B337804

COURT OF APPEAL OF THE STATE OF CALIFORNIA
Second Appellate District, Division Two

ROSEMARY HATHORNE,
Plaintiff and Appellant,

v.

CITY OF LOS ANGELES et al.,
Defendants and Respondents.

Appeal from the Superior Court of the State of California,
for the County of Los Angeles, Case No.: 19STCV20318
Hon. Lynne M. Hobbs, Dept. 30

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Plaintiff Rosemary Hathorne appeals an order denying her motion to vacate a dismissal. Hathorne had agreed to settle her claims settlement with Defendant City of Los Angeles ("City") and signed the written settlement agreement. The trial court set an OSC re: Dismissal (Settlement). Due to attorney error, the OSC was not properly calendared by Hathorne's counsel, DTLA Law Firm ("DTLA"). When no one appeared for Hathorne, the court dismissed the case. DTLA did not discover the dismissal until informed by a Deputy City Attorney. Hathorne moved to vacate the order of dismissal, which was denied.

The denial was erroneous and inconsistent with governing policies preferring adjudication on the merits. Even assuming that the three-prong *Stiles/Aldrich* test is the proper test for orders denying motions to vacate, Hathorne properly satisfied the three prongs. In short, (1) she demonstrated meritoriousness by having a $400,000 settlement agreement; (2) her attorneys' mistakes and neglect resulted in the dismissal; and (3) Hathorne moved to vacate within two months of discovering that her case had been dismissed.

But there's more. Our Supreme Court has cast doubt over the applicability of the *Stiles/Aldrich* test to *orders* denying motions to vacate. (*Rappleyea*.) Because an order is not final, it is not entitled to the same policy weight as a judgment. (*See In re Marriage of Stevenson*.) Thus, the trial court's application of the *Stiles/Aldrich* test was incorrect and a per se abuse of discretion.

The Court should reverse.

II. STATEMENT OF THE CASE

A. The parties agree to settle the case in October 2022.

Hathorne and the City agreed to settle this personal injury case in October 2022 for $400,000, following a mediation. (AA 90.)

B. The City sends a draft release to Plaintiff's counsel in December 2022.

Two months later, in December 2022, the City prepared and sent a full release of claims to Plaintiff's counsel. The release contingent of approval by the City Council. (AA 94.) The release did not require that the case remain pending, i.e., not dismissed, for defense counsel to seek and obtain final approval from the City Council.

On February 17, 2023, the City's counsel emailed Plaintiff's counsel John Rofael and asked if Hathorne had signed the release. (AA 96.) In response, Rofael requested another copy of the release; the City's counsel did so. (AA 97, 101.)

C. The handling attorney for Hathorne abruptly left the firm in March 2023; trial court sets continued OSC Re: Dismissal (Settlement) for May 8, 2023.

In March 2023, John Rofael abruptly left the DTLA Law Firm and ceased handling the case; a March 13, 2023, email from the City inquiring about the status of the agreement received an auto-response stating that he was "out of the office indefinitely," and directed all further inquiries to legal assistant Sandra Hernandez. (AA 107.) On March 17, 2023, the trial court held an OSC Re: Dismissal (Settlement) and another attorney from the firm appeared and requested more time for Hathorne to review and sign the release. (AA 62.) The Court continued the OSC to May 8, 2023. (*Ibid.*)

D. Hathorne signs release on May 4, 2023.

Plaintiff Hathorne signed the release on May 4, 2023, and her counsel mailed a hard copy to the City Attorney's office at City Hall. (AA 59, 64-65, 120.) The City later denied receiving the signed release. (AA 70, 74, 88.)

On May 8, 2023, the trial court called OSC, and no party appearing, dismissed the case without prejudice. (AA 68.) A copy of the minute order dismissing the case was mailed.

E. Plaintiff's counsel contacts City Attorney's office to inquire about status of payment in October and November 2023.

Subsequently, on both October 27, 2023, and November 28, 2023, Plaintiff's counsel inquired as to the status of approval and release of funds. (AA 53, 74-75.) Vanessa Ticas, a deputy City Attorney, responded and denied ever receiving a signed settlement agreement, and responded that the case was already dismissed. (AA 74.) Hernandez replied that the settlement agreement had been mailed to City Hall, 200 N. Main St., Room 600, Los Angeles, CA 90012. (AA 71.) Ticas again denied receiving the signed agreement and informed Hernandez, that in any event the "release would have been contingent on council approval." (AA 70.)

F. Hathorne files motion to vacate the dismissal in January 2024.

On January 4, 2024, Plaintiff noticed her motion to vacate, set for February 23, 2024. Along with a memorandum, Plaintiff filed the declaration of its attorney Daniel Azizi and four Exhibits. (AA 58-77.) Azizi declared that the failure to appear at the OSC was due to attorney John Rofael leaving the firm and a failure to calendar the OSC or inform anyone at the firm of the OSC. (AA 58.) As partner, Azizi took responsibility for not attending the OSC. (AA 59.) Exhibit A was the March 17, 2023 minute order. (AA 62.) Exhibit 2 was a signed release dated May 4, 2023. (AA 64-66.) Exhibit 3 was the May 8, 2023, Minute Order. (AA 68.) Exhibit 4 was the email exchange between Plaintiff's counsel and law firm with the City. (AA 70-76.)

The City opposed the motion (AA 80-86), attached the declaration of Ticas (AA 86-88), and Exhibits 1-5, including several subparts. (AA 90-122.) Plaintiff replied. (AA 126-134.) The matter was heard on February 23, 2024, with a court reporter present. (AA 138.) Afterwards, the trial court adopted its tentative as the final ruling of the court. (AA 138-141.)

G. Hathorne timely appeals.

A Notice of Ruling was served and filed on February 27, 2024. [1](AA 135-42.) Plaintiff timely appealed.[2] (AA 149.)

III. STANDARD OF REVIEW

Appeals from orders under section 473 are generally reviewed for abuse of discretion. (*Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 897-898.) Appeals from orders under a court's equitable power is reviewed under the same standard. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975 (*Rappleyea*), 981; *In Re Marriage Of Park* (1980) 27 Cal.3d 337, 347.) The discretion of the trial court cannot be "capricious or arbitrary… but [must be] impartial [ ], guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gartia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." (*Id.*, citing *Benjamin v. Dalmo* (1948) 31 Cal.2d 523, 526; *Bailey v. Taaffe* (1866) 29 Cal. 423, 424.) Orders denying relief are "scrutinized more carefully than order[s] permitting trial on the merits." (*Rappleyea* , at p. 980, citing *Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233; see also *Miller v. City of Hermosa Beach* (1993) 13 Cal.App.4th 1118, 1136.)

That said, whether the trial court was correct in applying the "stringent" *Aldrich* test here is a question of law and should be reviewed de novo. (See *Rappleyea* at p. 982.)

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[1] No judgment was entered into the court record. An unsigned minute order is not a judgment. (Cal. Civ. Proc. 581d.)

[2] Although an order denying a motion to vacate is not generally appealable (*see Kalenian v. Insen* (2014) 225 Cal.App.4th 569, 575-576), an exception applies here. (*Cope v. Cope* (1964) 61 Cal.App.2d 218, 228-229.) An order is appealable where "circumstances are such that an appeal from the first order would be vain for lack of a record showing the rights of the aggrieved party." (*Id.* [citations omitted].) "Since an appeal would lie from a final judgment denying [an independent action in equity], it would appear to be incongruous to hold that it would not lie from an order to the same effect made in the original case." (*Id.*, at p. 229, fn. 8.)

IV. LEGAL ANALYSIS

A. A trial court is empowered to vacate its dismissal order because of extrinsic mistake.

Our Supreme Court has long recognized the courts' inherent powers to vacate its own orders including dismissals. This recognition is based on the strong policy favoring trial on the merits. (*Olivera v. Grace* (1942) 19 Cal.2d 570, 575.) This policy overrides the "usual conclusive effect" of a final judgment or order, if that final judgment or order was obtained through fraud or mistake, preventing a "fair adversary hearing" and "reasonable opportunity to litigate." (*In re Marriage of Guardino* (1979) 95 Cal.App.3d 77, 88, citing 5 Witkin, Cal. Procedure (2d ed. 1971) Attack on Judgment in Trial Court, § 175, pp. 3744-3745.) Thus, even after the statutory six-month period under section 473 expires, a court may still vacate its own order on equitable grounds. (*Olivera*, *supra*, at pp. 575-576.)

The terms "fraud" and "mistake" have broad meanings and "encompass almost any set of extrinsic circumstances which deprive a party of a fair hearing. (*Aldrich, supra,* at p. 738*; see In re Marriage of Park*, *supra*, at p. 342.) "'Extrinsic' refers to matters outside of the issues framed by the pleadings, or the issues adjudicated." (*Aldrich*, *supra*.)

B. Plaintiff satisfied the three-part *Aldrich* test.

"Mistake" as relevant here is defined as an omission or failure to act. (*Aldrich supra*; *see Salazar v. Steelman* (1937) 22 Cal.App.2d 402, 409 [definition of affirmative mistake].) As it relates to *judgments*, courts have developed a three-part test to set aside a judgment from an extrinsic mistake. (*Stiles v. Wallis* (1983) 147 Cal.App.3d 1143 (*Stiles*),1147-1148*; accord Rappleyea,* at p. 983 [italics in *Rappleyea*].)

First, the moving party must show that it has a meritorious case. Second, the moving party must articulate a satisfactory excuse for not presenting a defense to the original action. Third, the moving party must

demonstrate that it was diligent in seeking to set aside the default once it had been discovered. (*Aldrich*, *supra*, citing *Stiles*, *supra*.)

1. A signed Settlement Agreement demonstrates a meritorious case.

As stated above, the first prong is to demonstrate a meritorious case. (*Aldrich*, supra.) Only a minimal showing is required. (*Stiles v. Wallis* (1983) 147 Cal.App.3d 1143, 1148, citing *Gudarov v. Hadijeff* (1952) 38 Cal.2d 412; *Beard v. Beard* (1940) 16 Cal.2d 645; accord *Mechling v. Asbestos Defendants* (2018) 29 Cal.App.5th 1241 (*Mechling*), 1246 ["[M]erely attaching a signed verification to a proposed answer is sufficient to demonstrate meritoriousness"]; *see Rappleyea*, *supra,* at p. 983 [an unverified complaint offsets an unverified answer].) Thus, Hathorne must only establish facts "indicating a sufficiently meritorious claim entitl[ing her] to a fair adversary hearing." (*Mechling, supra,* citing *In re Marriage of Park,* supra, at p. 346.) There is no requirement to submit any evidence, affidavits or declaration. (*Mechling*, at p. 1247.) [3]

The trial court stated that Hathorne "fail[ed] to address the first element. There is no showing that Plaintiff has a meritorious case." (AA 141.) That criticism is mystifying. Here, Hathorne did more. She sufficiently stated a cause of action and received—at the very least—an offer from the City to settle her claims for $400,000. That satisfies the minimal required showing for a meritorious case.

2. Attorney neglect is a satisfactory excuse.

This factor balances the policy favoring a hearing on the merits against a party's flagrant disregard of his responsibilities. (*cf Hammell v. Britton* (1941) 19 Cal.2d 72, accord *Stiles, supra,* at p. 1148.) The question is "the same as asking whether an extrinsic mistake occurred." (*Rappleyea*, *supra,* at

[3] One could restate the standard as being the familiar demurrer standard: the sufficiency of the pleading. This makes sense. As section 473 was designed to set aside defaults, how would a defendant demonstrate a meritorious case without the benefit of discovery? Why would a defendant be held to a higher standard at this stage than that of a demurrer?

pp. 982-983.)[4] An extrinsic mistake can come in many forms but is always neglect resulting in an unjust order or judgment. (*Kuchlar v. Kuchlar* (1969) 1 Cal.3d 467, 471-472, citing 3 Witkin, Cal. Procedure, p. 2128 [and cases cited].)

Here, Hathorne demonstrated the occurrence of an extrinsic mistake. In October 2022 the parties had come to terms for a $400,000 settlement. On March 17, 2023, at the OSC, Hathorne's counsel requested more time to review and execute the terms of the release. The court continued the OSC to May 8, 2023. On May 4, 2023, the release was signed and mailed to the City. Before the May 8th OSC, Hathorne's handling attorney, John Rofael, abruptly left DTLA. Rofael did not calendar the new date for the OSC before he left. As a result, Hathorne was not represented at the OSC, and the case was dismissed on the court's own motion.[5]

Attorney neglect in calendaring hearings has long been considered excusable. (See, *Comunidad en Accion v. Los Angeles City Council* (2013) 219 Cal. App. 4th 1116, 1131-35; *Nilsson v. Los Angeles* (1967) 249 Cal. App. 2d 976; *Elston v. City of Turlock* (1985) 38 Cal.3d 227, 234 *Los Angeles v. Board of Supervisors* (1930) 105 Cal. App. 199.) Indeed, it is a "classic example" excusable neglect supporting relief under section 473. (*Comunidad en Accion, supra,* quoting *Elston*.) Even more so when an attorney abruptly leaves a firm and leaves chaos in his wake. More than that, had the City received the signed release then the settlement would be valid. Azizi declared that his office mailed the executed release on May 4, 2023. (AA 58.) Ticas declared that she never received it. (AA 88.) Thus, the mistake here—in part—also belongs to the United States Postal Office.

Because there was attorney error and a mailing mix-up, there is excusable neglect and extrinsic mistake.

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[4] Both the trial court and the City analyzed this prong as a question of diligence. That is wrong. Diligence is analyzed in prong three.

[5] It is worth noting that neither party appeared at the OSC. Why the City did not appear is regrettably not reflected in the record. Either way, it demonstrates the ease in which any attorney may neglect a hearing. It also possibly reflects the mindset of the deputy attorney: there was no need to show because she expected to receive a signed agreement. Perhaps she expected Hawthorne's attorney to report the signed settlement to the Court.

3. Hathorne was diligent in moving to vacate within 37 days of discovering the dismissal.

"[D]iligence is the most inextricably intertwined with prejudice. If heightened prejudice strengthens the burden of proving diligence, so must reduced diligence prejudice weaken it." (*Rappelyea*, at pp. 983-984.) The "court must weigh the reasonableness of the conduct of the moving party in light of the extent of the prejudice to the responding party." (*In re Marriage of Stevenot*, *supra*, at p. 1071.)

Diligence is measured in time, starting from when the moving party discovers the entry of judgment. (*Kramer v. Traditional Escrow, Inc.* (2020) 56 Cal.App.5th 13, 37.) Here, it is undisputed that Hathorne's counsel discovered the dismissal on November 28, 2023 and moved to vacate the dismissal only 37 days later. This is well within the amount time courts have considered reasonable. (*Hallett v. Slaughter* (1943) 22 Cal.2d 552; *Mechling*, *supra*, at p. 1248 [five months is reasonable]; *McCreadie v. Arques* (1967) 248 Cal.App.2d 39 [up to one year may be reasonable]; *Stiles*, *supra*, at p. 1150 [20 months was excessive]; *but see Rappelyea*, *supra*, at p. 984 [a year and one-half delay is acceptable where the mistake was attributable to the court clerk].)

Here, the court made three observations. First, that "Plaintiff's counsel does not state when the discovery of the mistaken dismissal occurred or what may have caused the delay in discovering the mistake." (AA 141.) Second, that "there is no explanation for the delay from June to the end of October." (Id.) And third, that "Plaintiff wait[ed] until January to file this motion." (Id.)

These observations are contradicted by the record.

First, Plaintiff's counsel *did* state when the discovery of the mistaken dismissal occurred, Azizi declared that "Defendant's November 28, 2023 e-mail was *Plaintiff and my firm's first notice* of Defendant's erroneous position as to the enforceable settlement and Defendant's unilateral and improper withdrawal thereof. Had Defendant made its unexpected position clear at the time of my office's first request (October 27, 2023), then I would have sought relief pursuant to California Code of Civil procedure section 473(b)." (AA 59,

¶13.) It is also evident from the content of the communications from Plaintiff counsel's office in October and November 2023 that they did not believe there was any issue and that they were simply following up on payment.

Because Azizi did not receive notice until November 28, 2023, Hathorne was not on the diligence clock until then. Hathorne moved to vacate less than six weeks after receiving notice of the dismissal. The period between November 28 and January 4 also encompasses the holiday season making the modest 37-day period even more understandable.

Second, Plaintiff's counsel *did* explain the delay from the time of the dismissal to its discovery on November 28, 2023. Azizi declared that Attorney Rofael abruptly left the firm before the May 8th OSC and informed no one at the firm of the hearing. (AA 58, ¶7.) As noted above, the first time Azizi found out about the dismissal was November 28, 2023. (AA 59.) To the degree that the trial court relied on the notice mailed out by the court clerk (AA 117), that notice is not conclusive. It only creates a presumption of having received the document, but that presumption may be rebutted by declaration or other admittable evidence. (Cal. Evid. Code sections 641, 604.) A declaration made on personal knowledge to not having received the mail can override the presumption. (*Taylor v. State Bar of Cal.* (1974) 11 Cal. 3d 424, 433.) Although Azizi does not explicitly disavow receiving the notice, Azizi does affirmatively state that the first time his firm had actual notice of the dismissal was on November 28, 2023.

All that aside, the court made a fundamental error in evaluating Hathorne's diligence. The issue here is diligence of pursuing *equitable relief, not statutory relief*. Under section 473, a party has six months from the entry of the order to move for relief. But where the issue is diligence as an element of a motion for equitable relief the relevant consideration is when the moving party received *actual notice* of the dismissal, which here is November 28, 2023. The trial court's focus on the time between the May 8 OSC and October 2023, when the firm was following up on the status of the check was therefore misplaced.

4. There is no possible prejudice to the City.

As *Rappelyea* noted, the diligence required is less where—as here—there is no prejudice to the City. First, there was no final judgment entered. Thus, while the order dismissed the case, there was no judgment in favor of the City that now needs to be vacated. Second, and related, because there was no judgment, the settlement agreement is still in effect.

It is worth emphasizing that the City has already agreed to settle this case for $400,000. Thus, the worst that can happen to the City is that it becomes easier procedurally for Hathorne to compel the City to pay the amount it has already agreed to. Hathorne still retains the right to have her settlement agreement declared and enforced in another proceeding. The only question here is whether this court has jurisdiction to enforce or if Hathorne must now initiate a second action.

Thus, there is no (or very little) prejudice to the City. Because there is no prejudice to the City, Hawthorne's required diligence showing is proportionally minimized.

C. The trial court used the wrong test because it never entered a judgment, only an order.

The distinction between judgments and orders are firmly established in California's jurisprudence. As relevant here, the trial court only entered an *order* of dismissal and never signed it. Thus, the order does not take the form of a judgment under section 581d.

"A judgment is the final determination of the rights of the parties in an action or proceeding." (Code Civ. Proc., § 577.) California has a strong public policy in favoring finality of judgments. (*Rappelyea*, *supra*, at p. 982, citing *In e Marriage of Stevenot, supra* at p. 1071.) That is why equitable relief from a default *judgment* (as opposed to entry of default) requires exceptional circumstances to be granted. (*Rappelyea, supra*; *but see County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1229-1230 [applying *Rappelyea* to include orders].) The appellate courts developed the three-prong test to

further these policy considerations. (*Rappelyea, supra*, at pp. 981-982 [tracing the history from *Stiles* through *Aheroni v. Maxwell* (1988) 205 Cal.App.3d 284, 291].)

But the Supreme Court left for another day whether the three-prong test applies only to judgments or even to orders. (*Rappelyea*, at 982 [declining to address the issue because even applying the three-prong test, relief was available].) Perhaps that day has come.[6]

> "To the extent the policy disfavoring equitable relief is based on an understandable distaste for the forfeiture of a judgment, which is vested personal property [citations omitted] the policy's basis is weaker in this case." (*Rappelyea*, supra, at p. 982.)

Because the court here is applying its inherent and equitable powers, it is no different than an original action in equity. (See *Cope, supra,* at p. 229, fn. 8.) When a court sits in equity, it only asks was there an extrinsic fraud or mistake. (*See Caldwell v. Taylor* (1933) 218 Cal. 471, 477.) That question is the same as prong two of the *Stiles/ Aldrich* test. (*Rappelyea*, *supra*, at p. 982-983.) Thus, the only question in an equity action that does not involve a final judgment is whether there was a satisfactory excuse in the form of an extrinsic mistake. A court sitting in equity does not ask either prong one (meritorious case) or prong three (diligence).

Here, Hathorne had a satisfactory excuse: attorney neglect. In October 2022 the parties had come to terms for a $400,000 settlement. On March 17, 2023, at the Order to Show Cause, Hathorne requested more time to review and execute the terms of the release. The court continued the OSC to May 8, 2023. On May 4, 2023, the release was signed and mailed to the City. Before the May 8th OSC, Hathorne's primary attorney, John Rofael, abruptly left DTLA. Rofael did not calendar the new date for the OSC. So Hathorne was not represented at the OSC and the case was dismissed on the court's motion.

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[6] Whether the trial court applied the correct test is a pure question law reviewed de novo and this Court may review pure questions of law even if they were not fully stated below. (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742; *Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 767.)

Because Hathorne established extrinsic mistake, equitable relief from an order is available and should have been granted.

V. CONCLUSION

The Court should reverse the trial court's order of dismissal. Applying the three-part *Stiles/Aldrich* test, Hathorne made a satisfactory showing of all three prongs. She had a meritorious case because she obtained a $400,000 settlement agreement. Hathorne demonstrated extrinsic mistake—her attorney's neglect in appearing for the OSC. And Hathorne diligently moved for relief less than six weeks after discovering her attorney's mistake. The trial court abused its discretion in finding otherwise.

The trial court also erred in applying the three-prong test to a motion to vacate an order. Because an order is not final, it is not held to the same stringent three-prong test as is a judgment. For an order to be set aside and vacated in equity, the moving party only needs to demonstrate either extrinsic fraud or mistake. Hathorne demonstrated extrinsic mistake: her attorney's neglect.

The Court should reverse.

Dated: March 13, 2025 JOSEPH S. SOCHER, ESQ.

By: /s/ *Joseph S. Socher*
Joseph S. Socher
Attorney for Plaintiff/Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court, Rule 8.204, the text of this Appellant's Opening Brief, including footnotes, consists of approximately 4000 words as counted by the Microsoft Word program used in preparing this brief.

Dated: March 13, 2025

JOSEPH S. SOCHER, ESQ.

By: /s/ *Joseph S. Socher*
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