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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JAMES D. MACIEL, SR., Plaintiff and Appellant, v. LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY, Defendant and Respondent.	B255975 (Los Angeles County Super. Ct. No. VC063181)

APPEAL from a judgment of the Superior Court of Los Angeles County, Roger T. Ito, Judge. Affirmed.

James D. Maciel, Sr., in pro. per., for Plaintiff and Appellant.

Levy & Nourafchan, Nazila Y. Levy; Greines, Martin, Stein & Richland, Martin Stein and Carolyn Oill for Defendant and Respondent.

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Plaintiff James D. Maciel, Sr., appeals from the trial court's judgment of dismissal in this negligence action against the Los Angeles County Metropolitan Transit Authority (MTA). We affirm.

FACTS AND PROCEDURE

Maciel filed this action against MTA seeking damages for personal injury and property damage. He alleged he was injured when he fell while taking a seat on a bus. Additionally, he cracked his iPod in the fall. MTA moved for judgment on the pleadings on the grounds that (1) there was no statutory basis to hold MTA liable, as required by Government Code section 815, and (2) Maciel failed to comply with the claim presentation requirements of Government Code sections 911.2 and 945.4, except as to his claim for property damage to his iPod.[1] Maciel had submitted a claim for $270 for the iPod, but he had not filed a claim for personal injuries.

The court granted the motion for judgment on the pleadings without leave to amend. The minute order of the motion hearing states: "[T]here is a stipulation between [MTA] to pay the Plaintiff, James D. Maciel, Sr. the sum of $270.00 for the replacement of his broken I-Pod. [¶] . . . [¶] The Plaintiff is to file a dismissal of the action upon receipt of the $270.00." The formal order granting the motion stated the same. MTA tendered a check to Maciel for $270, which was cashed.

Approximately three months later, Maciel had not yet filed a dismissal of the action, and MTA moved ex parte for entry of the dismissal. Counsel's declaration in support of the ex parte application stated the parties stipulated in open court at the motion hearing that Maciel would accept $270 to dismiss the action. Counsel mailed him a check for $270 and a request for dismissal with prejudice for him to execute. Maciel cashed that check. After he did not return the executed request for dismissal to counsel

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[1] Maciel has not included his complaint in the record. We take our summary of his allegations from MTA's memorandum of points and authorities in support of its motion for judgment on the pleadings.

for MTA, counsel spoke to him on the telephone on several occasions, and he assured her he would return the executed document but failed to do so.

Counsel had tried to contact Maciel at his telephone number of record to provide notice of the ex parte application. The number was disconnected. The same day, counsel mailed a letter to Maciel advising him of the ex parte application. Counsel sent the letter on Friday, March 7, 2014, and indicated her intent to appear ex parte on Tuesday, March 11, 2014. Maciel did not appear at the ex parte hearing. The court granted MTA's ex parte application and ordered the action dismissed with prejudice.

Approximately two weeks later, Maciel filed a motion to vacate the dismissal (motion to vacate) and a motion for leave to file a first amended complaint (FAC). Maciel's motion to vacate indicated that, at the hearing on MTA's motion for judgment on the pleadings, he had stated he would proceed with this action for iPod damages only, given the court's ruling that his claim form set forth only property damage. MTA then agreed to give him $270 for the cost of the iPod. Maciel argued he did not agree to dismiss his action, though, and the $270 only resolved the property damage issue. He further argued he did not receive the letter advising him of the ex parte application until three hours after the hearing, and he thus had no opportunity to respond. Maciel's motion for leave to file an FAC argued his FAC would cure the defects identified in MTA's motion for judgment on the pleadings.

The court denied both of Maciel's motions. It held that MTA mailed timely notice of the ex parte application to Maciel, and moreover, he had not submitted a sworn declaration attesting to his late receipt of notice. The court also held there was no basis for relief under Code of Civil Procedure section 473.[2] It had previously found the case was barred for failing to comply with the Government Code, and the time to cure those defects had past.

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[2] Further undesignated statutory references are to the Code of Civil Procedure.

Maciel filed a notice of appeal the same day the court denied both motions. He purported to appeal from the judgment of dismissal rendered earlier, not the order denying his motions.

DISCUSSION

1. Jurisdiction

MTA argues we should summarily affirm the judgment of dismissal because Maciel has not raised any issues within our jurisdiction. MTA contends he appealed from the judgment dismissing his action, yet he raises issues dealing solely with his motion to vacate, and he did not state he was appealing from the order denying the motion to vacate. We are not persuaded we should summarily affirm the judgment.

We disagree that the issues Maciel raises deal only with the motion to vacate. Some but not all relate to the motion to vacate. Fairly construed, some relate to alleged errors the court made in granting the ex parte application for a dismissal. These arguments are reviewable on appeal from the judgment of dismissal. (*Rao v. Campo* (1991) 233 Cal.App.3d 1557, 1565 [interim orders are reviewable on appeal from the final judgment].)

An order denying a statutory motion to vacate is appealable. (*Shisler v. Sanfer Sports Cars, Inc.* (2008) 167 Cal.App.4th 1, 5.) To the extent Maciel's arguments relate to the order denying the motion to vacate, we agree we have no jurisdiction to review that independently appealable order. He did not appeal from it. (*Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 239 [no jurisdiction existed to review separately appealable order granting new trial motion when the notice of appeal from the judgment did not expressly identify that order].) As we discuss below, even if we had jurisdiction to review the order denying the motion to vacate, Maciel's arguments would fail on the merits.

2. Merits

Maciel asserts the court erred in granting MTA's ex parte application for a dismissal because (1) there was no evidence he agreed to dismissal of the case; (2) MTA did not support its ex parte application with a sufficient declaration, as required by

California Rules of Court, rule 3.1202(c);[3] and (3) MTA did not serve the ex parte application on him before the hearing. None of these arguments require reversal.

The record contains sufficient evidence that Maciel agreed to dismiss the case. In her sworn declaration submitted with the ex parte application, MTA's counsel stated the parties stipulated in open court that Maciel would accept $270 from MTA and dismiss his action. When he cashed the check but did not return the request for dismissal to MTA, he told counsel he intended to send her the executed request for dismissal. The court's minute order and formal order regarding the motion for judgment on the pleadings both indicate Maciel agreed to accept $270 for his iPod and dismiss the action.

This evidence is consistent with most of Maciel's statements in his motion to vacate. He admitted that he agreed to proceed solely on his property damage claim when the court determined he did not comply with the claim presentation requirement for his personal injury claim. (Maciel does *not* contend the court erred in granting the motion for judgment on the pleadings on this or any other basis.) He also admitted that he agreed to accept $270 in satisfaction of his property damage claim. There were no further claims remaining then, whether he agreed to file a request for dismissal or not.

Maciel's procedural arguments with respect to the ex parte application also fail. First, MTA's declaration in support of the application complied with rule 3.1202(c). The rule requires an ex parte applicant to "make an affirmative factual showing in a declaration containing competent testimony based on personal knowledge of irreparable harm, immediate danger, *or any other statutory basis* for granting relief ex parte." (Italics added.) Section 664.6 provided a statutory basis for granting MTA's ex parte application. It provides: "If parties to pending litigation stipulate . . . orally before the court, for the settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement." (§ 664.6.) Counsel's declaration set forth the necessary underlying facts—that the parties had orally stipulated in open court

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3 Further undesignated rule references are to the California Rules of Court.

for settlement of the case. Section 664.6 does not on its face require a *noticed* motion, and the words "upon motion" generally means a request of a party. (*Oppenheimer v. Deutchman* (1955) 132 Cal.App.2d Supp. 875, 879.) Maciel has not cited any authority demonstrating section 664.6 requires a noticed motion as opposed to an ex parte motion.

Second, MTA's failure to serve the ex parte application on Maciel before the hearing did not result in prejudicial error. Rule 3.1206 requires parties appearing at the ex parte hearing to "serve the ex parte application or any written opposition on all other appearing parties at the first reasonable opportunity," otherwise the court may not conduct the hearing absent exceptional circumstances. Maciel was not an "appearing part[y]" at the hearing, and thus, the plain language of the rule did not require service on him. Even if MTA improperly failed to serve Maciel, he has not shown the court would have reached a more favorable result, had MTA served him. (Cal. Const., art. VI, § 1 [courts will not reverse "for any error as to any matter of procedure" unless the error resulted in a "miscarriage of justice"]; *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800 [courts should declare a "miscarriage of justice" only when "'it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error'"].) We have already determined there was sufficient evidence of his agreement to dismiss the case.

Maciel additionally argues the court erred in denying his motion to vacate when it determined MTA timely notified him of the ex parte application and found he did not include a sworn declaration attesting to his late receipt of the ex parte notice. We have no jurisdiction to review the order denying the motion to vacate, as discussed above. Even if we did, we would be unpersuaded by these arguments for the following reasons.

Rule 3.1203(a) requires an ex parte applicant to notify all parties of the application "no later than 10:00 a.m. the court day before the ex parte appearance." The declaration filed with the application must state the applicant gave notice or "[t]hat the applicant in good faith attempted to inform the opposing party but was unable to do so, specifying the efforts made to inform the opposing party." (Rule 3.1204(b)(2).) Accordingly, the ex parte rules contemplate that there may be situations in which an applicant cannot reach

the opposing party. MTA's application and attempts to notify Maciel complied with these rules. Counsel's declaration set forth how she attempted to give notice by calling him, but she could not reach him because his telephone number was out of service. She then mailed him notice on Friday of the hearing on the following Tuesday. In other words, she made a good faith attempt to notify him and informed the court of the efforts she made.

Maciel contends he included a verification at the end of his motion to vacate, and this was as good as a sworn declaration attesting to his late receipt of notice. Whether he submitted a sworn statement setting forth his late receipt of notice is irrelevant. The rules required MTA to attempt to provide notice in good faith, and it did so. They did not require proof of actual receipt of notice for the court to proceed.

Moreover, assuming for the sake of argument that the court's findings on these issues were wrong, Maciel has not demonstrated why they require reversal of the order denying the motion to vacate. Section 473 permits the court to relieve a party from a judgment or dismissal when there has been "mistake, inadvertence, surprise, or excusable neglect." (§ 473, subd. (b).) Maciel disagreed with the court's findings. But his disagreement did not constitute mistake, inadvertence, surprise, or excusable neglect.[4]

DISPOSITION

The judgment is affirmed. MTA shall recover costs on appeal.

FLIER, J.

WE CONCUR:

BIGELOW, P. J. GRIMES, J.

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[4] Maciel has filed a request for judicial notice of his proposed first amended complaint. We deny his request as unnecessary to the disposition of this appeal. (*Salmon Protection & Watershed Network v. County of Marin* (2012) 205 Cal.App.4th 195, 209, fn. 13.)