

What a Relief?

By Alana H. Rotter

As any litigator quickly learns, the summary judgment statute imposes many procedural requirements. Courts have cautioned that the statute, Code of Civil Procedure Section 437c, is "unforgiving" and that "there is little flexibility" in its requirements. *Brantley v. Pisano*, 42 Cal.App.4th 1591, 1607 (1996). Failure to comply with these requirements is "likely to be fatal to the offending party." One failure that is particularly likely to be fatal at summary judgment? Failing to file a timely opposition.

This may seem obvious. It is the opposition's job to raise triable issues of fact precluding summary judgment. Without an opposition, the court is of course more likely to find that there are no disputed material facts and to grant summary judgment.

But the appellate courts disagree on just how fatal the lack of a timely opposition is. Specifically, they have split over whether a court *must* grant a party's request for relief under Code of Civil Procedure Section 473, subdivision (b) after summary judgment is granted as unopposed. This is a significant issue. An attorney's failure to timely oppose summary judgment would have much less severe consequences for the client if relief is mandatory than if it is not.

Section 473(b) Relief

Section 473(b) offers a second chance in some situations to litigants who would otherwise suffer for their attorneys' mistakes. It includes two kinds of relief: discretionary and mandatory.

Under Section 473(b)'s discretionary provision, the court *may* relieve a party from "a judgment, dismissal, order, or other proceeding" occasioned by "mistake, inadvertence, surprise, or excusable neglect."

Under Section 473(b)'s mandatory provision, the court *shall* vacate a "default entered by the clerk" or "resulting default judgment or dismissal" upon a timely request "accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect."

To the extent that Section 473(b) applies to summary judgments, it would permit parties to request that the trial court vacate an unopposed

summary judgment and consider a late opposition. But to what extent does it apply?

Mandatory Relief

Given the trial court's latitude to deny discretionary relief under Section 473(b), mandatory relief might seem more promising for a party whose counsel has failed to timely oppose summary judgment. But mandatory relief may not be available from a summary judgment. That is because by statute, mandatory relief applies only to a "default," "resulting default judgment[,] or dismissal." Courts have split over whether a summary judgment granted as unopposed is a "default" or "dismissal" for Section 473(b) purposes.

In *Avila v. Chua*, 57 Cal.App.4th 860 (1997), the Second District, Division Five held that mandatory relief applies to summary judgments. The court reasoned that an unopposed grant of summary judgment is "directly analogous to a default judgment" because in both scenarios, there is no litigation on the merits. Additionally, granting mandatory relief where counsel has failed to file a timely opposition is consistent with the statutory purpose, which is to avoid having clients suffer for their attorneys' mistakes.

Upon finding that mandatory relief was available, the *Avila* court reversed an order denying relief under Section 473(b) and a summary judgment. The court found it unnecessary to decide whether counsel's failure to file a timely opposition was excusable, as would have been a prerequisite to discretionary relief but is not a requirement for mandatory relief.

At least three other courts have held that mandatory relief *does not* apply to summary judgments. *Huh v. Wang*, 158 Cal.App.4th 1406 (2007); *Prieto v. Loyola Marymount University*, 132 Cal.App.4th 290 (2005); *English v. IKON Business Solutions, Inc.*, 94 Cal.App.4th 130 (2001); see also *Hossain v. Hossain*, 157 Cal.App.4th 454, 458 (2007). Courts rejecting mandatory relief reason that such relief is available only from a "default" or "dismissal" and that an unopposed summary judgment is neither.

English laid out this position in the most detail. It traced the development of Section 473(b), noting that although the discretionary provision has existed since 1851, the mandatory provision was not added until 1988. As originally en-

acted, the mandatory relief provision applied only to a "default judgment" entered against a defendant. It was designed to address the "reluctance by the trial courts to grant discretionary relief from default judgments because of increased caseloads." The Legislature subsequently amended Section 473(b) to grant mandatory relief from a "default" or a "dismissal" in addition to a "default judgment." But it has not expanded mandatory relief beyond those categories.

The *English* court concluded based on this statutory evolution that the Legislature intended mandatory relief to apply only in very narrow circumstances: to a default or default judgment entered based on the defendant's failure to answer a complaint, or to a dismissal that is the procedural equivalent of a default — i.e., a dismissal after the plaintiff fails to oppose a motion to dismiss. A summary judgment for the defendant is neither. "Rather, it is a judicial determination that under the undisputed facts before the court, the moving party is entitled to prevail in the action as a matter of law."

English criticized *Avila* and other decisions that, in "ultimately misguided quests to salvage cases lost by inept attorneys," have expanded mandatory relief beyond what the Legislature intended. It emphasized that the Legislature differentiated between the scope of discretionary and mandatory relief and that no court can substitute its judgment for the Legislature's.

Several other courts have followed *English*, including, most recently, the Sixth District in *Huh v. Wang*. *Huh* explained that because summary judgments are not defaults, default judgments, or dismissals, applying mandatory relief would "go[] far beyond anything the Legislature has done." Accordingly, *Huh* affirmed an order denying mandatory relief. The Supreme Court denied review in *Huh*, as it had in *English*.

Huh appears to be reflect a growing trend: *Avila* was decided before *English*, and most, if not all, of the published decisions since *English* have found mandatory relief inapplicable to summary judgment.

Discretionary Relief

Failing to file a timely summary judgment opposition is not necessarily fatal even if mandatory relief is unavailable. Unlike mandatory relief, there is no question that discretionary relief is available in the summary judgment context. That's because Section 473(b) permits a





court to grant discretionary relief from a "judgment, dismissal, order, or other proceeding," not just from a default or dismissal. Summary judgments clearly fall within the expanded list. This means that the court *may* vacate a summary judgment, accept a late opposition, and reconsider the matter.

A few words of warning are in order, however. To be entitled to discretionary relief, a party must show that the mistake or neglect was excusable. The court has broad discretion to deny relief if it disbelieves the explanation for the neglect or otherwise finds the neglect inexcusable. And where the trial court denies relief without stating its reasons, the reviewing court may presume that it found the request inadequate on any basis supported by the record. It follows that a party seeking discretionary relief should explain the ultimate facts showing excusable neglect and, to the extent possible, provide evidence supporting those facts — for example, an admissible declaration from the individual who caused the mistake. The stronger the evidentiary showing of excusable neglect, the better the chance of winning discretionary relief in the trial court or on appeal.

The recent decision in *Huh* demonstrates the high bar for establishing "excusable neglect" and the extent of the court's broad discretion. As mentioned above, the plaintiff in that case unsuccessfully sought mandatory relief from a summary judgment granted after

his attorney failed to file an opposition. He also sought discretionary relief. The appellate court affirmed an order denying any relief.

Even though the order denying relief apparently did not offer any reasons, the trial court "implicitly determined that [plaintiff] failed to establish entitlement to relief." *Huh* found two bases in the record for affirming that conclusion.

First, the record supported a finding that the plaintiff did not act diligently, having waited an unexplained three months after notice of entry of judgment to seek relief. Second, the record supported a finding that the plaintiff had not established excusable neglect. The court rejected counsel's explanations for missing the opposition deadline, explaining that missing a deadline due to an "exceptional workload" is not excusable. There must also be an additional factor outside the attorney's control, such as an assistant's error or a law firm's breakup. Because the record

did not show any of these additional factors, the trial court had discretion to deny relief.

Huh highlights the significance of the divide over whether mandatory relief is available from a summary judgment. It may be difficult to establish the excusable neglect required for discretionary relief, and trial courts have wide latitude in deciding whether the showing is adequate. If mandatory relief were available, an attorney who inadvertently failed to timely oppose summary judgment would likely have a much better chance of obtaining Section 473(b) relief. Although at least one court has agreed that mandatory relief is available, the well-reasoned decisions in *English* and its progeny suggest that in the case of most unopposed summary judgments, discretionary relief is the only option.

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