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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

KAZI SHADAT HOSSAIN, Plaintiff and Appellant, v. MOHAMMED JAMSHED HOSSAIN, Defendant and Respondent.	B196198 (Los Angeles County Super. Ct. No. BC318012)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rolf H. Treu, Judge. Affirmed in part, reversed in part, with directions.

Malhotra & Malhotra, Krishna R. Malhotra; and Howard Posner for Plaintiff and Appellant.

Mary Rafanai-Steele for Defendant and Respondent.

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*Under California Rules of Court, rules 976(b) and 976.1, only the first paragraph, part II of the Discussion, and the Disposition are certified for publication.

This appeal arises from a dispute over the termination of a partnership, Padma, LLC (Padma) between Kazi Shadat Hossain and Mohammed Jamshed Hossain for the operation of a hotel.[1] Kazi appeals from trial court orders enforcing the terms of an agreement settling the partnership dispute and denying relief sought under Code of Civil Procedure section 473 (section 473). In the published portion of this opinion, we hold that the attorney fault provision in subdivision (b) of that statute does not apply to an attorney's failure to timely file opposition and a cross-motion to a motion to enforce a settlement. In the unpublished portion of the opinion, we find that the trial court did not abuse its discretion in denying Kazi's motion for relief under the discretionary portion of section 473, and that the judgment in favor of Jamshed and against Kazi must be reversed because of a lack of evidence to support the award.

FACTUAL AND PROCEDURAL SUMMARY

The briefs and record on appeal (an appendix provided by appellant) provide little insight into the underlying partnership dispute. We take much of our factual summary from a report prepared by a referee appointed to review a settlement agreement reached by the parties.

Kazi and Jamshed were partners in Padma, which operated the hotel. (The parties refer to themselves as partners although their business was in the form of a limited liability corporation.) A dispute arose between the parties. On May 9, 2004, the parties signed an agreement, drafted by Pramod Patel, which apparently provided for dissolution of Padma. The parties refer to this as the Patel agreement, which is not included in the record on appeal. The Patel agreement provided that Kazi would reimburse Jamshed for certain costs incurred in renovating and refurbishing the hotel. Jamshed operated the hotel.

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[1] To avoid confusion, we follow the convention of the parties by referring to the litigants, respectively, as Kazi and Jamshed.

On June 9, 2005, apparently through mediation, the parties reached a further agreement that Kazi would sell his interest to Jamshed. That settlement agreement is part of the record before us.

Jamshed moved to enforce the terms of the June 2005 mediated agreement. The court appointed a referee. According to Jamshed, the purpose of the reference was to clarify the terms of the agreement. The referee's report describes the purpose of the reference to be for "a recommendation to the court as to whether and under what terms the parties' respective motions to enforce a settlement pursuant to CCP sec. 664.6 should be granted."

The parties submitted briefs to the referee. The parties, their attorneys, and others who participated in the mediation (which resulted in the June 2005 settlement agreement) provided declarations about what occurred at the mediation. At a second hearing before the referee, the parties and their attorneys testified about the dispute and their interpretation of the June 2005 settlement agreement.

Kazi took the position that Jamshed had failed to pay him $80,000 in draws against his profit participation, as required by the settlement agreement. Jamshed claimed a credit of $29,000, representing the amount Kazi took from the partnership. He also claimed that Kazi was obligated to pay a 50 percent share of specified expenses incurred to maintain and improve the hotel. The amount of those expenses was the primary issue between the parties.

The referee found that the Patel agreement provided that certain specified expenses would be shared equally by the partners. He concluded: "The categorized expenses set forth in the Patel agreement, which would affect an accounting to determine the amount of profit, if any, are not specifically provided for by, or referred to in, the [June 9, 2005] settlement agreement." The referee found that expenses set forth in the Patel agreement "actually paid on or before May 31, 2005 shall be shared equally by the partners . . . ." The amounts paid by Jamshed for those expenses as of May 31, 2005 were to be deducted from any arrearage in the monthly draw due to Kazi. The referee found that "Patel

agreement expenses estimated but not paid by May 31, 2005 *are not an obligation of Kazi*." (Italics added.)

The referee did not calculate the expenses to be shared by Kazi. Instead, he noted that this sum was disputed and suggested that "typical evidence of payment, such as receipts and cancelled checks, will demonstrate which expenses have in fact been paid on or before the deadline of May 31, 2005 by Jamshad [*sic*]." The court reiterated that "Any such expenses not paid by that [May 31, 2005] deadline are the obligation only of [Jamshed]." The referee concluded that the terms of the settlement agreement were sufficient to make the agreement enforceable by motion pursuant to Code of Civil Procedure section 664.6.

The trial court adopted the referee's report as its order, and directed counsel to file any motion for entry of judgment pursuant to the June 2005 settlement agreement by a set date. Jamshed filed a new motion to enforce the agreement, supported by his declaration setting out expenses he claimed should be shared by Kazi. He also submitted documents which he claimed authenticated these expenses.

Kazi's opposition to Jamshed's motion to enforce and his own motion to enforce were rejected by the trial court as untimely. No reporter's transcript of the hearing on the motion is provided. The trial court entered judgment in favor of Jamshed for $21,589.32, the precise amount sought by Jamshed in his motion. The sum was calculated by taking the $80,000 draw owed by Jamshed to Kazi and deducting $26,666.68 in draw payments already made and $29,000 withdrawn by Kazi from Padma accounts, for a net sum due Kazi of $24,333.32. The trial court then calculated Kazi's share of joint expenses (according to Jamshed's figures) as $45,922.64. Deducting the $24,333.32 Kazi was owed from the $45,922.64 he owed on expenses, results in the judgment amount of $21,589.32 to be paid by Kazi to Jamshed.

Kazi moved to set aside the judgment pursuant to section 473. The motion was denied. This timely appeal followed.

DISCUSSION

I

Kazi challenges the sufficiency of the evidence to support the judgment in favor of Jamshed. He argues that many of the expenses claimed by Jamshed were not paid by the May 31, 2005 deadline set out in the Patel agreement, and therefore are not his responsibility. Although he mentions a number of specific items in his briefing, Kazi abandoned all but two of them: "But for this Court's purposes, it is not necessary to pick apart each expense item. Even if the court below had accepted every other expense as legitimately reimbursable, it would still have had to deduct the $10,570 'carpet installation' (of which he documented only $8,400, all of it paid after the May 31 cutoff) and the October 2005 $1,000 payment to WOW from Jamshed's $45,922.64, leaving only $34,352.64 in expenses, of which Jamshed would be entitled to subtract half, or $17,176.32, from the $24,333.32 Jamshed admits owing Kazi. Thus the net judgment should be an award to Kazi of at least $7,157, not a $21,589.32 award to Jamshed; Jamshed's own moving papers show that the court's judgment was wrong by $28,746.32." In light of Kazi's concession, we examine only the two items he preserves. Jamshed's brief on appeal does not address this issue.

The first disputed item is $10,570 for carpet installation. In support of that item, Jamshed submitted exhibit D to his declaration for enforcement of the settlement. Exhibit D is an undated hand-written document on stationery from the hotel, labeled "Receipt." Item "A" on the receipt is for carpet installed for a charge of $6,899.75. Item "B" is for banding installed for a charge of $2,500.00. Item "C" is for removal of furniture for no charge. A "total" is written under these items, for $400.00, although by our calculation, these sums total $9,399.75. Under the total is a notation reading: "received cash 3400.00" and "CK 5000.00." At the bottom, a construction company and individual name and telephone number are recorded. This document does not establish a charge for $10,570 nor does it establish that it was paid before the May 31, 2005 deadline.

The next page of exhibit D is a check numbered 1120, dated June 11, 2005, drawn on a Padma account, made payable to "Cash" for $5,000. On the bottom of the check there

is a notation reading: "balance paid for carpet install." Kazi argues that this expense should not be shared because the check is dated June 11, 2005.

Kazi speculates that the $3,400 cash payment for carpet is apparently reflected on another exhibit to Jamshed's declaration, a hand-written cash receipt on hotel stationery. The cash receipt states that a payment of $1,000 was received, with a signature and the date "6/1/05." Below that notation is the statement: "I have received cash 2400, & chk# 1120 [illegible]" with a signature and date of June 10, 2005. Both signatures appear to match the signature on the carpet installation receipt.

The check and receipt establish that the carpet payment was made after the May 31, 2005 deadline. Jamshed did not prove that he paid $10,570 for the carpet before the May 31, 2005. That item must be deleted from the calculation of Kazi's share of expenses.

The second challenged item is a partial payment for computer services provided by WOW Complete Enterprises. Jamshed's declaration claimed $2,700 for "WOW Enterprises" services, dated April 15, 2005. Exhibit I-11 to the declaration is a work order on a printed "WOW" form. It is dated April 15, 2005, and states that computer equipment was set up at the lodge for a charge of $2,700. Kazi cites to pages 35 and 36 of appellant's appendix, which are Bank of America credit card statements for a Padma account. They reflect that payments were made to WOW dated April 25, 2005 for $1,250 and October 3, 2005 for $1,000. We agree with Kazi that the October payment should be disregarded because it was made after the May 31 cutoff.

Jamshed did not prove that he was entitled to charge Kazi with half of the $10,570 carpet expense and the $1,000 WOW payment made in October 2005. Deleting those items from the $45,922.64 in expenses claimed by Jamshed leaves a total of $34,352.64. Under the Patel agreement, Kazi is responsible for one half of that amount, or $17,176.32. It is uncontested that Jamshed owed Kazi $24,333.32 in partnership draw payments. When $17,176.32 is deducted from that sum, the net judgment should have been to award Kazi $7,157 against Jamshed. We direct the judgment be corrected to reflect this award.

II

Kazi failed to file timely opposition to Jamshed's motion to enforce the settlement agreement, and also was late in filing his own motion to enforce. The trial court declined to consider these late papers. Kazi argues they should have been considered under section 473, under both the mandatory and the conventional discretionary provisions of the statute. We first discuss the mandatory provision.

Kazi argues he was entitled to mandatory relief from his untimely opposition and motion to enforce the judgment under section 473, subdivision (b). That provision provides: "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." If the application for relief is made within six months of entry of judgment and is "accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect" the court shall 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." (§ 473, subd. (b).)

Where an attorney affidavit of fault is filed under section 473, subdivision (b), there is no requirement that the attorney's mistake or inadvertence be excusable. (*Vaccaro v. Kaiman* (1998) 63 Cal.App.4th 761, 770.) California courts are divided as to whether the mandatory relief provision of section 473 applies in a context other than default.

Kazi cites a line of authority granting relief under the mandatory provision in situations which they describe as the procedural equivalent of a default. (*In re Marriage of Hock & Gordon-Hock* (2000) 80 Cal.App.4th 1438, 1445-1446 [wife and her attorney failed to appear at the time set for further trial of reserved issues, held: procedural equivalent of a default judgment]; *Avila v. Chua* (1997) 57 Cal.App.4th 860, 868 [failure to timely oppose motions for summary judgment, held: case was "directly analogous to a default judgment"]; *Yeap v. Leake* (1997) 60 Cal.App.4th 591 [majority found failure of

counsel and client to attend arbitration to be analogous to default and held mandatory provision applicable; but see dissent, concluding mandatory provision inapplicable].) These cases, of which *Yeap* is by this Division, give a broad reading to the statutory term "default" and "default judgment."

Other cases interpret the mandatory provision according to its terms. We find theses cases more persuasive. The court in *English v. IKON Business Solutions, Inc.* (2001) 94 Cal.App.4th 130 (*English*), disagreed with *Avila v. Chua*, *supra*, 57 Cal.App.4th 860. "Contrary to the court in *Avila*, we conclude the mandatory provision of section 473(b) simply does not apply to summary judgments because a summary judgment is neither a 'default,' nor a 'default judgment,' nor a 'dismissal' within the meaning of section 473(b). Therefore, regardless of whether summary judgment was entered against English because of her counsel's mistake or neglect, relief from the judgment was not available to her under the mandatory provision of section 473(b), and the trial court properly denied her motion to vacate the judgment under that provision." (*Id*. at p. 138.)

The *English* court based its conclusion in part on a comprehensive examination of the legislative history of the statute, and the cases interpreting that history. (*English*, *supra*, 94 Cal.App.4th at pp. 138-143.) Turning to the language of section 473, subdivision (b), the court summarized: "As used in the mandatory provision of section 473(b), 'default' carries its narrower meaning. The mandatory provision of the statute requires the court to vacate not any 'default,' but only a 'default entered by the clerk . . . which will result in entry of a default judgment . . . .' By qualifying the word 'default' in this manner, the Legislature plainly conveyed its intent to use the word in its narrower sense. Thus, the mandatory provision of section 473(b) applies to a 'default' entered by the clerk (or the court) when a defendant fails to answer a complaint, not to every 'omission' or 'failure' in the course of an action that might be characterized as a 'default' under the more general meaning of the word." (*Id*. at p. 143, fn. omitted.)

The *English* court gave a similar interpretation to "default judgment": "With the word 'default' thus properly understood, the meaning of the term 'default judgment' follows inexorably. A 'default judgment' within the meaning of section 473(b) is a

judgment entered after the defendant has failed to answer the complaint and the defendant's default has been entered. (See Code Civ. Proc., § 585 [setting forth procedures for entry of default judgment]; *Peltier v. McCloud River R.R. Co.* [(1995)] 34 Cal.App.4th [1809,] 1820 ['a default judgment is entered when a defendant fails to appear'].)" (*English, supra*, 94 Cal.App.4th at pp. 143 -144; see also *Prieto v. Loyola Marymount University* (2005) 132 Cal.App.4th 290, 295 [mandatory relief not applicable to unopposed summary judgment motion].)

We conclude that Kazi was not entitled to mandatory relief because the circumstances here do not constitute a default or default judgment to bring the case within that provision of section 473, subdivision (b). No default was entered by the clerk, and there was no default judgment.

III

Kazi also argues he was entitled to relief under the discretionary provision of section 473, subdivision (b), because his attorney demonstrated that the untimeliness of the opposition and his motion to enforce was due to excusable neglect.

"'A ruling on a motion for discretionary relief under section 473 shall not be disturbed on appeal absent a clear showing of abuse.' [Citation.] 'Excusable neglect' is generally defined as an error '"'a reasonably prudent *person* under the same or similar circumstances might have made.'" [Citation.]' (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 258.) Thus, as the trial court pointed out, '[c]onduct falling below the professional standard of care, such as failure to timely object to or properly advance an argument, is not therefore excusable.' (*Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 682 (*Garcia*).)" (*Ambrose v. Michelin North America, Inc.* (2005) 134 Cal.App.4th 1350, 1354.) The court in *Ambrose* concluded that "[a] reasonably prudent person just does not fail to include an essential request for continuance and an accompanying affidavit in an opposition to a summary judgment motion." (*Ambrose v. Michelin North America, Inc., supra*, 134 Cal.App.4th at p. 1354.)

"'To determine whether the mistake or neglect was excusable, ". . . the court inquires whether '*a reasonably prudent person* under the same or similar circumstances'

might have made the same error . . . ." [Citation.] Thus, the mandatory provision does not create a whole new class of mistakes or acts of neglect by the attorney which result in the court having to grant relief. The distinction in the statute noted by the Supreme Court's use of the term "reasonably prudent person" describes the obvious intent of the Legislature to mandate relief only from mistakes fairly imputable to the client, i.e., mistakes anyone could have made. The Legislature did not intend to eliminate attorney malpractice claims by providing an opportunity to correct all the professional mistakes an attorney might make in the course of litigating a case. This is demonstrated by the language of the statute itself, which distinguishes between the mandatory relief available to the client and the permissive relief available under the original statute to "a party or . . . legal representative." (§ 473, subd. (b).)' (*Garcia v. Hejmadi* [(1997)] 58 Cal.App.4th [674,] 682.)" (*Generale Bank Nederland v. Eyes of the Beholder Ltd.* (1998) 61 Cal.App.4th 1384, 1399-1400.)

The court in *Generale* held that "'Conduct falling below the professional standard of care, such as failure to timely object or to properly advance an argument, is not therefore excusable. To hold otherwise would be to eliminate the express statutory requirement of excusability and effectively eviscerate the concept of attorney malpractice.'" (*Generale Bank Nederland v. Eyes of the Beholder Ltd.*, *supra*, 61 Cal.App.4th at p. 1400.) It concluded: "'The advancement of arguments is the very essence of the professional responsibilities assumed by attorneys; failure to timely make an argument cannot, therefore, be considered a mistake permitted to an untrained "reasonably prudent person" within the meaning of section 473.' (*Garcia v. Hejmadi*, *supra*, 58 Cal.App.4th at p. 684.) Similarly, it has been stated that '[t]he mere fact that an attorney does not make a skillful presentation of a client's case will not, standing alone, usually warrant relief under section 473.' (*Vartanian v. Croll* (1953) 117 Cal.App.2d 639, 644.)" (*Generale Bank Nederland v. Eyes of the Beholder Ltd.*, *supra*, 61 Cal.App.4th at p. 1401.)

Here, counsel for Kazi declared that her opposition and motion to enforce the judgment were untimely because her sole associate resigned without prior notice at the end of July 2006. This occurred when she "was engaged in fairly extensive litigation,"

including trial preparation, preparation of a petition for writ of mandate, and an anti-SLAPP motion (Code Civ. Proc., § 425.16) in another matter. She explained that these matters imposed "a very heavy pressure on my time and seriously compromising my ability to keep track of my diary for preparation and filing of documents in the matter before the court. I, however, did my best to grapple with the situation and tried to find new counsel to assist me." The search for an additional attorney to assist was unsuccessful.

Under these circumstances, we find no abuse of the trial court's conclusion that excusable neglect had not been demonstrated. The press of business alone is not an excuse. (See *Metropolitan Service Corp. v. Casa de Palms, Ltd.* (1995) 31 Cal.App.4th 1481, 1486-1487.)

DISPOSITION

The judgment is reversed with directions to enter judgment in favor of Kazi in the amount of $7,157. The order denying relief under section 473, subdivision (b) is affirmed. Each side is to bear his own costs on appeal.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.