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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MARY JACK, et al., Plaintiffs and Appellants, v. CITY OF LOS ANGELES, et al., Defendants and Respondents, 925 MARCO PLACE, LLC, et al., Real Parties in Interest.	B297021 (Los Angeles County Super. Ct. No. BS175256)

APPEAL from a dismissal order of the Superior Court of the County of Los Angeles, James C. Chalfant, Judge. Affirmed.

Amanda Seward for Plaintiffs and Appellants.

Michael N. Feuer, City Attorney of Los Angeles, Terry Kaufman-Macias, Senior Assistant City Attorney, and Oscar Medellin, Deputy City Attorney, and Thomas Law Group, Tina A.

Thomas, Amy R. Higuera, and Leslie Z. Walker, for Defendants and Respondents.

Jeffer Mangels Butler & Mitchell, Benjamin M. Reznick, Matthew D. Hinks, and Daniel Freedman, for Real Parties in Interest.

I. INTRODUCTION

Plaintiffs Mary Jack and Sue Kaplan sued the City of Los Angeles (City) and the California Coastal Commission (Coastal Commission) to overturn those entities' approvals of a residential development project (the project) proposed by the real parties in interest.[1] The City moved to dismiss the two CEQA[2]-based claims against it on the grounds that plaintiffs failed to request a final hearing on the merits within the 90-day time limit provided by Public Resources Code section 21167.4, subdivision (a) (section 21167.4(a)); and plaintiffs thereafter moved to stay the City's approval of the project under Code of Civil Procedure section 1094.5, subdivision (d). The trial court granted the City's dismissal motion as to the two CEQA-based causes of action and denied plaintiffs' motion to stay.

On appeal from the dismissal order, plaintiffs contend that: they were excused from strict compliance with the 90-day time limit in section 21167.4(a) because when read together with a

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[1] Real parties in interest are 925 Marco Place, LLC, 927 Marco Place, LLC, Ron Harel, and Shula Harel.

[2] California Environmental Quality Act (Pub. Resources Code § 21000 et seq.).

local rule, that statute is ambiguous; they substantially complied with the 90-day time limit; and their failure to comply with the time limit constituted excusable neglect under Code of Civil Procedure section 473, subdivision (b) (section 473(b)) entitling them to relief from default. On appeal from the denial of their request for a stay, plaintiffs contend that the trial court erred in concluding that their request was moot and in finding that they had not demonstrated either a reasonable prospect of success on the merits or irreparable harm. We affirm.

II. BACKGROUND

A. *Petition for Writ of Mandate*

On September 27, 2018, plaintiffs filed a verified petition for writ of mandate against the City and the Coastal Commission. The petition asserted three claims: a first cause of action against the City for violation of CEQA; a second cause of action against the City and the Coastal Commission for violation of the Coastal Act;[3] and a third cause of action against the City for violation of "due process."

One day later, on September 28, 2018, the trial court issued a notice of trial setting conference scheduled for January 3, 2019, i.e., approximately 90 days from the filing of the petition. The court ordered that plaintiffs serve notice of the conference on all parties within 10 days. On October 26, 2018, plaintiffs belatedly served notice of the conference on the City, the Coastal Commission, and the real parties in interest.

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[3] California Coastal Act of 1976 (Pub. Resources Code § 30000 et seq. (Coastal Act)).

B. *Motions to Dismiss and Stay*

In February 2019, the City filed a motion to dismiss the first and third causes of action on the grounds that plaintiffs had failed to comply with section 21167.4(a), which required them to file a written request for a final hearing on the merits within 90 days of the filing of the petition. According to the City, compliance with the 90-day time limit was mandatory and plaintiffs' failure to comply with it required dismissal.[4]

Plaintiffs filed their opposition to the motion to dismiss in March 2019, arguing that because the trial court had already scheduled a trial setting conference under the Los Angeles County Superior Court Local Rules, rule 3.232(h) (rule 3.232(h)), requiring plaintiffs to file a request for hearing would be unnecessary and lead to "absurd results." Plaintiffs also maintained that they had substantially complied with section 21167.4(a) by serving notice of the trial setting conference that

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[4] Following the filing of the dismissal motion, plaintiffs filed an ex parte application to stay the City's approval of the project, arguing that, based on that approval, the real parties in interest had obtained demolition permits and were proposing to move forward with the project. At the ex parte hearing, the trial court set a hearing on both the City's motion to dismiss and plaintiffs' motion to stay for April 9, 2019. In March 2019, plaintiffs filed their motion to stay which they noticed for hearing on the scheduled date.

had been set by the court and that their failure to strictly comply was excused under section 473(b).[5]

C. *Rulings on Motions*

Following further briefing on both motions, the trial court conducted a hearing on April 9, 2019. The court issued a written decision granting the motion to dismiss. It rejected plaintiffs' argument that section 21167.4(a) was ambiguous and concluded that plaintiffs had failed to comply with that section. It further rejected plaintiffs' argument that they had substantially complied with section 21167.4(a), noting that "[plaintiffs] have not actually complied with any portion of section 21167.4(a)'s requirement of a 90-day request." Finally, the court concluded that plaintiffs were not entitled to relief pursuant to section 473(b) because, even assuming counsel's mistake was excusable, plaintiffs had failed to act diligently in seeking relief because, as of the date of the court's order, plaintiffs still had not filed a request for a hearing.

The trial court also denied the motion to stay. It concluded that even assuming it was incorrect in its conclusion that the CEQA causes of action should be dismissed, plaintiffs' request for a stay was moot and plaintiffs had failed to demonstrate a stay was appropriate.

That same day, the trial court filed a form "order of dismissal" which stated that the action was dismissed "with prejudice" "as to the City of Los Angeles only. (See minute order of 4/9/19 [final ruling on motion to dismiss])[.]"

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[5] There is no indication in the record whether the trial setting conference went forward as scheduled on January 3, 2019, and, if so, whether the case was set for trial that day.

D. *Appeal from Dismissal Order*

On April 16, 2019, without requesting a formal dismissal of their pending second cause of action against the City, plaintiffs filed a notice of appeal from the dismissal order. Following briefing on the merits, we requested supplemental letter briefs on the issue of whether the appeal should be dismissed as it was taken from an order that did not resolve all the claims and issues between plaintiffs and the City, including specifically the second cause of action against the City. Both parties submitted letter briefs arguing that, based on their understanding of the trial court's dismissal order, the second cause of action against the City was no longer pending in the trial court and therefore the dismissal order was final as against the City and directly appealable.

Following oral argument limited to the appealability issue, the parties submitted further letter briefs and a stipulation—pursuant to *Sullivan v. Delta Air Lines, Inc.* (1997) 15 Cal.4th 288 (*Sullivan*)—in which plaintiffs agreed to waive any right to litigate their second cause of action against the City for violation of the Coastal Act.

III. DISCUSSION

A. *Appealability*

We have reviewed the parties' postargument letter briefs and plaintiffs' stipulation based on *Sullivan, supra*, 15 Cal.4th 288. In light of plaintiffs' express waiver on appeal of their right to further litigate the second cause of action against the City for

violation of the Coastal Act, and in the interests of judicial economy, we exercise our discretion under *Sullivan*[6] to amend the trial court's dismissal order nunc pro tunc to reflect the dismissal with prejudice of the second cause of action against the City only and treat the appeal as taken from a final appealable order.

B. *Dismissal Motion*

Plaintiffs contend that the trial court erred by dismissing their two CEQA-based claims based on their failure to comply with section 21167.4(a). According to plaintiffs, section 21167.4(a) is ambiguous such that dismissal of plaintiffs' petition was permissive rather than mandatory, and the court here abused its discretion in dismissing their petition. Plaintiffs also argue that they substantial complied with the requirements of section 21167.4(a). Finally, they maintain that even if they technically violated section 21167.4(a), their failure to comply with the time limits of that section constituted excusable neglect under section 473(b). We reject each of plaintiffs' arguments below.

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[6] The court in *Sullivan, supra*, 15 Cal.4th 288 held, "When a party expressly waives on appeal the right to litigate an unresolved cause of action that deprived the judgment as entered of finality, the appellate court may give effect to the waiver by amending the judgment to reflect a dismissal of that cause of action with prejudice." (*Id*. at pp. 308–309.)

1. Section 21167.4(a)

Section 21167.4(a)[7] provides that a CEQA petitioner "*shall* request a hearing within 90 days from the date of filing the petition or *shall* be subject to dismissal." (Italics added.) Plaintiffs contend that section 21167.4(a) is nonetheless ambiguous when considered together with rule 3.232(h) such that dismissal of plaintiffs' petition was not mandatory. The City counters that section 21167.4 is not ambiguous and dismissal was mandatory. (*Comunidad en Accion v. Los Angeles City Council* (2013) 219 Cal.App.4th 1116, 1131 ["Requesting a hearing under . . . section 21167.4 is a mandatory provision of CEQA"]; *Fiorentino v. City of Fresno* (2007) 150 Cal.App.4th 596, 603 ["[The] language [of section 21167.4(a)] is plainly mandatory. . . . Consequently, under the plain meaning of the statutory language, a CEQA action must be dismissed when a timely request for hearing is not filed, provided that a motion is made by any interested party or the court"].) We review de novo issues of

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[7] Public Resources Code section 21167.4 provides in pertinent part: "(a) In any action or proceeding alleging noncompliance with this division, the petitioner shall request a hearing within 90 days from the date of filing the petition or shall be subject to dismissal on the court's own motion or on the motion of any party interested in the action or proceeding. [¶] (b) The petitioner shall serve a notice of the request for a hearing on all parties at the time that the petitioner files the request for a hearing. [¶] (c) Upon the filing of a request by the petitioner for a hearing and upon application by any party, the court shall establish a briefing schedule and a hearing date. In the absence of good cause, briefing shall be completed within 90 days from the date that the request for a hearing is filed, and the hearing, to the extent feasible, shall be held within 30 days thereafter. . . ."

statutory interpretation. (*United Riggers & Erectors, Inc. v. Coast Iron & Steel Co.* (2018) 4 Cal.5th 1082, 1089.)

We will assume, without expressly deciding, that section 21167.4(a) does not mandate dismissal for noncompliance with its requirements and the trial court therefore erred in its interpretation of that section. We conclude, however, that any such error was harmless because the court also concluded that plaintiffs had not substantially complied with section 21167.4(a)'s requirements and were not entitled to discretionary relief under section 473(b), conclusions that we affirm. Thus, even if section 21167.4(a) was a discretionary, rather than mandatory, provision, the court's conclusion that it would not grant plaintiffs discretionary relief demonstrates that plaintiffs suffered no prejudice from the trial court's assumed error. Absent such prejudice, there is no basis to reverse the dismissal order. (*F.P. v. Monier* (2017) 3 Cal.5th 1099, 1107–1108.)

2. Substantial Compliance

According to plaintiffs, the trial court abused its discretion in dismissing their petition because they had substantially complied with the provisions of section 21167.4(a). "'Substantial compliance, as the phrase is used in the decisions, means *actual* compliance in respect to the substance essential to every reasonable objective of the statute.' [Citation.] Where there is compliance as to all matters of substance[,] technical deviations are not to be given the stature of noncompliance. [Citation.] Substance prevails over form. When the plaintiff embarks [on a course of substantial compliance], every reasonable objective of [the statute at issue] has been satisfied." (*Southern Pac.*

Transportation Co. v. State Bd. of Equalization (1985) 175 Cal.App.3d 438, 442.) "Thus, the doctrine gives effect to our preference for substance over form, but it does not allow for an excuse to literal noncompliance in every situation." (*Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419, 1430.) We review a court's substantial compliance finding for substantial evidence. (*Oceguera v. Cohen* (2009) 172 Cal.App.4th 783, 794; *Minelian v. Manzella* (1989) 215 Cal.App.3d 457, 463.)

Plaintiffs' contention that they substantially complied with section 21167.4(a) because *the trial court*, pursuant to local rule, set a trial setting conference, is meritless. By their argument, plaintiffs concede that the court set the matter for a trial setting conference, not plaintiffs. Further, and contrary to plaintiffs' argument, a trial setting conference is not the functional equivalent of the request for hearing required under section 21167.4(a), which, when filed and timely served, triggers certain important deadlines under other provisions of Public Resources Code section 21167.4. Specifically, subdivision (c) of that section provides that "[u]pon the filing of a request by the petitioner for a hearing and upon application by any party, the court shall establish a briefing schedule and a hearing date. In the absence of good cause, briefing shall be completed within 90 days from the date that the request for a hearing is filed, and the hearing, to the extent feasible, shall be held within 30 days thereafter." Here, although the court set a trial setting conference for January 3, 2019, it did not set a briefing schedule or a hearing on the merits of plaintiffs' CEQA-based causes of action. Thus, the court's conclusion that "[plaintiffs] have not actually complied with any portion of section 21167.4(a)'s requirement of a 90-day request" was supported by substantial evidence.

3. Section 473(b)

In their opposition to the City's motion to dismiss, plaintiffs argued that, even assuming they failed to comply with the 90-day time limit for filing a "request for hearing" under section 21167.4(a), that failure constituted excusable neglect under section 473(b) warranting relief from default. The trial court disagreed, finding that plaintiffs had failed to act diligently in seeking relief, as required under that section.

"[A] threshold requirement for relief [under section 473(b)] is the moving party's diligence. (*Elston* [*v. City of Turlock* (1985)] 38 Cal.3d [227,] 234.) As the statute itself provides, application for relief 'shall be made *within a reasonable time*, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken.'" (*Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1420.) "A ruling on a motion for discretionary relief under section 473[(b)] shall not be disturbed on appeal absent a clear showing of abuse. [Citations.] As the Supreme Court explained in *In re Marriage of Connolly* (1979) 23 Cal.3d 590, 598 . . . : 'Although precise definition is difficult, it is generally accepted that the appropriate test of abuse of discretion is whether or not the trial court exceeded the bounds of reason, all of the circumstances before it being considered. [Citations.] We have said that when two or more inferences can reasonably be deduced from the facts, a reviewing court lacks power to substitute its deductions for those of the trial court.' [Citation.]" (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610.)

Plaintiffs were not entitled to relief under section 473(b) for at least two reasons. First, section 473(b) provides, in pertinent 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." (Italics added.)

The procedural prerequisites for relief under section 473(b), including the requirement that the party seeking relief file an application supported by certain documents, have been strictly construed. For example, in *Arambula v. Union Carbide Corp.* (2005) 128 Cal.App.4th 333, the court held that the party seeking affirmative relief from default or dismissal under section 473(b) is required to file and serve a noticed motion. "[W]e conclude that an application for relief under section [473(b)] is a motion and that an application for relief under the statute is deemed to be made *upon filing in court of a notice of motion and service of the notice of motion on the adverse party*. [Citation.] Therefore, absent service on the adverse party [of such a noticed motion], there is no '*application*' for relief." (*Id*. at p. 341, original italics.)

Here, plaintiffs raised section 473(b) in their opposition to the motion to dismiss which was supported by the declaration of their counsel,[8] but which did not include a copy of the request for

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[8] Counsel's declaration stated, in relevant part, "Prior to filing this action, I reviewed Public Resources Code Section[s] 2100[0]–21189, the CEQA Guidelines (California Code of Regulations, Title 14, Div. 6, Chapter 3, Sections 15000–15387, and the local rules governing CEQA action[s]. I was aware of the

hearing that they proposed to file outside the 90-day time limitation. Because plaintiffs failed to file and serve a noticed motion, i.e., an "application," for relief under section 473(b) and failed to attach their proposed request for hearing, plaintiffs were not entitled to the relief from default they sought.

Second, even assuming plaintiffs had properly filed a section 473(b) motion, the trial court did not abuse its discretion in denying it. First, plaintiffs denied that they had acted with inadvertence. As counsel's declaration acknowledged, she "was aware of the requirement [that plaintiffs] file a request for a hearing" but upon receiving the notice of trial setting conference, "[she] thought [she] had achieved what would happen if [she] had made the request for the hearing, and could not see the logic of making an additional request." Thus, counsel conceded that she had not inadvertently failed to request a hearing, but instead, had made a conscious decision not to file such a request.

Nor did plaintiffs concede any error. Plaintiffs argued that they had not violated section 21167.4(a) at all, and framed the legal issue as: "[I]s there a violation of this provision when before the [plaintiff] in an action can even make the request, the court calendars the matter for a trial setting conference[?]" Plaintiffs

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requirement [that plaintiffs] file a request for a hearing and that in turn the Court would set a trial setting conference and was prepared to make the request within 90 days of filing the petition for writ of mandate. But, almost immediately after the petition was filed, I received notice from the Court that a trial setting conference was scheduled for January, 2019[,] and on behalf of the [plaintiffs], I duly served written notice of the trial setting conference. . . . Because of this I thought I had achieved what would happen if I had made the request for the hearing, and could not see the logic of making an additional request."

continued, "There is nothing more the [plaintiffs] can do in requesting a trial date. [The City's] view of the law would have the nonsensical result in having the [plaintiffs] tell the court, no you cannot set the matter for a trial setting conference until we ask for it, or requiring [plaintiffs] to file another request basically saying yes, I know you set the matter for a trial setting conference but the rules require me to ask for what you have already given us. It gets even more ridiculous because, how would the court respond: [S]et another date or respond with the same date[?]"

Notwithstanding plaintiffs' failure to acknowledge any mistake or inadvertence, the trial court nonetheless "assume[d] that the mistake of law by [plaintiffs'] counsel [fell] into the excusable category," but nonetheless concluded that plaintiffs were not entitled to discretionary relief because they had not acted diligently in seeking relief. The court's conclusion that plaintiffs did not act diligently was well supported by the record. As of the date of the hearing on the City's motion to dismiss, plaintiffs still had not filed the required request for a hearing on the merits of their CEQA claims. Thus, the trial court did not abuse its discretion when it denied plaintiffs relief from dismissal.

C. *Motion to Stay*

Plaintiffs' appeal from the ruling on their motion to stay is predicated on the assumption that their CEQA claims were improperly dismissed. Because we have concluded that the trial court correctly dismissed those claims, we do not reach plaintiffs' contentions in support of their motion to stay.

IV. DISPOSITION

The dismissal order is affirmed. No costs are awarded on appeal.

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KIM, J.

We concur:

BAKER, Acting P. J.

MOOR, J.