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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

DALE MARTIN et al., Plaintiffs and Respondents, v. LEON BELLISSIMO, Defendant and Appellant.	B268443 (Los Angeles County Super. Ct. No. BC571699)

APPEAL from a judgment of the Superior Court of Los Angeles County, Yvette M. Palazuelos, Judge. Reversed and remanded.

Law Offices of Steven Rein and Steven Rein for Defendant and Appellant.

Law Offices of Wayne M. Abb and Wayne M. Abb for Plaintiffs and Respondents Dale Martin, Lana Smith and Lonnie Martin.

Leon Bellissimo appeals the trial court's order denying his motion to set aside the default and default judgment for $56,499.04 entered against him personally in favor of Dale Martin, Lana Smith and Lonnie Martin, the owners of real property leased by Bellissimo and/or the company he owned and operated, Burbank Kawasaki, Inc. Bellissimo contends on appeal, as he did in the trial court, that he did not have actual notice of the lawsuit in time to defend the action and that relief from default was therefore warranted under Code of Civil Procedure section 473.5 (section 473.5). The trial court in denying Bellissimo's motion focused solely on the adequacy of substituted service of the summons and complaint at Bellissimo's business address and failed to consider his contention regarding the lack of actual notice. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Unlawful Detainer Action, Default and Default Judgments*

Dale Martin, Lana Smith and Lonnie Martin (collectively "property owners") filed an unlawful detainer action on February 6, 2015, and a first amended complaint for unlawful detainer on February 17, 2015, against Leon Bellissimo individually, Leon Bellissimo dba Burbank Motors and Burbank Kawasaki, Inc. The operative first amended complaint alleged Bellissimo and the corporation operating his business were in possession of the premises located at 1329 North Hollywood Way in Burbank pursuant to a written five-year lease agreement dated December 10, 2005, which the parties had thereafter extended through July 1, 2015. The first amended complaint also alleged Bellissimo and his corporation had been served by substituted service at the business property with a three-day

notice to pay back rent (then $39,531.04) or to quit and deliver up possession of the property.

On March 9, 2015 the property owners filed a request for entry of default on the first amended complaint and entry of a clerk's judgment for restitution of the premises and issuance of a writ of execution on the judgment. The proof of service of the summons and complaint included with the request for entry of default indicated the registered process server had left copies of the documents with an individual named Marcelo Hernandez at the business property on February 22, 2015 and thereafter mailed copies of the documents to Bellissimo, using the address of the business property. The request for entry of default was served by mail on Bellissimo and his corporation at the address of the business property. For reasons not apparent from the record, the request for entry of default was denied.

A second request for entry of default was filed by the property owners on March 20, 2015, again seeking only entry of a clerk's judgment for restitution of the property and issuance of a writ of execution on that judgment. The request was also served by mail to the address of the business property. Default was entered on March 20, 2015, and a clerk's judgment by default for possession only was filed March 25, 2015. The sheriff posted the premises on April 27, 2015 and conducted the lock-out on May 5, 2015.

The property owners thereafter filed a request for entry of a default and a court judgment for unpaid rent. The request was supported by a declaration from one of the property owners. On August 18, 2015 the court entered judgment in favor of the property owners and against Bellissimo and the corporation operating the business in the sum of $56,499.04: $39,531.04 plus

$14,143.00 in rent through the May 5, 2015 lock-out date; $2,150.00 in attorney fees, as provided in the parties' lease agreement; and $675.00 in costs.

2. *The Motion To Set Aside the Default and Default Judgments*

On September 4, 2015 Bellissimo and Burbank Kawasaki moved to set aside the default and default judgments on the ground service of the summons did not result in actual notice in time to permit them to defend the action (§ 473.5). Bellissimo and the corporation also alleged there were procedural defects and irregularities in the matter that effectively denied them due process of law.

In a declaration in support of the motion, Bellissimo explained he was the president and chief executive officer of Burbank Kawasaki, Inc., which had owned and operated a Kawasaki motorcycle dealership on the property at 1329 North Hollywood Way, Burbank. According to Bellissimo, he signed the lease agreement with the property owners on behalf of the corporation, not personally. In late 2013 or early 2014 the corporation lost its franchise with Kawasaki due to poor sales. It continued to do business but finally closed in November 2014 after it lost its state motor-vehicle sales license. Thereafter, Bellissimo, who testified he had been spending less and less time at the property, worked with the property owners in an attempt to find a buyer or lessee to replace Burbank Kawasaki. In late 2014 or early 2015 Bellissimo posted a large notice in the window of the structure on the business property advertising it for sale or lease. The notice contained Bellissimo's personal contact information, including his home telephone number, address and email. Bellissimo's contact information was also included on a

credit application he completed when the property lease was executed in 2005.

Bellissimo declared he was unaware of the eviction proceedings until late April or early May 2015 when the sheriff's notice to vacate was posted on the premises. Bellissimo had not been personally served with the three-day notice or the summons and complaint or first amended complaint even though his home contact information was available to the property owners, and he stated the person allegedly served at the property never notified him or gave him copies of the various documents. Bellissimo also declared he did not know "Marcello Fernandez," the individual purportedly served with the three-day notice at the business property, or "Marcelo Hernandez," the person purportedly served with the summons and complaint.

In addition, when he first learned of the lawsuit, Bellissimo believed it was for possession only. Because Burbank Kawasaki was by then out of business, Bellissimo had no objection to the judgment for possession. However, when he learned in connection with the August 18, 2015 hearing that the property owners not only were attempting to recover back rent but also were asserting he was personally liable for the sums due, Bellissimo hired counsel to promptly seek to set aside the default and default judgments.[1] A proposed answer to the complaint was

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[1] In their motion Bellissimo and Burbank Kawasaki also argued the three-day notice was defective because it failed to itemize the amount of rent due on a month-by-month basis. In addition, they asserted the property owners had improperly refused to allow them access to personal property left on the premises in violation of the requirements of Code of Civil Procedure section 1174.

attached to the motion. It asserted, among other defenses, that only Burbank Kawasaki, not Bellissimo personally, was a proper defendant. It also alleged an accord and satisfaction with respect to past-due rent.

In their opposition papers the property owners contended they had properly effected substituted service on Burbank Kawasaki and Bellissimo[2] and emphasized that, while Bellissimo's declaration stated he had gradually been spending less and less time at the business site after his business failed, the negative pregnant of that statement meant he continued to be at the property at least some of time during the relevant period "even if only to inventory and/or dispose of the personal property remaining on the premises." They argued Bellissimo was a proper party to the lawsuit, noting the lease names both Bellissimo individually and Burbank Kawasaki as lessees. Finally, the property owners also argued Burbank Kawasaki's corporate status had been suspended and, therefore, it lacked capacity to defend the unlawful detainer action.

In a reply declaration Bellissimo insisted he was the only one who had a key to the premises. If someone was there at the times the three-day notice and summons and complaint were served, it was neither Bellissimo nor anyone who had his permission to be there. However, because the reply papers were not timely filed, the trial court did not consider them.[3]

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[2] In a footnote the property owners suggested the same individual was served with both the three-day notice and the summons and complaint and "Fernandez," rather than "Hernandez," was a typographical error.

[3] The hearing on the motion was originally scheduled for Friday, October 9, 2015. The reply papers, due Friday, October 2,

3. *The Trial Court's Ruling*

After hearing oral argument the trial court denied the motion to set aside the default and default judgments, adopting its written tentative ruling as the final ruling of the court.[4] Although quoting section 473.5 and reciting the well-established principle that "[i]t is the policy of the law to favor, whenever possible, a hearing on the merits," the court failed to consider Bellissimo's principal argument that the substituted service effected by the property owners did not result in actual notice in time to defend the action. Instead, after summarizing the parties' papers, in a single paragraph the court ruled without elaboration that Bellissimo and Burbank Kawasaki had not "raise[d] any doubts as to the means by which service was effected" and had not rebutted the presumption under Evidence Code section 647 that service was proper and occurred in the manner stated in the return of the registered process server; Bellissimo had cited no authority for his argument he should have been served at his home address rather than at the business property; Burbank Kawasaki was a suspended corporation that could not defend the action; and Bellissimo's argument he was not a proper party (a defense asserted in the proposed answer and not a ground advanced for vacating the default and default judgments) failed because, by defaulting, the allegations of the first amended complaint were presumed to be true.

2015 (Code Civ. Proc., § 1005, subd. (b)), were not filed and served until Tuesday, October 6, 2015. Although the court continued the hearing on its own motion to November 3, 2015, it nonetheless ruled the reply papers would not be considered.

[4] The hearing on the motion was not reported.

Bellissimo filed a timely notice of appeal from the judgment entered August 18, 2015 and the order denying his motion to vacate the default and default judgment. Burbank Kawasaki has not appealed.

DISCUSSION

1. *Governing Law and Standard of Review*

Section 473.5 authorizes the trial court to provide relief from a default or default judgment for lack of actual notice. Section 473.5, subdivision (a), provides, "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 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."

The provision requires the defaulting party to serve and file the notice of motion within a reasonable time but no later than two years after entry of the default judgment or 180 days after service of a written notice of entry of the default or default judgment, whichever is earlier. Section 473.5, subdivision (b), further requires the moving party to provide "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." When these conditions are met, the trial court "may set aside the default or default judgment on whatever terms as may be just and allow the party to defend the action." (§ 473.5, subd. (c).)

We review the trial court's order granting or denying a motion for relief from default and its findings regarding actual notice for abuse of discretion. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478; *Ramos v. Homeward Residential, Inc.* (2014)

223 Cal.App.4th 1434, 1440-1441, fn. 5; *Ellard v. Conway* (2001) 94 Cal.App.4th 540, 547.) When the evidence is in conflict and "the trial court could reasonably conclude the [defendants] had actual notice in time to defend," the trial court has discretion to deny the motion for relief from default. (*Ellard*, at p. 548.) Because of the policy favoring a hearing on the merits, however, "a trial court order denying relief is scrutinized more carefully than an order permitting trial on the merits." (*Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233.) "[W]hen a party in default moves promptly to seek relief, very slight evidence is required to justify a trial court's order setting aside a default." (*Shamblin*, at p. 478.)

2. *The Trial Court Abused Its Discretion in Denying Bellissimo's Motion To Set Aside the Default and Default Judgments*

Bellissimo fully satisfied all requirements for relief from default under section 473.5. His motion was filed well within the time constraints imposed by section 473.5, subdivision (a), and a reasonable time after he learned the property owners asserted he was personally liable for back rent on the business property. His declaration under penalty of perjury attested to his lack of actual notice of the proceedings until after his default had been entered on March 20, 2015—that is, without time to defend the action—and explained why, even if the property owners had properly effected substituted service, he had not learned about the lawsuit any earlier. In addition, Bellissimo's declaration demonstrated his lack of notice was not due to avoidance of service or inexcusable neglect. To the contrary, he explained, the property owners had his contact information and could have personally served him at his residence had they wished to do so. Unless

some aspect of Bellissimo's showing was refuted, the trial court should have granted him relief. (See *Shamblin v. Brattain*, *supra*, 44 Cal.3d at p. 478.)

The property owners fail to justify the trial court's unexplained denial of the section 473.5 motion. As they had in the trial court, on appeal the property owners emphasize that Bellissimo admitted he had learned of the unlawful detainer action as early as late April 2015 when the sheriff posted the property, yet elected to do nothing because he purportedly believed he would not be personally responsible for back rent (a belief that was unjustified, according to the property owners). But Bellissimo's default had been entered a month earlier. At the point the property was posted, all Bellissimo could do was attempt to set aside or vacate the default. Accordingly, his inaction from late April until September 4, 2015, when his motion was filed, is significant only if that delay necessarily means the motion was not filed within a reasonable time after notice of entry of the default. The trial court made no such finding (indeed, no findings at all with regard to section 473.5), and we decline to do so in the first instance on appeal.

The property owners also attempt to make much of the fact Bellissimo declared only that he was spending less and less time at the business, thereby suggesting he spent some time at the property and conducted some business there even after it was closed to the public. Whatever that inference may indicate for the effectiveness of the substituted service utilized by the property owners, however, it does not rebut Bellissimo's declaration that he did not have actual notice of the lawsuit prior to entry of the default.

Finally, with respect to actual notice and section 473.5 the property owners point out (as they had in the trial court through a request for judicial notice) that in a federal lawsuit filed by Kawasaki USA against Bellissimo in 2014, Bellissimo's default had been taken and he moved to set it aside, contending he had not been personally served at his home as recited in the process server's proof of service. On the day in question (during the weekend before July 4, "typically among the busiest of the year"), Bellissimo stated, he had been working at the motorcycle dealership from early morning until the evening. Thus, the property owners speculate, "It appears to be Bellissimo's *modus operandi*. When he is served at home, he claims he should have been served at the business; when he is served at the business, he claims he should have been served at home." But the process server in this case did not claim he personally served Bellissimo; and there is no suggestion, let alone evidence, that Marcello Fernandez or Marcelo Hernandez was actually Bellissimo. While we agree Bellissimo did not rebut the presumption under Evidence Code section 647 and the return of the registered process server established the facts stated in the return, those facts fail to demonstrate either that Bellissimo had actual notice of the action prior to entry of his default or that he deliberately avoided service.

On this record it was an abuse of discretion not to grant the relief requested.

DISPOSITION

The order denying Bellissimo relief under section 473.5 is reversed, and the cause remanded to the trial court with directions to enter a new and different order vacating the default and setting aside the default judgment for rent due against Bellissimo and to conduct further proceedings not inconsistent with this opinion. Bellissimo is to recover his costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

SMALL, J.*

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