COURT OF APPEAL – SECOND DIST.
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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ADRIENNE JOHNSON, Plaintiff and Appellant, v. PATRICIA ANN STRUIKSMA, Defendant and Respondent,	B290273 (Los Angeles County Super. Ct. No. BC553390)

APPEAL from orders of the Superior Court of Los Angeles County, Dennis J. Landin, Judge. Affirmed in part and dismissed in part.

Corin L. Kahn; Adrienne Johnson, in pro. per.; Barry's Law and Barry Fischer for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Jeffry A. Miller and Ernest Slome for Defendant and Respondent.

Plaintiff Adrienne Johnson appeals from: (1) an order dismissing her complaint for failing to serve summons within three years after the filing of the complaint (Code Civ. Proc., § 583.250),[1] and (2) an order denying her motion to set aside the dismissal based upon her attorney's neglect (§ 473, subd. (b)). We agree with defendant Patricia Ann Struiksma that the appeal from the dismissal order is untimely and dismiss the appeal to that extent. We affirm the court's order denying the motion to set aside the dismissal.

FACTUAL SUMMARY AND PROCEDURAL HISTORY

On August 1, 2014, Johnson, acting in propria persona, filed a complaint for damages against Struiksma and Mark Streelman. Johnson alleged that she was walking in a marked crosswalk when Struiksma, negligently driving a car owned by Streelman, hit Johnson.

Johnson did not serve the summons and complaint on any defendant. On February 1, 2016, when no one appeared for trial, the trial court dismissed the case pursuant to section 581, subdivision (b)(3).[2]

Johnson retained, and substituted in her place, attorney John Blanchard. On August 1, 2016, Blanchard filed on Johnson's behalf a motion to set aside the dismissal pursuant to

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[1] Unless otherwise specified, subsequent statutory references are to the Code of Civil Procedure.

[2] Section 581, subdivision (b)(3) states that an action may be dismissed—sua sponte and without prejudice—when no party appears for trial following 30 days' notice of time and place of trial.

section 473, subdivision (b). The trial court granted the motion on January 31, 2017. At the same time, the court set new dates and times for a final status conference and the trial date. The court also set a hearing on "an [order to show cause] re[garding] dismissal for failure to file a proof of service" for August 1, 2017, at 8:30 a.m. The next day, the court clerk served by mail on Blanchard a minute order setting forth the court's ruling on the motion to set aside the dismissal, specifying the new trial-related dates, and setting the date, time and place of an "[o]rder to [s]how [c]ause regarding dismissal for failure to file a proof of service" (the OSC). Blanchard, however, did not calendar the hearing date.

On August 1, 2017, no one appeared for the hearing on the OSC. The court dismissed the case pursuant to section 583.250 because Johnson failed to serve the summons within three years after filing the complaint as required by section 583.210.[3] Johnson herself learned of the dismissal on September 15, 2017.

On February 1, 2018, Johnson substituted attorney Eliel Cherminski in place of Blanchard, and Cherminski filed on Johnson's behalf a motion to set aside the 2017 dismissal pursuant to section 473, subdivision (b). The motion was supported with a declaration by attorney Blanchard stating the following: On January 3, 2017 (about seven months prior to the

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[3] Section 583.210, subdivision (a) provides: "The summons and complaint shall be served upon a defendant within three years after the action is commenced against the defendant. For the purpose of this subdivision, an action is commenced at the time the complaint is filed."

hearing on the OSC regarding dismissal), Blanchard reached an agreement with the California State Bar to "suffer a 90-day actual suspension from the practice of law," which would begin upon entry of an order by the Supreme Court. Blanchard expected the suspension would begin in March or April 2017 and that his license would be reinstated in "plenty of time" to serve the defendants. With Johnson's knowledge of the pending suspension, Blanchard decided to wait until after his reinstatement to serve the summons to avoid "any potential discovery sanctions should the defense propound discovery during [his] suspension." Johnson's suspension, however, did not begin until July 26, 2017, one week prior to the hearing on the OSC regarding dismissal. "[B]ecause [he] failed to have the [d]efendants served, and because [he] did not appear at that hearing, having failed to calendar it," the court dismissed Johnson's case.

On April 2, 2018, the court denied Johnson's motion. In its written order, the court rejected an argument that the time for serving defendants was tolled during the period that Blanchard had been suspended by the State Bar.[4] The court explained that although the statutory period is tolled while service of summons is "impossible" (§ 583.240, subd. (d)), Blanchard's State Bar suspension did not make service impossible; "anyone over the age of 18," the court stated, can serve a summons. (See § 414.10.)

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[4] Johnson did not make this argument in her written motion below. The reference to the "argument" in the court's order implies that the issue was raised during the hearing on the motion. Our record, however, does not include a transcript of that hearing.

The court concluded that, because the statutory period had not tolled and Johnson did not serve defendants within three years after the action commenced, dismissal was "mandatory."

Johnson filed a notice of appeal on May 23, 2018.

DISCUSSION

A. *Johnson's Notice of Appeal*

Struiksma argues that Johnson's appeal should be dismissed as untimely.[5] She asserts that Johnson appealed only from the court's August 1, 2017 order dismissing the case, and that the notice of appeal was filed long after the time to appeal that order had expired. As we explain below, we construe the notice of appeal to be from both the August 1, 2017 order dismissing the case and also from the April 2, 2018 order denying Johnson's motion to set aside the dismissal. To the extent the appeal is from the August 1, 2017 order of dismissal, it is, as Struiksma asserts, untimely and, therefore, we do not have jurisdiction to review that order. Because we construe the notice of appeal to be also from the April 2, 2018 order denying the motion to set aside the dismissal, however, the notice is to that extent timely, and we review her challenge to that order.

We construe a notice of appeal liberally in favor of its sufficiency. (Cal. Rules of Court, rule 8.100(a).) An ambiguous

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[5] Although Struiksma was not served with a summons and had not appeared in the trial court proceedings, she is entitled to file a respondent's brief on appeal. (See *McColm v. Westwood Park Assn.* (1998) 62 Cal.App.4th 1211, 1221.) The other named defendant, Streelman, did not file a respondent's brief and has not otherwise appeared in the case.

notice is sufficient "if it is reasonably clear what appellant was trying to appeal from, and where the respondent could not possibly have been misled or prejudiced." (*Luz v. Lopes* (1960) 55 Cal.2d 54, 59.) In determining prejudice, the court may consider documents related to the notice of appeal, such as the appellant's designation of the record. (*D'Avola v. Anderson* (1996) 47 Cal.App.4th 358, 362.)

Johnson's notice of appeal is ambiguous. She used Judicial Council Form APP-002, and checked a box stating that the appeal is from a "[j]udgment of dismissal under . . . [sections] 581d, 583.250, 583.360, or 583.430." This appears to refer to the court's order dismissing the case on August 1, 2017. The notice of appeal also states, however, that the date of entry of the order Johnson is appealing from is April 2, 2018. The only order issued on that date is the order denying Johnson's February 2018 motion to set aside the dismissal.

The check mark on the notice of appeal designating a "[j]udgment of dismissal" indicates that Johnson attempted to appeal from the August 1, 2017 order dismissing her case pursuant to section 583.250. The deadline for filing an appeal from a judgment of dismissal can vary depending upon whether the court clerk or a party serves notice of entry of the judgment, and can be extended if a party files a notice to vacate the dismissal. (Cal. Rules of Court, rules 8.104(a), 8.108(c).) Under no circumstance, however, will the notice of appeal be timely if it is filed more than 180 days after the judgment of dismissal. (*Ibid.*; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2019) ¶ 3:62, pp. 3-32 to 3-33 [even when the time to appeal is extended by post-trial motions, "the 180-day deadline is the *outside* limit"].) Here, Johnson filed

her notice of appeal 295 days after the entry of the dismissal. Therefore, to the extent the notice of appeal purports to initiate an appeal from the August 1, 2017 order of dismissal, it is untimely and we have no jurisdiction to review that order. (§ 906; *Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 56 ["The time for appealing a judgment is jurisdictional; once the deadline expires, the appellate court has no power to entertain the appeal."].)

Johnson's statement on the notice of appeal that she is appealing from an order entered on April 2, 2018 implies that she is appealing from the order denying her motion to set aside the dismissal, the only order the court entered on that date. Because the notice of appeal does not otherwise identify that order and indicates by check mark only the order of dismissal, it is ambiguous and arguably misleading. The possibility that a respondent would be misled or prejudiced by the ambiguity, however, was minimized or eliminated by other documents Johnson filed and served early in the appellate process. Johnson filed a civil case information statement to which she was required to attach a copy of the order from which she was appealing. (See Cal. Rules of Court, rule 8.100(g).) Johnson attached a copy of one order: the April 2, 2018 order denying her motion to set aside the dismissal. In her notice designating the clerk's transcript, Johnson specified she is appealing from the order dated April 2, 2018. She also designated for inclusion in the record her February 2018 motion to set aside the dismissal, which would not have been relevant if the only order from which she was appealing was the August 2017 dismissal order. Moreover, Struiksma addressed the merits of Johnson's arguments in her

respondent's brief. We therefore construe the notice of appeal as encompassing the April 2, 2018 order denying Johnson's motion to set aside the dismissal and conclude that Struiksma was not prejudiced by the notice's uncertainty.

B. *The Denial of Johnson's 2018 Motion to Set Aside the Dismissal*

Under section 473, subdivision (b), "whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect," the court shall "vacate any . . . resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect."

The statutory requirement that the attorney's fault "result[s]" in the dismissal, and the further proviso that relief is not available if "the court finds that the default or dismissal was not in fact caused by the attorney's" fault imposes a proximate cause element to the right to relief under the statute. (§ 473, subd. (b); *Cisneros v. Vueve* (1995) 37 Cal.App.4th 906, 912; see also *Milton v. Perceptual Development Corp.* (1997) 53 Cal.App.4th 861, 867 [in this context, proximate cause means "causation in fact"].) Thus, in moving to set aside the dismissal, Johnson had to prove that the August 1, 2017 dismissal was caused by her counsel's failure to appear at the OSC hearing.

Counsel's failure to appear by itself would not establish the requisite causation; if counsel appeared and made only unmeritorious arguments, the court would still have dismissed the case. Johnson was thus required to prove that if her counsel

had appeared at the OSC hearing, he or she would have made a meritorious argument against dismissal. Because dismissal for failure to timely serve a summons and complaint is generally mandatory once the three-year period has expired (§ 583.250, subd. (b)), Johnson needed to point to a meritorious argument that the three-year period had been tolled and extended as permitted by statute. (See § 583.240 [specifying grounds for tolling of time for service].)

At the hearing on the motion to set aside the dismissal, Johnson argued that her counsel's failure to appear at the OSC hearing caused the dismissal because if counsel had appeared, he would have argued that the time for serving summons was tolled while he had been suspended from the practice of law by the State Bar. The court rejected this argument because the summons could have been lawfully served by anyone over 18 years of age and not a party to the case. (§ 414.10.) Thus, even if Johnson's counsel had appeared at the OSC hearing and made this argument, the court would have dismissed the complaint. Johnson does not repeat this argument on appeal. We do not, therefore, consider it.

Johnson makes a different argument on appeal. She contends that the time for serving the summons was tolled between the time she filed her motion to set aside the dismissal of her complaint on August 1, 2016, until the time the court granted the motion on January 31, 2017. During that period, Johnson argues, it was legally impossible to serve the summons on defendants because her case had been dismissed. If her counsel had appeared at the OSC hearing and made *this* argument, she contends, the court would not have dismissed her case.

Because she failed to assert this argument below, she has forfeited it on appeal. (See *In re S.B.* (2004) 32 Cal.4th 1287, 1293; *In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 117.) Even if she had not forfeited the argument, it lacks merit.

Johnson's new tolling argument is based on section 583.240, subdivision (d), which provides that the three-year period within which to serve defendants with the summons and complaint is tolled while service "was impossible, impracticable, or futile due to causes beyond the plaintiff's control." (*Ibid.*) Such service, she argues, was impossible during the time the trial court was considering her 2016 motion to set aside the dismissal.

Initially, we note that courts have construed section 583.240, subdivision (d) "strictly" against plaintiffs "in light of the need to give a defendant adequate notice of the action so that the defendant can take the necessary steps to preserve evidence." (*Scarzella v. DeMers* (1993) 17 Cal.App.4th 1762, 1770; accord, *Shipley v. Sugita* (1996) 50 Cal.App.4th 320, 326.) *Dale v. ITT Life Ins. Corp.* (1989) 207 Cal.App.3d 495, a case cited by both parties, is instructive. In that case, the plaintiff made an ineffective and "insincere" attempt to serve a defendant and, based on the ineffective service, obtained a default judgment against the defendant. (*Id.* at pp. 497–498.) Several years later, a court set aside the default judgment because of the defective service. By then, more than three years had elapsed since the filing of the complaint, and the defendant moved to dismiss the action for failure to serve the summons within that time. (*Id.* at p. 498.) The trial court granted the motion and the Court of Appeal affirmed. The court explained that, even if the default

judgment made the service of summons on the defendant "impracticable," it was the defective service—for which the plaintiff "must bear responsibility"—that led to the entry of the default judgment. (*Id.* at pp. 502–503.) Thus, "the circumstances making service impracticable were entirely within [the plaintiff's] control." (*Id.* at p. 503.)

Here, the circumstance that made service on Struiksma impracticable or impossible is the court's entry of dismissal in February 2016. That dismissal, however, was due to Johnson's failure to appear for trial during the time she was representing herself—a failure for which she bears personal responsibility. Johnson does not dispute that responsibility, but contends that the time between the filing of her motion to set aside the dismissal in August 2016 and the court's granting of that motion in January 2017 should be excluded from the three-year period for service. During that time, her argument implies, service was not only impossible, but beyond her control.

Johnson relies on *Graf v. Gaslight* (1990) 225 Cal.App.3d 291 (*Graf*). In *Graf*, the trial court dismissed the plaintiff's complaint on its own motion for reasons not explained in the opinion. (*Id.* at p. 294.) After the plaintiff learned of the dismissal, he filed a motion to set it aside. (*Ibid.*) The court granted the motion 16 days later, indicating that the dismissal had been "mistakenly ordered by the court and not due to causes within the control of the [plaintiff]." (*Id.* at pp. 297–298.) Even so, the Court of Appeal held that most of the time during which the case had been dismissed did not toll the three-year period for serving the summons. (*Id.* at pp. 197–198.) The court did hold, however, that the statutory time was tolled for the 16 days

between the making of the motion to set aside the dismissal and the order granting that motion. (*Id.* at p. 298.)

Graf does not help Johnson. The court in that case tolled the time for service because the dismissal of the complaint and the resulting impossibility of serving the defendants was due to the trial court's mistake, "and not due to causes within the control of the [plaintiff]." (*Graf, supra*, 225 Cal.App.3d at p. 297.) Here, Johnson was representing herself when the court dismissed her case in February 2016, and that dismissal was not "due to causes beyond [her] control." (§ 583.240, subd. (d).) Indeed, the dismissal was solely attributable to Johnson's personal failure to appear for trial. Thus, Johnson was not entitled to toll the period during the time her case had been dismissed, including the time between the filing of her August 1, 2016 motion to set aside that dismissal and the court's ruling on January 31, 2017. In the absence of such tolling, dismissal was mandatory. (§ 583.250, subd. (b).) Therefore, even if Johnson's counsel had appeared at the OSC hearing in August 2017 and made the new argument she asserts on appeal, the argument would have been rejected and the case dismissed. Because her counsel's failure to appear at the OSC hearing and assert that argument did not cause the court's entry of dismissal, Johnson is not entitled to relief under section 473, subdivision (b).

C. *Adequacy of Notice of the OSC*

Section 583.250 provides that if service of the summons is not made within the statutory three-year period, "[t]he action shall be dismissed by the court on its own motion . . . after notice to the parties." (§ 583.250, subd. (a)(2).) The relevant notice is the court's January 31, 2017 order and its February 1, 2017 minute order.

The January 31, 2017 order sets forth dates for a final status conference and trial date, and states: "The court sets an OSC re[garding] dismissal for failure to file a proof of service on 8/1/17 at 8:30 a.m. All of said matters to be heard in Department 93."

The court's February 1, 2017 minute order states, among other matters: "An Order to Show Cause regarding dismissal for failure to file a proof of service is set on August 1, 2017, at 8:30 a.m. in Department 93." The court served the January 31, 2017 order and the February 1, 2017 minute order on Johnson's counsel, and Johnson does not dispute that her counsel received them.

Johnson contends that the court's orders did not adequately apprise her of the possibility that her case would be dismissed. We disagree. Reading the phrases "OSC re[garding] dismissal for failure to file a proof of service" and "[o]rder to [s]how [c]ause regarding dismissal for failure to file a proof of service" in their context, they have readily understandable and unambiguous meanings: At the date, time, and place stated, if plaintiff has not filed a proof of service of summons, plaintiff must show cause why the case should not be dismissed. The notice implies that the failure to show adequate cause—or the failure to appear at the hearing—would result in dismissal. The notice was sufficient to apprise Johnson of the nature of the hearing and of the risk of not appearing at the hearing.

Johnson further contends that the notice the court provided "was simply too early." Too much notice, she appears to argue, is inadequate notice. Johnson offers no citation for her argument. We reject the argument.

Johnson also argues that the court failed to comply with the notice requirements set forth in rule 3.1340 of the California Rules of Court.[6] Even if we assume that the court's notice would not satisfy that rule, the rule explicitly applies only to discretionary dismissals under sections 583.410 to 583.430 for delays in prosecution. (Cal. Rules of Court, rule 3.1340(a).) It does not apply to dismissals, such as the dismissal in this case, pursuant to section 583.250.

DISPOSITION

Insofar as the appeal is from the August 1, 2017 order dismissing Johnson's complaint, the appeal is dismissed.

The court's order dated April 2, 2018, denying Johnson's motion to set aside the order dismissing the action, is affirmed.

The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur.

CHANEY, J.

BENDIX, J.

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[6] California Rules of Court, rule 3.1340(b) provides: "If the court intends to dismiss an action on its own motion, the clerk must set a hearing on the dismissal and send notice to all parties at least 20 days before the hearing date."