Filed 3/22/17

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

LENORE SHIVELY, Plaintiff and Appellant, v. EAST SIDE UNION SCHOOL DISTRICT et al., Defendants and Respondents.	H041666 (Santa Clara County Super. Ct. No. CV246689)

INTRODUCTION

This appeal involves plaintiff and appellant Lenore Shively's attempt to set aside an order of dismissal entered by the trial court after her counsel failed to appear both at a case management conference and a subsequent order to show cause hearing relating to the prior failure to appear. As we will explain below, we do not address the merits of the arguments raised because we find we have no appellate jurisdiction. We therefore dismiss this appeal.

FACTUAL AND PROCEDURAL BACKGROUND

On May 22, 2013, Lenore Shively (Shively) filed suit against Piedmont Hills High School, East Side Union School District, and the South Bay Stallions. Shively claimed that she was attending a sporting event at Piedmont Hills High School in April 2012 when she "slipped and/or tripped on something sticking out of the ground which was on

and along the unlit path from the scheduled event she was there to attend." Her complaint asserted claims against all three defendants for negligence and premises liability, in addition to a claim against the high school and the school district for the allegedly dangerous condition of public property.

The trial court scheduled a case management conference for September 13, 2013 at 3:45 p.m. An associate attorney with plaintiff's counsel's office appeared at the scheduled time and place only to be notified that the conference had already occurred at 1:30 p.m. that day. Shively's counsel claims never to have received any notice of the time change, even though his proper address appeared in the caption on the complaint and on the case management statement prepared and filed before the conference.

In a minute order dated September 17, 2013, the trial court scheduled an order to show cause for Shively's failure to appear at the case management conference, which was to be heard on the next available date. A few days later, on September 23, the trial court issued a "Notice of Hearing on OSC Re: Dismissal" which set the hearing for November 7, 2013 and ordered "all parties" to attend to show cause why the case "should not be dismissed for failure of [Shively] to appear" at the case management conference.

The court's notice, however, was not served at the correct address. Instead, it was sent to a post office box belonging to a law firm with which Shively's counsel had not been associated for five years. Shively's counsel therefore did not appear at the November 7, 2013 hearing on the order to show cause and the trial court dismissed the complaint without prejudice. On November 8, 2013, an order of dismissal was filed by the trial court.

Shively's counsel asserted that he did not receive notice from the court that the case was dismissed. Instead, he claims that he only found out about the dismissal in May 2014. He indicated that he began to have problems with his secretary concerning calendaring and deadlines and by May 2014, this secretary no longer was with his office.

Early that same month, Shively's counsel directed his "interim secretary" to review the files left by his previous secretary and had his office call the trial court for a status update on the next case management conference. It was during that telephone call, according to Shively's counsel, that his office first received notice that the case had been dismissed. Shively's counsel then ordered copies of any notices regarding the scheduling of the hearing on the order to show cause and a copy of the order dismissing the complaint. He received those documents on May 12, 2014.

The next day, on May 13, 2014, Shively filed the first of three motions by which she would attempt to set the dismissal aside. The first was entitled a motion for relief from dismissal pursuant to Code of Civil Procedure section 473, subdivision (b).[1] Shively, after recounting the essential facts just summarized above, asked the court to set aside the dismissal pursuant to this statute because of his own "mistake, inadvertence, surprise, or excusable neglect."

Defendants opposed the motion. They argued that Shively could not seek the relief she sought under section 473, subdivision (b), because that statute provides only six months after a dismissal to file a motion for relief, a deadline which Shively missed. Defendants also argued that Shively had failed to inquire into the status of the case for almost eight months (from the original September 2013 case management conference until May 2014) and that her counsel or his staff had in fact been left a telephone voicemail on November 11, 2013 from an attorney for the South Bay Stallions, asking what had happened at the hearing on the order to show cause on November 7. (Shively's counsel disputed that he received this voicemail.)

[1] All further statutory references are to the Code of Civil Procedure.

Shively's first motion for relief was denied by the trial court on June 19, 2014, in an order which only noted that all the papers and arguments had been considered and that there was "good cause" for the order.

On July 3, 2014, Shively filed her second motion seeking relief from the dismissal. Relying on essentially the same facts as her first motion, Shively asserted that the trial court should set aside its dismissal under section 473, subdivision (d), which provides that "[t]he court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order." Shively argued that the "clerical mistake[]" of sending notices to the wrong address by the trial court justified setting aside the dismissal.

Defendants again opposed, arguing that Shively's latest motion was an improper motion for reconsideration, that it was not served properly, and that section 473, subdivision (d), did not provide the relief she was asking for. Defendants also asserted that Shively had failed to properly notice the motion and that she had not provided the requisite amount of time between that notice and the hearing. After Shively filed her reply (in which she argued that she was not seeking reconsideration of any prior order because she was seeking relief under a different statutory section), the trial court denied this motion was well. The order did not state any specific reasoning for the denial.

Shively filed her third motion on August 6, 2014. She called it a "motion for order vacating dismissal and to set aside dismissal void on its face." (Emphasis removed; capitalization altered.) Again reciting the same essential facts, Shively this time invoked the trial court's inherent equitable power to correct the clerk's mistake, asserted that the mistake had denied her right to be heard, and that the trial court's dismissal of her case without providing her proper notice violated her due process rights. Defendants again opposed, asserting, among other things, that Shively's latest motion was another

improper motion for reconsideration, she was not entitled to equitable relief because the mistake was her counsel's and that Shively had failed to prosecute her case for eight months. The South Bay Stallions again insisted that their attorney had called Shively's counsel about the case on November 11, 2013 and left a voicemail. Shively replied, arguing among other things, that her counsel was not at fault, that the supposed failure to prosecute was irrelevant, and that her due process rights were in fact violated.

In an order filed on October 15, 2014, the trial court denied Shively's third motion. Noting that the evidence relied upon by Shively in all three motions was "essentially identical," the trial court found that Shively had filed a renewed motion under section 1008, subdivision (b), without showing any new facts, circumstances, or law. As the trial court interpreted the chain of events: "[A]though [Shively] insists that she is not seeking reconsideration of any prior orders because she is seeking relief on a different legal theory, without question [Shively] is seeking the same relief in this third motion that she sought in the first and second motions."

The court also noted that Shively made no attempt to explain why the associate attorney who had attempted to appear at the September 2013 case management conference had done "nothing to learn the new hearing date" and that Shively's counsel could have discovered the date of the hearing on the order to show cause by her counsel's "checking the Court's website to see what actions were required after the initial [case management conference], contacting the [c]lerk's [o]ffice on the day of the initial [case management conference], or by calling the Court. More importantly Plaintiff's counsel fails to explain why he did nothing to investigate the status of or otherwise pursue a case filed in May of 2013 for a full year before discovering that the case had been dismissed more than six months earlier. The Court cannot find that Plaintiff exercised appropriate or sufficient diligence under these circumstances to warrant the Court's exercise of discretionary equitable powers." [Citations]." The court also held that the dismissal

order was not void, as Shively insisted, because the court had had jurisdiction over the parties when the order was made, and that therefore "even acts or order in excess of power by failing to follow procedure are voidable, not void."

Shively filed a notice of appeal on November 20, 2014. That notice indicated that the appeal was from the order denying Shively's third motion. On December 9, 2014, Shively filed a second notice of appeal, indicating that she was appealing *both* the trial court's original order from November 2013 dismissing her complaint and the trial court's October 2014 order denying her third motion.

DISCUSSION

Shively raises a number of arguments on appeal, largely repeating those she made below. However, we do not reach the merits of the case, because we find that we have no jurisdiction over this appeal. In their appellate brief, South Bay Stallions and the Pacific Coast Football League clearly ask that we "dismiss this appeal" because, they assert, the order subject to this appeal is not appealable. East Bay High School also argues that the third motion was a motion for reconsideration under section 1008, subdivision (a), and the resulting order is not an appealable order.[2]

As we conclude below, we agree that we have no jurisdiction to hear Shively's appeal of the trial court's order denying her third motion, although for slightly different reasons than asserted by defendants. We also find that we have no jurisdiction over Shively's appeal of the trial court's November 2013 dismissal of her case.

[2] We would have been assisted by Shively's responses to these arguments, but she did not file a reply brief (even though she appeared to be intending on filing one based on the parties' filed stipulation extending Shively's time to file her reply.)

I. *We Have No Jurisdiction to Review The Order Of Dismissal*

We first turn to the question as to whether we have jurisdiction to review the trial court's original entry of dismissal, which was filed on November 8, 2013. Shively identified this order in her second notice of appeal filed on December 9, 2016.

An order of dismissal has the effect of a final judgment and is therefore appealable (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 144, p. 218), even if the dismissal is without prejudice. (See *Gagnon Co. v. Nevada Desert Inn* (1955) 45 Cal.2d 448, 455.) However, the obvious problem here is that Shively's notice of appeal specifying this order was filed over a year after it was entered. This is more than the maximum 180 days allowed for an appeal and we therefore have no jurisdiction to review the dismissal order. (Cal. Rules of Court, rules 8.104(a)(1)(C), 8.104(e).)

Of course, we do not turn a blind eye to the problem that Shively identifies—that he was not properly served with the order of dismissal. The remedy in that situation, as she seemed to realize, is to file a motion to vacate the order. Although orders on motions to vacate a judgment are not generally appealable, an exception to this general rule applies when the underlying judgment is claimed to be void. (*311 South Spring Street Co. v. Department of General Services* (2009) 178 Cal. App. 4th 1009, 1014.) "In such a case, the order denying the motion to vacate is itself void and appealable because it gives effect to a void judgment.' [Citation]." (*Ibid.*) As we will explain below, however, this exception does not help Shively because of the procedural manner she used in the trial court to obtain the desired relief.

II. *We Have No Jurisdiction to Review the Trial Court's Order Denying Shively's Third Motion*

The question of our jurisdiction to review the trial court's denial of Shively's third motion to set aside the order of dismissal is a little more involved. As we have mentioned, all three motions relied upon essentially identical facts. The only difference

between the three motions was their legal bases. The first motion was based solely on section 473, subdivision (b), which provides for relief because of a party or counsel's "mistake, inadvertence, surprise or excusable neglect." (§ 473, subd. (b).) The second motion was based solely on section 473, subdivision (d), which provides in relevant part, that a court may "set aside any void judgment or order." (§ 473, subd. (d).) The third motion was based on the court's inherent equitable power to grant relief from a void order and to grant relief from an order resulting from extrinsic fraud or mistake. (See *Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 503.) The trial court believed that the third motion was a renewal of *both* of Shively's two previously denied motions, specifically citing section 1008, subdivision (b). And, as we have mentioned, East Bay High School asserts that the third motion was a motion for reconsideration under section 1008, subdivision (a).

We explore this question at some length because, as we shall explain, whether Shively's final motion was governed by section 1008 not only affected her right to relief in the trial court, but also affects her right to appeal. Section 1008 provides for two kinds of motions (they are called "application[s]" in the statute) by which a party may ask a court to revisit a prior denial of a motion, "applications for reconsideration" and "renewals of previous motions." (§ 1008, subds. (a), (b) & (e).) Section 1008 specifically states that an application for "reconsideration" under 1008, subdivision (a), is "not separately appealable. However, if the order that was the subject of a motion for reconsideration is appealable, the denial of the motion for reconsideration is reviewable as part of an appeal from that order." (§ 1008, subd. (g).) Before 2012, the case law was divided as to whether an order denying a motion for reconsideration under section 1008, subdivision (a) was separately appealable. (*Powell v. County of Orange* (2011) 197 Cal.App.4th 1573, 1576-1577.) In 2012, the Legislature amended subdivision (g) of section 1008 to add the language just quoted, specifying that such orders are not

independently appealable. (Assem. Bill No. 1067 (2011-2012 Reg. Sess.) § 1.) Section 1008, subdivision (g) does not, however, address renewed motions under subdivision (b). However, prior case law, which is still in effect, holds that such orders are also not appealable. (*Tate v. Wilburn* (2010) 184 Cal.App.4th 150, 160.)

A. The Scope Of Section 1008

To determine whether Shively's third motion was either a motion for reconsideration or a renewal of a previous motion under section 1008, we turn to the extensive analysis we provided in a case involving multiple motions to set aside a default. (See *Standard Microsystems Corp. v. Winbond Electronics Corp.* (2009) 179 Cal.App.4th 868, 889-893 (*Standard Microsystems*),disapproved on another point in *Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 844 (*Even Zohar*).) We discuss *Standard Microsystems* at some length because of its relevance.

In that case, the plaintiff served a complaint on defendants, but, relying on their attorneys' advice that the method of service was invalid, the defendants did not answer and plaintiff took the defendants' default. (*Standard Microsystems, supra,* 179 Cal.App.4th at p. 873.) After default was entered, the same attorney who had given the advice about service brought a motion for relief on the ground that service was void or that "defendants themselves were guilty of mistake surprise, inadvertence, or excusable neglect in believing [service] to be void" under section 473, subdivision (b). (*Ibid.*) The trial court denied relief and entered a default judgment. (*Ibid.*)

"Defendants then engaged new counsel, who moved for relief from the default judgment, as well as the underlying default, on the ground that both were the result of the fault of defendants' first attorney—an assertion that, if borne out, would ordinarily entitle them to mandatory relief under [section 473, subdivision (b)]. The trial court again denied relief." (*Standard Microsystems, supra,* 179 Cal.App.4th at p. 873.)

On appeal, one of the arguments the plaintiff made was that the second motion was barred by section 1008, which "restricts motions for reconsideration and renewals of previously denied motions." (*Standard Microsystems, supra,* 179 Cal.App.4th at p. 873.) In analyzing the issue, we noted that the statute describes a motion for reconsideration "not in terms of motions to reconsider some issue, question, or general subject but 'applications for reconsideration of *its orders*.' (§ 1008(e), italics added.) A motion for reconsideration is thus one that *explicitly directs the court's attention* to a *previous order* and seeks to 'modify, amend, or revoke [that] order.' (§ 1008(a).)" (*Id.* at p. 889.) "Consistent with this understanding, merely asking the court to grant relief that is *inconsistent with* a prior order, whether by the same or a different judge, is not a 'motion for reconsideration.' It may be barred by other, court-made rules of law [citation], but it is not barred by section 1008." (*Id.* at p. 890.)

We held that defendants' second motion was not a motion to reconsider the trial court's order denying defendant's first motion. "[T]o the extent defendants' second motion relied upon the mandatory provisions of section 473(b), it did not ask the court to reconsider its previous order. For all defendants cared, and all this record shows, that order was entirely correct when made; indeed, on the showing then before the court, it is difficult to see how a different order could have been made. The second motion rested on an entirely different legal theory, invoked a different statutory ground, and relied in very substantial part on markedly different facts. It neither asked for, nor sought by sly evasion, a determination contrary to any determination made in the first order. On the contrary, it cited that order as part of the series of events that entitled defendants to relief from the judgment. We therefore decline to view the later motion as one described in, or regulated by, section 1008(a)." (*Standard Microsystems, supra,* 179 Cal.App.4th at p. 891.)

We next turned to the question of whether the defendants' second motion constituted a renewal of a previous motion under section 1008, subdivision (b). (*Standard Microsystems, supra,* 179 Cal.App.4th at p 891.) We noted that the term "same order" in section 1008, subdivision (b), contained a "latent ambiguity" and, if applied literally, could lead to absurd results. "Suppose for example that a defendant moves to dismiss on the ground that the plaintiff has failed to serve and return summons within three years. (Code Civ. Proc., §§ 583.250, subd. (a)(2), 583.210, subd. (a).) The trial court denies the motion, but the plaintiff then sits on his hands for another three years. Surely section 1008 is not intended to bar a second motion to dismiss, this one asserting the plaintiff's failure to bring the matter to trial within five years. (Code Civ. Proc., §§ 583.360, subd. (a), 583.310.) Yet the second motion seeks 'the same order' as the first—a directive that the complaint be dismissed—and thus falls within the literal terms of section 1008(b). And this reading is arguably strengthened by the statute's explicit inclusion within its scope of renewed motions based on 'new or different facts, circumstances, or law.' Conceivably the Legislature intended a distinction between 'facts, circumstances, [and] law' on the one hand, and *grounds* on the other, such that two motions seeking the same relief *on different legal theories* would not be viewed as seeking the 'same order.' Such a gloss, however, finds as little basis in the actual language of the statute as the interpretations we have criticized above—though it does respect, as they do not, the rule resolving statutory ambiguities against forfeiture. The problem, in any event, illustrates one of the central defects in section 1008 as presently drawn: It attempts to prescribe a simple categorical rule to govern a subject whose nuance and complexity make it eminently better suited to the evolutionary, incremental processes of common law adjudication, or at least to the close and sustained attention of experts." (*Standard Microsystems, supra,* 179 Cal.App.4th at pp. 891-892.)

We resolved this question as follows: "Assuming (without deciding) that defendants' second motion sought the 'same order' as the first *in part*, the question becomes what effect such overlap should have. We emphatically reject the proposition that a motion seeking a previously denied order in addition to newly requested relief is thereby *entirely barred*, as if its repetitive aspect somehow tainted the whole." (*Standard Microsystems, supra,* 179 Cal.App.4th at pp. 892.)

Crucially, in finding that the defendants' second motion was not within the ambit of section 1008, we noted the distinct factual and legal grounds behind the two motions. Defendants' first motion was filed alongside a motion to quash service of process. (*Standard Microsystems, supra,* 179 Cal.App.4th at pp. 877.) Although both motions cited section 473, subdivision (b), the "only [coherent] legal argument offered by either was that service had been defective." (*Ibid.*) The first motion did not "suggest that the default was the product of neglect or mistake by counsel." (*Id.* at p. 878.) The subsequent motion to vacate the default judgment, on the other hand, had as its "central contention in support . . . that defendants' original attorneys had 'failed to provide the proper advice and take the proper actions once default became a palpable threat.' " (*Id.* at p. 880.)

B. ***Shively's Third Motion was a Renewal of Her Second Motion and the Order Denying the Third Motion Is Not Appealable***

Given our analysis in *Standard Microsystems,* we believe that Shively's third motion was neither a motion for reconsideration nor a motion to renew her first motion, although the question is admittedly much closer than that in *Standard Microsystems.* Although Shively's first and third motions relied on precisely the same facts, Shively was very clear in her first motion that she was relying, as a legal basis, only on section 473, subdivision (b), based upon her counsel's "mistake, inadvertence, surprise or excusable neglect." The third motion was based on the court's inherent equitable power to grant

relief from a void order and to grant relief from an order resulting from extrinsic fraud or mistake. Nor did Shively's third motion "*explicitly direct[] the court's attention* to [the] *previous order* [denying Shively's first motion] and seek[] to 'modify, amend, or revoke [that] order.' (§ 1008(a).)" (*Standard Microsystems, supra*, 179 Cal.App.4th at p. 889.)

We next determine whether Shively's third motion was either a motion for reconsideration of her second motion or a renewal of that motion. Because the third motion also did not explicitly seek to modify, amend, or revoke the court's denial of the denial of her second motion, it was not a motion for reconsideration under section 1008, subdivision (a). However, because both motions relied on the same facts and because of the similarity of the legal bases for these motions, it is difficult to avoid the conclusion that Shively's third motion was simply a renewal of her second motion.

The second motion was based solely on section 473, subdivision (d), which provides in relevant part, that a court may "set aside any void judgment or order." (§ 473, subd. (d).) That motion, however, emphasized that the trial court had "*inherent power* to set aside a judgment . . . even after the six-month period of [section 473, subdivision (b)] has passed." (Citation omitted; italics added.) The third motion, although it dropped the specific mention of section 473, subdivision (d), from the caption, was also based on the court's inherent equitable power to grant relief from a void order and to grant relief from an order resulting from extrinsic fraud or mistake. (See *Cruz v. Fagor America, Inc.*, *supra*, 146 Cal.App.4th at p. 503.) Although Shively insisted in her reply brief for the third motion that she was not seeking relief under section 473, subdivision (d), but was seeking relief only under the court's "equity power to grant relief from an order entered through extrinsic mistake or the inherent power of the court to set aside orders void on their face," her opening brief noted that the court's inherent power to set aside a void judgment was reflected in section 473, subdivision (d): "The language that is now the [*sic*] Code Civ. Proc. § 473(d) codified the court's inherent power to set

aside an order or judgment void on its fact at any time." Though Shively included arguments in her third motion, such as her claim of a due process violation, which were not emphasized in her second motion, both motions relied upon the trial court's inherent authority to set aside a void order.

In other words, Shively's third motion itself recognized the extremely close relationship between a court's inherent authority to vacate a void judgment and the codification of that inherent authority in the very statute that her second motion relied upon. We need not deeply analyze the differences and distinctions that may or may not remain between the two areas of law—as Shively herself indicated their close relationship. In other words, Shively's third motion was merely an attempt at a re-do of her second, with the slight alteration of the legal authority given to support the motion as an excuse to bring another motion. It is difficult to avoid the conclusion that Shively's third motion was a "sly" evasion meant to simply get another bite at the apple denied to her before. (*Standard Microsystems, supra,* 179 Cal.App.4th at pp. 890-891.)

This means that we must dismiss this appeal. Renewal of motions of section 1008, subdivision (b), as we have mentioned, are not appealable. (*Tate v. Wilburn, supra,* 184 Cal.App.4th at p. 160.) Allowing for such an appeal in this circumstance would, among other things, allow for an "unwarranted extension of time to appeal" from a previous order. (*Ibid.*) "Section 1008's purpose is ' "to conserve judicial resources by constraining litigants who would endlessly bring the same motions over and over, or move for reconsideration of every adverse order and then appeal the denial of the motion to reconsider." ' (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 1067 (2011-2012 Reg. Sess.) as amended Apr. 25, 2011, p. 4.)" (*Zohar, supra,* 61 Cal.4th at pp. 839-840.) Shively should have filed a notice of appeal from the order denying her second motion, an order which was filed on August 4, 2014. She did not and we therefore cannot remedy her failure to do so.

DISPOSITION

The appeal is dismissed. Costs are awarded to respondents.

_____
RUSHING, P.J.

WE CONCUR:

_____
PREMO, J.

_____
ELIA, J.

Shively v. East Side Union School District et al.
H041666