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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

WILLIE MILES, Plaintiff and Appellant, v. KEVIN DEMONT ROBERSON et al., Defendants and Respondents.	B233102 (Los Angeles County Super. Ct. No. BC416492)

APPEAL from an order of the Superior Court of Los Angeles County. Joanne B. O'Donnell, Judge. Reversed and remanded.

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Bergkvist, Bergkvist & Carter and Paul J. Carter for Plaintiff and Appellant.

No appearance for Defendants and Respondents.

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Willie Miles appeals from the order dismissing his personal injury action against Kevin Demont Roberson and Lydia Gordon after entry of their defaults. Because the trial court should not have dismissed the action, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Miles's Complaint*

On June 25, 2009, Miles, in pro. per., filed a summons and personal injury complaint against Roberson and Gordon, alleging that he was injured in an automobile accident in which Roberson was driving a motor vehicle registered to Gordon, Roberson's mother.[1] Miles sought damages to compensate him for wage loss, hospital and medical expenses and loss of earning capacity.

2. *The Initial Defaults Entered Against Roberson and Gordon*

On December 24, 2009, Miles, now represented by counsel, filed a request for entry of defaults against Roberson and Gordon. The clerk rejected the request among grounds that Miles had failed to file a statement of damages and proofs of service of the summons and complaint.

On December 30, 2009, Miles filed proofs of service indicating personal service on Roberson and substituted service on Gordon on July 11, 2009. In addition, his counsel filed a declaration stating that, since he had substituted into the case on November 9, 2009, all mail sent to Roberson and Gordon at their last known address had been returned and he had been unable to locate them to serve a statement of damages.

The trial court held hearings on January 19, February 9 and March 11, 2010 on orders to show cause regarding Miles's failure to file a request for entry of defaults against Roberson and Gordon.[2] At each hearing, Miles's counsel represented that

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[1] Miles also sued 21st Century Insurance Company and AIG Insurance Company but dismissed them from the case. As a result, they are not part of the appeal.

[2] The hearings were pursuant to California Rules of Court, rule 3.110(g), which provides, "If a responsive pleading is not served within the time limits specified in this rule and no extension of time has been granted, the plaintiff must file a request for entry of default within 10 days after the time for service had elapsed. The court may issue an

personal service of a statement of damages on Roberson and Gordon had been unsuccessful. At the March 11, 2010 hearing, counsel stated that he had submitted applications for service by publication, and the court continued the matter to April 12, 2010. At the April 12, 2010 hearing, the court noted that Miles's applications and orders for publication as to Roberson and Gordon had been rejected on March 18, 2010, but that, according to Miles's counsel, Roberson and Gordon had been served with a statement of damages by substituted service on April 9, 2010. According to the statement of damages, Miles sought $1,000,000 in general damages for pain and suffering; $150,000 for past medical expenses; $100,000 for future medical expenses; $65,000 for loss of earnings; $160,000 for loss of future earning capacity; and $1,000,000 in punitive damages. The court continued the order to show cause hearing to May 13, 2010.

Having served the statement of damages, on May 12, 2010, Miles filed a new request for entry of defaults against Roberson and Gordon. Given the pending request for entry of defaults, the trial court continued the May 13, 2010 order to show cause hearing to June 23, 2010. The clerk entered the default of Gordon on June 18, 2010, but rejected the request for entry of default as to Roberson, informing Miles that he needed to obtain a court order resolving a discrepancy between the identification of Roberson on the summons versus the complaint and the request for entry of default. At the June 23, 2010 order to show cause hearing, and a continuance of that hearing on July 28, 2010, the court noted the rejection of the request for entry of default as to Roberson and the representation by Miles's counsel that he would submit a declaration and order to correct the defect. The court continued the order to show cause hearing to September 2, 2010.

On August 27, 2010, Miles's counsel filed a declaration, a proposed order asking the trial court to amend the complaint to identify Roberson as he had been listed on the summons and a new request for entry of default with the correct identification. The court signed the order and granted Miles's request for entry of default against Roberson on

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order to show cause why sanctions should not be imposed if the plaintiff fails to timely file the request for the entry of default."

August 31, 2010. At the September 2, 2010 hearing, Miles's counsel represented to the court that the clerk had informed him that he needed to serve Roberson again with the summons and complaint and statement of damages given the name change. The court continued the order to show cause hearing to October 5, 2010.

On September 21, 2010, Roberson was personally served with the summons and complaint, the statement of damages and the trial court's August 31, 2010 order reflecting entry of default and the name change on the complaint. At the October 5, 2010 hearing, the court continued the order to show cause hearing to November 8, 2010, recognizing that Miles had filed a proof of service of the documents on Roberson on September 29, 2010.

3. *Miles's Initial Attempts to Obtain Default Judgments Against Roberson and Gordon*

On November 1, 2010, Miles filed a request for a default judgment against Roberson and Gordon with supporting documents. On November 5, 2010, the clerk rejected the request because Miles had failed to include a brief summary of the case identifying the parties and the nature of his claim, as required by California Rules of Court, rule 3.1800(a)(1). At the order to show cause hearing on November 8, 2010, the court continued the matter to December 7, 2010.[3]

On the day of the hearing, December 7, 2010, Miles filed a brief summary of the case, with a supporting declaration, explaining his version of the accident, medical expenses and requested damages. He also filed a new request for a default judgment against Roberson and Gordon. The trial court denied Miles's request for a default

[3] Given the entry of defaults against Roberson and Gordon, the order to show cause was now pursuant to California Rules of Court, rule 3.110(h), which provides, "When a default is entered, the party who requested the entry of default must obtain a default judgment against the defaulting party within 45 days after the default was entered, unless the court has granted an extension of time. The court may issue an order to show cause why sanctions should not be imposed if that party fails to obtain entry of judgment against a defaulting party or to request an extension of time to apply for a default judgment within that time." California Rules of Court, rule 3.110(i) provides, "Responsive papers to an order to show cause issued under this rule must be filed and served at least 5 calendar days before the hearing."

judgment without prejudice, stating: "The order to show cause re dismissal for failure to obtain default judgment is continued to January 10, 2011 . . . . Failure of [Miles] to submit a corrected default judgment package five days before that date that cures the defects noted herein will be a failure to show good cause why the case should not be dismissed. [¶] . . . [¶] . . . [Miles] failed to fill out section 7 (Memorandum of [C]osts) on the Entry of Default Judgment Form. [¶] Because this is a personal injury action [Miles] must file a statement of damages. CCP § 425.11. 'The plaintiff shall serve the statement upon the defendant pursuant to this section before a default may be taken, if the motion for default judgment includes a request for punitive damages.' CCP § 425.115(f). Default was entered on June 18, 2010 [as to Gordon and on August 31, 2010 as to Roberson] but the statement of damages was not served [on Roberson] until September 21, 2010, after default was entered. Accordingly, the request for punitive damages is procedurally defective and the default judgment must be denied. [¶] [Miles] has also not proved up all of the damages requested. [Miles] requests $482,872.20 in special damages for medical costs arising out of the personal injury. [Miles] states that he has incurred this amount in medical bills to treat injuries arising out of the car accident. However, this amount does not accord with the amount in the statement of damages served on defendants, which lists medical expenses as $150,000.00. Additionally, the complaint only lists damages 'according to proof.' Accordingly, [Miles's] special damages request violates CCP § 425.11. [¶] [Miles] also requests $1,000,000.00 in general damages. However, the amount of general damages (pain and suffering, emotional distress, future wages, etc.) and the amount of special damages proved must not be grossly disproportionate. [Citation.] Because the amount of general damages [Miles] seeks is almost double the amount of special damages, it is grossly disproportionate."

Later that month, Miles personally served Roberson, on December 19, 2010, and Gordon, on December 20, 2010, with a new statement of damages, this time decreasing his request for general damages for pain and suffering to $500,000; increasing his request for past medical expenses to $482,872.20; maintaining his requests for $100,000 for

future medical expenses, $65,000 for loss of earnings and $160,000 for loss of future earning capacity; and eliminating his request for $1,000,000 in punitive damages. At the order to show cause hearing on January 10, 2011, the trial court noted the representation by Miles's counsel that he had resubmitted a default judgment package and continued the hearing to February 9, 2011.

At the February 9, 2011 order to show cause hearing, the trial court again denied Miles's request for default judgment without prejudice. According to the court, "The order to show cause re dismissal for failure to obtain default judgment is continued to March 17, 2011 . . . . Failure of [Miles] to submit a corrected default judgment package five days before that date that cures the defects noted herein will be a failure to show good cause why the case should not be dismissed. [Miles] is ordered to compile all documents and declarations that support his request, including those filed with previous requests, into one default judgment package. [¶] . . . [¶] . . . [Miles] has not filed a mandatory summary of case indentifying parties and nature of action with this default judgment package. [Miles] has not filed a competent declaration or other supporting admissible evidence with this default judgment package. The default judgment package is defective for these reasons as well as for the reasons explained below.

"Because this is a personal injury action [Miles] has to file a statement of damages. CCP § 425.11. Before a default may be entered, plaintiff must serve defendant with a 'statement of the nature and amount of damages sought.' CCP § 425.11(b), (c); see *Hamm v. Elkin* (1987) 196 Cal.App.3d 1343, 1345 (service after default entry but before prove-up not sufficient). The purpose of the statement of damages is to give defendant 'one last chance' to respond, knowing exactly what judgment may be entered if he or she fails to appear. Absent such statement, defendant lacks notice of the actual liability threatened, so that any default judgment is void. [Citations.] [Miles] served a new statement of damages reflecting [his] changed request for damages on both defendants by personal service on December 19, 2010 and December 20, 2010. However, [Miles] has not sought to reenter default on defendants to give defendants the last chance that due process requires. The original default was entered on June 18, 2010

[as to Gordon and on August 31, 2010 as to Roberson]. Because [the defaults were] entered before [Miles] filed [the current] statement of damages, th[e] entry of default[s] . . . is void. Further, a § 425.11 statement is considered an amendment to the complaint and [Miles] thus must give defendant[s] the same time to respond as to an amended complaint. No default can be entered until at least 30 days after service of the CCP § 425.11 statement. [Citations.] [Miles] must wait until at least 30 days after the statement of damages w[as] served and then seek a new entry of default against defendants.

"[Miles] has also not proved up all of the damages requested. The statement of damages states that [Miles] seeks $500,000.00 for pain and suffering, $482,872.20 for medical expenses, $100,000.00 in future medical expenses, $65,000.00 in loss of earnings and $160,000.00 in loss of future earning capacity. [Miles] provided evidence and declaration in his prior default judgment package properly supporting the amount of medical expenses requested. However, [he] has provided no explanation for how he calculated future medical expenses or even a declaration supporting the request. Similarly, [he] has provided no evidence of his current earnings to date lost and provided no explanation or proof for how he calculates his future lost earnings. Further, [Miles] seeks judgment against both defendant Kevin Roberson and Lydia Gordon but has not shown liability as to both defendants in this action and that the recovery is not duplicative."

4. *The New Defaults Entered Against Roberson and Gordon and Miles's Further Attempt to Obtain a Default Judgment*

Given the trial court's determination that the previously entered defaults were void, Miles sought and the clerk entered new defaults against Roberson and Gordon on February 14, 2011. On March 2, 2011, Miles submitted a new default prove-up package, including a summary of the case, declarations from him and his counsel and medical records and statements. Miles described the injuries he suffered to his legs, head, chest, neck and back, the medical treatment he had received, including eight surgeries on his right leg and amounting to $482.872.20, and his need for continued treatment and further

surgery to his leg, which he had been advised would cost $100,000 and carried the possibility of amputation. Miles also explained that, in the 51 months since the accident, he has been unable to work in his occupation as a landscaper and tree trimmer for which he made $15,000 per year and thus has lost $63,750 in earnings. He said that at 53 years of age he anticipated working another 10 years, which made his loss of future earnings $150,000. With respect to general damages, Miles stated, "The pain and suffering from the eight previous surgeries has been excruciating. There is no formula that I know of to quantify my pain into monetary damages, but I believe that I have suffered at least $500,000 in general damages." He incurred $1,225 in costs in prosecuting the action.

Miles also gave his version of the accident, explaining that Roberson was driving eastbound on 73rd Street while Miles "was standing adjacent to the curb[,]" and Roberson "came on the wrong side of the road . . . and struck [Miles] with his car." Miles stated that Roberson "was negligent in that, as noted in the police report, he failed to safely operate his motor vehicle upon a roadway, was traveling at an unsafe speed for conditions and failed to maintain a proper lookout. In addition, [Roberson] fled the scene of the accident, a felony." As to Gordon, Miles explained that Roberson was driving his mother's car at the time of the accident and said, "I have lived in the neighborhood where this accident took place for over twenty years. I had seen defendant Roberson driving erratically numerous times prior to the accident and I understand that his mother had been aware of his erratic behavior (which he displays in his public conduct) for a significant period of time before the accident. Therefore, based on a theory of negligent entrustment, I believe that . . . Gordon is liable for the full amount of damages that I have incurred." Aside from the statements in his declaration, Miles did not submit any evidence regarding the accident and asserted liability of Roberson and Gordon, such as proof of vehicle ownership.

5. *The Trial Court's Dismissal of the Case*

On March 17, 2011, without holding a hearing, the trial court issued a minute order, stating "The Court has read and reviewed the submitted default judgment package and now orders as follows: [¶] The order to show cause is granted. Case is dismissed as

[Miles] has failed in 3 attempts to prove his entitlement to the default judgment he requests." Miles filed a timely notice of appeal.

DISCUSSION

Because the trial court voided the initial defaults entered against Roberson and Gordon, the operative defaults are those entered on February 14, 2011. Miles submitted a default prove-up package on March 2, 2011. Without holding a hearing on the pending order to show cause, the trial court dismissed the action on March 17, 2011. Even assuming the court could enter the severe sanction of dismissal at this stage of the proceedings, Miles's default prove-up package at least established liability for negligence as to Roberson and Miles's entitlement to some amount of damages, including pain and suffering. The court thus erred in dismissing the action.

DISPOSITION

The order dismissing Miles's action against Roberson and Gordon is reversed, and the matter is remanded to the trial court to allow Miles to file a new default prove-up package within 45 days of the issuance of the remittitur. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

CHANEY, J.