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PERSPECTIVE

You Don't Always Get a Second Chance

By Paul Kujawsky

If you have to prepare an opposition to a motion for summary judgment, you probably shouldn't hand it off to your paralegal to write. If you do, make sure she finishes it before she leaves on a cruise to Alaska. Otherwise, the resulting failure to timely oppose the motion will not be considered excusable inadvertence, mistake, surprise or neglect under Code of Civil Procedure Section 473(b). And since the mandatory relief provision of Section 473(b) for inexcusable neglect doesn't apply to summary judgments, even firing the paralegal when she comes back from vacation will not erase the sting of screwing up the case.

This is what we learn from the 5th District Court of Appeal's opinion in *Henderson v. Pacific Gas & Electric Co*., F058223, published Aug. 5, 2010. Susan Henderson worked for PG&E, but apparently they didn't get along well. She sued the company for breach of contract and employment discrimination. PG&E eventually moved for summary judgment.

Henderson's attorney was a sole practitioner who was no doubt quite happy, in these economically sluggish times, to have a busy caseload. Fortunately, he had a paralegal in whom he had confidence, so he assigned the drafting of the opposition to her while he worked on other matters. Unfortunately, she had vacation plans.

The filing deadline was Monday, Sept. 8, 2008. On Thursday, September 4, the paralegal called the attorney from home, where she had taken most of the case file, to assure him that the opposition would be on his desk the next morning. But on Friday, September 5, she left him a new message: she would e-mail the opposition directly to an attorney service. The service would file and serve the opposition on Monday. And she sailed away to Alaska.

One imagines the lawyer sleeping poorly that weekend. And rightly so. On Monday the attorney service told him that it had not heard from the paralegal. He scrambled to file something — a declaration that he would present evidence at the hearing on the summary judgment motion, showing the existence of triable issues of material fact. Over the next several days he received e-mails of some the paralegal's work product, and filed points and authorities, declarations and responses to PG&E's separate statement of facts.

In a September 15 ex parte application to continue the hearing on the summary judgment motion, the attorney, in the words of the Court of Appeal, "stated that he was throwing himself on the court's mercy relating to the late filing and service of the summary judgment opposition." Finally, on September 17, he filed a new set of documents constituting Henderson's opposition to the PG&E summary judgment motion.

The attorney, in the words of the Court of Appeal, 'stated that he was throwing himself on the court's mercy relating to the late filing and service of the summary judgment opposition.'

But it was too late. At the September 22 hearing on summary judgment motion, the court treated the ex parte application as a plea for a second chance under Code of Civil Procedure Section 473 (b), and gave it the thumbs down. The court granted PG&E's summary judgment motion.

On March 20, 2009, Henderson filed a motion to vacate the summary judgment, now explicitly relying on Section 473(b). Same result — motion denied. Henderson appealed.

The Court of Appeal affirmed. Section 473(b) provides for discretionary relief from attorney neglect. The relevant language is: "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."

The Court of Appeal held that the trial court did not abuse its discretion in denying relief. Henderson's argument that it was excusable mistake to rely on a paralegal to draft the opposition inspired a rare judicial double exclamation point: "She asserts this is the type of mistake a reasonable sole practitioner might make!!"

Not so, retorted the court: "[T]he trial court reasonably could conclude that his paralegal's inability to complete the assignment within the deadline he gave her, thereby resulting in late-filing of the opposition, did not constitute either surprise or excusable neglect, and instead was inexcusable as he failed to supervise his employee closely and trusted in her scheme to file and serve the documents from a remote, out-of-state location, without his ability to review and sign them. Certainly he knew by Friday morning that he did not have the documents to review and his paralegal was planning to attempt to transmit them from Seattle or the cruise ship. Instead of immediately informing opposing counsel or the court of this problem and requesting either a continuance of the hearing or an extension of time to file the opposition, he gambled that the paralegal's plan would work and the documents would be filed on time. He gambled and lost."

Henderson fared no better with Section 473(b)'s "fall on your sword" clause, by which the party gets a break if her lawyer admits that the mistake was entirely his, even if inexcusable: "Notwithstanding any other requirements of this section, the court shall, 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, vacate any...resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or...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 appellate court found that this provision does not apply to summary judgments. It agreed with the line of cases represented by *Huh v. Wang* (2007) 158 Cal.App.4th 1406, which noted that "[b]y its express terms, the mandatory relief provision applies only to defaults, default judgments, and dismissals." It rejected A*vila v. Chua* (1997) 57 Cal.App.4th 860, the single case holding that the mandatory relief provision of Section 473(b) applies to summary judgments.

The lessons for the trial lawyer are clear. "Just in time" may be a workable business strategy for the production and distribution of pencils, peanuts and the like. But the concept doesn't translate at all well to preparing and filing legal papers. If at all possible, finish writing in plenty of time before the filing deadline, including a cushion for the odd unexpected emergency.

If you've lost a summary judgment, don't plan to rescue your client by admitting that your conduct was flagrantly, even flamboyantly boneheaded. The mandatory relief provision of Section 473(b) doesn't apply to summary judgments. On the other hand, if you want to plead excusable mistake or neglect, don't let a paralegal operate without supervision, regardless of whether she skips town or not.

Otherwise, when you consult with an appellate lawyer after losing the case, you may hear, "I wouldn't say this is a particularly viable appeal, but is your malpractice coverage current?"

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