

PROFESSIONAL LIABILITY UPDATE

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CIVIL PROCEDURE

California Law

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The Third District holds that mandatory relief under CCP § 473(b) based on an attorney’s mistake, inadvertence, surprise or neglect is not available to vacate an order granting summary judgment due to attorney error or a dismissal based on a failure to disclose a causation expert.

English v. IKON Business Solutions, Inc. (2001) 94 Cal. App. 4th 130

Evan English sued her employer IKON under the FEHA. English did not submit any evidence demonstrating a triable issue of fact in opposition to IKON’s motion for summary judgment. The opposition relied on CCP § 437c(h) and requested the opportunity to complete further discovery. English failed to explain what essential facts would be discovered, and failed to explain why the evidence could not have been presented in opposition to the motion. The court granted IKON’S motion.

English then filed a motion under the “mandatory” provision of CCP § 473(b) which requires the court set aside dismissals based on attorney mistake, inadvertence, surprise or neglect. English’s attorney filed a declaration claiming he had a mistaken belief that he only had to explain why he had not been dilatory in pursuing the case to obtain the requested continuance. The trial court denied the motion to vacate.

On appeal English argued that due to her attorney’s mistake, the summary judgment against her was equivalent to a default. The Court disagreed, holding that the mandatory provision of § 473(b) does not apply to a summary judgment. A summary judgment is neither a default, a default judgment, nor a dismissal within the meaning of the section. “Default” and “default judgment” under § 473(b) is limited to circumstances where a defendant fails to answer a complaint, and a judgment thereon.

The Court did not follow the holding of the Second Appellate District in *Avila v. Chula*, (1997) 57 Cal.App.4th 860. The *Avila* court held that the grant of summary judgment after failure to file timely oppositions “was directly analogous to a default judgment” and § 437(b) applied.

The Court noted that, under the appropriate circumstances, relief from a

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summary judgment ruling due to attorney error may be available under the *discretionary* provision of § 473(b)

Gotschall v. Daley (2002) 96 Cal.App.4th 479.

Michael Gotschall sued Peggy Daley for injuries sustained when he was attacked in her home. His counsel disclosed one expert for trial, an economist to testify about loss of earnings. The expert witness disclosure also indicated that plaintiff would call all of his treating physicians as non-retained experts, without specifically naming them. During motions *in limine* the trial court precluded the treating physicians' testimony because the disclosure of expert witnesses did not specifically identify them. Daley's motion for a dismissal because Gotschall could not establish the causation of his injuries was granted.

Gotschall moved to vacate the dismissal and augment his expert list under the mandatory provision of C.C.P. § 473(b). He argued that his counsel mistakenly believed that it was unnecessary to disclose treating physicians. Gotschall argued his counsel made a mistake of law that cost him his day in court, making the mandatory provision of § 473(b) applicable. The trial court granted the motion.

The Court of Appeal reversed, holding that the mandatory provision of C.C.P. § 473(b) only applies to defaults and dismissals "akin" to defaults. Because plaintiff had an opportunity to contest the dismissal, it was not "akin" to a

where relief is not limited to defaults, default judgments, and dismissals.

default. For this reason, the trial court had no power to grant relief under the mandatory provision of C.C.P. § 473(b). Because Gotschall did not seek relief under the discretionary provision of C.C.P. § 473(b), the court did not consider the issue.

Comment: C.C.P. § 473(b) should not be considered a safe harbor when an attorney's error results in dismissal. When seeking relief for errors or omissions under this statute, counsel should always include a request for relief under the discretionary provision as well the mandatory provision. Even if mandatory relief is not available, the court may exercise its discretion to grant relief and the trial court's ruling will not be disturbed absent an abuse of discretion.