No.

IN THE

Supreme Court of the United States

JEFF & SANDRA SCHWARTZ
Petitioners
v.

JP MORGAN CHASE BANK NA ET AL
Respondent.

On Petition for a Writ of Certiorari
to the California Court of Appeal,
Fourth Appellate District, Division 3

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

1. Did the court violate Schwartz's Fifth Amendment right to be heard by refusing to consider his sworn statement in support of his application for mandatory, non-discretionary, relief?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Jeff and Sandra Schwartz respectfully petition for a writ of certiorari to review the judgment of the California Court of Appeal, Fourth Appellate District, Division 3.

OPINIONS BELOW

The opinion of the California Court of Appeal, Fourth Appellate District, Division 3, is reported at 2018 WL 579099. The California Supreme Court denied certiorari.

JURISDICTION

The California Court of Appeal issued its decision on January 29, 2018 (p. 5) and denied rehearing on February 15, 2018. A Petition for Review was submitted to the California Supreme Court on March 5, 2018; it was denied on April 18, 2018. (p. 17.) This Court has jurisdiction pursuant to 28 U.S.C. Section 1257, subdivision (a).

CONSTITUTIONAL PROVISION AT ISSUE

No person shall be … deprived of life, liberty, or property, without due process of law." (U.S. Const., 5th Amend.)

STATEMENT OF THE CASE

This case challenges the constitutionality of a state court permitting a judge to deny an applicant's right to be heard.

The salient facts are undisputed: The California legislature enacted Code of Civil Procedures section 473 which allows an attorney to seek relief from a judgment. Subdivision (b) permits the attorney to seek either discretionary or mandatory relief. The primary difference being that the court lacks discretion to deny a proper application for mandatory relief.

Despite this black-letter law, the California Court of Appeal affirmed denial of an application for mandatory relief on the grounds that the court did not believe the attorney's sworn statement. The court did not cite any evidence that the attorney's statement was false or give any other reason for disbelieving the attorney; the judge used his discretion to effectively prevent the attorney's sworn statement to be heard. This violates the Schwartzes' right under the Fifth Amendment to the U.S. Constitution's guarantee to be "heard" before being deprived of property. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

THE ISSUES RAISED IN THIS PETITION WERE LITIGATED THROUGHOUT THE STATE COURT PROCEEDINGS

The question of whether the court had discretion to refuse to hear an attorney's sworn declaration, without any evidence of its falsity, was raised in the trial court, Court of Appeal, and California Supreme Court.

REASONS FOR GRANTING THE WRIT

1. The Fifth Amendment requires that an applicant be "heard" before being deprived of property.

A person is entitled to be heard before the government may take their property. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The court deprived Jeff Schwartz of that right by refusing to hear his explanation supporting his application from mandatory relief.

2. The appellate court affirmed the trial court's refusal to hear Schwartz's sworn statement.

The California Court of Appeal affirmed the lower court dismissal on the grounds that the judge has discretion to deny mandatory relief. This is a non sequitur.

CONCLUSION

The Opinion violates Schwartz's Fifth Amendment right to be heard prior to having his property taken. This petition should be granted in the interests of justice.

Respectfully submitted,

July 10, 2018

s/_____
Jeffrey M. Schwartz

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JEFF SCHWARTZ et al,

Plaintiffs and Appellants,

v.

JPMORGAN CHASE BANK, NA, et al,

Defendants and Respondents

Case No. G053186

(Super. Ct. No. 30-2013-00664660

Filed January 29, 2018

OPINION

Appeal from a judgment of the Superior Court of Orange County, Peter J. Wilson, Judge. Affirmed.

Schwartz Law and Jeffrey M. Schwartz for Plaintiffs and Appellants.

Bryan Cave, Glenn J. Plattner and Deborah P. Heald for Defendant and Respondent JPMorgan Chase Bank, N.A. Wright, Finlay & Zak, Gwen H. Ribar and Marvin B. Adviento for Defendant and Respondent Select Portfolio Servicing, Inc.

Plaintiffs Jeff and Sandra Schwartz appeal from an order denying their motion to vacate the dismissal of their complaint. Plaintiffs argue the trial court had no discretion to deny their motion to set aside the dismissal order under Code of Civil Procedure section 473, subdivision (b), because the motion met all the requirements for mandatory relief under that statute. They contend that because Jeff, an attorney who is representing himself and his wife in this case, filed a declaration under penalty of perjury stating his failure to appear for two successive hearings on an order to show cause regarding dismissal (OSC re: dismissal) was inadvertent, the court was required to grant them relief from the ensuing dismissal.[1]

Defendant JPMorgan Chase Bank, NA (Chase), filed a motion to strike part of plaintiffs' opening brief, on the ground it also challenges the merits of the trial court's initial order dismissing the case, which is outside the scope of plaintiffs' amended notice of appeal. We agree the propriety of the dismissal order is not before us, and we consequently will not address the merits of that

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[1] Because plaintiffs share the same last name, and much of our discussion focuses on Jeff specifically, we refer to him by his first name, for the sake of clarity. No disrespect is intended.

ruling.[2] However, we construe the discussion of it in plaintiffs' opening brief as merely providing context (albeit not entirely relevant context) for his arguments pertaining to the court's order denying his motion for relief from that order. We consequently deny the motion to strike it.

Defendant Select Portfolio Servicing, Inc. (Select), argues this appeal is moot, pointing out the order dismissing the complaint was made without prejudice and plaintiffs promptly filed another complaint in a different case, seeking the same relief against the same parties.[3] While that may be true as to Select, we note the defendants named in the two complaints are not identical. The defendants in this case are Chase and Select, while the defendants named in the new complaint are Select and Quality Loan Service Corporation. Since the new complaint would not render the case moot as to Chase, we consequently reject

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[2] In April 2016, plaintiffs filed a motion for permission to file a corrected notice of appeal, stating their appeal was from the court's September 10, 2015 order after judgment. We granted their motion, stating that as "corrected, appellants' appeal is deemed to be from the trial court's September 10, 2015, order after judgment."

[3] Select has requested that we take judicial notice of the subsequent complaint filed by plaintiffs in the Superior Court of Orange County, case No. 30-2016-00836466-CU-BC-CJC. That request is granted.

Select's mootness argument, and address the matter on the merits.

On the merits, we agree with Chase and Select. Plaintiffs fail to acknowledge that the trial court was not obligated to believe Jeff's declaration stating his reasons for failing to appear at the two earlier hearings on the OSC. And when Jeff again failed to appear in court for the hearing on his own motion to vacate the dismissal, the court explicitly relied on that non-appearance as a basis for concluding that Jeff's explanation for the earlier non-appearances was not credible. It was on that basis that the court denied the motion to vacate. Because there is substantial circumstantial evidence supporting the trial court's credibility determination, we cannot disturb its ruling on appeal.

The order is affirmed.

FACTS

Plaintiffs filed a verified complaint in July 2013 against Chase, their mortgage lender. The complaint alleged Chase violated former Civil Code section 2923.6, subdivision (c), which prohibited a lender, a mortgage servicer, or their agent from recording a notice of default or notice of sale on a mortgaged property during the period in which the

borrower's completed application for a "first lien loan modification" was pending.

In February 2014, plaintiffs filed a first amended complaint, which named Select as an additional defendant. In October 2014, plaintiffs filed notice of a conditional settlement of the case. After receiving that notice, the trial court scheduled the OSC re: dismissal for May 29, 2015. In its order, the court stated, "If dismissal of the entire action is filed and entered with the Court, appearances will not be necessary. If dismissal of [the] entire action is not entered all counsel of record are to appear. Failure to appear will result in Court dismissal of [the] entire action."

On May 29, 2015, the court held the hearing on the OSC re: dismissal. Jeff did not appear as ordered. However, both Chase and Select did appear, and informed the court plaintiffs had not completed a loan modification. The court continued the OSC to June 26, 2015, and ordered the clerk to give notice. The clerk did so.

Jeff again failed to appear at the continued hearing for the OSC re: dismissal on June 26, 2015. Again, counsel for Chase and Select informed the court that plaintiffs had "not completed the documents necessary for a loan modification." The court ordered the case dismissed without prejudice.

In July 2015, plaintiffs filed an ex parte motion for an immediate order setting aside the dismissal pursuant to the mandatory relief provision of Code of Civil Procedure section 473. As an alternative to an immediate order granting relief, plaintiffs requested the court shorten time for a noticed hearing.

The court set the matter for a hearing on September 10, 2015, and Chase filed an opposition, joined by Select. The court issued a tentative ruling granting the motion to set aside the dismissal.

And once again, both Chase and Select appeared at the hearing, but Jeff did not. Jeff later stated, in his declaration, he had interpreted the court's tentative ruling as a final ruling on his motion, obviating any need to appear for the scheduled hearing.

The trial court took the motion under submission at the hearing, and later issued a minute order denying it. In its order, the court explicitly relied on Jeff's failure to appear at the hearing as evidence justifying its decision. "[P]laintiffs failed to appear at today's hearing, and have filed nothing with the court indicating that they would or could not appear. Counsel for defendants Chase and Select Portfolio Servicing duly appeared for the hearing. [¶] Plaintiffs' motion is DENIED. To the extent that plaintiffs' made a

marginal showing of excuse in their moving papers, based on plaintiff Jeffrey Schwartz' bald assertion that he did not receive the notice, mailed to him by the clerk, of the prior hearing that resulted in the dismissal, plaintiffs' wholly unexplained failure to appear at today's hearing causes the court to reject that assertion as inherently unreliable."

The court also noted that "[p]laintiffs' conduct herein further dictates that no finding of general excusable mistake or neglect can reasonably be made to justify setting aside the default."

DISCUSSION

The denial of a motion to vacate the judgment pursuant to Code of Civil Procedure section 473 is appealable as an order made after judgment. (Shapiro v. Clark (2008) 164 Cal.App.4th 1128, 1137-1138; § 904.1, subd. (a).) "However, it is settled that: 'A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.'" (Denham v. Superior Court (1970) 2 Cal.3d 557, 564.)

In this case, plaintiffs "contend the trial court erred in denying the . . . motion because it is undisputed that it was timely, in proper form, and accompanied by an attorney's sworn affidavit attesting to his inadvertence." They rely on Carmel, Ltd. v. Tavoussi (2009) 175 Cal.App.4th 393, 399, for the proposition that "'[i]f the prerequisites for the application of the mandatory provision of section 473, subdivision (b) exist, the trial court does not have discretion to refuse relief.'"

However, in making that argument, plaintiffs fail to acknowledge the significance of Jeff's failure to appear at the hearing on their motion. That failure was significant in two ways. First, as established long ago by our Supreme Court, the trial court was entitled to view Jeff's non-appearance as an abandonment of the motion to vacate. (Frank v. Doane (1860) 15 Cal. 303 [a party's failure to appear and prosecute a motion is "a virtual abandonment of the motion"].) And in that circumstance, the order denying the motion is not even reviewable on appeal. (Ibid.; see also Cal. Rules of Court, rule 3.1304(d) ["If a party fails to appear at a law and motion hearing without having given notice [of non-appearance], the court may take the matter off calendar . . . or may rule on the matter."].)

Second, Jeff's non-appearance also constituted evidence the trial court could rely upon

in assessing the merits of his motion. And indeed, the trial court's minute order denying the motion relied specifically on the fact Jeff failed to appear at the hearing as a basis for rejecting his proffered justifications for his earlier non-appearances: "To the extent that plaintiffs' made a marginal showing of excuse in their moving papers, . . . plaintiffs' wholly unexplained failure to appear at today's hearing causes the court to reject that assertion as inherently unreliable."

So while the trial court had apparently been willing to give Jeff the benefit of the doubt in its initial assessment of his declaration of fault—hence its tentative decision to grant the plaintiffs' motion to set aside the judgment—his failure to even appear at the hearing on his own motion lost him that benefit. The court no longer found his explanation for his earlier non-appearances to be credible. And that credibility 7 determination meant that relief was not mandated under Code of Civil Procedure section 473.

As explained by this court in Johnson v. Pratt & Whitney Canada, Inc. (1994) 28 Cal.App.4th 613, 622 (Johnson), "[i]n certain situations, section 473 mandates relief on the basis of an attorney's affidavit 'unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect.' The

statute clearly involves an assessment of credibility by the trial court." (Italics added.)

And when the trial court finds, contrary to the attorney's claim, that the dismissal was not caused by the attorney's mistake, inadvertence surprise or neglect, we cannot disturb that finding if supported by substantial evidence. "Credibility is an issue for the fact finder. As we have repeatedly stated, we do not reweigh evidence or reassess the credibility of witnesses." (Johnson, supra, 28 Cal.App.4th at p. 622.)

In this case, the trial court's rejection of Jeff's claim was supported by substantial evidence; i.e., the fact that Jeff had once again failed to appear at a noticed court hearing—his third in a row. And because that latest non-appearance was on the plaintiffs' own motion seeking relief from the consequences of Jeff's prior nonappearances, it gave the court a basis for skepticism about Jeff's professed reasons for failing to appear in court on the earlier occasions. (See Massimino v. Taranto (1930) 108 Cal.App. 692, 694 [when appellant "pyramided one default upon another, . . . [w]e cannot hold that it was an abuse of discretion for the trial court to refuse to accept as an excuse . . . the naked assertion of the attorney's belief, in the absence of the recital of any supporting facts upon which the belief was based"].)

More specifically, when Jeff again failed to appear, the trial court could reasonably infer that his pattern of non-appearances reflected a deliberate effort to avoid the dismissal order he anticipated would likely issue at the hearing on the court's OSC re: dismissal.

Because substantial evidence supported the trial court's rejection of Jeff's declaration in support of the motion to set aside the dismissal, we find no error in the court's order denying plaintiffs' motion. (See Behm v. Clear View Technologies (2015) 241 Cal.App.4th 1, 16 [court looked to circumstantial evidence in assessing whether trial court erred "in finding [the attorney's] affidavit to be incredible, therefore denying mandatory relief under [Code of Civil Procedure] section 473, subdivision (b)"].)

DISPOSITION

The order denying plaintiffs' motion to set aside the dismissal of their complaint is affirmed. Chase's motion to strike portions of plaintiffs' opening brief and Select's joinder thereto, is denied. Select's request for judicial notice is granted. Chase and Select are to recover their costs on appeal.

IKOLA, J.

WE CONCUR:

ARONSON, ACTING P. J.

FYBEL, J

Court of Appeal, Fourth Appellate District, Division Three - No. G053186

8247275

IN THE SUPREME COURT OF CALIFORNIA
En Banc

JEFF SCHWARTZ et al., Plaintiffs and Appellants,
v.
JPMORGAN CHASE BANK, NA, et al., Defendants and Respondents.

The petition for review is denied.
The request for an order directing publication of the opinion is denied.

SUPREME COURT
FILED
APR 18 2018
Jorge Navarrete Clerk