



## Alerts

### California Court Reluctantly Vacates Dismissal of Legal Malpractice Action

March 16, 2016

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*Younessi v. Woolf* (Cal. Ct. App. Feb. 16, 2016)

#### Brief Summary

The California Court of Appeal, Fourth District, reluctantly affirmed an order vacating the dismissal of an attorney malpractice action where plaintiffs were entitled to relief under Cal. Civ. Proc. Code § 473(b)'s attorney-fault rule. *Younessi v. Woolf* (Cal. Ct. App. Feb. 16, 2016).

#### Complete Summary

Plaintiffs filed a legal malpractice action alleging that a judgment in another matter resulted from their former attorneys' failure to effectively represent them. The attorneys demurred to the complaint and moved to strike portions of it. Thereafter, plaintiff's attorney was replaced, and the new attorney neglected to file the substitution of attorney papers with the court. In the interim, no one (neither the original attorney nor the new attorney) opposed the demurrers, which were granted with leave to amend by the court. Additionally, the amended complaint was not filed within the time permitted by the court. Defendants applied *ex parte* for an order dismissing the action based on plaintiff's failure to file the amended complaint in the permitted time period. This *ex parte* was also unopposed and granted.

When plaintiff's new counsel finally filed the substitution, he moved to set aside the dismissal under Cal. Civ. Proc. Code § 473(b) on the ground of excusable neglect on his part. In support of his motion he submitted a declaration that represented that he did not know the demurrers and motions to strike were pending, and that although he reviewed the register of actions on the case, he "missed" those items. He said he "got distracted," and that when he finally learned that the demurrers were granted with leave to amend, he "just assumed" the court would provide him 30 days to file an amended complaint. The court had only granted 10 days leave to amend. The trial court granted his motion to set aside the dismissal notwithstanding defendants' opposition. The trial court stated that it granted the motion based on Section 473(b)'s "discretionary" provision.

On appeal, the court found that because defendants did not file a motion to dismiss the case, and the dismissal instead resulted from an order granting defendant's *ex parte* application for entry of a dismissal (without any opposition

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from plaintiffs that would allow the trial court to evaluate why they had failed to timely file an amended complaint) the dismissal was the procedural equivalent of a default judgment. Because it resulted from plaintiff's counsel's inexcusable conduct, the court concluded that the mandatory attorney-fault provision applied. The court of appeal upheld the trial court's order, stating, "we reluctantly affirm the trial court's order vacating the dismissal."

### **Significance of Opinion**

This opinion is significant because it is a lesson on the importance of attorneys communicating with each other, their clients and opposing counsel when being retained on a case. All litigators get busy, especially when preparing for trial. But, when a new case comes in the door, the priority should be checking the status of the pleadings and the docket to make sure to not miss any immediate deadlines.

For more information, please contact your Hinshaw attorney.

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