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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

EDWIN B. ROMERO, Plaintiff and Appellant, v. RAYMOND HONANIAN, Defendant and Respondent.	B283072 (Los Angeles County Super. Ct. No. BC532984)

APPEAL from an order of the Superior Court of Los Angeles County, Michael L. Stern, Judge. Affirmed.

Arbat and Deian V. Kazachki for Plaintiff and Appellant.

Asbet A. Issakhanian for Defendant and Respondent.

Plaintiff Edwin B. Romero appeals from an order granting defendant Raymond Honanian's motion to set aside the default and default judgment entered against him. Romero contends the motion was erroneously granted because the default and default judgment were not void on their face and Honanian's motion was otherwise untimely. Because Romero's service of process by publication on Honanian was ineffective, the default and default judgment were void. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Complaint, Service by Publication, and Entry of the Default and Default Judgment*

On January 14, 2014 Romero filed a verified complaint for damages against Honanian, H.A.R. Enterprises, Inc. (H.A.R.), and 20 Doe defendants alleging causes of action for breach of contract, breach of fiduciary duty, and unjust enrichment. The complaint alleged that on March 30, 2012 Romero entered into an agreement with H.A.R. and Honanian to sell them the Cafe Hill restaurant, located at 632 South Hill Street in Los Angeles, for $45,000. The complaint further alleged Romero performed all obligations under the contract, but when H.A.R. and Honanian took possession of Cafe Hill on December 1, 2012, they failed to deposit the remaining balance of $43,800 into escrow. The complaint sought $45,000 in damages plus interest, costs, and further appropriate relief.

On April 18, 2014 Romero filed an application for service by publication. According to the declaration of due diligence attached to Romero's application, Siavosh Nehoray, a registered process server retained by Romero's attorney, attempted without

success to serve Honanian three times at his residence and three times at H.A.R.'s place of business as listed with the California Secretary of State. Nehoray attached to his declaration a copy of an entry on the California Secretary of State's Web site identifying Honanian as agent for service of process on H.A.R., and listing H.A.R.'s address as 1600 Virginia Avenue in Glendale, California.

Nehoray's declaration for service on Honanian stated that 1600 Virginia Avenue was a residence, and on January 28, 2014 at 10:00 a.m. and on February 5, 2014 at 1:30 p.m. Nehoray rang the doorbell, but no one answered or appeared to be home. On the third attempt, a female "residen[t] . . . of the house" informed Nehoray that Honanian had never lived there. Nehoray provided a physical description of the female in his declaration of diligence. Romero filed a similar declaration of due diligence for service on H.A.R. at its business address.

Nehoray also declared he attempted to serve Honanian at his place of residence at a specified address on Lexington Drive, apartment 214. The declaration stated on March 12, 2014 at 10:00 a.m. Nehoray could not get into the building and on March 14, 2014 at 1:30 p.m. no one answered the door bell. On the third attempt made on March 16, 2014 at 6:00 p.m., Nehoray spoke to a "female residen[t] who had no knowledge of Raymond Honanian."

The trial court granted Romero's application and authorized service by publication on H.A.R. and Honanian in a Glendale newspaper. On June 13, 2014 Romero filed a proof of service of summons and complaint, including a declaration attesting the summons had been published in the designated paper once per week during each of the four preceding weeks.

On August 28, 2014 Romero filed a request for entry of default and default judgment. Romero also voluntarily dismissed the Doe defendants. The same day the court clerk entered a default and the trial court signed a default judgment against H.A.R. and Honanian in the amount of $54,890.22.[1]

B. *Honanian's Motion To Set Aside the Default and Default Judgment*

On February 16, 2017 Honanian filed a motion to set aside the default and default judgment and to quash service of summons on four grounds: (1) inadvertence, surprise, mistake, or excusable neglect (Code Civ. Proc.,[2] § 473, subd. (b)); (2) lack of actual notice (§ 473.5); (3) lack of personal jurisdiction (§ 418.10); and (4) a void order and judgment (§ 473, subd. (d)).[3] Honanian argued the default and default judgment were void for ineffective service of process. In his declaration filed in support of the motion, Honanian stated he "was never served with the complaint and just found out about this lawsuit when [he] recently wanted to refinance [his] property." Honanian noted

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[1] H.A.R. has not challenged the validity of the default and default judgment entered against it, or otherwise appeared in this action. We express no view regarding the validity of the default and default judgment entered against H.A.R.

[2] All further statutory references are to the Code of Civil Procedure.

[3] Section 473, subdivision (d), provides that "[t]he court . . . may, on motion of either party after notice to the other party, set aside any void judgment or order." Because we conclude the trial court properly granted relief under section 473, subdivision (d), we do not reach the alternative grounds for Honanian's motion.

that Romero "very well knew [Honanian] was at the Café Hill restaurant . . . but never tried to serve [him] at that location," and that Romero had not tried to locate him through DMV records, mail him a copy of the lawsuit, or search for him on the Internet. Honanian also filed a declaration from Armen Momjian, who stated he lived at 1600 Virginia Avenue. Momjian declared that no one came to 1600 Virginia Avenue in 2014 or since that time asking for Honanian and that no one who lived at the residence in 2014 matched the process server's description of a female resident.

Romero opposed Honanian's motion, arguing service by publication was effective, the default and default judgment were not void on their face, and Honanian's motion was untimely. Romero also argued Honanian knew of the default judgment at least as of February 2016 when Honanian and Romero's attorney discussed by telephone settling the case for "a fraction" of the judgment. Romero claimed he and Honanian also had a phone conversation about settlement around the same time. Romero attached declarations attesting to these phone conversations.

In his declaration in support of his reply, Honanian admitted speaking with Romero and Romero's attorney in 2016, but denied learning of the lawsuit through those conversations. According to Honanian, they only spoke about whether Honanian still owed Romero money for the restaurant.

At a hearing on April 10, 2017 the trial court granted Honanian's motion and set aside the August 28, 2014 default and default judgment. The trial court ordered Honanian to file an answer. Romero timely appealed.

DISCUSSION

A. *The Order Granting Honanian's Motion To Set Aside the Default and Default Judgment Is Appealable*

Honanian contends we lack jurisdiction over the appeal under the "one final judgment rule." We disagree.

"An order vacating a default and default judgment is appealable as an order after final judgment." (*Manson, Iver & York v. Black* (2009) 176 Cal.App.4th 36, 42 [appeal properly taken from order vacating default judgment against defendant six years after entry]; accord, *Shapiro v. Clark* (2008) 164 Cal.App.4th 1128, 1137 ["a postjudgment denial (or grant) of relief from the default and the judgment" is appealable as "a special order after judgment on a statutory motion to set aside the judgment"]; see § 904.1, subd. (a)(2) [appeal may be taken from an order made after an appealable final judgment].)

B. *Standard of Review*

"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*); accord, *Nixon Peabody LLP v. Superior Court* (2014) 230 Cal.App.4th 818, 822.) As the *Pittman* court explained, "[T]he 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.'" (*Pittman*, at p. 1020.)

As part of our independent review, we examine the trial court's ruling, not its reasoning, and may affirm the ruling on any ground supported by the record. (*Young v. Fish & Game Com.* (2018) 24 Cal.App.5th 1178, 1192-1193 ["it is a settled appellate principle that if a judgment is correct on any theory, the appellate court will affirm it regardless of the trial court's reasoning"]; *Lunada Biomedical v. Nunez* (2014) 230 Cal.App.4th 459, 479 ["'[a] reviewing court will uphold a judgment if it is correct for any reason "'regardless of the correctness of [its] grounds"'"].)

"'The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason.'" (*IIG Wireless, Inc. v. Yi* (2018) 22 Cal.App.5th 630, 646; accord, *Austin v. Los Angeles Unified School Dist.* (2016) 244 Cal.App.4th 918, 929.)

C. *Honanian's Motion To Set Aside the Default and Default Judgment Under Section 473, Subdivision (d), Was Timely*

Romero contends Honanian's motion was untimely because it was filed over two-and-a-half years after entry of the default and default judgment. Honanian contends his motion was timely under section 473, subdivision (d), because the default and default judgment were void on their face, allowing for direct attack at any time. Honanian is correct.

If a court "lack[s] fundamental authority over the subject matter, question presented, or party, . . . its judgment [is] void." (*In re Marriage of Goddard* (2004) 33 Cal.4th 49, 56; accord, *Ramos v. Homeward Residential, Inc.* (2014) 223 Cal.App.4th 1434, 1442 (*Ramos*) [default and default judgment void for lack of proper service on corporate agent]; *Carr v. Kamins* (2007)

151 Cal.App.4th 929, 933 (*Carr*) [default judgment void for ineffective service by publication].)

"There is no time limit to attack a judgment void on its face" under section 473, subdivision (d). (*Pittman, supra*, 20 Cal.App.5th at p. 1021; accord, *OC Interior Services, LLC v. Nationstar Mortgage, LLC* (2017) 7 Cal.App.5th 1318, 1327 ["A judgment that is void on the face of the record is subject to either direct or collateral attack at any time."].) "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." (*Pittman*, at p. 1021; accord, *OC Interior Services, LLC*, at p. 1327.) Where, as here, "the complaint is not answered by any defendant," the judgment roll includes "the summons, with the affidavit or proof of service; the complaint; the request for entry of default . . . , and a copy of the judgment . . . ." (§ 670.)

Honanian argued in his motion that the record demonstrated Romero's efforts to locate Honanian before attempting to effect service by publication were inadequate, rendering the service ineffective and the default and default judgment void for lack of personal jurisdiction. Because Honanian's motion argued the default and default judgment were void on their face, his motion was timely. (*Rockefeller Technology Investments (Asia) VII v. Changzhou SinoType Technology Co., Ltd.* (2018) 24 Cal.App.5th 115, 137 [setting aside default judgment 15 months after entry for lack of proper service on foreign company]; *Pittman, supra*, 20 Cal.App.5th at p. 1021 [challenge to vexatious litigant order entered after voluntary dismissal was timely although brought nearly five years after entry where appellant argued trial court lacked jurisdiction to

issue order and jurisdictional facts were ascertainable from the record]; *Ramos, supra*, 223 Cal.App.4th at p. 1442 [challenge to default and default judgment for lack of proper service timely although brought more than six months after entry].)

D. *The Default and Default Judgment Were Void Because Service by Publication Was Ineffective*

"'When jurisdiction is sought to be established by constructive service, the statutory conditions for such service must be strictly complied with or the judgment is subject to [direct or] collateral attack.'" (*Carr, supra*, 151 Cal.App.4th at p. 936; accord, *Olvera v. Olvera* (1991) 232 Cal.App.3d 32, 41 ["When substituted or constructive service is attempted, strict compliance with the letter and spirit of the statutes is required."].) Romero's failure adequately to comply with the requirements for service by publication under section 415.50 renders the default and default judgment void for lack of personal jurisdiction over Honanian. (*American Express Centurion Bank v. Zara* (2011) 199 Cal.App.4th 383, 387 ["'a default judgment entered against a defendant who was not served with a summons in the manner prescribed by statute is void'"]; *Carr*, at p. 937 ["Given that the service was ineffective, the resulting judgment is invalid . . . ."].)

Service by publication is proper only upon a showing that "the party to be served cannot with reasonable diligence be served in another manner . . . ." (§ 415.50.) "'The term "reasonable diligence" as used to justify service by publication "denotes a thorough, systematic investigation and inquiry conducted in good faith . . . ." [Citation.] Where the party conducting the investigation ignores the most likely means of

finding the defendant, the service is invalid even if the affidavit of diligence is sufficient.'" (*In re Arlyne A.* (2000) 85 Cal.App.4th 591, 598 [Los Angeles County Department of Children and Family Services failed to exercise reasonable diligence in locating father where it failed to call directory assistance for telephone number and could easily have obtained police report containing father's current address]; accord, *Carr, supra*, 151 Cal.App.4th at p. 936 [plaintiff in quiet title action not reasonably diligent where he failed meaningfully to investigate who might be occupying subject premises]; *David B. v. Superior Court* (1994) 21 Cal.App.4th 1010, 1016 [no reasonable diligence where agency knew father was enlisted United States Marines, but failed to contact the Marine Corps].)

Romero's attempts to locate Honanian were inadequate to support issuance of the order authorizing publication. After failing to serve Honanian at H.A.R.'s place of business, Romero's registered process server only made three attempts to serve Honanian at his home, two of which were during the work day. It is unclear from Nehoray's declaration whether on the third attempt the person with whom Nehoray spoke lived in Honanian's unit or merely the building. Nehoray states only that a female resident "had no knowledge of Raymond Honanian."

The declaration does not describe any further attempts to locate Honanian, let alone the thorough and systematic good-faith investigation required by section 415.50's reasonable diligence standard. (See Judicial Council com., 14B pt. 1 West's Ann. Code Civ. Proc. (2016 ed.) foll. § 415.50 ["A number of honest attempts to learn defendant's whereabouts or his address by inquiry of relatives, friends, and acquaintances, or of his employer, and by investigation of appropriate city and telephone

directories, the voters' register, and the real and personal property index in the assessor's office, near the defendant's last known location, are generally sufficient. These are the likely sources of information, and consequently must be searched before resorting to service by publication."]; *Olvera v. Olvera, supra*, 232 Cal.App.3d at p. 42 [diligent search should include "recent inquiries of *all* relatives, friends, and other persons likely to know defendant's whereabouts; searches of city directories, telephone directories, tax rolls, and register of voters; and inquiries made of occupants of all real estate involved in the litigation"].)

Romero does not explain why he was unable to contact Honanian by phone or e-mail, despite the complaint's allegations that they had previously engaged in business dealings. Most glaringly, Romero did not inquire at 632 South Hill Street, the location of the business underlying the dispute between Romero and Honanian. Romero's complaint alleged that "[o]n December 1, 2012 the defendants took possession of the premises [at 632 South Hill Street] along with all the inventories of the business," and that Honanian "has been enriched by receiving the benefit of owning 'Cafe Hill' at the expense of the plaintiff," implying Honanian's continued possession of the business. Under these circumstances, inquiring at Cafe Hill was the most likely means of locating Honanian. Romero's application for service by publication was silent on whether any such inquiry was attempted, rendering it inadequate to satisfy section 415.50's reasonable diligence requirement. (*Carr, supra*, 151 Cal.App.4th at p. 936 [plaintiff "at the least had a duty to make further inquiry [at subject property] before seeking to accomplish service by publication" in quiet title action]; *In re Arlyne A., supra*,

85 Cal.App.4th at p. 598 ["'Where the party conducting the investigation ignores the most likely means of finding the defendant, the service [by publication] is invalid . . . ."].)

Because service by publication was ineffective, the default and default judgment were void.[4]

E. *The Trial Court Did Not Abuse Its Discretion in Setting Aside the Default and Default Judgment*

Having concluded the default and default judgment were void, the trial court had the discretion to grant Honanian's motion to set them aside. (§ 473, subd. (d) ["The court may . . . set aside any void judgment or order."]; *Pittman, supra*, 20 Cal.App.5th at p. 1020 ["'[I]nclusion of the word "may" in the language of 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].'"]; *Ramos, supra*, 223 Cal.App.4th at p. 1444 [affirming trial court's vacatur of default and default judgment for ineffective service of process]; *Strathvale Holdings v. E.B.H.* (2005) 126 Cal.App.4th 1241, 1251-1252 [affirming trial

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[4] Romero's attempt at service by publication also failed to follow the trial court's order authorizing the service method. The trial court expressly ordered a copy of the summons and complaint be mailed to Honanian if his address was ascertained during the publication period, and required a "declaration of this mailing," or alternatively "of the fact that the address was not ascertained." The record does not contain any such declaration. Indeed, the record shows no attempt by Romero at any point to mail the complaint and summons to Honanian at any of his possible addresses, further undermining the validity of the service by publication.

court's vacatur of default judgment where plaintiff failed to establish personal jurisdiction over defendants].)

Romero has failed to meet his burden to show the trial court abused its discretion in setting aside the default and default judgment. Although there was no court reporter at the April 10, 2017 hearing at which the trial court granted Honanian's motion, Romero could have filed on appeal an agreed or settled statement of the proceedings at the hearing. (Cal. Rules of Court, rules 8.134 [agreed statement] & 8.137 [settled statement].) In the trial court, the parties submitted competing declarations as to when Honanian received actual notice of the judgment. To the extent the trial court may have resolved these disputed facts in granting the motion, we have no record on which to assess the propriety of this determination.

On appeal, ""'(1) a judgment is presumed correct; (2) all intendments and presumptions are indulged in favor of correctness; and (3) the appellant bears the burden of providing an adequate record affirmatively proving error.'"" (*Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 996; accord, *Acquire II, Ltd. v. Colton Real Estate Group* (2013) 213 Cal.App.4th 959, 970.) ""'Failure to provide an adequate record on an issue requires that the issue be resolved against appellant.'"" (*Mack v. All Counties Trustee Services, Inc.* (2018) 26 Cal.App.5th 935, 940; accord, *Hotels Nevada, LLC v. L.A. Pacific Center, Inc.* (2012) 203 Cal.App.4th 336, 348 ["By failing to provide an adequate record, appellant cannot meet his burden to show error and we must resolve any challenge to the order against him."].) In the absence of a record showing otherwise, Romero has not carried his burden to show the trial court abused

its discretion in setting aside the void default and default judgment.

DISPOSITION

The order granting Honanian's motion to set aside the default and default judgment is affirmed. Honanian is entitled to costs on appeal.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

SEGAL, J.