Filed 12/21/09

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

MORIS SAKHAI et al., Plaintiffs and Appellants, v. ATWAIN ZIPORA et al., Defendants and Respondents.	B210323 (Los Angeles County Super. Ct. No. SC077603)

APPEAL from a judgment of the Superior Court of Los Angeles County. Allan J. Goodman, Judge. Affirmed as modified.

Schuler & Brown, Jack M. Schuler and Sam D. Ekizian for Plaintiffs and Appellants.

Law Offices of Thomas O'Hagan and Harvey L. Goldhammer for Defendant and Respondent Atwain Zipora.

Goates & McCarthy and David A. Koester for Defendant and Respondent Wilshire Manning Homeowners Association.

---

* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of parts I, III, IV and V.

In the summer of 2003, appellants Moris Sakhai and Nayer Azadegan filed suit against several defendants alleging claims for trespass and negligence. By the spring of 2008, appellants had not brought the case to trial. The trial court, on its own motion, dismissed the case for delay in prosecution under Code of Civil Procedure sections 583.410 et seq.[1] The court later denied appellants' motion to set aside the dismissal under section 473, subdivision (b) due to attorney mistake, inadvertence, surprise, or excusable neglect. Appellants contend the trial court's orders were in error and an abuse of discretion. In the published portion of this opinion, we conclude the trial court gave proper notice of its order to show cause as to why the case should not be dismissed for delay in prosecution, in accordance with California Rules of Court, rule 3.1340(b). We modify the trial court's order of dismissal to one without prejudice, and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 2000, appellants were leasing an apartment on Wilshire Boulevard. According to appellants, a water pipe burst in the building, causing flooding and damage to appellants' property. In June 2003, appellants filed suit against five named defendants, including respondent Atwain Zipora, and numerous Doe defendants. The complaint asserted claims for negligence and trespass.

The record is silent as to what took place in the case between June 2003 and March 2005. In March 2005, appellant Sakhai filed for bankruptcy. The trial court subsequently stayed the instant action. In December 2005, the bankruptcy action was dismissed, and appellants informed the court the action was ready to be set for trial. The court told the parties the case would be reassigned, and set a further status conference and trial setting conference for January 2006.

---

[1] All further statutory references are to the Code of Civil Procedure. All references to rules are to the California Rules of Court.

The record does not include a transcript or other record of the trial setting conference, but at some point the case was set to go to trial in April 2007. In February 2007, appellants sought leave to file a second amended complaint. The proposed second amended complaint asserted additional causes of action for breach of covenant/ equitable servitude, breach of contract, and nuisance. The added claims were based on alleged breaches of the covenants, conditions, and restrictions, bylaws, and rules and regulations of respondent Wilshire Manning Homeowners Association (Wilshire Manning), which governed the building.

At the March 2007 hearing on appellants' motion for leave to amend, appellants' counsel represented that the amended complaint alleged no new facts, and no additional discovery would be necessary. Counsel for respondent Zipora argued the additional causes of action fundamentally changed the case, and further time would be required to allow for a motion for summary adjudication. Appellants did not object to a trial continuance. The court warned:

> "All right. The court is inclined to grant the amendment. The question is whether defense actually wants the continuance. Plaintiff is amenable. I'll tell you that if there is a continuance, it's not going to be a short one because I have other people relying on their trial dates."

The court granted appellants leave to file the amended complaint and offered a February 4, 2008 trial date, which the parties accepted. The court also reminded the parties to comply with a previously issued trial order.

The record is silent as to what happened in the case over the nine months following the hearing on appellants' motion seeking leave to file a second amended complaint. In January 2008, the trial court issued the following order *sua sponte*:

> "Notwithstanding the March 8, 2007 Order granting leave to file a second amended complaint, neither that complaint, nor any answer thereto, has been filed. Nor has any party complied with the June 29, 2006 Order Regarding Trial Preparation and Management, viz., no joint [or separate] documents have been timely filed in advance of the Final Status Conference, now reset for January 22, 2008. This action was filed on June 12, 2003 and has been set and reset for trial. It is now 4 and one half years old.

"Good cause appearing, each party shall show cause on Tuesday, January 22, 2008 why counsel should not be sanctioned for failing to timely file the trial documents specified in the Trial Order and in [California Court and Los Angeles Superior Court rules.] On February 4, 2008 at 8:30 a.m. each party [seeking] affirmative relief shall show cause why this action should not be dismissed for failure to bring to trial within three years of its filing."

At the January 22, 2008 hearing, appellants' counsel explained his office had received a copy of the complaint marked "received" by the court, and mistakenly interpreted the notation as an indication the complaint was filed. Counsel also claimed to be unaware that pre-trial filings were due. Although Zipora answered the complaint the morning of the hearing, Wilshire Manning had yet to answer or file a responsive pleading. The trial court discussed a trial date with the parties. The following colloquy ensued:

"Court: We have 15 and 18 cases set for each trial each month now set until next fall. So is there anything that compels this to be set before the fall?

"[Appellants' counsel]: I don't know, but isn't there a five-anniversary year date?

"Court: That is a good question, because this case is old to begin with. Let's see. You may need to bring a motion to advance it. . . . [¶] . . . [¶] . . . The court is going to vacate the trial date and FSC date. The plaintiffs need date to set this, because I don't have dates before October. The plaintiffs have to show good cause. The next date the court has is in October. . . . If plaintiff wants to go to trial before five years, he needs to make a motion."

On January 25, 2008, appellants filed the second amended complaint. On February 18, 2008, Wilshire Manning demurred to the second amended complaint. The demurrer asserted the second amended complaint failed to state a cause of action against Wilshire Manning because it alleged facts regarding only Zipora's actions and pled no facts about Wilshire Manning's acts, or its failure to act. At an April 1, 2008 hearing, the trial court sustained Wilshire Manning's demurrer with leave to amend. The court also ordered appellants to appear on April 29, 2008, to show cause as to why the action should not be dismissed for delay in prosecution pursuant to sections 583.410, subdivision (a), and 583.420, subdivision (a)(2)(A).

On April 11, 2008, appellants filed their third amended complaint. In response to the court's order to show cause, appellants' counsel filed a declaration arguing any substantial delay in the case was not attributable to appellants' failure to prosecute. Appellants asserted the bankruptcy stay was the only source of significant delay in the case. They further contended information they received through discovery resulted in the filing of the second and third amended complaints, and the amendments "made bringing the action to trial impossible, impracticable or futile as additional theories of liability required the parties involved to propound additional discovery and take additional depositions."

On April 29, 2008, the trial court dismissed the case due to appellants' failure to bring it to trial within three years. The court noted that even when the bankruptcy stay was subtracted, four years and three months had elapsed since appellants filed their original complaint. Moreover, at the hearing, respondents' counsel indicated appellants had conducted discovery during the bankruptcy stay; appellants' counsel did not know whether this was true and could not dispute the point.

On June 6, 2008, appellants filed an ex parte application for an order shortening the time for hearing on a motion to set aside the dismissal under section 473, subdivision (b). Appellants contended their counsel made two mistakes that should be excused: (1) representing to the court that appellants' amended complaints were necessitated by the discovery of new facts rather than demurrers to the complaints; and (2) failing to file and serve the second amended complaint. The trial court denied the request for an order shortening the notice period. The court also noted appellants never filed a motion to set the case for trial, despite the court's suggestion that they do so in order to avoid dismissal.

On June 30, 2008, appellants filed their motion seeking an order setting aside the dismissal under section 473, subdivision (b). Appellants again argued the bankruptcy stay delayed the trial. Appellants additionally contended trial was delayed because in March 2007 the court set a February 2008 trial date to accommodate its congested

calendar. The motion also re-asserted the arguments advanced in the previous ex parte application. On July 22, 2008, the trial court denied the motion. This appeal followed.

DISCUSSION

I. Jurisdiction

Appellants purported to appeal from the trial court order dismissing the case and the subsequent order denying appellants' motion to vacate the judgment. However, appellants failed to include in the record a signed order of dismissal. Under section 581, subdivision (d), only a signed, written order of dismissal filed in the court is appealable as a final judgment. (§ 581(d); *Munoz v. Florentine Gardens* (1991) 235 Cal.App.3d 1730 (*Munoz*); *Rios v. Torvald Klaveness* (1969) 2 Cal.App.3d 1077, 1079.) On September 15, 2009, we informed the parties we were considering dismissing the appeal for lack of an appealable order or judgment. On September 30, 2009, appellants filed a motion to augment the record with a signed, written order of dismissal entered on September 29, 2009. We have granted the motion, and deem appellants' notice of appeal to be from the judgment entered on September 29, 2009. (Rule 8.104(e)(1); *Munoz, supra,* 235 Cal.App.3d at pp. 1731-1732.) Appellants' notice of appeal was premature due to the lack of a final judgment, thus we reject respondent Zipora's argument that the appeal was untimely filed.

II. The Trial Court Gave Proper Notice of the Discretionary Dismissal Hearing

Appellants contend the trial court was required to give the parties 45 days' notice before a hearing on a discretionary dismissal under section 583.410. We disagree.

Section 583.410, subdivision (b) provides that a discretionary dismissal for delay "shall be pursuant to the procedure and in accordance with the criteria prescribed by rules adopted by the Judicial Council." Rule 3.1340(b) states: "If the court intends to dismiss an action on its own motion, the clerk must set a hearing on the dismissal and mail notice to all parties at least 20 days before the hearing date." (*Roman v. Usary Tire & Service Center* (1994) 29 Cal.App.4th 1422, 1428.) Here, the trial court gave the parties notice of the order to show cause why the action should not be dismissed for delay in prosecution 28 days before the hearing. This was more than enough notice under rule 3.1340(b).

Appellants ignore rule 3.1340(b) and instead cite rule 3.1342 which provides that a *party* seeking dismissal of a case for delay in prosecution must serve and file a notice of motion at least 45 days before the date set for a hearing on the motion. Rule 3.1342 explicitly applies to a party in the action, whereas rule 3.1340(b) explicitly applies to the court's own motion to dismiss the case. Since the dismissal occurred in this case on the court's own motion, rule 3.1340(b) applied.

Appellants cite *Franklin Capital Corp. v. Wilson* (2007) 148 Cal.App.4th 187 (*Franklin*), for the proposition that the court must provide 45 days' notice before dismissing an action for delay in prosecution. In *Franklin*, the defendant filed a motion to dismiss for delay in prosecution. The following month, the trial court issued an order to show cause (OSC) regarding dismissal or sanctions. The minute order setting the OSC hearing did not mention any authority on which the OSC would proceed. (*Id.* at p. 191.) Two days before the hearing, the defendant's counsel filed a declaration in support of dismissal of the action, incorporating the defendant's earlier motion to dismiss. The day before the hearing, the plaintiff voluntarily dismissed the action. The day of the OSC, plaintiff's counsel did not appear; thus the court ordered a dismissal with prejudice. A resulting minute order did not cite statutory or case authority for the dismissal, but indicated the dismissal was for lack of prosecution and also alluded to counsel's failure to pay previously assessed sanctions. (*Id.* at p. 192.)

The court of appeal found several errors in the trial court's ruling, including the failure to provide adequate notice, assuming the dismissal was a discretionary dismissal for failure to bring the case to trial under section 583.410. The court referenced rule 3.1342 (then recently re-numbered from rule 373), and found the plaintiff had received only 14 days' notice, less than that required by rule 3.1342. (*Franklin, supra,* at p. 214.)

As respondent Wilshire Manning points out, *Franklin* differs from the case at bar in that the defendant first filed a motion to dismiss for delay in prosecution. Although *Franklin's* discussion of notice focused solely on the trial court's OSC and resulting dismissal, rather than on the defendant's first motion to dismiss for delay, the court did not address the applicability of rule 3.1340(b).

We are aware of no legal authority, other than *Franklin*, that suggests the court must comply with rule 3.1342 when acting on its own motion to dismiss a case for delay in prosecution, nor does appellant cite to any other authority to support this contention. Prior to 1990, when rule 3.1340(b) was adopted (as rule 372), neither the Code of Civil Procedure, nor the rules of court specifically stated how much notice the court was required to give when initiating a discretionary dismissal motion on its own. Thus, in *Wilson v. Sunshine Meat & Liquor Co.* (1983) 34 Cal.3d 554, 560 (*Wilson*), our Supreme Court noted some courts of appeal had found the trial court was bound to comply with the rule (then 203.5(a)) requiring parties to provide 45 days' notice. The *Wilson* court further noted that, by its terms, the rule applied only to a *party* seeking dismissal, but the court did not decide whether cases applying the subdivision to a trial court-initiated motion were incorrect. However, rule 3.1340(b) eliminated any confusion by specifying how much notice the court, as opposed to a party, must give. (See *Eliceche v. Federal Land Bank Assn.* (2002) 103 Cal.App.4th 1349, 1366, fn. 15 [noting *Wilson* discussion and revision to rule providing that court must give 20 days' notice].)

Given that rule 3.1340(b) sets forth a specific notice period for dismissal on the court's own motion, we must respectfully disagree with *Franklin* to the extent the case holds the court must provide 45 days' notice if it intends to dismiss a case under section 583.410, et seq. on its own motion.[2]

III. The Trial Court Did Not Abuse its Discretion in Dismissing Appellants' Action

Under section 583.410, subdivision (a), "[t]he court may in its discretion dismiss an action for delay in prosecution pursuant to this article on its own motion or on motion of the defendant if to do so appears to the court appropriate under the circumstances of the case." Section 583.420 provides the court may not dismiss a case for delay in prosecution unless, among other circumstances, the action is not brought to trial within

---

[2] However, we note that application of rule 3.1340(b) in *Franklin* would not have affected the result in that case; the trial court gave only 14 days' notice, rather than the 20 days rule 3.1340(b) requires.

three years after the action is commenced, or two years if prescribed by a Judicial Council rule. (§ 583.420, subd. (a)(2).) Under rule 3.1340(a), the court may in fact dismiss an action pursuant to sections 583.410 and 583.420 if the action is not brought to trial within two years after it is commenced. (*Kidd v. Kopald* (1994) 31 Cal.App.4th 132, 147-148.) Rule 3.1342(e) identifies various criteria the trial court is to consider in ruling on a motion to dismiss for delay in prosecution.[3]

" 'The competing considerations to be evaluated are the policies of discouraging stale claims and compelling reasonable diligence balanced against the strong public policy which seeks to dispose of litigation on the merits rather than on procedural grounds.' [Citation.] 'However, it is now well established that the policy [of preferring to dispose of litigation on the merits] only comes into play when a plaintiff makes a showing of some excusable delay.' [Citation.]" *Van Keulen v. Cathay Pacific Airways, Ltd.* (2008) 162 Cal.App.4th 122, 131 (*Van Keulen*).)

"When the trial court has ruled on such a motion, ' "unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power." '

---

3 Rule 3.1342(e) provides: "In ruling on the motion, the court must consider all matters relevant to a proper determination of the motion, including: (1) The court's file in the case and the declarations and supporting data submitted by the parties and, where applicable, the availability of the moving party and other essential parties for service of process; (2) The diligence in seeking to effect service of process; (3) The extent to which the parties engaged in any settlement negotiations or discussions; (4) The diligence of the parties in pursuing discovery or other pretrial proceedings, including any extraordinary relief sought by either party; (5) The nature and complexity of the case; (6) The law applicable to the case, including the pendency of other litigation under a common set of facts or determinative of the legal or factual issues in the case; (7) The nature of any extensions of time or other delay attributable to either party; (8) The condition of the court's calendar and the availability of an earlier trial date if the matter was ready for trial; (9) Whether the interests of justice are best served by dismissal or trial of the case; and (10) Any other fact or circumstance relevant to a fair determination of the issue. [¶] The court must be guided by the policies set forth in Code of Civil Procedure section 583.130." Although the trial court is to consider the above factors, it is not required to make express findings as to each factor. (*Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 698-699 (*Landry*).)

[Citations.] ' "The burden is on the party complaining to establish an abuse of discretion . . . ." ' [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331; *Van Keulen, supra,* 162 Cal.App.4th at p. 131.)

Appellants have not met their burden to establish an abuse of discretion. Appellants contend the delays in bringing the case to trial were not of their making, yet the record reveals this contention to be less than accurate. As an initial matter, appellants ignore the period of apparent dormancy in the case between June 2003 and March 2005. The action was almost two years old before the case was stayed pending resolution of Sakhai's bankruptcy. Appellants never explained what, if anything, they were doing to prosecute the case during that period. Although appellants' chronology of events reads as if the case did not begin until December 2005 when the bankruptcy stay was lifted, the trial court properly took into consideration the 21-month period preceding the stay. (*Williams v. Los Angeles Unified School Dist.* (1994) 23 Cal.App.4th 84, 98-99.)

Further, appellants exaggerate the impact of the bankruptcy stay.[4] Even when the bankruptcy stay period is subtracted as a time in which the trial court did not have jurisdiction, or in which it was impracticable to prosecute the case (see § 583.340), the stay lasted less than nine months. When the bankruptcy stay is excluded, the action was two years old in February 2006, and three years old in February 2007. Yet, the case was not dismissed until April 2008. Thus, the bankruptcy stay cannot account for the total

---

4 It is not clear why the case was stayed during Sakhai's bankruptcy. As respondents point out, it is well established that the automatic stay under federal bankruptcy law does not apply to superior court actions initiated by a plaintiff-debtor. (*Shah v. Glendale Federal Bank* (1996) 44 Cal.App.4th 1371, 1375; [collecting cases]; *Lauriton v. Carnation Co.* (1989) 215 Cal.App.3d 161, 164-165 [case dismissed for failure to bring matter to trial before five years; period when plaintiff was in bankruptcy did not stay case and was not excluded from the calculation of the five-year period].) The record does not indicate how the stay came to pass in this case. However, appellants never disputed that they conducted discovery during the stay. This, at a minimum, made it reasonable for the trial court to reject their claim that prosecution of the case was impossible or impracticable during that period.

delay in bringing the case to trial. (*White v. Mortgage Finance Corp.* (1983) 142 Cal.App.3d 770, 774.)

Appellants further contend significant delay was caused by the transfer of the case to a different court and congestion in the court's calendar. According to appellants, the court "explained that numerous cases were being re-assigned and transferred from Main Street to Purdue, and trials were being scheduled 1 to 1-1/2 years later after the transfer." We note this assertion is not reflected in the record.[5] But even if the delay between December 2005 and April 2007 was due entirely to the reassignment of the case and the trial court's full calendar, it was appellants who delayed the case even further. Appellants did not seek leave to file a second amended complaint until February 2007, three years and eight months after the case was filed, and only two months before the trial date. Appellants failed to provide a reasonable excuse for this delay. In fact, at the hearing on appellants' motion for leave to amend, appellants represented that the amendments added no new facts to the complaint, only additional legal theories, which calls into question why appellants did not make the amendments earlier. Perhaps appellants could not get a trial date earlier than April 2007, but it was not impossible, futile, or impracticable for appellants to seek leave to amend their complaint to add new legal theories earlier than two months before trial. Had they done so, a trial continuance in February 2007 may not have been necessary.

The original and amended complaints were not legally or factually complex, and there is no record of discovery disputes. (See rule 3.1342(e)(5).) The delay necessitated by a second amendment to the complaint was attributable to appellants. Moreover, the

---

5 The record indicates that at a December 2005 status conference, the trial court asked if the case was ready to be set for trial. Appellants' counsel said a lot of discovery was pending, but the case was "ripe for trial." The trial court commented, "the case is certainly old enough." The court then informed the parties the case would be reassigned, and set the matter for a further status conference and trial setting conference. The court said nothing about how the new department was scheduling trials. The record does not include a transcript of the January 2006 status conference.

trial court expressed concern that appellants had deliberately and repeatedly amended their complaint to avoid impending trial dates.[6]

Appellants' failure to file and serve the amended complaint only exacerbated the already existing delay. Although appellants argued this was an inadvertent mistake, the trial court could reasonably consider the delay the error generated. Appellants' failure to realize the second amended complaint had not been deemed filed and served further suggests a general failure to prosecute the action. For example, appellants apparently neglected to notice that respondents never answered the second amended complaint or filed responsive pleadings. Indeed, appellants never identified what steps they took to actively prosecute the action between March 2007—when the court granted them leave to file a second amended complaint—and January 2008, when the court notified the parties the second amended complaint had never been filed. And, despite the trial court's explicit suggestion that appellants file a motion to specially set the trial, appellants never did so.

We therefore cannot conclude the trial court exceeded the bounds of reason in dismissing appellants' action for delay in prosecution. Appellants' own actions caused significant delays in the case, such as waiting for over three years to seek leave to amend their complaint, then failing to file and serve the amended complaint once leave was granted. Appellants failed entirely to describe their efforts to diligently prosecute the case. (*Landry*, *supra*, 39 Cal.App.4th at p. 699.) While appellants try to pin much of the delay on the bankruptcy stay, the less than nine-month period was minimal compared to the entire pendency of the action. Similarly, the inability of the court to set immediate trial dates does not fully explain the long pendency of the case. We find no abuse of discretion.

---

6 At the dismissal hearing, the court stated: "Well, I think the defense view is that you keep amending the complaint instead of going to trial. We've had how many trial dates in this matter? At least two. Is it three? . . . . And every time we get close to trial you amend the complaint."

IV. The Court Properly Denied Appellants' Section 473 Motion

Following the trial court's discretionary dismissal of appellants' action for failure to bring the case to trial, appellants filed a motion to set aside the dismissal under section 473, subdivision (b) (hereinafter, 473(b)). The trial court properly rejected the motion.

Section 473(b) requires the court to vacate a default judgment or dismissal when a motion under the section is made within six months after entry of judgment, and "is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect," unless the court finds the default or dismissal was not actually caused by the attorney's mistake, inadvertence, surprise, or neglect.[7] But, as appellants acknowledge, numerous appellate courts have held this provision only applies to dismissals that are procedurally equivalent to a default. Thus, in the context of discretionary or mandatory dismissals for failure to prosecute an action or to serve a complaint, courts have interpreted section 473(b)'s mandatory provision as providing relief only when there is a failure to oppose the dismissal motion. (*Peltier v. McCloud River R.R. Co.* (1995) 34 Cal.App.4th 1809, 1817 (*Peltier*); *Graham v. Beers* (1994) 30 Cal.App.4th 1656, 1661.)

For example, in *Peltier,* the court concluded applying section 473(b)'s mandatory provision to dismissals for delay in prosecution would essentially invalidate the discretionary dismissal statutes, because nearly all discretionary dismissals are caused by

---

[7] This provision is referred to as the "mandatory" provision of section 473(b), in contrast to the "discretionary" provision set forth at the beginning of the statute: "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 . . . ." (See e.g., *Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 615-616 (*Leader*); *Generale Bank Nederland v. Eyes of the Beholder Ltd.* (1998) 61 Cal.App.4th 1384, 1394 (*Generale Bank*).) In the proceedings below and on appeal, appellants cite section 473(b) in its entirety, but their arguments reference only the mandatory provision. Appellants have not sought relief under the discretionary provision. Our review of the applicability of section 473(b)'s mandatory provision is de novo. (*Pagarigan v. Aetna U.S. Healthcare of California, Inc.* (2007) 158 Cal.App.4th 38, 45.)

attorney fault. "[A]lmost every plaintiff whose case was dismissed thereunder could 'then jump back into court on a section 473 motion, accompanied by an attorney's affidavit of negligence, and have the case reinstated based on the same facts offered, but discarded, in the hearing on the request to dismiss.' [Citation.] . . . . We may not adopt such a construction of section 473 unless compelled to do so." (*Peltier, supra,* 34 Cal.App.4th at p. 1822.) The court therefore rejected the plaintiff's argument that section 473(b) mandated relief from the dismissal of his case resulting from the error of his former attorney in failing to move the case forward due to a mistaken legal strategy.

Several courts since have adopted this reasoning and applied it to comparable situations. (See e.g. *Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1415-1418 [summary judgments]; *Gotschall v. Daley* (2002) 96 Cal.App.4th 479, 484-485 [motion to dismiss based on plaintiff's inability to establish causation]; *Leader*, *supra,* 89 Cal.App.4th at pp. 615-616, 620 [failure to file an amended complaint after demurrer sustained with leave to amend]; *English v. IKON Business Solutions, Inc.* (2001) 94 Cal.App.4th 130, 141-146 [summary judgments]; *Generale Bank*, *supra,* 61 Cal.App.4th at pp. 1395-1398 [dismissal of third-party claim for substantive reasons].)

Appellants fail to distinguish *Peltier* or similar cases, and we see no basis to do so. Appellants did not fail to oppose the court's dismissal motion. In their section 473(b) motion, appellants contended counsel failed to make the right arguments when opposing dismissal, and that counsel's previous mistakes during the litigation caused the underlying dismissal. A motion for mandatory relief under section 473(b) is not a mechanism for the aggrieved party to re-argue why the case should not be dismissed for delay in prosecution. Further, an attorney's failure to make the best arguments in opposition to a dismissal motion is not the procedural equivalent of a default. The trial court properly denied appellants' section 473(b) motion.

V. The Court's Dismissal Should Have Been Without Prejudice

Appellants contend the court erred in dismissing the action with prejudice. Section 581, subdivision (b)(2)(4), provides the court may dismiss an action "without prejudice, when dismissal is made pursuant to the applicable provisions of Chapter 1.5

(commencing with Section 583.110)." Thus, the dismissal in this case should have been entered without prejudice. (*Franklin, supra,* 148 Cal.App.4th at pp. 214-215.) We therefore modify the order to a dismissal without prejudice.[8]

DISPOSITION

The trial court's order of dismissal is modified to a dismissal without prejudice. The judgment is otherwise affirmed. Respondents are to recover their costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION

BIGELOW, J.

We concur:

FLIER, Acting P. J.

MOHR, J.*

---

[8] Respondent Zipora argues the dismissal with prejudice should stand because appellants waived the issue by failing to object, or, alternatively, because the statute of limitations has run on all of appellants' claims, therefore the error was harmless. As to forfeiture, even if an objection was required, whether the trial court could dismiss the action under section 583.410 with prejudice is a pure question of law. We have the discretion to address such issues, even when they are not raised below. Further, we cannot conclude on the record before us that the trial court's error was harmless. Although it is difficult to imagine that any cause of action appellants may have arising out of the underlying circumstance of this action remains viable, we need not foreclose that possibility.

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