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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

SUSAN COLBORN, Plaintiff and Appellant, v. CHEVRON U.S.A., INC., Defendant and Respondent.	A150831, A151494 (Contra Costa County Super. Ct. No. MSC1401280)

In these consolidated appeals, Susan Colborn challenges the superior court's denial of her motion for relief from default under Code of Civil Procedure section 473 and its subsequent award of costs.[1] Because of the strong public policy in favor of deciding cases on the merits, relief from default under section 473 is liberally granted when promptly sought. The default here consisted of Colborn's failure to respond to a summary judgment motion filed by her former employer, Chevron U.S.A., Inc., resulting in a ruling and ultimately judgment against her. She contends she mistakenly believed her former attorney of record, who was still assisting her after she decided to represent herself in the case, had agreed to and would file opposition to Chevron's motion. Neither he nor she filed opposition. Less than two weeks after the court granted Chevron's unopposed summary judgment motion, Colborn sought relief from the default, which the superior court denied. While Colborn's evidence of excusable neglect is not compelling, it suffices to meet the "slight evidence" standard our Supreme Court held applies to a

[1] All further statutory references are to the Code of Civil Procedure.

promptly filed motion for relief from default. In this circumstance, the superior court's denial of her motion was an abuse of discretion. In view of our reversal of the judgment, we also vacate the order awarding costs to Chevron.

BACKGROUND

Plaintiff filed a complaint alleging that Chevron's termination of her employment, after 23 years, was motivated by an intent to retaliate against her for complaining that the company was engaging in age discrimination against one of her subordinates. Initially, she was represented by attorney Nicolas Vrataric. In March 2015, after the case was filed and prior to her deposition, Vrataric filed a substitution of counsel, which he and Colburn had signed, substituting her in pro per in place of him. Thereafter, she represented herself at her deposition. At a status conference held several months later at which she appeared, Chevron's counsel informed the court it planned to file a motion for summary judgment. The judge then advised Colborn that a motion for summary judgment is a significant motion that could result in dismissal of her case and that she should consider retaining counsel.

Several months later and as promised, Chevron filed its motion for summary judgment and hand served the moving papers on Colborn. The motion was set for hearing on July 8, 2016, and Chevron filed an amended notice so stating and served it on Colborn by mail.

According to Colborn's declaration in support of her subsequent motion for relief from default, after receiving the summary judgment papers on April 22, 2016, she "immediately" contacted Vrataric by email and told him she would mail copies of the papers to him, which she did on April 25, 2016, with a handwritten note asking him to contact her if anything else was needed. Ten days later, she sent him another handwritten note reminding him to contact her if she needed assistance, informing him that the judge had emphasized the importance of being represented and asking whether they should remove her as pro per. Over the next several weeks, Colborn received discovery requests and other documents and promptly mailed them to Vrataric. On June 27, 2016, Vrataric left her a phone message informing her "he had been going through the materials that I

sent to him and that we should respond to the Summary Judgment." She responded to the message indicating she agreed and asking him to let her know what else was needed. On July 6, 2016, she received a "Notice of No Opposition to the Defendant's Motion for Summary Judgment/Adjudication," filed by Chevron, and immediately mailed it to Vrataric. She called and emailed Vrataric reminding him to attend the hearing or to send someone from his firm in his place. The next day she sent an additional email asking him to confirm his availability. On the morning of July 8, she contacted two attorneys available to her through Hyatt Legal Plans to ask if they could attend the hearing on her behalf, but neither was available.

Also according to Colborn, on the afternoon of July 8, 2016, she received an email from Vrataric stating he had sent her an email sometime earlier regarding what would be needed to respond to the summary judgment motion. She responded that she had never received it and requested that he resend it. On July 10, she began contacting other employment law firms, and on July 11 received a note from Vrataric's law office informing her Vrataric was on medical leave, could not assist her and was unavailable.

In the meanwhile, on July 7, 2016, the trial court had issued a tentative ruling granting Chevron's motion for summary judgment. Neither Colburn nor anyone on her behalf had contested the tentative or appeared at the hearing on the motion, and on July 8, 2016, the ruling had become the order of the court.

On July 20, 2016, Colborn, still in pro per, filed a motion to set aside the default order on the motion for summary judgment and grant a continuance and additional time to respond the motion. In the motion, she declared under penalty of perjury the facts set forth above regarding her receipt of the summary judgment papers and communications with Vrataric.

Chevron filed opposition to the motion, contending Colborn was aware she was not represented by counsel, was warned by the court of the potential consequences of a motion for summary judgment and failed to oppose the motion, request a continuance, contest the tentative ruling or appear at the hearing. Chevron contended her motion was procedurally improper because it failed to include a proposed opposition to the motion

for summary judgment, and further argued that it lacked merit because Colborn acted unreasonably when Vrataric failed to respond to her notes and messages about opposing the motion. Chevron contended Colborn's declaration about her contacts with Vrataric were hearsay and argued she should have attached her written communications with him. Chevron's counsel then declared, in opposition to the motion, that she (counsel) had recently contacted Vrataric's office. His assistant had told her office (1) that Colborn was repeatedly told Vrataric could not assist her because he was ill and no longer represented her and (2) that "they" never told Colborn they would prepare an opposition to the motion for summary judgment.

Colborn, represented by new counsel, filed a reply. The reply argued the requirement that an application for discretionary relief from default under section 473, subdivision (b) include "an answer or other pleading proposed to be filed" did not apply to an opposition to a summary judgment motion because it was not a "pleading" as defined by the Code of Civil Procedure. Noting the deadline for seeking relief from default would not expire until January 8, 2017, Colburn's reply requested additional time to file her opposition to the summary judgment motion now that she had counsel. In response to Chevron's argument that Colborn could not show mistake because she knew she was self-represented, the reply explained that Vrataric had continued to consult and advise her after substituting out and had told her " 'we' (i.e., Mr. Vrataric and Ms. Colborn) should respond to defendant's motion for summary judgment." The reply argued that under the circumstances it was reasonable for her to expect he would prepare the opposition after she sent him the papers and sought his help. In an accompanying declaration, Colborn attached copies of notes and emails she had referred to in her earlier declaration.

The motion for relief from default was heard on September 9, 2016. Colborn appeared through her new counsel by telephone. The court adopted its tentative ruling denying the motion, which stated: "Plaintiff represents herself in pro per, and has done so since March 2015. In her moving papers, she contends that her previous attorney has failed to respond to Defendant's [motion for summary judgment] and take any action on

her behalf. She has failed to set forth any legitimate ground upon which to set aside the default order. The order granting summary judgment is affirmed."

On October 6, 2016, plaintiff, in pro per again, sought reconsideration of the motion to set aside the default summary judgment. On October 11, 2016, the court filed Chevron's proposed form of judgment**.** On January 19, 2017, the court issued a tentative ruling denying Colborn's motion for reconsideration and to set aside default, which was uncontested and became the order of the court. On April 7, 2017, the trial court amended the judgment to award Chevron costs of $8,848.

DISCUSSION

I.

Colborn Met Her Burden to Show a Mistake Justifying Relief from Default.

Section 473, subdivision (b), which governs motions for relief from default, provides in relevant 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. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken."

In *Fasuyi v. Permatex* (2008) 167 Cal.App.4th 681 (*Fasuyi*), we set forth the principles governing motions for relief under section 473: "The most fundamental of those principles is that affirmed in *Au–Yang v. Barton* (1999) 21 Cal.4th 958, 963: ' "[T]he policy of the law is to have every litigated case tried upon its merits, and it looks with disfavor upon a party, who, regardless of the merits of the case, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary.' " (*Ibid.*, citing among other cases, *Weitz v. Yankosky* (1966) 63 Cal.2d 849, 855 (*Weitz*).)

This court further noted in *Fasuyi*: " 'Because the law favors disposing of cases on their merits, "any doubts in applying section 473 must be resolved in favor of the party seeking relief from default [citations]. Therefore, a trial court order denying relief

is scrutinized more carefully than an order permitting trial on the merits." ' (*Rappleyea v. Campbell, supra*, 8 Cal.4th at p. 980, quoting *Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233 (*Elston*)). In Witkin's typically succinct statement of the rule, the remedial relief offered by section 473 is 'highly favored and is liberally applied.' (8 Witkin, Cal. Procedure, Attack on Judgment in Trial Court [4th ed. 1997] § 152, pp. 653–654 and numerous cases there collected.)

"As a result of those principles, the Supreme Court has recognized that if a defendant promptly seeks relief . . . and there is no showing of prejudice to [the opposing party . . . , ' "very slight evidence will be required to justify a court in setting aside the default." ' (*Elston, supra*, 38 Cal.3d at p. 233.) Or as *Elston* put it two pages later, '[u]nless inexcusable neglect is clear, the policy favoring trial on the merits prevails.' (*Id.* at p. 235.)" (*Fasuyi, supra*, 167 Cal.App.4th at p. 696.)

Fasuyi discusses another point that is pertinent here. " 'Where a default is entered because defendant has relied upon a codefendant or other interested party to defend, the question is whether the defendant was reasonably justified under the circumstances in his reliance or whether his neglect to attend the matter was inexcusable. [Citations.] This rule has been held applicable where an insured relied upon his insurer to defend. (*Pelegrinelli v. McCloud River Etc. Co.* (1905) 1 Cal.App. 593, 594) [¶] With regard to whether the circumstances warranted reliance by the defendant on a third party, the efforts made by the defendant to obtain a defense by the third party are, of course, relevant. . . . Even if the mistake were caused by *some* negligence on defendant's part, this negligence might be excused if it in no way prejudiced the opposing party. [Citations.]' (*Weitz, supra*, 63 Cal.2d at pp. 855–856.)" (*Fasuyi, supra*, 167 Cal.App.4th at p. 697.) While in this case it is the plaintiff rather than defendant who relied on a third party to defend, an attorney rather than an insurance company on whom reliance was placed, and a motion for summary judgment rather than a complaint that went undefended, the approach just described seems equally appropriate given the principles that govern motions for relief from default.

Finally, as we also observed in *Fasuyi*, " 'Our standard of review is well articulated by the California Supreme Court in *Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233: "A motion seeking such relief lies within the sound discretion of the trial court, and the trial court's decision will not be overturned absent an abuse of discretion. [Citations.] However, the trial court's discretion is not unlimited and must be ' "exercised in conformity with the spirit of the law and in a manner to subserve and to impede or defeat the ends of substantial justice." ' " ' " (*Fasuyi*, *supra*, 167 Cal.App.4th at p. 695, quoting *McCormick v. Board of Supervisors* (1988) 198 Cal.App.3d 352, 359–360.)

Applying these principles, we conclude that the trial court abused its discretion by denying relief from default in this case.

Colborn's declarations in support of her motion for relief from default state that she relied on her attorney, Vrataric, to prepare and file opposition to the motion for summary judgment. She states that he continued to assist her after he substituted out of the case as her counsel, and that she communicated with him several times over the period between her receipt of the moving papers and the hearing date. Chevron contends that reliance was unreasonable for several reasons.

First, Chevron contends that Colborn's failure to understand that the deadline for her to file opposition to the summary judgment motion was June 24, 2016, 14 days before the July 8 hearing date, was not reasonable and that her status as a pro per representing herself does not excuse her from knowing the rules, particularly because she admitted the court emphasized the timing requirements for summary judgment at the status conference at which Chevron informed the court of its intent to file such a motion. If Colburn's claim of mistake was that she missed the deadline, Chevron's argument might have traction, but here it is beside the point. Her mistake was not that she overlooked, ignored or was mistaken about the deadline to file opposition to Chevron's motion. Rather, her claim is that she relied on Vrataric and believed *he* would prepare and file opposition on her behalf. The fact that she was not aware of the date the opposition was due is of no consequence if her reliance on Vrataric to handle the response to the motion

was reasonable. Regarding that reliance, Colborn declared that immediately after receiving Chevron's moving papers, she emailed Vrataric about them and promptly sent him copies. She then followed up by sending him additional information in May and June 2016, and repeatedly asked him to contact her if he needed anything additional. She also reminded him of the hearing two days ahead of time. By the time she received Chevron's notice of no opposition to the motion on July 6, 2016, the time for filing opposition had long since passed. Given these facts, Chevron's argument that Colborn failed to show mistake because she was not excused from knowing or complying with the rules misses the boat.

Second, Chevron dismisses Colborn's reliance on her attorney-client relationship with Vrataric as a "red herring" because the relationship "does not establish that Vrataric represented Appellant in this action or that he committed to filing an opposition on her behalf." This argument again fails to grapple with Colburn's explanation for her mistake. She did *not* rely solely on the existence of an attorney-client relationship in the abstract as the basis for her belief. Instead, she explained that she understood the substitution to be a temporary one for purposes of her deposition[2] and that Vrataric continued to advise and assist her in the case after she became pro per. For example, she stated, "he was still available during the deposition to advise on anything that I was not comfortable with and . . . I could call him by phone," and "[a]fter the deposition, Mr. Vrataric continued to advise me and answer my questions. He never told me that he would not be representing me or helping me." Indeed, although neither party mentions it, the record shows Vrataric appeared in court twice on Colburn's behalf at case management conferences in March 2015 and September 2015—both appearances he made *after* having substituted out. Colburn stated that she "expected that Mr. Vrataric was going to prepare the opposition to defendant's motion for summary judgment until [she] received the email correspondence from his office on July 11, 2016 that he was out on medical emergency,"

[2] It is not evident why Vrataric substituted out. The record reflects his offices were in Southern California, and that all his court appearances in the case were by telephone, suggesting travel costs may have been a factor.

and her expectation was based on these facts and their communications once the motion was filed. Thus, Colburn did not rely solely on the existence of the attorney-client relationship she had with Vrataric (either as counsel of record or as an adviser to her in her pro per capacity) in believing he would handle the opposition to Chevron's motion. She also relied on the continued assistance he gave her after he substituted out and his failure, after she sought his assistance on the summary judgment opposition, to inform her he would not continue to assist her.

Third, Chevron argues that Colborn knew she was representing herself and that Vrataric was not her attorney of record, as indicated by instances in which she communicated with opposing counsel directly, attended a status conference and was copied on a letter from Vrataric to Chevron's counsel stating that she would thereafter be appearing in pro per. It also points to her note to Vrataric on May 5, 2016, asking, "Is it time for you to substitute back in?" These facts are not in dispute, but they, too, are beside the point. The mistake Colborn claims to have made is not that she thought Vrataric *was* her counsel *of record* but rather that she believed he would continue to assist her in the case notwithstanding her pro per status, including by preparing and filing her opposition to the summary judgment motion. Chevron contends the note shows Colborn "was thus clearly aware that she represented herself and that, in order for Vrataric to file an opposition on her behalf, he had to first substitute back in as counsel of record, but he never did so." Chevron overlooks that Vrataric could have filed a substitution of counsel simultaneously with the motion or might have purported to "appear specially," as he had done at one of the post-substitution settlement conferences.

Fourth and finally, toward the end of its factual arguments, Chevron gets to the heart of the issue, arguing Colburn acted unreasonably by relying on Vrataric without his providing a clear commitment or assurance that he would prepare and file her opposition to the motion. It contends her lapse in relying on Vrataric in the absence of any affirmative communication from him, coupled with "the trial court's express warning that opposing [a motion for summary judgment] is a technical process," was unreasonable. "A reasonably prudent person would have filed an opposition, a declaration, or requested

a continuance in advance of the [motion for summary judgment] hearing date, of which Appellant was aware for more than 75 days. Indeed, Appellant belatedly suggested these options on July 7, 2016 to Vrataric: 'Can you confirm if you are able to provide me with further legal support? Either filing the response to the summary judgment, or if not, requesting an extension so I can look for another attorney?' "

In this regard, Chevron's argument is closer to the target. Colburn's reliance on Vrataric until the hearing date without at least requesting an extension on her own behalf even after it became apparent that Vrataric had failed to file an opposition was not the most vigilant course. On the other hand, this is not a case where Colburn sat idly by after the motion was filed and did nothing to protect her rights. She was neither inactive nor inattentive; rather, she made a misjudgment in relying on Vrataric without clear communication that he was taking action on her behalf.

In the end, we cannot say that Colborn's reliance on her ongoing relationship with Vrataric, his continued post-substitution efforts on her behalf, and his failure after she sent him the summary judgment papers to inform her that he would not prepare her opposition was so unreasonable and deficient that she should be denied relief from default even though she promptly sought such relief and Chevron was not prejudiced. In these circumstances, only "very slight evidence" is required to justify setting aside the default. This is not a case in which " 'inexcusable neglect is clear,' " and thus " 'the policy favoring trial on the merits prevails.' " (*Fasuyi*, *supra*, 167 Cal.App.4th at p. 696.) In denying Colborn's motion for relief from default, the trial court failed to apply this standard and thus abused its discretion.

II.

Chevron Has Not Demonstrated Procedural Error.

Chevron also argues we should not consider Colborn's appeal from the court's denial of her motion for relief from default at all because the motion was "procedurally improper." Quoting section 473, subdivision (b)'s requirement that such a motion "shall be accompanied by a copy of the answer or other pleading proposed to be filed" and "otherwise . . . shall not be granted," Chevron argues Colborn was required to submit her

opposition to summary judgment with her motion for relief from default. The purpose of the requirement, Chevron contends, is to compel the party seeking relief "to demonstrate his or her good faith and readiness to proceed on the merits." For this proposition, it cites *Job v. Farrington* (1989) 209 Cal.App.3d 338, 341, which supports Chevron's description of the purpose for the pleading requirement, but ultimately reversed an order denying relief, holding the defendant's submission of a proposed answer after the filing of the motion but prior to the hearing sufficed. (*Id*. at pp. 340–341.) It adopted a "substantial compliance" standard and found that standard had been met. (*Id*. at pp. 341.)

Colborn argues, first, that the Code of Civil Procedure defines "pleading," and it does not include a brief. Specifically, she cites section 420, which defines "pleadings" as "the formal allegations by the parties of their respective claims and defenses," and section 422.10, which states, "The pleadings allowed in civil actions are complaints, demurrers, answers, and cross-complaints." Since a summary judgment opposition is not a "pleading" within the meaning of these sections, Colborn contends she was not required to file a proposed opposition with her motion for relief from default. In the alternative, she argues that even if her opposition to the motion were considered a "pleading" for purposes of section 473, she substantially complied with the rule, which is all that *Job v. Farrington* and other cases require. She did so by informing the trial court she was prepared to file an opposition before the statutory deadline for filing her motion for relief from default expired, or any earlier deadline the court deemed reasonable.

Colborn has the better argument. She is correct that the Code of Civil Procedure defines pleadings, and its definition does not encompass memoranda of points and authorities or other motion papers. Chevron cites *Russell v. Trans Pacific Group* (1993) 19 Cal.App.4th 1717, 1731 for the broad proposition that the pleading "requirement has been broadly applied not only to pleadings, but to other proposed filings as well." In that case, the Third District affirmed the denial of relief under section 473 because the defendants in that case did not "assert mistake of law or any other statutory ground for relief under section 473" and on appeal did "not defend their motion under the standards of section 473 at all." (*Russell*, at p. 1729.) They argued instead that they were entitled

to file a motion for attorney fees after the deadline for such a motion had passed simply because the plaintiff would not be prejudiced if relief were granted. (*Ibid*.) The court rejected their argument, observing that "absence of prejudice to the opposing party is not in and of itself sufficient to entitle a party to relief under section 473. Rather, the rule is that in the absence of prejudice, the trial court has broad discretion to allow relief on one of the statutory grounds—excusable mistake, inadvertence, neglect, or surprise. [Citation.] Here there was no such showing." (*Id.* at pp. 1729–1730.) In a single sentence at the end of its analysis, the court noted, "Nor was a copy of their proposed motion attached to their request for relief, as section 473 plainly requires." (*Id*. at p. 1730.)

Russell is one of only two cases we have been able to find addressing whether motion papers constitute a "pleading" for purposes of section 473. The other case (which neither party cites), is *Austin v. Los Angeles School District* (2016) 244 Cal.App.4th 918 (*Austin*). *Austin* involved a plaintiff who, like Colburn, was initially represented by counsel, filed a wrongful termination case under California's Fair Employment and Housing Act (FEHA) and, after her counsel withdrew, failed to respond to the defendants' motion for summary judgment. (*Austin*, at pp. 921, 923–924.) She then sought relief under section 473, subdivision (b). (*Austin*, at pp. 925–926.) After the trial court denied relief on erroneous legal grounds not pertinent here, the appellate court reversed and remanded for it to exercise its discretion using the appropriate standard. (*Id.* at p. 932.)

Austin addressed the *Russell* holding in a setting almost identical to this one. The defendant there made the same argument Chevron makes here: that the plaintiff's failure to attach a proposed opposition to the summary judgment motion violated the pleading requirement of section 473, subdivision (b). (*Austin*, *supra*, 244 Cal.App.4th at pp. 932–933.) The court rejected the defendant's assertion that *Russell* holds " '[c]ourts will not consider a [section] 473[, subdivision] (b) motion on the merits if the moving party fails to file or attach any responsive pleading,' " noting that *Russell* "did not hold the moving party's failure to comply with the attached-pleading requirement barred consideration of

its motion under section 473[, subdivision] (b)." (*Austin*, *supra*, 244 Cal.App.4th at p. 932, fn. 11.) Rather, the *Austin* court observed, failure to attach the opposition "was one of several factors the appellate court [in *Russell*] evaluated in concluding the trial court had not abused its discretion in denying relief." (*Ibid.*)

Observing that " '[p]leading' [as defined in sections 420 and 422.10] does not include the opposition to a motion for summary judgment," the *Austin* court did not decide whether the Legislature intended "such a narrow construction of the term in the context of a section 473[, subdivision] (b) application for relief from a judgment following an order granting summary judgment." (*Austin*, *supra*, 244 Cal.App.4th at p. 933, fn. 12.) It had no reason to reach that issue because it held Austin had substantially complied with the "attached-pleading" requirement in that her motion for relief from default made the same factual contentions and legal arguments she would have made in any opposition to summary judgment. (*Id*. at p. 933 & fn. 12.)

In this respect, *Austin* is not identical to this case. Colburn's motion for relief provided no information about the factual or legal bases on which she would oppose summary judgment. However, in the reply papers in support of the motion, Colburn's newly retained counsel offered to file an opposition to the motion for summary judgment prior to the expiration of the six-month period for filing the section 473 motion or by any other deadline the court deemed reasonable. Since, despite seeking new counsel beginning on July 10, 2016, Colburn had only succeeded in retaining such counsel on September 9, 2016, it was plain that she needed some additional time. Her retention of new counsel and offer to file opposition in a reasonable time under the circumstances satisfied the purpose of the attached-pleading requirement—to demonstrate she was acting in good faith and not simply to delay the proceedings. (See *Austin*, *supra*, 244 Cal.App.4th at p. 933 ["objective of the attached-pleading requirement [is] to determine 'the relief sought is not simply to delay the proceedings' and the party is acting in good faith"].) Further, in view of the uncertain state of the law regarding whether a "pleading" for purposes of section 473, subdivision (b) encompasses an opposition to a

summary judgment motion, Colburn's failure to file such opposition with her motion for relief does not provide grounds for denying relief from default.

III.

Reversal of the Judgment Requires Reversal of the Award of Costs.

In her second appeal, Colburn challenges the award of costs to Colborn. She argues that if we reverse the judgment the award of costs must fall as well, citing *Allen v. Smith* (2002) 94 Cal.App.4th 1270, 1284. Chevron does not argue otherwise, and Colburn is correct.

DISPOSITION

The judgment, including the award of costs, is reversed, and the case is remanded for further proceedings. Appellant shall recover costs on appeal.

STEWART, J.

We concur.

KLINE, P.J.

MILLER, J.