

Does Section 473 Include an In-House Counsel Who Is Also a Corporate Officer?

By

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In a recent case of *Gutierrez v. G&M Oil Co., Inc.* (2010), 184 Cal.App.4th. 551, after a class action wage and hour lawsuit was filed against G&M Oil Co., Inc. its general counsel, Michael Gray, who was also an authorized agent for service of process and vice president of the corporation, has concealed the lawsuit from the corporation and decided to handle the defense of the case himself. Between the filing of the action in December 2006 and default judgment issued in December 2008, Gray attended two case management conferences, but took no other action to defend the case. The original complaint was succeeded by first and second amended complaint. Each complaint was followed by a request for default, since Gray failed to file a responsive pleading.

The default was finally taken in January 2008. Four months later in May 2008, Plaintiff successfully sought an order requiring the company to provide the name and home address of every employee in Plaintiff's class. Gray did nothing to oppose the order, nor did he show up at the hearing, despite service of the notice.

In September 2008, Plaintiff requested an entry of default judgment. A judgment was obtained in early December 2008, for around \$4 million.

After the entry of judgment Gray brought the matter to company's chief executive officer and founder George Pearson for the first time. Pearson immediately removed Gray from his position of general counsel and agent for service of process and retained a law firm to defend the action.

In March 2009, the firm filed a motion to vacate the default class action judgment, based, among other things, on Gray's declaration recounting the facts and admitting that the entry of default was a result of his sole neglect, and that G&M Oil Company, Inc. has had no knowledge or consent and was entirely blameless and without fault in this matter. Pearson also stated in his declaration that Gray had no managing responsibilities and his sole job was to advise Pearson and act as an agent for service of process.

Subsequently the court granted G&M's motion to set aside the default and allowing G&M to answer second amended complaint. And ordered Gray to pay about \$17,000.00 in attorneys fees to Plaintiff's counsel. Plaintiff appealed the order granting the motion to vacate the default judgment.

Do In-House Counsel Come Within Section 473? – Yes.

In discussing the precedent the Court pointed out that some authorities have restricted the mandatory relief provisions of section 473 only to matters where the party is "totally innocent of any wrongdoing and the attorney was the *sole* cause of the default or dismissal." (Citing *Lang v. Hochman* (2000) 77 Cal.App.4th 1225, 1248, original italics.) While other authorities indicated that the provision is available for clients who may be at some fault in allowing the dismissal or

default, just as long as the client is not guilty of intentional misconduct in contribution to the adverse result. (*SJP Limited Partnership v. City of Los Angeles* (2006) 136 Cal.App.4th 511, 520.)

In the present matter, Appellant argued that since Gray was not only an in-house counsel but also a corporate officer, his misconduct should be imputed to G&M.

Although there is no published opinion directly on point, the Court took a look at two California Supreme Court opinions that held that in-house attorneys employed as attorneys for their employer do indeed have an attorney-client relationship with their employers for the following reasons: (1) in-house counsel do not represent themselves but a third party; (2) treating in-house attorneys differently from the outside attorneys for purposes of section 1717 would create an unfair differentiation in the law; and (3) the fact that in-house counsel is employed full-time by the corporation does not alter the fact of representation by an independent third party.

Because there is an attorney-client relationship between in-house attorneys and the companies they are employed by, the Court concluded that in-house attorneys come within section 473.

Does It Make a Difference That the In-House Attorney Was Also a Corporate Officer? – Not Under These Facts.

Appellant’s counsel argued that since Gray was also a corporate officer, he and G&M were one and the same, legally speaking. The Court disagreed under these specific circumstances for the following reasons.

First, the Court stated, section 473 does not differentiate between in-house counsel who is also an officer, it only requires an attorney-client relationship. Since the corporation cannot represent itself in court without an attorney, the very corporate form then, in the context of litigation, treats in-house attorneys, whether they are officers or not, as agents separate from the corporation itself and thus establishes an attorney-client relationship.

Second, the Court noted that the case law distinguishes between legal and non-legal services performed by in-house counsel for a corporation. However, representing a corporation in court is the quintessential legal service performed by an attorney, in-house or outside.

And finally, the Court stated that even if the Court decided to create an implied exception to the statutory language of section 473, this case would be the last case appropriate to do so. “Gray’s declaration is clear that he was not acting a corporate officer in neglecting to file a response to the Gutierrez action; he concealed the matter from his fellow corporate officers, and was able to do so only because of his role as a sole in-house counsel. This is not a case of attorney *conspired* with management to “take the fall” to further some silly scheme to use section 473 to buy time in litigation.” *Gutierrez, Supra*, 184 Cal.App.4th at 559.

Is the Mandatory Relief Provision of Section 473 Constitutional? - Yes.

The California Constitution states that “no judgment may be set aside unless ‘after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.’” *Id.* (Citing Cal. Const., art. VI, § 13.)

The Court held that Appellant did not carry its burden to show that allowing this case to be decided on the merits rather than by default judgment would in any way result in a miscarriage of justice. While G&M, the Court noted, showed great prejudice in the set-aside judgment – “about \$4 million of prejudice.” *Id.* at 560.

The Court affirmed the trial court’s order setting aside the default judgment.

Although in this case the Court did not carve out an implied exception to section 473 regarding in-house counsel who is also a corporate officer, the language of the Court’s decision leaves a possibility for such exception to be created in the future where a set of facts would render it appropriate to preclude an in-house counsel who is also an active corporate officer from the use of the mandatory relief provision of section 473 of the California Code of Civil Procedure.