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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

CNL GROUP, LLC, Plaintiff and Respondent, v. ALLEN LEE, Defendant and Appellant.	B285210 (Los Angeles County Super. Ct. No. BC611636)

APPEAL from a judgment and post-judgment order of the Superior Court of Los Angeles County, Mark V. Mooney, Judge. Affirmed.

Park & Lim, S. Young Lim and James E. Adler for Defendant and Appellant.

Law Offices of Barry G. Florence, Barry G. Florence; Law Offices of Choi & Associates, Edward W. Choi and Paul M. Yi for Plaintiff and Respondent.

In this commercial unlawful detainer case, defendant Allen Lee appeals a default judgment for possession and a final judgment awarding damages to plaintiff CNL Group, LLC (CNL Group). Lee also appeals a post-judgment order denying his motion to vacate the judgment. He claims he was never properly served with the summons and complaint, did not receive actual notice of the action, and the underlying complaint failed to state a claim. We reject his contentions and affirm.

BACKGROUND

On January 16, 2009, Lee signed a written three-year lease with CNL Group for use of a commercial property at 735 E. 12th Street, Unit 113, in Los Angeles (the leased premises) for "garment wholesale." Two amendments to the lease were signed increasing the base rent and ultimately extending the lease to March 31, 2018. Both extensions bear Lee's signature, although he disputes that he signed them, as discussed below.

Payments under the lease stopped, and on February 18, 2016, CNL Group served a three-day notice to pay rent or quit the premises. The proof of service declared it was served on Lee at the address of the leased premises "[b]y delivering the notice to a person of suitable age and discretion at the occupants' property address above and also mailing a second copy to the occupant at his property address above, because the occupant could not be found. The notice was delivered to Jane Doe, a competent adult appearing to be in charge of the Property listed above, and described as follows: Sex: Female, Race: Latino, Weight: 150, Age: 25, Hair: Brown, Height: 5'4"."

CNL Group then filed an unlawful detainer complaint on February 26, 2016, naming Lee and Doe defendants. It filed two proofs of service for the summons and complaint dated March 11

and 18, 2016. The first proof of service indicated the "Party served" was "all occupants" at the leased premises. The second indicated the "Party served" was Lee at the leased premises. Both indicated substitute service was utilized. Although they identified the address for the leased premises, both proofs checked the box that the documents were left at a "home" with "a competent member of the household (at least 18 years of age) at the dwelling house or usual place of abode of the party." That person was "Jane Doe, a competent member of the household," described as Latino, female, 5'4" in height, age 25, with brown hair, and weighing 170 pounds. The documents were also mailed to the same address for the leased premises. CNL Group filed a single "Declaration of Reasonable Diligence," indicating the process server attempted personal service at the leased premises at various times on three consecutive days before attempting substitute service by leaving the documents with Jane Doe and mailing them to the leased premises.

Lee did not respond to the complaint. CNL Group eventually filed a request for entry of default and request to set the case for trial, both of which were mailed to the leased premises. Subsequent filings and minute orders from the court were also served on Lee by mailing them to the leased premises.

The clerk entered default judgment for possession only on March 24, 2016. A bench trial was held on April 11, 2016 without Lee's presence. The court heard CNL Group's evidence and awarded it $27,913.46 in past due rent and damages, $2,100 in attorney's fees, and $510 in costs. For some unexplained reason, CNL Group did not submit a proposed judgment until nearly a year later, which the court signed on March 21, 2017.

On August 4, 2017, Lee moved for relief from the default and judgment pursuant to Code of Civil Procedure section 473, subdivision (d),[1] section 473.5, subdivision (a), and principles of equity, arguing he never received proper service or actual notice of the summons and complaint. In an affidavit, Lee basically admitted that he did not intend to occupy or use the property when he signed the lease in 2009. Instead, he signed the lease as a "favor" to his brother Kyong Lee, and his brother would actually occupy the property to operate *his* garment business. Lee claimed he was not involved in that business and only went to the premises "once or twice."

Lee stated that approximately one or two years after he signed the lease, he instructed his brother to remove his name from all corporate documentation, especially any further lease documents. He claimed his brother assured him "on several occasions" that his name was removed. Nonetheless, his brother forged his signature on the two lease extensions without his knowledge and "at the instruction of [CNL Group's] agent Mr. Robert Cho and in his presence."

Lee claimed he was not at the leased premises when the unlawful detainer complaint and summons was served. He claimed he first learned of the unlawful detainer action in July 2016, when CNL Group filed a separate civil case against him for breach of the lease, in which it identified the unlawful detainer case.[2] As for the unlawful detainer judgment entered in March

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[1] All undesignated citations are to the Code of Civil Procedure unless otherwise indicated.

[2] Notably, Lee filed demurrer to the breach of contract case in August 2016, in which he not only acknowledged the existence

2017, Lee claimed CNL Group never informed him judgment was entered despite the ongoing litigation in the breach of contract case. Instead, he did not learn the judgment had been entered until mid July 2017 when his attorney discovered it.

In further support of the motion to vacate the judgment, Lee's brother submitted an affidavit also acknowledging Lee signed the lease on his behalf so he could run his garment business at the leased premises. He claimed Lee was not involved with the business and only visited the leased premises once or twice. He claimed CNL Group's agent Robert Cho knew he was not Lee but urged him to sign Lee's name to the lease extensions anyway. Lee's brother did not inform Lee that he had signed his name. He claimed neither he nor any of his employees received the summons and complaint.

CNL Group opposed Lee's motion. It did not dispute that Lee signed the lease on behalf of his brother, but it submitted additional evidence that Lee was involved in his brother's business. For example, Lee testified at his deposition in the breach of contract case that he authorized his brother to utilize Lee's name, driver's license, and social security number to obtain the lease, and he made the initial down payment for the lease. CNL Group offered documents indicating that Lee set up a corporation called Pasae Inc. in January 2009. That business opened a bank account in February 2009 listing its location and mailing address as the leased premises and listing both Lee and his brother as authorized signatories. In November 2012—after

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of court's damages award in the unlawful detainer case, but he argued that award was res judicata to the breach of contract claim.

the first lease extension was signed in February 2012—Pasae Inc. filed a Statement of Information with the California Secretary of State listing the leased premises as its principal office location as well as the address for Lee as chief executive officer, secretary, and chief financial officer. It also listed Lee as the agent for service of process and the leased premises as the location for service of process.[3]

CNL Group's managing member Cho declared that at all times from the signing of the lease until July 2017, he believed the person at the leased premises was Lee, and he had received all monthly rent payments from 2009 until January 2016 from Pasae Inc. Lee never notified him that he was no longer affiliated with the business operating at the leased premises. Cho "believed that the person at the store on a daily basis was Allen Lee and did not know of anyone named Kyong Lee until July 2017."

CNL Group also submitted Lee's deposition testimony admitting that he never personally informed CNL Group that he was no longer affiliated with his brother's business operating at the leased premises. Nor did he inform CNL Group that his brother was unauthorized to sign any documents on behalf of Pasae Inc.

On August 31, 2017, the trial court issued a minute order indicating it held a hearing and heard argument on Lee's motion. Lee did not submit a reporter's transcript or settled or agreed statement for that hearing. The court denied the motion, finding

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[3] On appeal, Lee contends all these documents were also forged. He did not raise this factual argument in the trial court in response to CNL Group's evidence, so we will not consider it.

that there was "no procedur[al] basis for the motion" and "no basis for a [section] 473 . . . motion."

On September 15, 2017, Lee filed a notice of appeal, identifying the August 31, 2017 order denying the motion to set aside the judgment and the underlying March 21, 2017 judgment.[4]

DISCUSSION

1. The Judgment Was Not Void Under Section 473, Subdivision (d)

Lee argues the default judgment should be set aside because it was void due to lack of proper service, citing section 473, subdivision (d). As relevant here, under section 473, subdivision (d), "[t]he court . . . may, on motion of either party after notice to the other party, set aside any void judgment or order," which includes " 'a default judgment which is valid on its face, but void, as a matter of law, due to improper service.' " (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1200 (*Hearn*).)

The parties disagree on our standard of review. Lee claims our review is purely de novo because the underlying facts are not disputed. That is incorrect because the facts surrounding the issue of effective service were plainly in conflict. CNL Group claims our review is for abuse of discretion because the judgment was a "judgment after a bench trial," not a "default judgment." That is nothing more than a semantic distinction. The final

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[4] Lee's appeal of the underlying judgment was timely filed within 180 days of the entry of judgment because the record contains no indication that he was served with a notice of entry of judgment. (Cal. Rules of Court, rule 8.104(a)(1); *Moghaddam v. Bone* (2006) 142 Cal.App.4th 283, 288.)

judgment was entered after Lee's default in failing to appear and defend the action, whatever its label.

The standard of review under section 473, subdivision (d) is generally two-fold. Inclusion of the word "may" in section 473, subdivision (d) " 'makes it clear that a trial court retains discretion to grant or deny a motion to set aside a void judgment [or order].' [Citation.] However, the trial court 'has no statutory power under section 473, subdivision (d) to set aside a judgment [or order] that is not void . . . .' [Citation.] Thus, the reviewing court 'generally faces two separate determinations when considering an appeal based on section 473, subdivision (d): whether the order or judgment is void and, if so, whether the trial court properly exercised its discretion in setting it aside.' [Citation.] The trial court's determination whether an order is void is reviewed de novo; its decision whether to set aside a void order is reviewed for abuse of discretion." (*Pittman v. Beck Park Apartments Ltd.* (2018) 20 Cal.App.5th 1009, 1020 (*Pittman*).)

Even when the issue is voidness, however, "courts distinguish between orders that are void on the face of the record and orders that appear valid on the face of the record but are shown to be invalid through consideration of extrinsic evidence." (*Pittman, supra,* 20 Cal.App.5th at p. 1020.) "An order is considered void on its face only when the invalidity is apparent from an inspection of the judgment roll or court record without consideration of extrinsic evidence." (*Id.* at p. 1021.) The judgment roll is limited to "the summons, proof of service of the summons, complaint, request for entry of default, copy of the judgment, notice of any ruling overruling a demurrer interposed by the defendant and proof of service thereof, and, if service was by publication, affidavit for publication and order directing it."

(*Ramos v. Homeward Residential, Inc.* (2014) 223 Cal.App.4th 1434, 1440 (*Ramos*).) If the voidness challenge is based only on the judgment roll, we review that issue de novo. (*Ibid.*)

Conversely, "[i]f the invalidity can be shown only through consideration of extrinsic evidence, such as declarations or testimony, the order is not void on its face." (*Pittman, supra,* 20 Cal.App.5th at p. 1021.) In that case, "where a plaintiff has contested a motion to vacate a default judgment by way of affidavits and other evidence that goes beyond the judgment roll . . . of necessity our review goes beyond the judgment roll. [Citation.] In determining any issues raised by such evidentiary matters, our review is governed by the familiar abuse of discretion standard. [Citation.] That standard requires we defer to factual determinations made by the trial court when the evidence is in conflict, whether the evidence consists of oral testimony or declarations." (*Ramos, supra,* 223 Cal.App.4th at pp. 1440-1441.)

CNL Group attempted substitute service on Lee pursuant to section 415.20, subdivision (b): "If a copy of the summons and complaint cannot with reasonable diligence be personally delivered to the person to be served, as specified in Section 416.60, 416.70, 416.80, or 416.90, a summons may be served by leaving a copy of the summons and complaint at the person's dwelling house, usual place of abode, usual place of business, or usual mailing address other than a United States Postal Service post office box, in the presence of a competent member of the household or a person apparently in charge of his or her office, place of business, or usual mailing address other than a United States Postal Service post office box, at least 18 years of age, who shall be informed of the contents thereof, and by thereafter

mailing a copy of the summons and of the complaint by first-class mail, postage prepaid to the person to be served at the place where a copy of the summons and complaint were left. Service of a summons in this manner is deemed complete on the 10th day after the mailing."

" 'Statutes governing substitute service shall be "liberally construed to effectuate service and uphold jurisdiction if actual notice has been received by the defendant . . . ." ' " (*Hearn, supra,* 177 Cal.App.4th at p. 1201.) " 'To be constitutionally sound the form of substituted service must be "reasonably calculated to give an interested party actual notice of the proceedings and an opportunity to be heard . . . [in order that] the traditional notions of fair play and substantial justice implicit in due process are satisfied." ' " (*Bein v. Brechtel-Jochim Group, Inc.* (1992) 6 Cal.App.4th 1387, 1392 (*Bein*).) Further, " 'the filing of a proof of service creates a rebuttable presumption that the service was proper.' " (*Hearn, supra,* at p. 1205.)

In a conclusory argument without citation to legal authority, Lee first contends the proofs of service were void on their face because they identified the leased premises as a "home" and indicated the summons and complaint were left with "a competent member of the household (at least 18 years of age) at the dwelling house or usual place of abode of the party." This alleged minor discrepancy was harmless under the circumstances. (*Bein, supra,* 6 Cal.App.4th at p. 1394 ["[M]inor, harmless deficiencies will not be allowed to defeat service."]; see *Hearn, supra,* 177 Cal.App.4th at p. 1204 [finding error in process server's verification for substitute service harmless under circumstances of case].) The proofs of service listed the correct address for the leased premises and described the person on

whom the summons was actually served. Although Lee advances a variety of other arguments, he does *not* claim this apparent minor error prevented him from receiving actual notice of the lawsuit.

Lee next contends that even if CNL Group intended to serve him at his "usual place of business," there was no evidence the leased premises was his place of business, let alone his "usual" place of business. The crucial question is whether "a connection [has been] shown between the address at which substituted service is effectuated and the party alleged to be served." (*Corcoran v. Arouh* (1994) 24 Cal.App.4th 310, 315.) Under the circumstances here, Lee's connection to the business at the leased premises was a factual issue that the trial court implicitly resolved against Lee. We defer to the court's factual findings on this point. (*Ramos, supra,* 223 Cal.App.4th at p. 1441.)

Even though Lee admitted that his brother was actually going to operate the business at the leased premises, there was plenty of evidence that supported the trial court's implicit finding that Lee nonetheless maintained a close connection to that business and the leased premises. Lee signed the original lease, and his name was also signed on the lease extensions. Even though he claimed his brother forged his name on the extensions without authorization, the court could have reasonably disbelieved him. Indeed, as late as November 2012, Lee listed his company Pasae Inc.'s address as the leased premises and listed himself as agent for service of process at the leased premises. Pasae Inc. paid all the lease payments. Lee claimed he sought to disassociate himself from his brother's business, but he admitted that he never personally informed CNL Group. Consistent with

that, Cho declared that he believed Lee was the person "at the store on a daily basis" operating the business. These facts reasonably supported a finding that Lee had a sufficient connection to the leased premises that substitute service was proper.[5]

Lee finally argues the "Declaration of Reasonable Diligence" from the process server was insufficient because it showed the attempts at personal service were only made at the leased premises, and not at the address for tenant notices listed in the lease. We discuss this issue more fully below in rejecting Lee's challenge to the sufficiency of the complaint. Suffice it to say here that because the facts showed that the leased premises was Lee's "usual place of business," his challenge to substitute service based on the process server's declaration fails.

In sum, Lee failed to show the default judgment was void pursuant to section 473, subdivision (d) due to lack of proper service.

2. The Record Is Inadequate to Review the Court's Refusal to Set Aside the Default Judgment Pursuant to Section 473.5 or Based on Equity

Lee also moved to set aside the judgment pursuant to section 473.5 and the trial court's equitable powers. Section 473.5, subdivision (a) states in relevant part that, "[w]hen service of a summons has not resulted in actual notice to a party in time

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5 Lee cites *Zirbes v. Stratton* (1986) 187 Cal.App.3d 1407, but the facts in that case bear no resemblance to the facts here. Service was ineffective in that case because the plaintiff left the summons and complaint with the defendant's estranged husband at a restaurant in which the defendant's only current connection was a community interest. (*Id.* at p. 1417.)

to defend the action and a default or default judgment has been entered against him or her in the action, he or she may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the action." Likewise, a court has the inherent equitable power to set aside a judgment when service is ineffective due to extrinsic mistake. (*Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 502 (*Cruz*).) Both grounds for relief are discretionary, and we review the court's decision for abuse of discretion. (*Sakaguchi v. Sakaguchi* (2009) 173 Cal.App.4th 852, 861 [§ 473.5]; *Cruz, supra,* at p. 503 [equitable relief].)

We cannot reverse the court's ruling under these provisions because Lee has not provided a reporter's transcript or settled or agreed statement of the hearing on his motion, and there is nothing else in the record to adequately explain the basis for the court's exercise of discretion. "Appealed judgments and orders are presumed correct, and error must be affirmatively shown. [Citation.] Consequently, appellant has the burden of providing an adequate record. [Citations.] Failure to provide an adequate record on an issue requires that the issue be resolved against appellant. [Citation.] Without a record, either by transcript or settled statement, a reviewing court must make all presumptions in favor of the validity of the judgment." (*Randall v. Mousseau* (2016) 2 Cal.App.5th 929, 935.) Particularly when our review is for abuse of discretion, "a reporter's transcript or an agreed or settled statement of the proceedings will be indispensible." (*Southern California Gas Co. v. Flannery* (2016) 5 Cal.App.5th 476, 483.)

At least one ground could have reasonably supported the court's refusal to exercise its discretion: Lee lacked actual notice due to his own inexcusable neglect. (See § 473.5, subd. (b)

[motion must be "accompanied by an affidavit showing under oath that the party's lack of actual notice in time to defend the action was not caused by his or her avoidance of service or inexcusable neglect"]; *Cruz, supra,* 146 Cal.App.4th at p. 503 [extrinsic mistake justifying exercise of equitable power "exists when the ground for relief is not so much the fraud or other misconduct of one of the parties as it is the excusable neglect of the defaulting party to appear and present his claim or defense"].) The evidence showed Lee misled CNL Group when he entered the original lease and then he either continued to lie about his connection to his brother's business or at the very least he failed to notify CNL Group he was no longer affiliated.

Without some basis to review the trial court's discretionary decision, we must conclude the court's decision was proper.

3. Lee's Challenge to the Merits of the Judgment Fails

Lee argues the alleged service of the three-day notice to pay rent at the leased premises was improper because the lease contained a clause stating that "[a]ll notices from Landlord or Tenant to the other may be served, as an alternative to personal service, by mailing the same by registered or certified mail, postage prepaid, or by overnight courier, addressed . . . to Tenant at the address for Tenant set forth" in the lease. The tenant address designated in the lease was different from the leased premises.[6]

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[6] Lee did not raise this contention in the trial court, but "the issue of whether a cause of action is stated is not waived by the failure to raise it in the trial court, and it may be raised for the first time on appeal." (*Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 7, fn. 2.) We deny CNL Group's motion

By statute, a three-day notice to a commercial tenant to pay rent or quit the premises may be served on the tenant personally or, if the tenant is absent from the premises, "by leaving a copy with some person of suitable age and discretion at the property, and sending a copy through the mail addressed to the tenant at the address where the property is situated." (§ 1162, subd. (b)(1)-(2).) For commercial leases, the landlord and tenant "may lawfully agree to notice procedures that differ from those provided in the statutory provisions governing unlawful detainer." (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 750 (*Culver Center*).)

Here, the lease stated that notices "may be served" by mail to Lee's designated address in lieu of personal service. This permissive language created an *additional* method of service, but it did not preclude substitute service pursuant to section 1162. Although Lee relies on *Culver Center*, the lease in that case mandated that all notices " 'shall be deemed delivered' " when served by one of the specified means at a designated address, which rendered service at another address ineffective. (*Culver Center*, *supra*, 185 Cal.App.4th at pp. 746-747, 751.) Thus, substitute service of the three-day notice at the leased premises consistent with section 1162 was proper.

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to consider additional evidence on this issue because it is unnecessary to our decision.

DISPOSITION

The judgment and post-judgment order are affirmed. Respondent CNL Group is awarded costs on appeal.

ROGAN, J.*

WE CONCUR:

RUBIN, Acting P. J.

GRIMES, J.

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* Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.