

California Country Club Homeowners Assn. v. Roberto Orci, et al.
BC 365454

TYPE OF MOTION: Motion for Relief from the Order Granting Plaintiff's Summary Judgment

MOVING PARTY: Defendants/Cross-Complainants Roberto Orci and Jeanine Orci

RESP. PARTY: Plaintiff/Cross-Defendant California Country Club Homeowners Assn.

HEARING DATE: Monday, October 6, 2008

ORIGINAL FILED
OCT 14 2008
LOS ANGELES
SUPERIOR COURT

On 08/04/08, this Court granted Plaintiff/Cross-Defendant's motion for summary judgment. Defendants now seek relief from the order granting Plaintiff's summary judgment motion pursuant to CCP §473.

CCP §473(b) provides in pertinent part, "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." CCP §473(b) also mandates that a court grant such relief where there is an attorney affidavit of fault stating the mistake, inadvertence, surprise or neglect.

Defendants contend that they are entitled to mandatory or discretionary relief under CCP §473 because Defendants' counsel mistakenly believed that the Court would review the entire court file – namely the evidence submitted in connection with the prior TRO/PI hearing – and as such, failed to submit any additional evidence to the Court in opposing the MSJ. According to Defendants, this evidence shows the existence of triable issues of fact that preclude summary judgment in favor of Plaintiff.

However, the purpose of the mandatory relief provision of CCP §473 is "to alleviate the hardship on parties who *lose their day in court* due solely to an inexcusable failure to act on the part of their attorneys." *Generale Bank Nederland v. Eyes of the Beholder Ltd.* (1998) 61 Cal.App.4th 1384, 1397, citing to *Huens v. Tatum* (1997) 52 Cal.App.4th 259, 264. The statute was not intended to be a "catch-all remedy for every case of poor judgment on the part of counsel which results in a dismissal." *Id.* Thus, in a case like *Avila v. Chua* (1997) 57 Cal.App.4th 860, which is cited by Defendants, mandatory relief was granted after the trial court struck a late-filed opposition and granted a summary judgment motion on the basis of the moving papers. In this situation, the plaintiff lost his day in court due solely to his lawyer's failure to timely act and was "directly analogous to a default judgment." *Id.* at 868. Relief, however, was not mandatory based on an attorney's affidavit contending that he could have done a better job opposing a summary judgment motion in *English v. IKON Business Solutions, Inc.* (2001) 94 Cal.App.4th 130, 147-148, and in *Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 681, where the attorney's fault consisted in failing to present all available evidence in opposition to a motion.

Here, similar to the situations in *English* and *Garcia* and unlike that in *Avila*, it cannot be said that Defendants were deprived of their day in court. Defendants were represented by counsel, who appeared at the hearing, and timely filed an opposition to the summary judgment motion, which was considered by the Court. Moreover, contrary to Defendants' assertions, they did offer evidence in an attempt to meet their burden of proof, i.e. the declarations of Defendants, but the Court concluded that such evidence was inadmissible and insufficient to defeat Plaintiff's summary judgment motion. The mandatory relief provision of CCP §473 is inapplicable here.

As for whether discretionary relief under §473 should be granted, the party seeking relief must demonstrate that the mistake, inadvertence or neglect was excusable. "In deciding whether counsel's error is excusable, the reviewing court looks to the nature of the mistake or neglect and whether counsel was otherwise diligent in investigating and pursuing the claim. When examining the mistake or neglect, the court inquires whether a reasonably prudent person might have made the same error under the same or similar circumstances." *Munoz v. State of California* (1995) 33 Cal.App.4th 1767, 1782-1783, citing *Bettencourt v. Los Rios Community College Dist.* (1986) 42 Cal.3d 270, 276. It has been held that, "Conduct falling below the professional standard of care, such as failure to timely object or to properly advance an argument, is not...excusable. To hold otherwise would be to eliminate the express statutory requirement of excusability and effectively eviscerate the concept of attorney malpractice." *Garcia, supra*, at 682-683.

Here, Defendants' counsel's alleged mistake was failing to submit all evidence to the Court in opposing the MSJ because he believed that the entire court file would be considered by the Court.¹ However, counsel did not request that the Court take judicial notice of the file, and nowhere in Defendants' Notice of Opposition, Memorandum of Points and Authorities, Separate Statement, or Declarations did counsel direct the Court to any evidence that was previously submitted by Defendants. The only "evidence" that was cited to were Defendants' declarations, which were wholly insufficient to defeat Plaintiff's summary judgment motion. Although Defendants have now presented evidence, including an amended separate statement, such evidence is irrelevant to this motion. The issue here is not whether the original opposition was insufficient to prevail, but whether the reason advanced for its insufficiency was "excusable" within the meaning of §473. *Id.* at 684. Here, it was inexcusable for counsel to fail to produce any competent evidence in opposing a motion for summary judgment.

And finally, there is no basis to grant §473 relief based on Defendants' "surprise." In Mr. Orci's declaration submitted in opposition to the motion for summary judgment, he merely offered conclusory statements without citing to any evidence or directing the Court to consider any previously submitted evidence. Considering this lack of evidence, Mr. Orci should not have been "surprised" by the Court's decision.

(1) This Court finds no evidence that there was any "agreement" between counsel, tacit or otherwise, to have the Court consider all materials in the Court file. No standard language in the notice of motion could reasonably be seen by any seasoned counsel to abrogate CCP Section 437c, or any other code section. Rather, this Court believes the Opposition reflects Defense Counsel's tactical decisions, particularly to rely on findings made by Judge Yaffee and declarations filed by Defendants, and legal argument attacking Plaintiff's position. Regardless, the only way this Court could have considered the "other evidence" in the Court's file would have been pursuant to a request for judicial notice of same. While the Court could take judicial notice of the existence of this evidence, it could not take notice of the truth of the facts contained therein, so had defense counsel not been "mistaken" about consideration of this "other evidence," this "evidence" could not raise a triable issue of fact. *Day v. Sharp* (1975) 50 CA 3d. 904, 914, *Sosinsky v. Grant* (1992) 6 CA 4th 1548, 1564, 1569

The Motion for Relief from the Order Granting Plaintiff's Summary Judgment is DENIED.

Defendants' Requests for Judicial Notice are GRANTED.²

Plaintiff's evidentiary objections are SUSTAINED.

Date: 10/14/08



Hon. Terry A. Green
Judge of the Superior Court

(2) The "evidence" noticed and incorporated in Defendants' new Separate Statement, cannot be considered for the truth of facts noticed, only the existence of the documents noticed. *Day v. Sharp, Sosinsky v. Grant*, both Supras. Defendants also present new evidence, such as the declarations of Janet Spinks and Roberto Orci, that apparently are not part of the Court's file, hence not properly considered if we were to forgive counsel for his "mistake." Thus, nothing in the Amended Separate Statement would raise a triable issue of fact, and the Plaintiff's Motion for Summary Judgment would still be granted even if the CCP 473 relief sought here was given to Defendants.

C E R T I F I C A T E O F M A I L I N G

L.A. Superior Court Central

Civil Division

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