for relief from default was filed five and a half months later, on May 3, 2004. Therefore, the motion, insofar as it invoked the mandatory relief provision of section 473, was timely. However, the motion failed to satisfy all the criteria for mandatory relief and therefore should have been denied.

Our "focus here is on the third component of the test for granting mandatory relief, namely the requirement that the attorney's conduct or inaction in fact cause the dismissal or entry of default. That component has been described as ' "a causation testing device." ' [Citations.] We affirm the trial court's finding on the causation issue so long

as it is supported by substantial evidence. [Citation.]" (*Benedict, supra,* 87 Cal.App.4th at pp. 927-928.)

Section 473, subdivision (b), "does not preclude relief under the mandatory provision when default is entered as a result of a combination of attorney and client fault. The statute merely requires that the attorney's conduct be a cause in fact of the entry of default (see § 473, subd. (b)), but does not indicate it must be the *only* cause." (*Benedict, supra,* 87 Cal.App.4th at pp. 928-929.)

Here, there is no substantial evidence in the record to indicate that Gonzalez's conduct played any part in the entry of default. As indicated, Gonzalez's affidavit of fault stated: "I was employed (in early December 2003) to represent the [moving] Defendants in this lawsuit." Thus, Gonzalez was retained by defendants several weeks *after* the default judgment was entered against them. Further, there was no assertion by Gonzalez that he was in any way responsible for the entry of default or the default judgment against his clients. Instead, Gonzalez merely admitted fault in his calendaring of the motion for *relief* from default. That was an irrelevancy. The necessary showing was that "the *default* . . . was . . . in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." (§ 473, subd. (b).)

The Gonzalez declaration did not contain any explanation for defendants' failure to answer the complaint, or any discussion of the events leading up to the entry of default or default judgment against the defendants. The only explanation is found in the moving declarations of Jose B. Mendez, Jose O. Mendez, and Patricia Mendez Romero.
To reiterate, all three declarations stated: "I was quite confused when I was initially served with the summons and complaint in this case. First of all, I am not fluent in English and I was not initially represented by counsel. I did not understand that if I did not respond to the complaint that I would be responsible for the debts owing by the corporation, Mendez Distributing. As such, I did not file an answer to the Plaintiff's complaint."

In sum, there is no substantial evidence to support a finding Gonzalez was responsible for the entry of default and default judgment. Therefore, the trial court erred in vacating the default and default judgment pursuant to the mandatory relief provision of section 473.

DISPOSITION

The order granting relief from the default and default judgment is reversed with directions to reinstate the default judgment. Appellant shall recover costs on appeal.

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KLEIN, P.J.

We concur:

CROSKEY, J.

ALDRICH, J.