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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ADAM MARTINEZ, Plaintiff and Appellant, v. SOUTHERN CALIFORNIA EDISON COMPANY, Defendant and Respondent.	G051029 (Super. Ct. No. 30-2010-00406671) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Mary Fingal Schulte, Judge. Affirmed.

Hall & Bailey and Donald R. Hall for Plaintiff and Appellant.

Richard D. Arko and Patricia A. Cirucci; Greines, Martin, Stein & Richland, Robin Meadow and David E. Hackett; Pyka Lenhardt Schnaider Zell and Donald H. Zell for Defendant and Respondent.

* * *

Adam Martinez appeals from the trial court's entry of judgment dismissing his tort claims against Southern California Edison Company (Edison) pursuant to the

parties' settlement agreement. (Code Civ. Proc., § 664.6; all further statutory references are to this code unless noted otherwise.) Martinez had entered a conditional settlement with Edison in which Edison paid him $25,000, subject to his unilateral right to rescind the settlement if he repaid the money within 30 days of the outcome of a writ proceeding filed by a codefendant. Edison moved to enforce the settlement agreement when more than 60 days passed after the writ was resolved and Martinez had not repaid the funds, but Martinez argued his attorney's failures entitled him to relief under section 473, subdivision (b) [hereafter "section 473(b)"], precluding entry of judgment pursuant to the settlement. Alternately, he argues the antiforfeiture provisions of Civil Code section 3275 prevented enforcement of the settlement agreement. These contentions are without merit, and we therefore affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

Martinez sued Edison and multiple "Doe" defendants in September 2010, alleging their negligence contributed to his injuries when the metal tent pole he was using on a ladder to measure trees contacted Edison's power lines. He later named Edison's line-maintenance contractor, Asplundh Tree Expert Company (Asplundh) as Doe 1. Asplundh answered, denied liability, and noticed a summary judgment motion. But a few weeks before the hearing, Martinez sought leave to amend the complaint.

His proposed amendment added allegations that Edison had known a required "High Voltage" sign was missing or broken when the accident occurred, and added a claim for punitive damages against Edison. Plaintiff's proposed amended complaint inexplicably reverted to Doe designations for the other defendants. Although Doe 1 remained in the caption and body of the proposed amended complaint, the pleading did not name Asplundh specifically in the caption, body, prayer, or in any proposed amended provisions.

At the hearing on Martinez's motion for leave to amend, Asplundh sought to clarify whether it was "in or out of the case," but the court deferred discussion on that issue to the summary judgment hearing and granted Martinez leave to amend. A week later, the trial court heard and denied Asplundh' s summary judgment motion.

Nevertheless, Asplundh refused to participate in further discovery, claiming Martinez had dismissed Asplundh because he had failed to name it in the first amended complaint. The trial court was not pleased when Martinez reported Asplundh's conduct, observing at an ensuing hearing, "I think you're playing games. I think you're trying to drag things out, and you're wasting my time with such a silly opposition . . . ." The court ordered Asplundh to answer the amended complaint within three days, but Asplundh instead filed a demurrer.

After Asplundh disobeyed its order, the trial court overruled the demurrer and invited Martinez to move to strike Asplundh's original answer and take its default on the first amended complaint. Martinez did so, and after the trial court entered the default, Asplundh filed in this court a petition for a writ of mandate to overturn it.

Meanwhile, the proceedings central to this appeal finally arose when Martinez, Edison, and their counsel attended a settlement conference. There, the court proposed a resolution in which Martinez would conditionally settle his claims against Edison in return for $25,000, but if Asplundh succeeded in setting aside its default, Martinez would have the right to rescind the settlement agreement with Edison, provided it returned Edison's funds within 30 days of Asplundh's relief from its default. Martinez and Edison accepted this proposal, and the trial court entered a minute order confirming a "court supervised settlement pursuant to Code of Civil Procedure section 664.6." Martinez acknowledged on the record that he understood and agreed to the settlement terms. Martinez and his attorney then signed on August 9, 2012, a "Release and Settlement Agreement" memorializing the terms.

The agreement specified the pertinent terms in Section 3, as follows: "(a) In consideration of the conditional release set forth below in Section 3(b), Edison agrees to make a payment of Twenty-Five Thousand Dollars ($25,000.00) payable to Adam M. Martinez and his attorney of record, Donald Robert Hall, A Professional Corporation. [¶] (b) As to said payment, Plaintiff and Edison further agree that said settlement with Edison is a conditional settlement and was entered into as a result of the Court entering a default against Asplundh and that said settlement and payment by Edison of the settlement amount is conditional based upon the outcome of any writ or appeal by Asplundh of any default or default judgment entered against Asplundh as follows: [¶] (1) Should Plaintiff prevail as to any such writ or appeal by Asplundh, or settle with Asplundh, then the settlement will constitute a full and complete settlement as to any and all liability and claims against Edison; [¶] (2) Should Asplundh prevail as to any such writ or appeal from any default or default judgment for Plaintiff and against Asplundh, or should the trial court set aside the default judgment against Asplundh, then such settlement will no longer be deemed binding upon the Plaintiff, *if the Plaintiff pays Twenty-Five Thousand Dollars ($25,000.00) to Edison within 30 days of the entry of any decision or order by the Court of Appeal . . . in Asplundh's favor*." (Italics added.)

After Martinez and his attorney, Donald Hall, signed the settlement agreement, Edison performed its part of the contract by paying Martinez $25,000.

But as Edison and Martinez expected, Asplundh filed a writ petition for mandamus relief from the default judgment the trial court entered against it. In February 2014, a panel of this court filed an opinion granting Asplundh's petition and ordering the trial court to vacate Asplundh's default, and the remittitur issued on May 5, 2014.

After more than two months elapsed without Martinez repaying Edison the $25,000, Edison filed a motion in the trial court on July 16, 2014, under section 664.6 to enforce the settlement agreement and for entry of a dismissal.

Martinez's opposition conceded the 30-day deadline for repayment had passed, but argued the deadline should be excused because his attorney overlooked it and also failed to notify Martinez of the writ opinion vacating Asplundh's default.

Martinez's attorney admitted fault and, like Martinez, asserted the sole basis for opposing enforcement of the settlement agreement was his failure to remind Martinez to repay the $25,000 under the settlement terms. Attorney Hall stated in his declaration, as pertinent: "13. Asplundh' s Petition for Writ of Mandate was critical. If Asplundh's petition had been granted on the original grounds specified by the court, Asplundh would have eventually been dismissed from the case pursuant to a statute of limitations defense. [¶] 14. Given these critical proceedings involving Asplundh and the length of time which had elapsed, when the remittitur issued, I forgot the provision in the settlement agreement requiring Plaintiff to return the $25,000 within 30 days after the decision became final with the Court of Appeal. My mistake, inadvertence, and neglect to forward the payment to Edison was my fault and my fault alone. I did not communicate the remittitur information to Plaintiff within the 30 day period for payment. [¶] 15. Prior to the time the 30 days expired, I did not receive a demand for payment from Edison or its counsel.

Accordingly, Martinez argued that if the court were inclined to enter Edison's dismissal under section 664.6, the dismissal should be set aside under section 473(b).

The trial court rejected Martinez's argument. In its tentative opinion in Edison's favor to enforce the settlement agreement, the court had observed: "The parties knowingly entered into a settlement, forming a contract. CCP § 473(b) relief is not available just because a party breaches a contract or fails to perform. Here, Plaintiff did not lose his day in Court due to any mistake of his attorney; rather, he knowingly and voluntarily chose to take the benefit of money in exchange for a particular timeline and a particular result."

At the hearing, the court similarly noted that "the trigger for enforcing the settlement was the fact that the — a remittitur came down, and then the money was not tendered back"; the "contract was pretty clear, and if the condition precedent was not met, then I think that the settlement is binding." Addressing the "473 issues," the court stated, "it just doesn't strike me that that is available every time somebody defaults on a contract." "I'm not seeing this dismissal as a default for which that mandatory relief is available." The trial court granted Edison's motion to enforce the settlement agreement under section 664.6 and entered judgment pursuant to its terms, dismissing Martinez's claims against Edison.

II

DISCUSSION

Martinez contends the trial court erred by enforcing the judgment under section 664.6, rather than granting him relief under section 473(b) to preclude Edison's dismissal based on his attorney's admission of fault. Alternately, Martinez asserts for the first time on appeal that Civil Code section 3275 precluded the dismissal. The trial court did not err in concluding Martinez was not entitled to relief under section 473(b) or section 3275.

Section 664.6 provides: "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement." The Legislature enacted this section "to provide a summary procedure for specifically enforcing a settlement contract without the need for a new lawsuit." (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 809.)

"Settlements are contracts. To set them aside, one must present contractual grounds for rescission — fraud, mutual mistake, coercion, etc." (*Huens v. Tatum* (1997) 52 Cal.App.4th 259, 264 (*Huens*), disapproved on another ground in *Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 256-257 (*Zamora*).) Because there is no

dispute here that the parties reached the requisite "meeting of the minds" to form a valid settlement contract, our review is "limited." (*J.B.B. Investment Partners, Ltd. v. Fair* (2014) 232 Cal.App.4th 974, 984 [noting public policy favoring settlements].)

Section 473(b) provides for discretionary and in some instances mandatory relief from default judgments and some dismissals. Mandatory relief requires an attorney's affidavit of fault (*ibid.*), but is not available to prevent a "voluntary dismissal executed pursuant to a settlement." (*Huens*, *supra*, 52 Cal.App.4th at p. 265.) As *Huens* explained, "[A]llowing a party to escape the consequences of his agreement upon the mere affidavit of his attorney that he had made an *inexcusable* error concerning the applicable facts or law" would "constitute a serious intrusion into contract law. . . . It would also undermine our strong public policy in favor of settlements." (*Id.* at pp. 264-265, original italics.) Accordingly, mandatory relief was not available under section 473(b).

Section 473(b)'s broader discretionary relief provision states: "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." (Italics added.) It applies to voluntary dismissals. (*Zamora*, *supra*, 28 Cal.4th at p. 254 [statutory language extends to "*any* 'judgment, dismissal, order, or other proceeding'"].) But "the discretionary relief provision of section 473 only permits relief from attorney error 'fairly imputable to the client, i.e., mistakes anyone could have made.'" (*Id.* at p. 258.) In other words, "neglect is excusable if a reasonably prudent person under similar circumstances might have made the same error." (*Austin v. Los Angeles Unified School Dist.* (2016) 244 Cal.App.4th 918, 929 (*Austin*).) It does not apply to conduct below the professional standard of care for attorneys because "[t]o hold otherwise would be to eliminate the express statutory requirement of excusability and effectively eviscerate the concept of attorney malpractice." (*Zamora*, at p. 258.)

"The test for discretionary relief under . . . section 473 requires the party seeking relief to show excusable error." (*Comunidad en Accion v. Los Angeles City Council* (2013) 219 Cal.App.4th 1116, 1132; accord, *Austin*, *supra*, 244 Cal.App.4th at pp. 928-929 [moving party bears burden under § 473(b)].) We review the trial court's decision for abuse of discretion. (*Zamora*, *supra*, 28 Cal.4th at p. 257 ["'clear showing of abuse'" necessary to reverse].)

Here, Martinez based his motion on his attorney's admitted failures to notify him of the writ opinion vacating Asplundh's default and to alert Martinez to repay Edison $25,000 within 30 days of that outcome to rescind the settlement with Edison. Hall noted Edison did not make a demand for repayment within the 30 days, implying that omission rendered Hall's oversight excusable. But the settlement agreement included no such requirement, and it is an attorney's professional responsibility to keep track of deadlines. (*Munroe v. Los Angeles County Civil Service Com.* (2009) 173 Cal.App.4th 1295, 1297, 1303; *People ex rel. Dept. of Fish & Game v. Attransco, Inc.* (1996) 50 Cal.App.4th 1926, 1936 ["Litigation is full of short deadlines"].) Because an attorney also must "keep a client reasonably informed about significant developments" (Rules Prof. Conduct, rule #3-500; Bus. & Prof. Code, § 6068, subd. (m)), Hall's admissions he "forgot the provision in the settlement agreement requiring Plaintiff to return the $25,000 within 30 days" and "did not communicate the remittitur information to Plaintiff" do not constitute excusable neglect. To the contrary, an attorney's "failure to discharge routine professional duties" is inexcusable rather than excusable negligence. (*Generale Bank Nederland v. Eyes of the Beholder Ltd.* (1998) 61 Cal.App.4th 1384, 1402.)

Apart from forgetfulness, Hall attributed his errors to his focus on the writ proceeding involving Asplundh. But that proceeding was important in part because rescission of the settlement agreement with Edison turned on its outcome, and presumably those stakes should have helped Hall to recall the 30-day deadline. But in

any event, because the discretionary relief standard applies to mistakes a reasonable person "could have made" (*Zamora*, *supra*, 28 Cal.4th at p. 258) rather than to attorney negligence (*ibid.*), "an exceptional workload generally must be accompanied by some factor outside the attorney's control that made the situation unmanageable," such as a staff error, a glitch in office machinery such as a computer failure, or a firm's breakup or loss of an attorney. (*Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1424.) Hall's focus on the Asplundh writ petition was a necessary part of his attorney responsibilities, but the "press of business" alone does not constitute grounds for relief. (*Id.* at pp. 1423-1424; see also 8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 161, p. 757 [press of business excuse, "standing alone, has been considered insufficient"].) Hall offered no other extenuating circumstances, and therefore the trial court did not err in concluding section 473(b) relief was not available to preclude granting Edison's motion to enforce the settlement.

On appeal, Martinez argues for the first time that Civil Code section 3275 precludes enforcing the terms of his settlement agreement with Edison. The argument is forfeited for failure raise and litigate it below (*Newton v. Clemons* (2003) 110 Cal.App.4th 1, 11), and in any event fails on the merits.

Section 3275 provides: "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty."

The case on which Martinez relies illustrates that section 3275 does not apply here. In *Timney v. Lin* (2003) 106 Cal.App.4th 1121 (*Timney*), the parties' settlement agreement resolving their failed real estate contract included a liquidated damages provision that was neither labeled as such, nor had any relation to actual damages. Such "penalty clauses" are unenforceable (see Civ. Code, § 1671, subd. (b))

because they bear "no reasonable relationship to the range of actual damages that the parties could have anticipated would flow from a breach." (*Ridgley v. Topa Thrift & Loan Assn* (1998) 17 Cal.4th 970, 977.) Here, while Martinez likens to a forfeiture his release without a trial of his tort claims against Edison, *that* was precisely what the parties contemplated in entering their settlement agreement. There was no forfeiture and nothing like the illegal penalty provision in *Timney*. Consequently, Martinez's reliance on *Timney* and Civil Code section 3275 are without merit.

III

DISPOSITION

The judgment is affirmed. The parties shall bear their own costs on appeal.

ARONSON, ACTING P. J.

WE CONCUR:

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FYBEL, J.

IKOLA, J.