Filed 2/27/18 Robers v. Ruehr CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

KENNETH ROBERTS, Plaintiff and Appellant, v. OLIVER WOLFGANG RUEHR, Defendant and Respondent.	B277385 (Los Angeles County Super. Ct. No. BC552128)

Appeal from an order of the Superior Court of Los Angeles County, Mark V. Mooney, Judge. Affirmed.

Law Offices of Kevin Faulk, Kevin Faulk; Bramson, Plutzik, Mahler & Birkhaeuser, Robert M. Bramson, and Jennifer S. Rosenberg for Plaintiff and Appellant.

Wang, Shin & Associates, Christian Shin, Willie Wang; and Daniel R. Fisher for Defendant and Respondent.

Appellant Kenneth Roberts (Roberts) appeals from an order granting the motion of respondent Oliver Wolfgang Ruehr (Ruehr) to set aside, pursuant to Code of Civil Procedure sections 473, subdivision (b) and 473.5, a default and a default judgment entered against Ruehr. After a hearing, the trial court found service was defective and granted the motion. The hearing was unreported and the trial court denied Roberts's motion for a settled statement. Roberts failed to challenge the denial of his motion by means of a writ petition. He thus has not provided us with a record adequate for our review. Because we must presume that the court's findings, both express and implied, support its ruling, we affirm the order.

PROCEDURAL AND FACTUAL BACKGROUND

In December 2013, Roberts purchased from Ruehr a 2011 Mercedes CL550 automobile at a cost of $51,400. In July 2014, after unsuccessful efforts to resolve a dispute with Ruehr arising from the sale of the vehicle, Roberts filed a lawsuit alleging two causes of action, violation of the Consumers Legal Remedies Act (Civ. Code, § 1750 et seq.) and breach of implied warranty of merchantability (Civ. Code, § 1790 et seq.).

After seven unsuccessful attempts to personally serve Ruehr with the summons and complaint, Roberts who believed that Ruehr was licensed by the Department of Motor Vehicles (DMV) to sell automobiles at wholesale, sought to effect service pursuant to Vehicle Code section 11710, subdivision (d). That subdivision authorizes service of process on a licensed and bonded automobile dealer by means of substitute service on the director of the DMV "in any action, or actions, which may thereafter be commenced against [said automobile dealer], arising out of any claim for damages . . . by reason of the violation

of . . . any of the terms and provision of this code." Roberts mailed to the DMV copies of the summons and complaint, after which a DMV representative acknowledged in writing that the documents "have been served upon the Director of Motor Vehicles on behalf of [Roberts]." Roberts also mailed copies to Ruehr.

Ruehr did not respond to the complaint. After a number of unsuccessful attempts to obtain Ruehr's default, Roberts succeeded on February 10, 2015. And, on October 8, 2015, the court entered a default judgment in favor of Roberts in the total sum of $166,731.50, which included $100,000 in punitive damages.

On June 13, 2016, approximately eight months after entry of judgment, Ruehr filed a motion to set aside the default and default judgment, and for leave to defend the action. The motion alleged, among other things, that service was defective in that Roberts erroneously relied on Vehicle Code section 11710, subdivision (d), which did not apply to Ruehr; that Ruehr has meritorious defenses to Roberts's lawsuit; and that Ruehr's failure to respond was due to his mistaken belief that he was not served. Ruehr attached to the motion as an exhibit his proposed answer to the complaint.

Roberts opposed the motion, contending that it was filed more than six months after entry of judgment and thus was untimely; that the summons and complaint were properly served by mail on the DMV; that Ruehr had actual notice of the lawsuit by means of service upon the DMV; and that Ruehr does not qualify for relief under Code of Civil Procedure section 473.5 because of his actual notice, avoidance of service, and inexcusable neglect.

The motion was heard on July 6, 2016 without the presence of a court reporter. The court's minute order states: "The court indicates it has read and reviewed the material submitted in connection with the above motion, hears [from] counsel and rules as follows: The [c]ourt finds defective service. The motion to set aside default and default judgment is granted. . . . Defendant is to file his answer."

On August 31, 2016, Roberts timely filed a notice of appeal from the July 6 order. On his notice designating the record on appeal filed the same day, Roberts indicated that he elected to use an appendix in lieu of a clerk's transcript. Further, he elected to proceed without a reporter's transcript and acknowledged his understanding that without "a record of the oral proceedings in the superior court . . . the Court of Appeal will not be able to consider what was said during those proceedings in determining whether an error was made in the superior court proceedings."

One week after filing his notice designating the record on appeal, Roberts filed an amended designation stating that he wished to proceed by means of a settled statement. He thereafter filed with the trial court three motions for a settled statement, which were all denied. He requested to augment the record on appeal with documentation showing his attempts to obtain a settled statement and, after that motion was denied, asked that we take judicial notice of his attempts to obtain a settled statement, which we now deny. He did not, however, file a writ petition requesting that we order the trial court to prepare a settled statement.

DISCUSSION

Ruehr urges us to affirm the trial court's order on the ground that Roberts cannot demonstrate error in the absence of a reporter's transcript or settled statement. Ruehr is correct. "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 (*Randall*).) Indeed, " '[a] judgment or order of the lower court is *presumed correct.* All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.' " (*Denham* v. *Superior Court* (1970) 2 Cal.3d 557, 564.)

California Rules of Court, rules 8.130 and 8.137, permit a party to file a motion for a settled statement. Where a party does not have access to a verbatim transcript of the oral proceedings in the trial court, the settled statement provides an alternative. The rules governing settled statements "require[] the parties and the court to create an adequate, accurate record of the trial or ruling on appeal." (*Randall, supra*, 2 Cal.App.5th at p. 931.)

In *Randall,* as in the instant case, there was no court reporter during trial, and after trial the trial court denied the plaintiff's motion for a settled statement. (*Randall*, *supra*, 2 Cal.App.5th at p. 932.) The plaintiff failed to seek timely review of the denial. (*Ibid.*) Thus, although it determined that the trial court abused its discretion in denying the motion, the reviewing court concluded that "[b]ecause the issue has been forfeited, and because the record before us is insufficient to permit review of the judgment, we affirm." (*Ibid.*)

And so it is here. The trial court granted Ruehr's set aside motion on the ground of defective service. The trial court then

denied Roberts's motion for a settled statement and Roberts failed to seek writ review. Although Roberts attempted to raise the issue in his original opening brief and original appendix, which this court rejected for failure to comply with court rules, and although Roberts made additional efforts to bring before this court his attempts to obtain a settled statement, the fact remains that Roberts did not pursue the correct avenue for relief.

Furthermore, it is of no moment that Roberts may have attempted to raise the issue in his original opening brief, which he informs us was done "[f]ollowing the dictates of *Randall*." True, the *Randall* court, citing *Western States Const. Co*. v. *Municipal Ct.* (1951) 38 Cal.2d 146 and *Keller* v. *Superior Court* (1950) 100 Cal.App.2d 231, stated that "[t]o preserve the issue of the denial for appeal, the appellant may seek writ review at the time of the denial, *or raise the denial in the opening brief on appeal*." (*Randall*, *supra*, 2 Cal.App.5th at pp. 935-936, italics added.) Because the plaintiff in *Randall* did not raise the issue in her opening brief, however, and because both of the cases cited are silent with respect to the prospect of raising the issue in the opening brief, the court's statement is dictum that has not been adopted by any subsequent case.[1] In any event, we fail to see how raising the issue in the opening brief would promote the interests of justice. Indeed, inasmuch as a significant amount of time has already elapsed by the time briefing in the appellate

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[1] In *Rhue v. Superior Court* (2017) 17 Cal.App.5th 892, the plaintiff, unlike her counterpart in *Randall*, sought writ review of the trial court's denial of her motion for a settled statement. Our colleagues in Division Seven, relying on its own decision in *Randall,* issued a writ of mandate and ordered the preparation of a settled statement.

court is completed, it would be unfair to the trial court and to the parties, particularly the prevailing defendant, to go back to square one and start over.

In sum, in the absence of a reporter's transcript or settled statement, we are not privy to the reason for the court's decision. We only know that the court "read and reviewed the material submitted in connection with the above motion [and] hear[d] [from] counsel." We do not know if counsel for either party offered any further evidence, explanation, or argument concerning the propriety of service upon the DMV. The trial court could have found that the judgment was void under Code of Civil Procedure section 473, subdivision (d),[2] based on Ruehr's contention in his moving papers that service was defective because Vehicle Code section 11710, subdivision (d), did not apply to him. Accordingly, we must affirm the order.

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[2] Code of Civil Procedure section 473, subdivision (d) states, in pertinent part: "The court . . . may, on motion of either party after notice to the other party, set aside any void judgment or order." A judgment may be set aside under this subdivision even after the six-month time limitation set forth in section 473 has expired. (See, e.g., *Cruz* v. *Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 496.)

DISPOSITION

The order setting aside Ruehr's default and the ensuing default judgment is affirmed. Ruehr is awarded his costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

BENDIX, J.*

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