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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

CITY BREEZE, LLC, et al., Plaintiffs and Appellants, v. AZIZA SHAHI, Defendant and Respondent; THE BANK OF NEW YORK MELLON et al., Interveners and Respondents.	B259117 (Los Angeles County Super. Ct. No. BC442323)

APPEAL from an order of the Superior Court of Los Angeles County. William F. Fahey, Judge. Affirmed.

Philip D. Dapeer for Plaintiffs and Appellants.

Law Offices of Rodney T. Lewin, Rodney T. Lewin; Lavaee Law Group and Michael Y. Lavaee for Defendant and Respondent.

Fidelity National Law Group and Howard P. Brody for Interveners and Respondents.

Plaintiffs and appellants City Breeze, LLC, Neutraceutical Services of America, and Bentley Industries, Inc. (collectively City Breeze), appeal from an order setting aside a default judgment against defendant and respondent Aziza Shahi. The trial court set aside the default on the ground of extrinsic fraud, finding that City Breeze failed to establish that Shahi was ever served with the complaint. Following an evidentiary hearing, the trial court concluded that Shahi was not a resident of the home in which the process server purported to accomplish substitute service, the process server did not actually sign the declaration attesting to service, and he was "substantially impeached" when he testified. On appeal, City Breeze does not challenge the trial court's finding of extrinsic fraud based on the process server's conduct. Rather, City Breeze argues that Shahi (1) waited too long to file a motion to set aside the default after she became aware of the lawsuit and (2) was barred from seeking to set aside the default judgment because of her alleged "unclean hands" with respect to conduct relating to the merits of City Breeze's claims. We reject both arguments and affirm.

BACKGROUND

City Breeze filed the lawsuit from which this appeal is taken on July 26, 2010. The initial complaint named various lenders (the Bank Defendants) that had allegedly noticed a

trustee's sale of a residence located on Shoreham Drive in West Hollywood (the Shoreham Property).[1] The complaint alleged that Shahi was the owner of the Shoreham Property, and that she had previously agreed to sell a 50 percent interest in that property to City Breeze for $500,0000. The complaint further alleged that, after that agreement, Shahi's adopted son, Tony Mir, had forged Shahi's name to loan documents to obtain over $2 million in loans from the Bank Defendants secured by the Shoreham Property. City Breeze claimed that, because the trust deed securing the loans was forged, the Bank Defendants had no valid interest in the Shoreham Property and the trustee's sale should not proceed. City Breeze alleged various causes of action to (1) stop the trustee's sale, (2) determine that the Bank Defendants had no valid interest in the Shoreham Property, and (3) establish and enforce City Breeze's alleged statutory and equitable liens against that property. The complaint did not name Shahi as a defendant.

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[1] The Bank Defendants were Reconstruct Company, Countrywide Home Loans, Inc., BAC Home Loans Servicing LP, Bank of America, N.A., and America's Wholesale Lender. The Bank Defendants had apparently assigned their interest in the Shoreham Property to various Bank of New York entities (BONY). BONY was subsequently permitted to intervene in the action. The procedural history relating to these other defendants is complicated and not germane to this appeal, other than to note that BONY filed an appeal of another order in the case. This court initially ordered BONY's appeal consolidated with this appeal for purposes of oral argument and decision, but subsequently dismissed it. (See order, *City Breeze v. Bank of New York Mellon* (B260575, Aug. 2, 2016).)

The trial court issued a temporary restraining order and then a preliminary injunction precluding the trustee's sale of the Shoreham Property. The Bank Defendants failed to appear in the action, and a default was entered against them on August 31, 2010. At the hearing on the default prove-up on December 14, 2010, the court suggested that Shahi was an indispensable party to the action, as City Breeze was seeking to create a lien on a property for which she was the record title holder. City Breeze therefore added Shahi as a "Doe" defendant on January 13, 2011.

Process server declarations filed on February 17, 2011, averred that Shahi was served through substitute service on January 17, 2011, by leaving the summons and complaint at the Shoreham Property and subsequently mailing the documents to Shahi at that address. Shahi did not file a responsive pleading. City Breeze obtained a default judgment against Shahi and the Bank Defendants on April 26, 2011. The judgment granted statutory and equitable liens against the Shoreham Property in the amount of $1,841,133.54 plus interest and authorized City Breeze to foreclose against the Shoreham Property "in the same manner as a foreclosure deed of trust containing a power of sale." On October 17, 2012, City Breeze acquired the Shoreham Property through a sheriff's sale.[2]

Evidence introduced below showed that Shahi first learned of this action and the default judgment against her in July 2013, when she executed a declaration at her son's request in connection with a motion brought by another party. Shahi subsequently filed a motion to set aside the default judgment on

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[2] By the time of this sale, the Bank Defendants had moved successfully to set aside the default judgment against them, and apparently stipulated to the sale.

December 23, 2013. The motion was supported by a declaration from Shahi stating that she lives in India, did not live or work in the Shoreham Property at any time since 2006, and had never been served with the summons and complaint. City Breeze opposed the motion on a number of grounds, including that the substitute service was proper, there was no extrinsic fraud, and the evidence that Shahi offered in support of her motion was inadmissible. City Breeze also argued that Shahi was not diligent in seeking to set aside the default judgment more than two years after the judgment was entered and "six months after her claims of actual knowledge."

The court denied Shahi's motion on January 21, 2014, on the ground that Shahi's declaration, which she signed in India, was procedurally defective. Shahi moved for reconsideration on February 7, 2014. At a hearing on March 26, 2014, the court set that motion for an evidentiary hearing.

The evidentiary hearing took place on July 25, 2014. Pursuant to *Summers v. McClanahan* (2006) 140 Cal.App.4th 403, 413, the trial court assigned the burden of proof to City Breeze to show proper service of the lawsuit on Shahi.

One of City Breeze's witnesses was Robert Hall, the process server whose signature appeared on the declarations attesting to substitute service on Shahi at the Shoreham Property. Hall testified that he did not actually sign the declarations supporting the purported service, but that his manager signed Hall's name with his approval. On cross-examination, Hall admitted that his manager did not have any personal knowledge of the facts set forth in the declarations, but that he simply relied upon the information that Hall provided.

Hall also testified that he recognized a photograph of the person with whom he left the summons and complaint at the Shoreham Property in January 2011, more than three years previously. He identified the person in the photograph as Mapi Mir, Tony Mir's ex-wife. On cross-examination, Hall admitted that City Breeze's party representative had shown him a picture of Mapi Mir in the hallway before his testimony to refresh his memory on "who we are talking about." He also admitted that he probably conducts a thousand services of process a year, but he nevertheless claimed to have a "specific recollection of what took place and who [he] served and what she looked like on January 17, 2011."

Mapi Mir testified that she had no communications with Shahi since divorcing Tony Mir in 1999 and did not know where to contact her. Mapi Mir had lived in the Shoreham Property from 2002 to 2014, and Shahi never lived there.

Shahi also testified at the hearing. She stated that she has lived in India her entire life. She has an Iranian passport, but she is "registered in India." She visited her son, Tony Mir, in California about once a year, but she has never stayed at or even been to the Shoreham Property. She did not authorize Mapi Mir to receive service of process or government documents for her. Shahi has never held a job and does not own a computer. She speaks Hindi and required an interpreter for the hearing.

The trial court granted Shahi's motion for reconsideration and ordered that the default be set aside. The court found that "the evidence adduced establishes that Shahi was not a resident of the Shoreham home, the so-called 'substituted service' was invalid and there was extrinsic fraud." The court found that the process server, Hall, was evasive and not credible, and declined

to give his testimony any weight. On the other hand, the court credited Shahi's testimony that she "never lived at the Shoreham property and never authorized Mapi Mir to receive documents for her." The court also stated that it had "considered and now rejects the balance of [City Breeze's] arguments, including that Shahi has waited too long to bring this motion and that she has 'committed perjury.' "

DISCUSSION

The Code of Civil Procedure establishes several statutory avenues to set aside default judgments.[3] Section 473, subdivision (b) permits a court to set aside a judgment on the ground of "mistake, inadvertence, surprise, or excusable neglect." A motion seeking relief under this subdivision must be brought within "a reasonable time, in no case exceeding six months" after the judgment was taken. (*Ibid.*) Section 473.5, subdivision (a) provides that, when service of a summons "has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered," the party may file a motion to set aside the judgment. Such a motion must be filed, at the latest, within two years after entry of the default judgment. (*Ibid.*) More generally, section 473, subdivision (d) permits a court to "set aside any void judgment or order." When the basis for a motion under this subdivision is that a judgment " 'though valid on its face, is void for lack of proper service, the courts have adopted by analogy the statutory period for relief from a default judgment' provided by section 473.5, that is, the two-year outer time limit." (*Trackman v. Kenney* (2010) 187 Cal.App.4th 175,

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[3] Subsequent undesignated statutory references are to the Code of Civil Procedure.

180 (*Trackman*), quoting 8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 209, pp. 814–815.)

Because Shahi filed her motion to set aside the default judgment more than two years after the judgment was entered, none of these statutory avenues for relief was available to her. However, in addition to seeking relief under these statutory provisions, a party "can show 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*, *supra*, 187 Cal.App.4th at p. 181.)[4]

City Breeze does not challenge the trial court's finding that the evidence showed extrinsic fraud and the purported substitute service was invalid.[5] Rather, it focuses on Shahi's conduct,

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[4] There is also no time limit for a motion to set aside a judgment on the ground that the judgment is void on the face of the record (including the proof of service). (*Trackman*, *supra*, 187 Cal.App.4th at p. 181; *Manson, Iver & York v. Black* (2009) 176 Cal.App.4th 36, 43 (*Manson*).) The trial court here did not find, and Shahi does not argue, that the proof of service was invalid on its face. We therefore consider only the claim of extrinsic fraud.

[5] Shahi argues that City Breeze was required to serve her under the Hague Service Convention (Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638), and that service was also invalid for that reason. City Breeze does not argue on appeal that service was valid, and Shahi does not argue that the Hague Service Convention precludes the defenses that City Breeze raises here (i.e., lack of diligence and unclean hands). We therefore need not reach the question whether the Hague Service Convention applies. However, we note that article 16 of the convention requires that

arguing that she waited too long to bring her motion to set aside the default judgment and that she was barred under the doctrine of unclean hands from seeking relief from the default because she testified inconsistently in the declaration she executed in July 2013 and at the evidentiary hearing on her motion to reconsider. We consider each of these arguments below.

1. There is Sufficient Evidence Supporting the Trial Court's Finding that Shahi Showed Adequate Diligence

We review the trial court's decision to set aside the default judgment on the ground of extrinsic fraud for abuse of discretion. (*Weitz v. Yanofsky* (1966) 63 Cal.2d 849, 854 (*Weitz*); *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981 (*Rappleyea*).) "[I]n the absence of a clear showing of abuse of discretion where the trial court grants the motion, the appellate court will not disturb the order." (*Weitz*, at p. 854.)

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an application for relief from default "may be filed only within a reasonable time after the defendant has knowledge of the judgment," and leaves to the contracting states to specify a time, no less than one year, within which such an application must be made. (*Id.*, 20 U.S.T. 361; 1969 U.S.T. LEXIS 152 at pp. *22–23.) The Designations and Declarations Made on the Part of the United States in Connection with the Deposit of the United States Ratification states that an application under article 16 will not be entertained if it is filed after the later of (1) one year following judgment or (2) "after the expiration of the period within which the same may be filed under the procedural regulations of the court in which the judgment has been entered." (*Id.*, 20 U.S.T. 361; 1969 LEXIS 152 at pp. *31–32.) Thus, whether or not the Hague Service Convention applies, it appears that Shahi's diligence must be evaluated under California law.

So long as relief under section 473 is available, there is a strong public policy in favor of setting aside a default to permit a party to have his or her day in court. (*Rappleyea*, *supra*, 8 Cal.4th at pp. 981–982.) However, " '[b]eyond this period there is a strong public policy in favor of the finality of judgments and only in exceptional circumstances should relief be granted.' " (*Id.* at p. 982, quoting *In re Marriage of Stevenot* (1984) 154 Cal.App.3d 1051, 1071.) That policy is embodied in a three-element test to obtain equitable relief from default. The defaulted party must (1) demonstrate that it has a meritorious case, (2) articulate a satisfactory excuse for not presenting a defense to the original action, and (3) demonstrate diligence in seeking to set aside the default once discovered. (*Rappleyea*, at p. 982, citing *Stiles v. Wallis* (1983) 147 Cal.App.3d 1143, 1147.) City Breeze's argument focuses on the last of these elements.

Citing *Benjamin v. Dalmo Mfg. Co.* (1948) 31 Cal.2d 523 (*Benjamin*) and *Stafford v. Mach* (1998) 64 Cal.App.4th 1174 (*Stafford*), City Breeze argues that there is a judicially recognized three-month outer limit for an unexplained delay in filing a motion for relief from default once the default is discovered. *Benjamin* and *Stafford* concerned delays in motions to set aside default under section 473, subdivision (b), which requires that a motion for relief be filed "within a reasonable time, in no case exceeding six months." However, even assuming that the reasoning in those cases should be extended to motions for equitable relief from default on the ground of extrinsic fraud,[6]

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[6] See *Weitz*, *supra*, 63 Cal.2d at page 857 ("To the extent that the court's equity power to grant relief differs from its power under section 473, the equity power must be considered narrower, not wider").

they would not require reversal here, as they address *unexplained* delays. (See *Benjamin*, at p. 529; *Stafford*, at p. 1184.)

The court held in *Benjamin* that a "large discretion" is accorded the trial court in assessing delay, but "there must be some showing—some evidence—as the basis for the exercise of such discretion." (*Benjamin*, *supra*, 31 Cal.2d at p. 528.) Since our Supreme Court's decision in *Benjamin*, the court has held that delays of more than three months were not excessive where sufficient evidence existed showing an adequate reason for the delay. (See *Weitz*, *supra*, 63 Cal.2d at pp. 853, 858 [trial court could properly conclude that a delay of about four months in filing a motion for relief from a default judgment was justified where the defendant relied upon his insurance company to respond]; *Rappleyea*, *supra*, 8 Cal.4th at pp. 979, 984 [pro se defendants exercised adequate diligence in filing a motion to set aside a default over a year after the default was entered as a result of a clerical error where they were misled about the legal consequences of the default]; see also *Manson*, *supra*, 176 Cal.App.4th 36 [trial court implicitly found sufficient diligence in moving to set aside a default despite a delay of almost three years, where the defaulted party received incorrect legal advice that there was nothing she could do].)

Here, while the record on the issue of diligence is sparse, there was sufficient evidence to support the trial court's finding that Shahi did not "wait[] too long" to bring her motion. Shahi lived in India, did not speak English, had never held a job, and did not own a computer. She is a widow who testified that she visited the United States only to see her son and had never even visited the Shoreham Property. Under the circumstances, the

trial court could reasonably conclude that a six-month delay to find and retain a lawyer to represent her in another country and to prepare a motion in a complicated action that had already been pending several years did not preclude Shahi from seeking equitable relief.

The trial court's finding is also supported by the lack of evidence of prejudice to City Breeze from the approximate six-month delay between the time that Shahi learned of the default in July 2013 and the time she filed her motion in December 2013. Although lack of prejudice alone is not sufficient to excuse a delay, it is "one of the factors the trial court may properly consider in determining whether defendant acted diligently." (*Weitz*, *supra*, 63 Cal.2d at p. 857.) "If heightened prejudice strengthens the burden of proving diligence, so must reduced prejudice weaken it." (*Rappleyea*, *supra*, 8 Cal.4th at p. 984.) City Breeze does not identify any specific prejudice from the passage of time from July to December 2013. By the time Shahi learned of this lawsuit in July 2013, City Breeze had already purchased the Shoreham Property in a sheriff's sale almost nine months earlier. Although the six-month period before Shahi filed her motion might have contributed to the time ultimately necessary to resolve the claims against her, City Breeze has little ground to complain, as it initially chose not to name Shahi in the litigation despite her status as the owner of title to the Shoreham Property and first sought a default judgment without adding her as a party.

We conclude that the trial court acted within its discretion in finding sufficient diligence.

2. Shahi's Motion Was Not Barred Under the Doctrine of Unclean Hands

City Breeze claims that Shahi was precluded under the equitable doctrine of unclean hands from seeking to set aside the default because she testified inconsistently about an issue concerning City Breeze's underlying claim against the Bank Defendants. In the declaration she executed in July 2013, Shahi testified that she had "personally or my son, Anthony Mir, at my request, authorization, knowledge, and consent, signed some or all" of the trust deeds that purported to grant an interest in the Shoreham Property to the Bank Defendants. City Breeze alleged that Shahi's signatures were forged. At the hearing in July 2014 on Shahi's motion to set aside the default, Shahi stipulated that she did not sign the trust deeds and testified that she did not authorize her son to sign her name to loan applications or to borrow any money involving the Shoreham Property. The trial court rejected City Breeze's unclean hands argument below that Shahi had "committed perjury" with respect to her apparently inconsistent testimony on this topic.[7]

The parties dispute whether the defense of unclean hands applies to an equitable motion to set aside a default judgment. We need not decide that issue because, even if the defense is

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[7] BONY submitted a responsive brief in this appeal directed to the question whether City Breeze is procedurally barred from raising the issue of the possible forgery of the trust deeds at this point in the litigation. That question is not relevant to our resolution of the unclean hands issue, and we therefore do not address it.

applicable, the trial court acted within its discretion in rejecting it here.[8]

For the defense of unclean hands to bar relief, the alleged misconduct " 'that brings the unclean hands doctrine into play must relate directly to the cause at issue.' " (*Jay Bharat Developers, Inc. v. Minidis* (2008) 167 Cal.App.4th 437.) In *Jay Bharat*, the appellant, a Red Brick Pizza franchisee, sued the franchisor, alleging fraud in the inducement of the franchise agreement. The franchisor cross-claimed for alleged breach of the franchise agreement, and the trial court issued a preliminary injunction pursuant to the cross-complaint precluding the franchisee from using Red Brick trademarks or from holding itself out as a Red Brick franchisee. The appellate court upheld the preliminary injunction. The court rejected the franchisee's unclean hands defense to the injunction, which was based upon the franchisor's alleged fraud in inducing it to enter the franchise agreement. The court held that this alleged fraud was relevant to the franchisee's damages claim but was not sufficiently related to the requested injunctive relief to implicate the defense of unclean hands. (*Id.* at pp. 445–446.)

Similarly, here, Shahi's alleged inconsistent testimony related to an issue separate from her motion to seek relief from the default judgment. That testimony concerned City Breeze's

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[8] There appears to be disagreement as to whether the abuse of discretion or the substantial evidence standard applies to appellate review of a trial court ruling on the unclean hands defense in situations where the defense may legally be raised. (See *Brown v. Grimes* (2011) 192 Cal.App.4th 265, 275.) The trial court's ruling here is supported under either of those deferential standards.

underlying claim against the Bank Defendants based on the allegation that the trust deeds under which they claimed an interest in the Shoreham Property were forged and therefore invalid. That claim did not "relate directly" to the question of the validity of service involved in Shahi's motion to seek relief from the default judgment.

In its reply brief, City Breeze argues for the first time that Shahi's alleged unclean hands affect her ability to show that she has a meritorious case. This argument serves only to show that, at most, Shahi's alleged inconsistent testimony relates to the merits of the underlying claims and not to Shahi's motion to set aside the default. City Breeze did not argue in its opening brief that Shahi failed to show a meritorious defense, and it has therefore forfeited the argument on appeal. (*Baugh v. Garl* (2006) 137 Cal.App.4th 737, 746 ["Ordinarily, contentions not raised in appellant's opening brief are deemed waived"].)[9] In any event, the unclean hands doctrine provides a defense, not a theory of relief, and could not be used affirmatively by City Breeze in support of its claims against Shahi. (*Brown v. Grimes*, *supra*, 192 Cal.App.4th at p. 284.) Shahi was not required to address possible *defensive* claims by City Breeze to show that she had a meritorious defense to City Breeze's claims against her.

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[9] Shahi submitted a declaration along with her motion to set aside the default denying that she agreed to sell the Shoreham Property to City Breeze. City Breeze does not argue on appeal that this statement was insufficient to show a meritorious defense. (See *Rappleyea*, *supra*, 8 Cal.4th at p. 983 ["Ordinarily a verified answer to a complaint's allegations suffices to show merit"].)

DISPOSITION

The trial court's order setting aside the default judgment against Aziza Shahi is affirmed. Shahi is entitled to recover costs on appeal from City Breeze et al. Bank of New York Mellon et al. shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

LUI, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.