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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

DENISE SALUTO, Plaintiff and Appellant, v. DEUTSCHE BANK NATIONAL TRUST COMPANY et al., Defendants and Respondents.	E053221 (Super.Ct.No. RIC518773) OPINION

APPEAL from the Superior Court of Riverside County. Paulette Durand-Barkley, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed.

George S. Wass for Plaintiff and Appellant.

AlvaradoSmith, John M. Sorich, S. Christopher Yoo, Robert Oliver and Thomas S. Van for Defendants and Respondents.

I. INTRODUCTION

Plaintiff and appellant Denise Saluto appeals from an order setting aside default and default judgment in her action against defendants and respondents Deutsche Bank

National Trust Company (Deutsche Bank), as trustee for Long Beach Mortgage Loan Trust 2005-WL3, and JPMorgan Chase Bank, N.A., an acquirer of certain assets and liabilities of Washington Mutual Bank from the Federal Deposit Insurance Corporation acting as receiver (JPMorgan Chase Bank).[1] Saluto contends: (1) defendants' motion for relief under Code of Civil Procedure[2] section 473.5 was, in essence, a motion for reconsideration of the trial court's denial of their motion for relief under section 473, subdivision (b), and defendants failed to comply with the requirements of section 1008; (2) defendants were not diligent in bringing their motion for relief; and (3) defendants failed to state they were never served or to explain why they were not grossly negligent. Saluto also contends the order was void because she objected to a commissioner hearing the matter. We conclude that defendants failed to establish diligence in bringing their motion for relief, and we therefore reverse the trial court's order.

II. FACTS AND PROCEDURAL BACKGROUND

In 2005, Saluto obtained a loan secured by a deed of trust encumbering real property in Rancho Mirage. The lender was Long Beach Mortgage Company; Deutsche Bank was later assigned the beneficial interest in the deed of trust. Saluto thereafter

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[1] Saluto's complaint (not included in the record) apparently named Washington Mutual Bank as successor in interest to Long Beach Mortgage Company (Washington Mutual Bank) as a defendant. JPMorgan Chase Bank states that it was erroneously sued under that name. We will therefore construe references in the record to Washington Mutual Bank as being references to JPMorgan Chase Bank.

[2] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

defaulted on the loan, and the property was sold at a trustee's sale, wherein Deutsche Bank became grantee of the real property.

On February 5, 2009, Saluto filed a complaint against JPMorgan Chase Bank and Deutsche Bank to set aside a trustee sale for violations of title 15 of the United States Code section 1601 et seq. and 12 Code of Federal Regulations part 226.1 et seq., to cancel the trustee deed upon sale, and to quiet title. The complaint was served on defendants the next day, February 6. The proof of service for JPMorgan Chase Bank stated that personal service was made on "WFemaleAprx45yrs;125Lb;BrwHr; said was Teller & VicePresident; would not give name" at 36101 Bob Hope Drive, Rancho Mirage, California 92270. The proof of service for Deutsche Bank stated that personal service was made on "WMaleAprx50yrs;200Lb;GreyHr; said was GeneralManager&VicePresident; would not give name" at 1761 East St. Andrew Place, Santa Ana, California 92705.

Defendants failed to respond to the complaint, and on March 16, 2009, Saluto served a request for entry of default on defendants. As to Deutsche Bank, service was mailed to 1761 East St. Andrew Place, Santa Ana, California 92705. As to JPMorgan Chase Bank, service was mailed to 36101 Bob Hope Drive, Rancho Mirage, California 92270. The next day, Saluto filed the proofs of service and the request for default with the trial court. The trial court entered default on each defendant on March 17, 2009.

In July 2009, Saluto filed a request for entry of default judgment, and on December 15, 2009, default judgments were entered.

On June 15, 2010, defendants filed a motion to set aside the defaults and default judgments under section 473, subdivision (b), which allows relief from an action taken against a party through mistake, inadvertence, surprise, or excusable neglect when the motion for relief is made "within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken." To support the motion, defendants filed the declarations of their attorney, Jenny L. Merris; a vice-president of Deutsche Bank, Ronaldo Reyes; and a research analyst of JPMorgan Chase Bank, Harold Galo. The declarations stated that defendants had no record of receiving service and were not aware of the lawsuit until March 2010.

The motion was heard by Judge Mark E. Johnson on October 28, 2010. At the hearing, Judge Johnson stated: "I'm going to deny the motion. I do believe that I am outside of the six-month limit. . . . I also don't see the due diligence. So if you want to re-bring it under [section] 473.5, I will look at that, but at least as to this ground I have before me, [section] 473 subdivision (b), I'm denying the motion."

On December 3, 2010, defendants filed a motion to set aside the defaults under section 473.5. Defendants submitted new declarations of Reyes, Galo, and Merris in support of the motion.

Reyes's declaration stated: "Notwithstanding the Proof of Service filed in this matter with respect to Deutsche Bank, Deutsche Bank had no record of the service of the Summons and Complaint in this matter. Moreover, I have no recollection or record of receiving service of the Summons and Complaint in this matter on February 6, 2009.

When a Deutsche Bank office receives service of process regarding a loan that is believed to be included in a trust for which Deutsche Bank is a trustee, it is typically forwarded to the trustee's office at 1761 East St. Andrew Place, Santa Ana, CA 92705. Once Deutsche Bank has identified that the loan is in fact in a trust for which it is a trustee, Deutsche Bank identifies the servicer of that loan and tenders the defense of the claim/action to the servicer. In this particular instance, there is no record that the Summons and Complaint was forwarded to the trustee's office at 1761 East St. Andrew Place, Santa Ana, CA 92705 or to JPMorgan Chase Bank, N.A." The declaration continued: "Although I have no recollection of being served with process ever in this action, Deutsche Bank's regular practice when served is to immediately forward it to the trustee's office at 1761 East St. Andrew Place, Santa Ana, CA 92705 who maintains records of the service and then forwards it to the servicer, which in this case is JPMorgan Chase Bank, N.A. I have no such recollection or records. [¶] . . . Deutsche Bank had no actual knowledge of this action until in or around early April 2010 when JPMorgan Chase Bank, N.A.'s counsel informed it that Plaintiff had recorded the Default Court Judgment against this property. This was the first time that Deutsche Bank became aware of the existence of this action."

Galo's declaration stated: "As Research Analyst, I monitor and oversee loans and/or properties that have resulted in litigation. The business records relating to any loans made by or properties serviced by JPMorgan are within my custody and control and maintained under my supervision and direction." The declaration continued: "Notwithstanding the Proof of Service filed in this matter with respect to JPMorgan,

JPMorgan has no record of service of the Summons and Complaint in this matter. JPMorgan's branch managers receive instruction and are informed of policy when they are served with process in legal matters. JPMorgan's policy is to keep records of service of process and to immediately forward the legal documents to JPMorgan's legal department for handling and review. [¶] . . . JPMorgan has no record, either from the branch alleged to have been served or in the legal department, of any service of process related to the Plaintiff or the real property, which is the subject of this litigation. JPMorgan had no actual knowledge of this action until on or around March 2010 when JPMorgan was informed that Plaintiff was seeking to refinance the property . . . and that Plaintiff had recorded the Default Court Judgment against this property."

Counsel for Saluto argued that the motion was actually one for reconsideration that should have been brought under section 1008 and that should therefore have been heard by Judge Johnson. Commissioner Paulette Durand-Barkley ruled that the motion was not one for reconsideration in that the prior motion was brought under section 473, subdivision (b), and the current motion was brought under section 473.5. Commissioner Barkley thereafter granted the motion.

III. DISCUSSION

A. Compliance with Section 1008

Saluto contends defendants' motion under section 473.5 was, in essence, a motion for reconsideration, and defendants failed to comply with the procedural requirements of section 1008. Defendants argued in the trial court and continue to argue on appeal that

section 1008 did not apply because the second motion was a new motion supported by a different evidentiary showing and different law. We will assume for purposes of argument that the motion was not one for reconsideration, and section 1008 did not apply.

B. Diligence in Bringing Motion for Relief

Saluto next contends defendants were not diligent in bringing their motion for relief.

1. Standard of Review

We review the trial court's ruling on an application for relief from a default and default judgment under an abuse of discretion standard. However, whether a party has acted diligently in bringing a motion for relief after discovery of the default is a question of fact for the trial court. (*Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1419-1420 [defendant failed to establish diligence when he received notice of entry of judgment on April 13, 2006, but failed to file a motion for relief until July 31, 2006].)

2. Analysis

Section 473.5 provides: "(a) When service of a summons has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered against him or her in the action, he or she may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the action. The notice of motion shall be served and filed within a reasonable time, but in no event exceeding the earlier of: (i) two years after entry of a default judgment against him or

her; or (ii) 180 days after service on him or her of a written notice that the default or default judgment has been entered.

"(b) A notice of motion to set aside a default or default judgment and for leave to defend the action shall designate as the time for making the motion a date prescribed by subdivision (b) of Section 1005, and it shall be accompanied by an affidavit showing under oath that the party's lack of actual notice in time to defend the action was not caused by his or her avoidance of service or inexcusable neglect. The party shall serve and file with the notice a copy of the answer, motion, or other pleading proposed to be filed in the action.

"(c) Upon a finding by the court that the motion was made within the period permitted by subdivision (a) and that his or her lack of actual notice in time to defend the action was not caused by his or her avoidance of service or inexcusable neglect, it may set aside the default or default judgment on whatever terms as may be just and allow the party to defend the action."

The requirement of diligence in bringing a motion for relief after notice is independent of the statutory deadlines for bringing the motion. (See, e.g., *Stafford v. Mach* (1998) 64 Cal.App.4th 1174, 1183-1185 and cases collected; *Kendall v. Barker* (1988) 197 Cal.App.3d 619, 624-626 (*Kendall*) and cases collected.) California courts have held that "[u]nexplained delays of more than three months in seeking relief from default after knowledge of its entry generally result in denial of relief." (*Kendall*, *supra*, at p. 625.) The court in *Kendall* explained: "'The moving party has a double burden: He

must show a satisfactory excuse for his default, and he must show *diligence* in making the motion after discovery of the default.' [Citation.]" (*Id.* at pp. 624-625.) The court held that the defendant in that case had failed to show due diligence when his attorney learned on July 18, 1986, that he had been served; the defendant received a request for entry of default on September 30, 1986; and in October 1986, his counsel acknowledged the default but failed to seek relief until March 30, 1987. (*Id.* at p. 625.)

When a party fails to show an adequate excuse for delay in bringing the motion, it is an abuse of discretion for the trial court to grant relief. (*Benjamin v. Dalmo Mfg. Co.* (1948) 31 Cal.2d 523, 531-532 [abuse of discretion to grant motion under § 473 when the defendant's attorney delayed more than three months in filing the motion after learning of default and provided no explanation for the delay];[3] see also *Stafford v. Mach*, *supra*, 64 Cal.App.4th at pp. 1183-1185 [defendant failed to establish diligence when it delayed in bringing motion for relief for four and one-half months after becoming aware of default judgment, and "[t]he record [was] devoid of any evidence justifying such a long delay"]; *Conway v. Municipal Court* (1980) 107 Cal.App.3d 1009, 1019 [when the defendant failed to provide any explanation for four-month delay in bringing a motion for relief,

[3] Sections 473, subdivision (b) and 473.5 include the same requirement that a motion for relief must be brought "within a reasonable time." Thus, the reasoning of the courts in the cases addressing section 473, subdivision (b) is fully applicable to the present case. (See *Schenkel v. Resnik* (1994) 27 Cal.App.4th Supp. 1, 4 ["Because the operative language in section 473 is the same as the language in section 473.5, we conclude that the same interpretation should be given to the reasonable time requirement set forth in both sections."].)

"the court could not excuse and set the default aside as it was not empowered to dispense with the 'reasonable time' requirement"].)

Here, JPMorgan Chase Bank asserts it discovered the default in March 2010 and Deutsche Bank asserts it discovered the default in early April 2010, but they did not file their motion under section 473.5 until December 2010.[4] Merris stated in her declaration that she was retained to represent defendants in this matter on March 31, 2010, and thereafter she promptly began investigating the matter. She stated that she attempted unsuccessfully to contact plaintiff and her voicemails were not returned. However, as the court stated in *Kendall*, "even if respondent's attorney left phone messages which were not responded to, no satisfactory reason has been given which explains a delay of nearly *six months* from the time respondent knew of the default to the application for relief." (*Kendall, supra*, 197 Cal.App.3d at p. 625.) Here, the delay between knowledge of the default and bringing the motion for relief under section 473.5 was more than *nine* months. We conclude no evidence in the record supports a finding that defendants acted diligently in bringing their motion for relief under section 473.5, and the trial court therefore abused its discretion in granting the motion.

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[4] As defendants have asserted in the trial court and on appeal, their second motion under section 473.5 was based on different facts and law than the earlier motion under section 473, subdivision (b). We therefore consider the timeliness of the filing of the second motion independently from the timeliness of the first motion. Moreover, Judge Johnson stated that even the first motion had not been brought with due diligence.

Because we have found reversible error based on defendants' failure to establish diligence in bringing their motion for relief, Saluto's additional contentions are moot.

IV. DISPOSITION

The order appealed from is reversed. Plaintiff shall recover costs on appeal.

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HOLLENHORST
J.

We concur:

RAMIREZ
P.J.

KING
J.