Filed 4/19/18 Jimenez v. Kensington Caterers, Inc. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

FIDEL CONSUELO JIMENEZ, Plaintiff and Respondent, v. KENSINGTON CATERERS INC. et al., Defendants and Appellants.	B275940 (Los Angeles County Super. Ct. No. BC478157)

APPEAL from a postjudgment order of the Superior Court of Los Angeles County, Susan Bryant-Deason, Judge. Reversed.

Cruz & Del Valle, Leonard G. Cruz and Sonia H. Del Valle for Defendants and Appellants.

Law Office of Robert Scott Shtofman, Robert Scott Shtofman for Plaintiff and Respondent.

INTRODUCTION

Defendants and appellants Kensington Caterers Inc. (Kensington) and Richard Mooney (Mooney) (collectively defendants) appeal the trial court's postjudgment order denying their motion to set aside a default and a $150,585 default judgment obtained by plaintiff and respondent Fidel Consuelo Jimenez (Jimenez).

Defendants contend the trial court erred as a matter of law in failing to set aside the default judgment against them as void or, alternatively, abused its discretion in refusing to set aside the default judgment based on its inherent equitable authority. Defendants' contentions essentially are based on two arguments: (1) the default judgment should be set aside based on extrinsic fraud because defendants never received proper service of the summons, complaint, notice of case management conference, and statement of damages; and, (2) the default judgment is void because it exceeds the damages specifically pleaded in the complaint, or, alternatively, because Jimenez failed to serve a mandatory Judicial Council form CIV-050 Statement of Damages.

We find the trial court did not abuse its discretion in refusing to set aside the default judgment for improper service of process. However, we hold the default and default judgment are void because the statement of damages Jimenez served on defendants did not comply with section 425.11 of the Code of Civil Procedure.

FACTS AND PROCEDURAL BACKGROUND

1. *Allegations of Complaint*

Jimenez, a self-described Hispanic male, filed a complaint for damages on February 1, 2012 against defendants. He alleged causes of action against both defendants for harassment (quid pro quo and hostile work environment) in violation of the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940), intentional infliction of emotional distress, and negligent infliction of emotional distress. Against Mooney only, Jimenez alleged a cause of action for assault and sexual battery. Finally, Jimenez alleged causes of action for race discrimination and failure to prevent discrimination and harassment in violation of FEHA against Kensington alone. The civil case cover sheet filed with the complaint describes the case as "Other employment."

The complaint alleges Jimenez began working as a cashier for Kensington, a catering company, at one of its cafes in 2004. In late 2006 or early 2007, at Mooney's direction, Jimenez temporarily assumed the duties of a Caucasian female manager who was on maternity leave, and then permanently took over those duties when she failed to return from leave. Jimenez alleges he was not paid a salary comparable to his peers from 2007 when he assumed the duties of the former manager until he filed his administrative complaints in 2011 with the Department of Fair Employment and Housing, "because he is a Hispanic male."

The complaint alleges Mooney created a hostile work environment beginning in 2007 until early 2011, when, inter alia, he "would approach Plaintiff and grab him by the buttocks[,] . . . would grab [P]laintiff's face, kiss him on the mouth and hug him[,] . . . [and] would order plaintiff to sit on his laps [*sic*]."

Jimenez alleges Mooney "promise[d] plaintiff incentives in exchange for sex," and "further exposed Plaintiff to a hostile work environment by promising other male employees incentives in exchange for sex and by having sex with other male employees in the storage facilities" at Kensington's cafes. In addition, Jimenez alleges "Mooney threatened him and his co-workers that if they ever reported these incidents [Mooney] would withdraw his sponsorship of their immigration process, deny it and would fire them."

The complaint also alleges that on one occasion, after Jimenez went to dinner with Mooney "out of fear of losing his job," Mooney insisted Jimenez stay overnight at Mooney's house because Jimenez lived far away, and "[i]n the middle of the night, Mooney woke plaintiff up, insisted that plaintiff enter into his bedroom and attempted to have forcible intercourse with plaintiff."

The complaint generally alleges "[t]he amount in controversy in this matter exceeds the sum of $25,000, exclusive of interest and costs." Jimenez alleges he has suffered "substantial losses in earnings and job benefits," and "has suffered and continues to suffer humiliation, embarrassment, mental anguish, emotional distress and discomfort" as a result of defendants' alleged harassment and Kensington's alleged race discrimination and failure to prevent discrimination and harassment; he has suffered "an offensive contact with his person," as a result of Mooney's alleged assault and sexual battery; and "has suffered and continues to suffer bodily injury, humiliation, embarrassment, and severe mental and emotional distress" as a result of defendants' alleged intentional infliction of emotional distress. For all causes of action, Jimenez alleges he

has been damaged "in an amount in excess of the minimum jurisdiction of this Court" and/or in an amount to be proven at trial. Finally, the prayer for relief requests special damages and general damages for "emotional distress and mental anguish," both according to proof, as well as punitive damages, attorney fees, and costs.

2. *Events Leading to Default Judgment*

According to a proof of service filed on March 19, 2012, Jimenez first served Mooney on February 3, 2012, at 2:10 p.m. The sworn declaration of the registered process server, Kingsley Ollawa (Ollawa), indicates he served Mooney at 5556 W. Washington Blvd. (the Washington address) by serving the summons and complaint, alternative dispute resolution (ADR) package, and civil case cover sheet (collectively the summons package) on P. London, as an authorized agent. The proof of service describes P. London as "Caucasian About 5'6" Authori[z]ed to Accept Service." The proof of service also indicates Ollawa served Mooney by substituted service by leaving the documents with "P. London an Assistant to Richard Mooney," and then mailing copies of the documents to Mooney by first class mail to the same location. The proof of service does not include a declaration of diligence stating the actions Ollawa first took to attempt personal service.

On April 23, 2012, Jimenez filed separate requests for entry of default on Kensington and Mooney, who had not responded to the complaint. Both requests included a declaration of mailing signed by counsel for Jimenez indicating that on April 23, 2012, he sent the requests for entry of default to Richard Mooney at the Washington address by first class mail. The clerk rejected both requests for entry of default for various reasons:

the original proof of service of summons and complaint for Kensington had not been filed; a declaration of diligence for substituted service was required for Mooney; and a statement of damages with proof of personal service had not been filed for either defendant.

According to two proofs of service filed June 11, 2012, one for Mooney and one for Kensington, Jimenez again served defendants on May 24, 2012, at 11:00 a.m. The sworn declaration of the same process server, Ollawa, indicates he personally served Mooney and Kensington (through Mooney as Kensington's authorized agent for service of process) at the Washington address, with copies of the summons package and notice of case management conference.

On August 8, 2012, Jimenez filed several documents. He filed a "Statement of Damages," prepared on pleading paper and signed by his counsel on May 19, 2012. He also filed an "amended" proof of service of summons on Mooney, including Ollawa's sworn declaration signed on August 3, 2012, indicating on May 24, 2012, at 12:43 p.m., Ollawa personally served Mooney with the summons package and statement of damages at the Washington address. Finally, Jimenez filed his second set of requests for entry of default on Mooney and Kensington. The clerk rejected these because, among other reasons, a statement of damages with proof of personal service on Kensington had not been filed.

A month later, on September 14, 2012, Jimenez filed a proof of service of summons on Kensington, including Ollawa's sworn declaration signed on August 3, 2012, that on May 14, 2012, at 12:43 p.m., Ollawa served Kensington by personally serving Mooney, as authorized agent for service of process, with

the summons package and statement of damages at the Washington address. That same day, Jimenez filed his third set of requests for entry of default against Mooney and Kensington, which were served by first class mail at the Washington address. The defaults were entered as requested.[1]

On July 18, 2013, Jimenez filed a request for default judgment, which Jimenez's counsel served on defendants by first class mail at the Washington address. In support of his request, Jimenez submitted his and his counsel's declarations under Code of Civil Procedure section 585, subdivision (d).[2] These attested to facts alleged in the complaint, attested to proof of service of the summons and complaint, and attached documents in support of the complaint's allegations. With respect to damages, Jimenez declared he had lost $135,520 in earnings from 2007 to date because of defendants' racial discrimination. Jimenez also attached a confidential psychological evaluation prepared December 17, 2012, in support of his claims of emotional distress damages. The request for entry of default itself requested $150,000 in special damages and $100,000 in general damages, along with interest and costs.

On July 18, 2013, the trial court entered default judgment against Kensington and Mooney in the amount of $150,000 plus $585 in costs.[3]

---

[1] After default was entered on September 14, 2012, the case was reassigned to Department 52.

[2] All further references are to the Code of Civil Procedure, unless otherwise specified.

[3] The proposed judgment prepared by Jimenez's counsel originally indicated judgment in the amount of $250,000. The

3. *Motion to Set Aside Default and Default Judgment*

Over two years later, on December 4, 2015, defendants moved to set aside the default and default judgment, recall the writ of execution, and cancel the abstract of judgment on the grounds they "were entered as a result of (1) lack of jurisdiction insofar as Plaintiff's judgments were procured based on a false affidavit of service; (2) lack of due process in that the judgments entered in favor of Plaintiff exceed[ ] the amounts demanded in Plaintiff's complaint for race discrimination and sexual harassment; (3) lack of due process for failure to serve notice of case management conference upon defendants; and (4) excessive judgments and/or double recovery." Defendants' motion was based on section 473(d) and the trial court's inherent equitable power to prevent injustice.

Defendants argued the gravamen of the complaint was an employment action, not a personal injury action. Thus, they contended the default judgment violated sections 580, subdivision (a), and 585, subdivision (b), because it granted relief in excess of the complaint, which alleged only damages in excess of $25,000, according to proof. Defendants alternatively argued that, if the complaint was considered a personal injury action, the default judgment must be set aside because Jimenez did not use the mandatory Judicial Council form CIV-050 for his statement of damages, nor did he include the information required by that mandatory form. Thus, defendants contended the statement of

---

trial court changed the amount to $150,000 and added the $585 in costs by hand. Almost a year later, on June 9, 2014, Jimenez obtained an abstract of judgment. The following year, on April 16, 2015, he obtained a writ of execution against Kensington and Mooney, and a second abstract of judgment on May 7, 2015.

damages was deficient under section 425.11 and could not support the default judgment.

Defendants' motion included declarations to support their extrinsic fraud argument and to demonstrate diligence in seeking relief from default. Mooney declared under penalty of perjury that he was never personally served with the summons package, notice of case management conference, or statement of damages. He "emphatically" denied having met Ollawa. He swore he never received by mail at the Washington address any of the requests for entry of default filed by Jimenez or the case management statement filed June 27, 2012. Mooney stated he did not learn Jimenez had filed this action against him or obtained a default judgment until his lawyers informed him on September 27, 2015. He also stated Jimenez had not attempted to levy or seize any of his or Kensington's accounts or assets to enforce the judgment. Mooney's declaration denied the allegations in Jimenez's complaint as "patently false."

Mooney's counsel also provided a declaration in support of defendants' motion. She declared under penalty of perjury that she first learned Jimenez had secured a default judgment against defendants on Friday, September 25, 2015, when she received an opposition to a motion to vacate a default and default judgment she had filed on behalf of defendants in another case filed against them by former Kensington employees, *Rosa Rosas et al. v. Kensington Caterers et al.*, Super. Ct. L.A. County, No. BC507797 (*Rosas*). She told Mooney about the default judgment at her first opportunity on September 27, 2015.

Defendants' counsel stated she instructed Mooney to search his records to demonstrate his whereabouts on the dates of service. She also recommended defendants wait for the ruling on

their motion to vacate the default judgment in *Rosas* before filing a motion to vacate the default judgment in this case. She averred she believed the ruling in *Rosas* would confirm defendants' legal arguments in favor of vacating the default in this case were correct. Counsel noted both cases involved the same process server, Ollawa, and shared at least one common attorney. The hearing on defendants' motion to vacate in *Rosas* was originally scheduled for October 8, 2015, but was continued to November 24, 2015. Defendants' counsel stated she reserved the earliest available date for a hearing on defendants' motion in this matter and caused the motion to be filed early on December 4, 2015.

Jimenez opposed defendants' motion. In his declaration, Jimenez's counsel recited his multiple instructions to Ollawa, the registered process server, concerning service of the summons package, notice of case management conference, and statement of damages. Jimenez's counsel stated that Ollawa advised him that on May 24, 2012, he went to the Washington address where he met with Mooney and personally served him, on behalf of himself and Kensington, with the summons package and notice of case management conference. Because he noticed Ollawa had not served the statement of damages, Jimenez's counsel instructed Ollawa to return to the Washington address and re-serve all of the documents, including the statement of damages. Ollawa did so. Defendants' counsel also stated he provided the filing clerk with a stamped envelope with defendants' address on each occasion when he filed a request for entry of default.

Jimenez also submitted Ollawa's declaration regarding his service of process on Mooney and Kensington. Ollawa declared under penalty of perjury that he had served the defendants three times. The first was on February 3, 2012, when he "sub-served"

Mooney by leaving the summons package with P. London, who told Ollawa she was authorized to receive service for Mooney. The second was on May 24, 2012, when he gave two sets, one for Mooney and one for Kensington, of the summons package and notice of case management conference directly to Mooney. The final service was that same day when Ollawa returned to give directly to Mooney two sets of the documents with the statement of damages he previously forgot. Finally, Ollawa clarified the date of May 14, 2012, on one of the proofs of service for Kensington, was a typographical error and should have been May 24, 2012.

On February 26 and March 29, 2016, the trial court conducted an evidentiary hearing on the service of process issue. Both sides presented conflicting evidence. Defendants called Mooney as a witness, who testified he was never personally served with the summons package, notice of case management conference, or statement of damages. Mooney testified Priscilla "P." London, his freelance bookkeeper, was not authorized to accept service on his or Kensington's behalf, nor was she ever given any legal documents relating to this case. Mooney testified London was unavailable for the February 26 hearing because she was out of town. According to Mooney, defendants did not call London as a witness at the second hearing because he did not think it was necessary, and she was not an employee.[4]

Jimenez called Ollawa, the process server, as a witness. Ollawa testified he personally served "P. London" with the

---

[4] Defendants also did not submit any declaration by London in support of their motion. Mooney testified he had not seen her between hearings.

summons package at the Washington address on February 3, 2012 and then mailed the package to Mooney at the same address. He testified he later served Mooney personally at that same address on May 24, 2012, first with the summons package and notice of case management conference, and later the same day with those same documents and the statement of damages. The trial court took the matter under submission at the conclusion of the March 29 hearing.

On May 20, 2016, the trial court entered an order denying defendants' motion to set aside the default and default judgment.[5] The trial court found defendants' motion was untimely under section 473, but that the court had inherent equitable authority to relieve a defendant from default judgment in limited circumstances, citing *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981. The trial court, however, determined defendants failed to satisfy the standard for equitable relief established in *Gibble v. Car-Lene Research, Inc.* (1998) 67 Cal.App.4th 295. That standard requires parties seeking relief from default to prove they have a meritorious case, establish a satisfactory excuse for not presenting a defense, and demonstrate diligence in seeking to set aside the default. In reaching its conclusion, the trial court found defendants did not provide a reason for their "unnecessary delay" in waiting to file their motion until December 4, 2015, seventy days after defendants stated they had actual notice of the default judgment on September 25, 2015.

---

[5] The trial court granted defendants' request for judicial notice of the proofs of service filed in this matter, the court's order granting defendants' motion to vacate in *Rosas*, and defendants' answer to Jimenez's complaint.

The trial court also concluded the moving papers, declarations, and testimony failed to establish the defense had a meritorious case. Finally, the trial court found defendants failed to demonstrate a satisfactory excuse. The trial court noted that, "according to Mooney, service of process was ineffective because it really didn't happen at all, on any date, stated in any proof of service, on either Richard Mooney or P. (Priscilla) London." In finding "no credibility of fraud in the return" after summarizing parts of Mooney's and Ollawa's testimony, the court noted that Mooney "had it within his power to produce witnesses who could have aided the Court in its decision, but did not." The trial court found Mooney's testimony was not credible, Jimenez sustained his burden to prove valid process, and defendants failed to prove there was fraud or mistake.

On June 28, 2016, defendants filed a notice of appeal from the May 20, 2016 order.

CONTENTIONS

Defendants contend: the trial court erred in denying their motion for relief from default because (a) the default judgment is void for lack of proper service; (b) the trial court abused its discretion in denying their motion for relief from default based on extrinsic fraud under equitable principles; and (c) the default judgment is void for exceeding the amount of damages specified in the complaint, or, alternatively, because Jimenez's statement of damages is deficient and, thus, cannot support a default.

DISCUSSION

1. *Standard of Appellate Review*

We review an order denying a motion to vacate a default and set aside a judgment under section 473 or on equitable grounds for an abuse of discretion. (*Rappleyea v. Campbell*

(1994) 8 Cal.4th 975, 981; *Strathvale Holdings v. E.B.H.* (2005) 126 Cal.App.4th 1241, 1249.)

We review de novo, however, a trial court's determination that a default judgment is or is not void. (*Rodriguez v. Cho* (2015) 236 Cal.App.4th 742, 752 [*Rodriguez*].) Nevertheless, "we defer to the trier of fact on issues of credibility." (*Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 968.) "Moreover, neither conflicts in the evidence nor ' "testimony which is subject to justifiable suspicion . . . justif[ies] the reversal of a judgment, for it is the exclusive province of the [trier of fact] to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends." ' [Citation.] Testimony may be rejected only when it is inherently improbable or incredible, i.e., ' "unbelievable *per se*," ' physically impossible or ' "wholly unacceptable to reasonable minds." ' " (*Oldham v. Kizer* (1991) 235 Cal.App.3d 1046, 1065.)

2. *Motion to Set Aside Default Based on Fraudulent Service of Process*

Defendants contend the trial court abused its discretion when it did not set aside the default judgment as void for lack of proper service, and did not exercise its inherent equitable power to set aside the judgment for extrinsic fraud or mistake.

A party may move to set aside a default judgment on the ground it is facially void *at any time*. (*Trackman v. Kenney* (2010) 187 Cal.App.4th 175, 181.) "A void judgment's invalidity appears on the *face of the record*, including the proof of service," not on evidence. (*Ibid.* [citing *Morgan v. Clapp* (1929) 207 Cal. 221, 224–225; *Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 496].)

In addition, a party may seek relief from a default judgment by "show[ing] that extrinsic fraud or mistake exists, such as a falsified proof of service, and such a motion may be made at any time, provided the party acts with diligence upon learning of the relevant facts." (*Trackman v. Kenney*, *supra*, 187 Cal.App.4th at p. 181.)

Defendants have not shown reversible error on either ground.

a. *The proof of service of summons and complaint is not void on its face*

On appeal, defendants argue the trial court erred in equating invalid substituted service with valid service when it denied their motion for relief. Essentially, defendants contend the February 3, 2012 proof of service of summons on "P. London" is void on its face because it did not comply with the statutory requirements of substituted service under section 415.20 in that no declaration of diligence by the process server was attached. Defendants' argument is without merit. Any defect in the February 3, 2012 proof of service does not render the default judgment here facially void because the default *was not entered based on this proof of service*. As defendants note, the clerk *rejected* Jimenez's initial requests for entry of default in part because a declaration of diligence for substituted service was required.

Indeed, the clerk did not enter the defaults until September 14, 2012, *after* Jimenez had filed proofs of service of summons indicating personal service on May 24, 2012, on Mooney as an individual, and on May 14, 2012, on Mooney in his capacity as authorized agent for service of process for Kensington. These proofs of service included the sworn

declarations of Ollawa, a registered process server, that he served defendants personally, establishing a presumption that defendants were personally served. (Evid. Code, § 647; *Rodriguez, supra,* 236 Cal.App.4th at p. 750 ["Evidence Code section 647 provides that a registered process server's declaration of service establishes a presumption that the facts stated in the declaration are true. (*American Express Centurion Bank v. Zara* (2011) 199 Cal.App.4th 383, 390.)"].)

Rather, the default judgment's invalidity on the ground of lack of proper service hinges on defendants' presentation of extrinsic evidence, specifically, Mooney's declarations filed in support of his motion and his testimony at the two evidentiary hearings. Thus, because the proofs of service on which the defaults were based are not invalid on their face,[6] the default judgment is not facially void for lack of proper service.

b. *The trial court did not err in finding no extrinsic fraud or mistake under its equity power*

Defendants' argument that the trial court abused its discretion by finding defendants failed to prove the default was obtained through extrinsic fraud also fails. "In conjunction with his or her showing of 'extrinsic fraud,' a party seeking equitable relief from a default judgment must satisfy three elements: 'First, the defaulted party must demonstrate that it has a meritorious case. Secondly, the party seeking to set aside the

---

[6] We note Ollawa's declaration filed in support of Jimenez's opposition to defendants' motion indicates Ollawa erred in giving the May 14, 2012 date on the proof of service for Kensington. The date of service was May 24, 2012. Even if the date was reported incorrectly, the *face* of the proof of service without resort to extrinsic evidence does not demonstrate it is invalid.

default must articulate a satisfactory excuse for not presenting a defense to the original action. Lastly, the moving party must demonstrate diligence in seeking to set aside the default once . . . discovered.' [Citations.] " (*Gibble v. Car-Lene Research, Inc., supra,* 67 Cal.App.4th at p. 315.)

The trial court applied this test and determined no extrinsic fraud existed warranting relief from judgment under its equitable power. In reaching its decision the trial court considered the declarations submitted in support of and in opposition to defendants' motion, as well as the live testimony of Mooney and Ollawa during two days of an evidentiary hearing, and the parties' papers and counsel's arguments. Mooney's and Ollawa's declarations and testimony directly contradict one another.

In his moving declaration, Mooney asserted, "I can state emphatically that I have never met Mr. Ollawa and most assuredly that he never personally handed to me plaintiff[']s complaint or any other legal document." He denied having received any documents relating to the case by mail. At the evidentiary hearing, Mooney similarly testified he was never personally served with the documents listed on the May 24, 2012 and May 14, 2012 proofs of service and that he had never met Ollawa. Mooney also testified about Priscilla "P." London, who he said was his freelance, part-time bookkeeper. He described her as a "petite," blonde, Caucasian woman, approximately "five-five, five-six," and seventy years old. He testified she usually did not work on her birthday, which was February 3. On cross-examination, Mooney testified that when he asked her, Ms. London told him she had never received any documents on his behalf. He also described the layout of his office and testified

that the front door to his office is always locked or, when unlocked, cannot be opened from the outside without a key.

In direct contrast, Ollawa declared under oath in his declaration regarding service of process on defendants that he "completed three services on the defendants": One on February 3, 2012, through substituted service by leaving documents with P. London; a second on the morning of May 24, 2012, by giving two sets of the summons package and notice of case management conference directly to Mooney, "one for him and one for . . . Kensington Caterers, Inc."; and a third later in the day on May 24, 2012, of the summons package plus the statement of damages. (He also declared the May 14, 2012 date should have read May 24, 2012, and testified to that fact at the evidentiary hearing.) At the hearing, Ollawa testified he had been a registered process server for about 12 years. He testified he went to defendants' office on February 3, 2012, saw Ms. London there, and asked her if she could receive the summons and complaint on behalf of Mooney. She replied yes. He described her as a Caucasian female, "about five-foot-six," and "in the neighborhood of probably 40 or late 30-something."

Ollawa further testified he returned to defendants' office on May 24, 2012, entered the building as someone was leaving, and served Mooney personally with the summons package and notice of case management conference. But, Ollawa said, he had to return "to serve them everything again because . . . the attorney told me I forgot . . . the statement of damages. And that was why I ha[d] to serve everything again." Ollawa testified that when he returned the office door was unlocked. He entered and gave Mooney the summons package, notice of case management conference, and statement of damages, but he did not include the

notice of case management conference on the May 24, 2012, 12:43 p.m., proof of service because he "didn't have the space."

We need not detail all the contradictions between Mooney's and Ollawa's testimony. Suffice it to say both witnesses could not be telling the truth. Here, the trial court found Mooney's testimony was not credible, evidently believing Ollawa rather than Mooney. On this record, we do not find Ollawa's testimony "wholly unacceptable to reasonable minds." In its order, the trial court specifically noted Mooney had the power "to produce witnesses who could have aided the Court in its decision, but did not," referring to Ms. London, who neither testified nor presented a declaration in support of defendants' motion. The court concluded defendants failed to prove there was fraud or mistake, and Jimenez had sustained his burden to prove valid proof of service.

" '[A] determination of the controverted facts by the trial court will not be disturbed.' [Citations.]" (*Lynch v. Spilman* (1967) 67 Cal.2d 251, 259.) Therefore, we will not disturb the trial court's determination that Mooney's testimony was not credible. The court acted within its discretion in finding the default judgment was not void for failure of service of process based on extrinsic fraud or mistake.[7]

---

[7] Defendants contend the trial court also abused its discretion in finding defendants did not present a meritorious defense and did not act diligently in seeking to set aside the default. Because we find the trial court did not abuse its discretion in rejecting defendants' claim of extrinsic fraud, we need not address these issues.

Finally, defendants argue the trial court abused its discretion by not considering Jimenez's failure to serve his case

3. *Motion to Set Aside Default Based on Damages in Excess of Complaint or Invalid Statement of Damages*

Nevertheless, the motion to set aside the default and default judgment should have been granted because the default was obtained through an invalid statement of damages. The court below did not address defendants' argument on this ground. We presume the court believed this argument was time-barred under section 473, not realizing defendants could bring their motion at any time on the ground the default judgment is facially void, as we discussed above.

Defendants contend the default judgment is facially void because it exceeds the amount of damages pleaded in Jimenez's complaint. "A court generally may not grant a default judgment that exceeds the amount demanded in the complaint. (§§ 580, subd. (a), 585, subd. (b).) Pursuant to section 425.11, a different rule applies '[w]hen a complaint is filed in an action to recover damages for personal injury or wrongful death.' (§ 425.11, subd. (b).) In such cases, the plaintiff may not state the amount demanded in the complaint, but must serve on the defendant a statement setting forth the nature and amount of damages.

---

management statement or meet and confer with defendants before the case management conference. Defendants cite no authority to support their contention a default should be vacated on these grounds other than the requirement of section 587 that a default shall not be entered without an affidavit stating a copy of the application for entry of default has been mailed to the defense. (§ 587.) The record reflects such affidavits were filed with the September 14, 2012 requests for entry of default. "The nonreceipt of the notice [of request for entry of default] shall not invalidate or constitute ground for setting aside any judgment." (*Ibid.*) Thus, no error occurred on these bases.

(§§ 425.10, subd. (b), 425.11, subds. (b), (c); *Sakaguchi v. Sakaguchi* [(2009)] 173 Cal.App.4th [852,] 860.)." (*Rodriguez*, *supra*, 236 Cal.App.4th at p. 752.)

If a trial court grants a default judgment that exceeds the amount demanded in the complaint or where the plaintiff fails to serve a statement of damages if required, the judgment may be vacated as void. (*Greenup v. Rodman* (1986) 42 Cal.3d 822, 826 [*Greenup*]; *Plotitsa v. Superior Court* (1983) 140 Cal.App.3d 755, 760 [*Plotitsa*].)

Here, Jimenez's complaint alleges "[t]he amount in controversy in this matter exceeds the sum of $25,000, exclusive of interest and costs" and prays for special damages and general damages "according to proof." The trial court's judgment after default in the amount of $150,000 plus costs of $585[8] therefore exceeds the $25,000 specified in the complaint. (See *Electronic Funds Solutions, LLC v. Murphy* (2005) 134 Cal.App.4th 1161, 1173–1174 [recoverable compensatory damages on default

---

[8] Defendants also contend the trial court abused its discretion in failing to consider whether this damages award was excessive because there is no evidence in the record to support Jimenez's claims, and he already recovered damages in a worker's compensation proceeding against defendants. Defendants' argument is without merit. The trial court considered the evidence Jimenez presented in his "prove-up" package, including his and his counsel's declarations, and reduced the $250,000 requested damages to $150,000. Moreover, defendants have presented no evidence in support of their argument the default judgment constitutes a double recovery. Therefore, the trial court did not abuse its discretion on this ground.

judgment limited to $50,000 where complaint alleged damages " 'in an amount in excess of $50,000' "].)

Accordingly, if the complaint is construed as a non-personal injury action, as defendants argue, the default judgment necessarily is void on its face for exceeding the damages specified in the complaint. (*Rodriguez, supra,* 236 Cal.App.4th at p. 755.) In his brief, Jimenez argued "the gravamen of the case at bar is for injuries to [Jimenez]'s person, or personal injuries." At oral argument, however, Jimenez's counsel conceded the causes of action alleged against Kensington are *not* primarily for the recovery of personal injury damages. Thus, counsel agreed the default judgment exceeded the amount of damages in the complaint, $25,000, as to Kensington. We find, however, that when viewed *in toto* the complaint is essentially one to recover damages for personal injury. Construing the complaint as a personal injury action, the default and default judgment are void because the statement of damages Jimenez served on defendants was fatally defective.

a. The complaint seeks recovery of damages for personal injury

Jimenez's complaint alleges tort causes of action for assault and battery, intentional infliction of emotional distress, and negligent infliction of emotional distress, as well as statutory claims under FEHA for harassment, racial discrimination, and failure to prevent harassment and discrimination. On its face, therefore, Jimenez's complaint includes causes of action for personal injury.

Defendants, however, contend the gravamen of the complaint is an employment action because Jimenez complains of workplace harassment and discrimination resulting in lost wages

and adverse employment actions, including defendants' failure to pay him a salary comparable to his Caucasian peers. Relying on *Rodriguez, supra*, 236 Cal.App.4th 742, defendants argue Jimenez's causes of action for assault, battery, and intentional and negligent infliction of emotional distress are incidental to his employment action, and thus, the complaint cannot be characterized as a personal injury action.

We disagree. In *Rodriguez*, the defendant moved to set aside a default judgment in a lawsuit for wrongful termination in violation of public policy in part on the ground the default judgment was void because it exceeded the amount demanded in the complaint. The plaintiff argued her action for wrongful termination in violation of public policy constituted an action to recover damages for personal injury and, thus, the default was not void because she had served the defendant with a valid statement of damages. (*Rodriguez, supra,* 236 Cal.App.4th at p. 752.) Relying on *Holmes v. General Dynamics Corp.* (1993) 17 Cal.App.4th 1418, the court of appeal found plaintiff's complaint for wrongful termination in violation of public policy was not an action to recover damages for personal injury, noting a wrongful termination action "is primarily defined by the loss of one's job, an economic benefit that constitutes a property right." (*Rodriguez, supra,* 236 Cal.App.4th at p.754–755.) The court further reasoned the nature of the cause of action was not to recover damages for personal injury given "[t]he tort vindicates the public's interest in fundamental public policies and prohibits employers from depriving a person of a job in violation of these public policies. [Citation.]" (*Ibid.*)

In contrast to the plaintiff in *Rodriguez*, Jimenez does not allege a claim for wrongful termination in violation of public

policy. He does not allege he was terminated from his employment at all—he was still employed by defendants when their motion was heard in 2016. Although he alleges he lost wages as a result of defendants' actions, Jimenez's harassment cause of action, alleged against both Mooney and Kensington, includes allegations of harm committed against his *person*. For example, Jimenez alleges that while at work, Mooney would "grab him by the buttocks," "grab plaintiff's face, kiss him on the mouth and hug him," and order Jimenez to sit on Mooney's "lap[],"all of which caused Jimenez to suffer "humiliation, embarrassment, mental and emotional distress, and discomfort." His assault and sexual battery cause of action against Mooney is clearly one for personal injury, as are his intentional infliction and negligent infliction of emotional distress causes of action, alleged against both Mooney and Kensington. (Cf. 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 574 [explaining "[a]n action for damages for emotional distress suffered from wrongful conduct is governed by the 2-year statute" of limitations under section 335.1]; Code Civ. Proc., § 335.1 [statute of limitations governing "assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another"].) In addition to mental anguish, Jimenez's intentional infliction of emotional distress cause of action alleges he has suffered "bodily injury," as a result of *both* defendants' conduct.

Thus, Jimenez's claims to recover for emotional and mental distress and bodily injury as a result of Mooney's workplace conduct and assault and battery at his home do not appear to be "incidental to" his discrimination claim to recover lost wages, as were the emotional distress damages plaintiff sought in *Rodriguez*. Moreover, courts have found section 425.11 applies to

discrimination claims seeking recovery for non-incidental emotional and mental distress damages. (See *Schwab v. Rondel Homes, Inc.* (1991) 53 Cal.3d 428, 432, 435 [holding 425.11 statement of damages required in action for housing discrimination where plaintiff sought damages for mental and emotional distress]; see also *Jones v. Interstate Recovery Service* (1984) 160 Cal.App.3d 925, 930 (*Jones*) [finding section 425.11 applied to all causes of action where non-personal injury claims were closely tied to personal injury claims].)[9] Defendants contend Jimenez's request for $135,520 in lost wages in his default judgment prove-up belies finding his complaint is one to recover damages for personal injury. However, Jimenez requested a total of $250,000 in damages. Presumably, therefore, the remaining $114,480 would cover the emotional, mental, and physical injuries alleged in the complaint.[10] We cannot say such an amount is incidental to Jimenez's claim for lost wages.

And although at oral argument Jimenez's counsel conceded the causes of action against Kensington were *not* for the recovery of personal injury damages, we cannot parse out the portions of the complaint seeking recovery for personal injury damages

---

[9] We reject defendants' argument the civil case cover sheet's designation of the complaint as "Other employment" demonstrates Jimenez's complaint is not for the recovery of damages resulting from personal injury. The civil case cover sheet "is used for statistical purposes" (Cal. Rules of Court, rule 3.220(a)), rather than to limit the nature of the complaint.

[10] Of course, if Jimenez had used the mandatory Judicial Council form CIV-050, we would not have to make any presumptions; we would know the exact nature of Jimenez's damages. (See discussion at p. 29, *post*.)

versus the recovery of lost wages from Kensington. As we have said, the complaint seeks damages for personal injury from *both* Mooney and Kensington. Accordingly, we do not treat the complaint as requiring the damages to be stated in it for Kensington under section 425.10, but requiring a statement of damages for Mooney under section 425.11, as Jimenez's counsel seemed to request at oral argument. (See *Jones, supra,* 160 Cal.App.3d at p. 930 [declining to partially reverse on causes of action not involving personal injury on ground section 425.11 would not apply because "plaintiffs' nonpersonal injury claims are tied so closely to the personal injury claims that section 425.11 applies to all causes of action"].)

Because we construe Jimenez's complaint as seeking recovery of damages based in part on personal injury, we must consider whether Jimenez's statement of damages complies with section 425.11. We find it does not.

b. *The statement of damages does not give each defendant actual notice of the specific nature of the general and special damages Jimenez seeks*

As we touched on above, section 425.11 requires a plaintiff to serve on "*the* defendant" a statement "setting forth the nature and amount of damages being sought" in the "same manner as a summons" before a default may be taken. (§ 425.11, subds. (b)–(d), italics added.) Our Supreme Court has explained, "Section 580, and related sections 585, 586, 425.10 and 425.11, aim to ensure that a defendant who declines to contest an action does not thereby subject himself to open-ended liability." (*Greenup, supra,* 42 Cal.3d at p. 826.) Thus, due process requires the service of a valid statement of damages under section 425.11 before a default may be taken. (*Greenup,* at pp. 826–827, 829.)

As a result, just as section 580 deprives a trial court of jurisdiction to enter a default judgment in excess of the amount sought in the complaint, failure to serve a valid statement of damages under section 425.11 deprives "the clerk and trial court of jurisdiction to enter a default." (*Schwab v. Southern California Gas Co.* (2004) 114 Cal.App.4th 1308, 1325.) Accordingly, a court "cannot allow a default judgment to be entered against defendants without proper notice to them of the amount of damages sought. A defendant is entitled to actual notice of the liability to which he or she may be subjected." (*Schwab v. Rondel Homes, Inc., supra,* 53 Cal.3d at p. 435.)

The Legislature has instructed the Judicial Council to "develop and approve an official form for use as a statement of damages pursuant to Sections 425.11 and 425.115." (§ 425.12, subd. (b).) The Legislature also has authorized the Judicial Council to "*prescribe* by rule the form and content of forms used in the courts of this state." (Gov. Code, § 68511, italics added.)

With this mandate, the Judicial Council adopted for mandatory use form CIV-050, revised as of January 1, 2007. Although the face of the record reveals Jimenez personally served a statement of damages on defendants, the statement was on a pleading prepared by Jimenez's counsel, not mandatory Judicial Council form CIV-050. The pleading provides:

> "Plaintiff submits the following statement of damages sought from Defendants, jointly and severally in this action:
>
> 1. General Damages: $100,000.00
>
> 2. Special Damages: $150,000.00."

We find this statement of damages does not comport with due process principles because it does not give *each* defendant actual notice of that defendant's potential liability.[11]

Here, Jimenez has alleged some causes of action jointly against Kensington and Mooney and others against just Kensington or Mooney. Yet, Jimenez's statement of damages only lists the damages Jimenez seeks from defendants *jointly and severally*. It does not identify what part of the claimed special and general damages are attributed to Kensington or Mooney alone versus those damages arising from their joint liability. Thus, neither Kensington nor Mooney can determine the amount of general and special damages for which each potentially is liable based on the complaint's allegations.

Rather, Kensington is left to wonder what portion of the $100,000 in general damages (which could include damages for emotional distress and pain and suffering) and what portion of the $150,000 in special damages (which could include damages not only for lost earnings, but also medical expenses), allegedly are attributable to Jimenez's claims against it as opposed to the assault and battery cause of action alleged against solely Mooney. Similarly, Mooney cannot determine what part of Jimenez's claimed damages relate to his own conduct versus Kensington's potential liability for racial discrimination and failure to prevent harassment and discrimination – causes of action Jimenez did not assert against Mooney. Without actual notice of their own potential liability, therefore, Kensington and Mooney could not "exercise [their] right to choose . . . between (1) giving up [their]

---

[11] We need not decide, therefore, whether a plaintiff's failure to use mandatory form CIV-050 *alone* renders a default and default judgment void.

right to defend in exchange for the certainty that [they] cannot be held liable for more than a known amount, and (2) exercising [their] right to defend at the cost of exposing [themselves] to greater liability." (*Greenup, supra,* 42 Cal.3d at p. 829.)

Mandatory form CIV-050 avoids this conundrum. It requires a plaintiff to "*name . . . one defendant only*," and state the type and amount of general and special damages plaintiff seeks from that named defendant. (Cal. Jud. Council Form CIV-050 [rev. Jan. 1, 2007].) Additionally, the mandatory form directs a plaintiff to break down the general and special damages claimed against that defendant into *separate and distinct categories*. For example, form CIV-050 requires a plaintiff to categorize general damages by the specific amount sought for, inter alia, "[p]ain, suffering, and inconvenience"; "[e]motional distress"; and "[o]ther (*specify*)." Similarly, a plaintiff must categorize special damages by the specific amount sought for, inter alia, "[m]edical expenses," "[l]oss of earnings," "[l]oss of future earning capacity," "[p]roperty damage," and "[o]ther (*specify).*" (*Ibid.*)

In contrast, the statement of damages Jimenez served merely lists his *total* general damages and his *total* special damages he sought from defendants, *jointly and severally*. Thus, it does not notify defendants of their own maximum liability for general and special damages or of the precise *nature* of those damages as section 425.11 and form CIV-050 require. Without that knowledge, neither Kensington nor Mooney would be able to evaluate whether the claimed damages were properly attributable to the causes of action alleged against each, or, for example, whether an insurance provider may cover all or part of the claimed damages. (See *Schwab v. Southern California Gas*

Co., supra, 114 Cal.App.4th at p. 1322 [" 'Section 425.11 has been construed to require "a statement of both special and general damages sought [because] . . . such information aids a defendant in evaluating the validity of plaintiff's damage claims with regard to their provability." ' [Citation.]"].) Such knowledge in turn could affect whether Kensington or Mooney decided to defend the claim or not. (*Greenup, supra,* 42 Cal.3d at p. 829 [" 'The rules governing default judgment provide the safeguards which ensure that defendant's choice is a fair and informed one.' "].)

Accordingly, we reject Jimenez's contention that his statement of damages is sufficient because he substantially complied with section 425.11, subdivision (b). Jimenez's reliance on *Davis v. Allstate Ins. Co.* (1989) 217 Cal.App.3d 1229, 1231 (*Davis*) in this regard is misplaced. There, the court found a plaintiff substantially complied with section 583.210, which requires the summons and complaint to be served within three years, when the plaintiff mistakenly served defendant with a superseded amended complaint within the prescribed timeframe. (*Ibid.*) The court reasoned the service provided the insurer "with timely notice of the action and of substantially all of the plaintiff's factual contentions against it, thus satisfying the purposes of the statute." (*Id.* at p. 1234.)

Jimenez's statement of damages, however, does not satisfy the purpose of the relevant statute here like the service of the wrong complaint in *Davis* did; nor did *Davis* involve the rules pertaining to defaults and default judgments, which " 'must be precisely followed to ensure that a defaulting defendant is aware of plaintiff's claims.' " (*Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 691, citation omitted.) Jimenez argues his statement of damages substantially complies with the purpose of

section 425.11, subdivision (b), because it informed defendants of the "nature and amount of damages being sought" by separately listing his total general damages and total special damages as interpreted by *Plotitsa, supra*, 140 Cal.App.3d at pp. 761–762. The court there reasoned "nothing in section 425.11 expressly prevent[s] a request to enter default from qualifying as a 'statement of damages' so long as the request states 'the amount of special and general damages sought to be recovered.' "[12] (*Id.,* at p. 761; see also *Schwab v. Southern California Gas Co., supra,* 114 Cal.App.4th at p. 1322 [statement of damages must separately state special and general damages].) Separately stating the total amount of general and special damages sought against defendants jointly, however, does not give defendants actual notice of their potential liability so as to make a "fair and

---

[12] At that time, section 425.11 provided, "[T]he party against whom the action is brought may at any time request a statement setting forth the nature and amount of damages being sought. . . . [¶] If no request is made for such a statement setting forth the nature and amount of damages being sought, the plaintiff shall give notice to the defendant of the amount of special and general damages sought to be recovered (1) before a default may be taken." (Stats. 1974, ch. 1481, § 2, p. 3239.) Amendments to the statute in 1993, inter alia, clarified the plaintiff must serve the statement previously referenced in the statute, rather than "give notice . . . of the amount of special and general damages." (Stats. 1993, ch. 456, § 2.) Currently, this segment of section 425.11 reads, "(b) . . . the defendant may at any time request a statement setting forth the nature and amount of damages being sought. . . . (c) If no request is made for the statement referred to in subdivision (b), the plaintiff shall serve the statement on the defendant before a default may be taken." Of course, form CIV-050 did not exist when *Plotitsa* was decided.

informed" decision of how to proceed. Moreover, identification of the precise nature of the damages sought, as form CIV-050 provides, is particularly important here where different claims seeking different types of damages are asserted against different defendants.

In short, Jimenez's statement of damages was not "sufficiently specific to allow" each defendant to determine its or his true liability. (*Schwab v. Southern California Gas Co., supra,* 114 Cal.App.4th at p. 1323.) That the default judgment of $150,000 plus $585 in costs does not exceed the total amount of $250,000 listed in Jimenez's statement of damages, therefore, is immaterial. Thus, unlike the mistaken service of the superseded complaint in *Davis, supra,* 217 Cal.App.3d at p. 1231, which fulfilled the purpose of the statute in issue, the failure to provide the type of specific and general damages alleged against *each defendant* here was not merely "a defect[] in form." (*Id.*, at p. 1233.)

Accordingly, because Jimenez did not serve defendants with a statement of damages that apprised each defendant of its liability for special and general damages, the statement of damages violates section 425.11 rendering the default and default judgment void. (*Schwab v. Southern California Gas Co., supra,* 114 Cal.App.4th at pp. 1325–1326.) We also note that "[p]rejudice is not a factor in setting aside a void judgment or order." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2017) ¶ 5:496 [citing *Sindler v. Brennan* (2003) 105 Cal.App.4th 1350, 1354].)

DISPOSITION

The May 20, 2016 order denying defendants' motion to set aside the default and default judgment is reversed. The matter is remanded with instructions to vacate the default and default judgment, recall the writ of execution, cancel the abstract of judgment, and for further proceedings consistent with this decision. Each party shall bear its own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

EDMON, P. J.

LAVIN, J.