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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

JOSEPH DOZIER et al.,

Plaintiffs and Appellants,

v.

BRIDGESTONE/FIRESTONE
NORTH AMERICA et al.,

Defendants and Respondents.

B162313

(Los Angeles County
Super. Ct. No. BC245480)

APPEAL from an order of the Superior Court for the County of Los Angeles,
Reginald A. Dunn, Judge. Affirmed.

Brayton Purcell, Alan R. Brayton, Gilbert L. Purcell, Lloyd F. LeRoy and David
Polin, for Plaintiffs and Appellants.

Spray, Gould & Bowers, Darren M. Harris and Robert Dean for Defendant and
Respondent Morton International, Inc.

Jackson & Wallace, John R. Wallace, James R. Colgan and William P. Buranich
for Defendant and Respondent Hanson Permanente Cement.

Grace, Genson, Cosgrove & Schirm, Eugene M. Genson and David K. Schultz for
Defendants and Respondents General Motors Corporation and Honeywell International.

Keesal, Young & Logan, Elizabeth A. Kendrick and Jeffrey A. Feasby for
Defendant and Respondent Lear Siegler Diversified Holdings Corp.

McKenna Long & Aldridge, William J. Sayers, Farah Nicol and Karen B.
Goldberg for Defendant and Respondent Maremont Corporation.

Law Offices of Craig Nelson and Craig Nelson for Defendant and Respondent
Amcord, Inc.

SUMMARY

In this action for wrongful death based on exposure to asbestos, the question is whether the trial court abused its discretion in denying a motion to set aside a judgment on the pleadings. The judgment was entered on the stated grounds that plaintiffs failed to plead facts sufficient to avoid the bar of the statute of limitations. The court properly denied the motion for relief from the judgment. Counsel's error in failing to plead specific facts entitling plaintiffs to use the delayed discovery provisions of the statute of limitations did not constitute excusable neglect under Code of Civil Procedure section 473. In addition, counsel's five-and-one-half-month delay in moving to set aside the judgment justified the trial court's denial of relief.

FACTUAL AND PROCEDURAL BACKGROUND

Lula Dozier was diagnosed with lung cancer in April 1999 and died on May 17, 1999. Twenty-one months later, on February 22, 2001, her husband and children (the Doziers) filed a wrongful death action alleging her death was caused by exposure to asbestos. After answering the complaint, two of the multiple defendants filed motions for judgment on the pleadings, asserting the complaint was barred by the one-year statute of limitations in Code of Civil Procedure section 340.2.¹ Other defendants then joined in the motions.

The Doziers opposed the motions for judgment on the pleadings, arguing that the complaint – which alleged only that decedent was not aware at the time of exposure that asbestos presented any risk of disease – was adequate. They contended they were not aware decedent's lung cancer was related to exposure to asbestos until September 2000. The Doziers also argued that if the complaint did not adequately address the statute of limitations issue, they should be granted leave to amend the complaint. However, no

¹ Section 340.2 requires an action for wrongful death based upon exposure to asbestos to be filed within one year from the date of death, or within one year "from the date the plaintiff first knew, or through the exercise of reasonable diligence should have known, that the death was caused or contributed to by" exposure to asbestos. (Code Civ. Proc., § 340.2, subd. (c).)

proposed amendment was offered. The Doziers' opposition was accompanied only by a declaration from their lawyer, Donald Oder. Oder's declaration stated, upon information and belief, that the Doziers contacted Oder's firm in September 2000 and that the Doziers were not aware until that time that decedent's lung cancer might have been caused by exposure to asbestos.

The motions for judgment on the pleadings were granted on March 26, 2002. The trial court observed that a plaintiff whose complaint shows on its face that his claims are barred, and who intends to rely on other facts to toll the statute of limitations, "must specifically plead those facts which show the time and manner of discovery despite reasonable diligence" The court concluded the facts stated in Oder's declaration were insufficient as a matter of law to show reasonable diligence, and the Doziers failed to show how the defect could be cured by amendment. Judgment was entered and notice of entry was served by the court on May 28, 2002. The Doziers did not appeal from the judgment.

Almost six months after the court's order granting judgment on the pleadings, the Doziers sought to set aside the judgment under Code of Civil Procedure section 473, subdivision (b).² They argued the judgment was a result of counsel's mistake, inadvertence or excusable neglect. Specifically, the Doziers asserted counsel should not have filed an opposition to the motions for judgment on the pleadings, and instead should have sought an order for leave to amend the complaint. Counsel "should not have

² The Doziers filed an ex parte application on September 11, 2002 to shorten time for notice and hearing of motions (1) to set aside the judgment and (2) for an order granting leave to amend the complaint. As justification for its ex parte application, a declaration from counsel stated: "The attached motions were difficult, with the posture of the motions and orders presenting varying options. It is filed at this time, after extensive research and interoffice meetings as to how to handle and resolve this unfortunate situation. I have recently joined the firm, and have been assigned this matter. It is filed now, after I have had to prepare and answer ready for 4 health related preference trials since July 10, 2002" The trial court granted the application to shorten time.

elected to stand on the pleadings” and “should have, but did not, find in his research on the statute of limitations” that the complaint was inadequate. Counsel thus failed to specifically plead facts entitling the Doziers to use the delayed discovery provision, and failed to file a noticed motion to amend the complaint with the necessary supporting documents. The Doziers contended this inadvertence or mistake was reasonable under the circumstances, making relief from the judgment appropriate. The Doziers also presented a declaration from the decedent’s husband, Joseph Dozier, to establish the facts concerning the delayed discovery of their cause of action, and a proposed first amended complaint incorporating those facts.³

The trial court denied the Doziers’ motion for relief from the judgment, as well as their motion for leave to file an amended complaint. The court’s minute order does not state its reasons for denying the motion to set aside the judgment, but does discuss its ruling on the motion for leave to file an amended complaint. The court stated there was “no possible way” the defects in the complaint could be cured by amendment, and continued with an explanation of the reasons for that conclusion.⁴

³ Dozier’s declaration stated that: (1) at the time of decedent’s death, Dozier was not aware that his wife’s lung cancer was in any way related to exposure to asbestos; (2) neither he nor the immediate family were informed that asbestos was a factor in decedent’s death, and since she was a smoker, “there was no reason to believe otherwise”; (3) no treating doctor told him or the decedent that asbestos was related to her lung cancer, and they received no materials from others that mentioned asbestos was related to her condition; (4) he and his immediate family did not become aware that decedent’s lung cancer “may have been related to exposure to asbestos” until September 2000; (5) they “became aware that asbestos may have caused her death when my brother informed me for the first time that asbestos may have had a role in her death”; and (6) Dozier then consulted counsel, and suit was filed five months later.

⁴ The court stated the Doziers failed to meet their burden to establish they were not negligent in failing to discover their cause of action sooner, and recited the allegations in the proposed complaint. The court continued: “The belief that asbestos was the cause of damage is based on mere speculation and conjecture. The conclusion was not based upon an autopsy but merely that Mr. Dozier’s brother informed him that asbestos ‘may’ have

The Doziers filed a timely notice of appeal from the trial court's order.

DISCUSSION

The Doziers argue the trial court abused its discretion in refusing to grant relief from the judgment and allow them to amend their complaint. They assert the court misconstrued the discovery rule. In addition, they claim the question whether they exercised due diligence in discovering their cause of action was a question of fact for the jury, not for the court.

We reject the Doziers' contentions, which are misdirected. The only question before this court is whether the trial court abused its discretion in refusing to set aside the judgment. It did not. Indeed, the court would have abused its discretion if it had granted relief from the judgment, because there was no excusable error justifying relief under the discretionary provision of Code of Civil Procedure section 473. Moreover, the trial court also could have appropriately based its denial of relief on the ground the application was not filed within the "reasonable time" required under section 473.

Relief from a judgment under the discretionary provision of Code of Civil Procedure section 473, subdivision (b), is proper only if the error by counsel is excusable.⁵ The question is whether a reasonably prudent person under similar circumstances might have made the same error. (*Bettencourt v. Los Rios Community College Dist.* (1986) 42 Cal.3d 270, 276.) Relief may be granted only from mistakes "fairly imputable to the client, i.e., mistakes anyone could have made." (*Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 682 [discussing mandatory relief].) "Conduct falling below the professional standard of care, such as failure to timely object or to properly advance an argument, is not therefore excusable." (*Ibid.*) Moreover, "[i]gnorance of the law, at least where coupled with negligence in failing to look it up,

had a role in her death. This is not a sufficient fact as a matter of law to toll the applicable statute of limitations."

⁵ The Doziers do not contend they were entitled to relief under the mandatory provision of the statute. (Code Civ. Proc., § 473, subd. (b).)

will not justify a trial court in granting relief’ ” (*Coordinated Construction, Inc. v. Canoga Big “A,” Inc.* (1965) 238 Cal.App.2d 313, 320, quoting *Security Truck Line v. City of Monterey* (1953) 117 Cal.App.2d 441, 445.)

Counsel admitted that the grounds he asserted in opposition to the motion for judgment on the pleadings were improper. He failed to specifically plead facts entitling the Doziers to use the delayed discovery provisions of Code of Civil Procedure section 340.2. Additionally, he should have filed, but did not file, a motion to amend the complaint with the necessary supporting documents. These are not mistakes that “anyone could have made.” (*Garcia v. Hejmadi, supra*, 58 Cal.App.4th at p. 682.) They were failures in counsel’s professional duty to ascertain the applicable legal requirements. Counsel’s failure to discharge routine professional duties is not excusable under section 473. (*Generale Bank Nederland, N.V. v. Eyes of the Beholder Ltd.* (1998) 61 Cal.App.4th 1384, 1402.)

In addition, when a party files an application for relief from a judgment after an extended delay, without an adequate excuse for the delay, it is an abuse of discretion for a trial court to grant relief under section 473’s discretionary provision. (*Stafford v. Mach* (1998) 64 Cal.App.4th 1174, 1183.) In this case, counsel waited five and one half months after the order granting the motion for judgment on the pleadings before seeking relief from the judgment. Counsel’s excuse was that the motion was “difficult” and was filed “after extensive research and interoffice meetings as to how to handle and resolve this unfortunate situation.” In addition, counsel had “recently joined the firm” and been assigned the Dozier matter, and “had to prepare and answer ready for 4 health related preference trials” in the two months prior to filing the Doziers’ motion. In our view, counsel did not state an adequate excuse for a five and one half month delay in seeking relief under section 473. (See *Stafford v. Mach, supra*, 64 Cal.App.4th at p. 1184 [“[w]e have not found any case where relief from default judgment has been deemed proper where there was an extended period of delay and little or no explanation”].) Thus counsel’s lack of diligence in making an application for relief likewise supports the trial court’s refusal to set aside the judgment.

The Doziers contend that the trial court, by ruling on the substantive ground that the complaint could not be amended to cure the defect, implicitly held that the application for relief from the judgment was filed within a reasonable time under section 473. We do not agree. Presumptions are indulged to support an order of the trial court (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564), not the reverse. The court expressly denied the motion to set aside the judgment, and “[w]e are required to uphold the ruling if it is correct on any basis, regardless of whether such basis was actually invoked.” (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32 [reviewing a custody order under abuse of discretion test].) In any event, as discussed above, counsel’s error was not excusable, and that ground alone required the trial court to deny relief. (*Generale Bank Nederland, N.V. v. Eyes of the Beholder Ltd., supra*, 61 Cal.App.4th at p. 1402.)

DISPOSITION

The order denying the Doziers’ motion to set aside the judgment is affirmed. Respondents are to recover their costs on appeal.

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BOLAND, J.

We concur:

COOPER, P.J.

RUBIN, J.