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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

FIROUZEH GHAFFARPOUR et al.,	B290188
Plaintiffs and Respondents,	(Los Angeles County Super. Ct. No. BC375937)
v.	
SADEGH NEMATPOUR,	
Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael J. Raphael, Judge. Reversed and remanded with directions.

Sadegh Nematpour in pro. per. for Defendant and Appellant.

Mazur & Mazur and Janice R. Mazur; Aroustamian & Associates and Ara Aroustamian for Plaintiffs and Respondents.

Defendant and appellant Sadegh Nematpour (Nematpour) appeals a $91,761 default judgment entered in favor of plaintiffs and respondents Firouzeh Ghaffarpour (Ghaffarpour) and Nabiollah Najafi Moallem (Moallem) (sometimes collectively referred to as Ghaffarpour or respondents). Nematpour's default was entered after the trial court struck his answer on a motion by Ghaffarpour for terminating sanctions based on Nematpour's failure to appear for his court-ordered deposition.

We conclude the default judgment as to Nematpour must be reversed because the complaint failed to state facts sufficient to constitute a cause of action against Nematpour, and remand the matter for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

This is the fourth time this matter has been before this court. (*Ghaffarpour et al. v. Commerce Plaza Hotel et al*. (June 22, 2010, B211251) [nonpub. opn.]; *Ghaffarpour v. Superior Court* (2012) 202 Cal.App.4th 1463; *Ghaffarpour et al. v. Commerce Plaza Hotel* (Mar. 27, 2016, B256798) [nonpub. opn.].) With respect to the instant appeal, the relevant procedural history is as follows.

1. *The complaint.*

On August 14, 2007, Ghaffarpour, Moallem, and two other individuals[1] filed suit against Commerce Plaza Hotel (the Hotel), SW Private Patrol aka South West Private Security (SW

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[1] The only plaintiffs before this court are respondents Ghaffarpour and Moallem. Also, while the March 22, 2018 default judgment is also against Nematpour's codefendant, Rudy Koffman, Nematpour is the sole appellant in this matter.

Security),[2] as well as Does 1 through 100. The original complaint, which is the operative pleading, alleged that on June 17, 2006, the plaintiffs were present at the Hotel, which had been rented as a polling location for an election being held by the Islamic Republic of Iran. The plaintiffs were part of a group of activists and journalists who had assembled to protest the election. The protesters were denied entry to the Hotel and were forced by the defendants and their agents to move to the sidewalk outside the Hotel's premises. When the plaintiffs reassembled on the sidewalk, defendants and their agents violently and with threat and use of physical violence attempted to take away the protestors' video and photography equipment. The protestors approached security personnel to inquire as to their conduct, and defendants and their agents then grabbed Moallem, handcuffed him, and dragged him away. When the other plaintiffs approached to demand what was the basis of the attack and detention of Moallem, defendants and their agents attacked them as well.

The complaint pled seven causes of action arising out of the incident: (1) negligence; (2) intentional infliction of emotional distress; (3) civil battery; (4) false imprisonment; (5) civil assault; (6) negligent failure to protect against criminal assault and battery; and (7) negligent failure to render aid to plaintiffs.

The Doe allegations in the complaint consisted of the following: the true names and capacities of Does 1 through 100 were unknown to plaintiffs, who therefore sued said defendants by their fictitious names, and plaintiffs would request leave to

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[2] SW Security is a security company that allegedly was hired by the Hotel.

amend to allege their true names and capacities once those were ascertained; Does 1 through 50 were the owners and operators of the Hotel and hired SW Security to provide security service during private events; and Does 1 through 50 hired SW Security for the subject election event.

2. *The Doe amendment naming Nematpour as Doe 3.*

Nematpour was not named in the original complaint. He was named as a Doe defendant six years into the litigation, based on the following circumstances. On November 14, 2013, Ghaffarpour's counsel obtained a copy of the Banquet Function Agreement with the names of the men who organized the event, including Nematpour. Three weeks later, on December 6, 2013, Ghaffarpour filed a Doe amendment naming Nematpour as Doe 3, that is to say, as one of the "owners and operators" of the Hotel. (Code Civ. Proc., § 474.)[3] [4] Ghaffarpour did not amend the

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[3] We note the complaint identified Does 1 through 50, in addition to Commerce Hotel Casino, as "the owners and operators" of the Hotel. Although Ghaffarpour named Nematpour in the pleading as Doe 3, as we will discuss, Ghaffarpour does not contend that Nematpour was an owner and operator of the Hotel. The papers submitted by Ghaffarpour in support of the default prove-up stated that Nematpour was one of the two individuals who "rented one of [the] meeting rooms [at the Hotel] . . . to be used as a polling place for the presidential elections for the Islamic Republic of Iran." Ghaffarpour's theory is that Nematpour, having rented the room and organized the event, is liable for "orchestrat[ing] the event and direct[ing] the security guards during it."

[4] All further statutory references are to the Code of Civil Procedure, unless otherwise specified.

original complaint to include any specific factual allegations against Nematpour.

3. *Nematpour answers the complaint, which is subsequently stricken for his noncompliance with discovery*.

On July 7, 2017, Nematpour filed an answer. He generally denied the allegations and pled as an affirmative defense that "each cause of action in the Complaint fails to allege facts sufficient to constitute a cause of action as against this answering Defendant."

After Nematpour failed to appear at his deposition, Ghaffarpour moved to compel his deposition. The trial court granted the motion to compel, imposed monetary sanctions of $1,260, and ordered Nematpour to appear for his deposition on October 23, 2017. Nematpour again failed to appear.

On October 31, 2017, Ghaffarpour filed a motion for terminating sanctions, requesting that Nematpour's answer be stricken and his default entered due to his failure to appear for his court-ordered deposition on October 23, 2017.

On November 14, 2017, the trial court granted the motion for terminating sanctions, struck Nematpour's answer, entered his default, and continued the matter to January 17, 2018, to enable Ghaffarpour to submit a default prove-up package.

4. *Proceedings leading up to entry of the default judgment*.

On November 21, 2017, Nematpour filed a motion to dismiss the action against him based on Ghaffarpour's failure to bring it to trial within five years. (§§ 583.310, 583.360.) According to Nematpour, the five-year period expired no later than June 14, 2017.

In opposition, Ghaffarpour contended that because Nematpour was in default, he was precluded from bringing the dismissal motion, and in any event, the motion was meritless.

On January 16, 2018, the trial court denied Nematpour's motion to dismiss and set the matter for a default prove-up hearing.

On March 7, 2018, the trial court denied a motion by Nematpour for reconsideration of the order that imposed terminating sanctions and struck Nematpour's answer to the complaint.

On March 22, 2018, the trial court entered a default judgment against Nematpour in the total amount of $91,761.50, including damages of $50,000 to Ghaffarpour and $40,000 to Moallem.

On May 21, 2018, Nematpour filed a timely notice of appeal from the default judgment.[5]

CONTENTIONS

Nematpour contends the judgment must be reversed because the complaint failed to state facts sufficient to constitute a cause of action against him. Additionally, Nematpour asserts the claims against him were barred by the two-year statute of limitations (§ 335.1), and by Ghaffarpour's failure to bring the matter to trial within five years (§ 583.310), and therefore the trial court lost the authority to grant the motion for terminating sanctions.

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[5] The default judgment is appealable. The fact that Nematpour defaulted in the trial court does not bar him from appealing the judgment that was entered. (*Misic v. Segars* (1995) 37 Cal.App.4th 1149, 1153-1154; Weil & Brown, et al., Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2019) § 5:272.)

DISCUSSION

1. *The sufficiency of the pleading is cognizable on the appeal from the default judgment.*

a. *General principles.*

Although the trial court struck Nematpour's answer and entered his default as a discovery sanction, the Supreme Court has rejected the argument that "default judgments entered for discovery violations should be held to differ fundamentally from other defaults as a matter of policy[.]" (*Greenup v. Rodman* (1986) 42 Cal.3d 822, 828.) Therefore, the usual rules relating to defaults and default judgments apply. On appeal from the default judgment, " '[a]n objection that the complaint failed to state facts sufficient to constitute a cause of action may be considered.' [Citations.] (*Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 282.) If the "well-pleaded allegations of the complaint do not state any proper cause of action, the default judgment in the plaintiff's favor cannot stand." (*Ibid.*)

b. *No merit to respondents' contention that Nematpour is barred from challenging the sufficiency of the pleading.*

The respondents' brief does not address Nematpour's appellate challenge to the sufficiency of the pleading, and simply contends that Nematpour is precluded from raising the issue on appeal because he did not file a demurrer below, and instead, filed an answer to the complaint. Respondents are mistaken. "If the party against whom a complaint or cross-complaint has been filed fails to object to the pleading, either by demurrer or answer, that party is deemed to have waived the objection *unless* it is an objection that the court has no jurisdiction of the subject of the cause of action alleged in the pleading *or an objection that the*

pleading does not state facts sufficient to constitute a cause of action." (§ 430.80, subd. (a), italics added.) Thus, an issue of the failure of a complaint to state a cause of action is never waived "and may be raised for the first time on appeal." (*Falahati v. Kondo* (2005) 127 Cal.App.4th 823, 831, fn. 18.)

Moreover, Nematpour's answer did object to the sufficiency of the complaint. As indicated, he pled as an affirmative defense that "each cause of action in the Complaint fails to allege facts sufficient to constitute a cause of action as against this answering Defendant." Thus, even assuming that by filing an answer a defendant may concede the sufficiency of the pleading, here, Nematpour's answer made no such concession.

We now examine the sufficiency of the pleading.

2. *The complaint fails to state facts sufficient to constitute a cause of action against Nematpour*.

a. *Standard of appellate review*.

As indicated, the issues that a defendant may properly raise on an appeal from a default judgment are limited, but include the sufficiency of the pleading. (*Steven M. Garber & Associates v. Eskandarian* (2007) 150 Cal.App.4th 813, 824.) "Generally, a defendant in default 'confesses the material allegations of the complaint. [Citation.]' [Citation.] Nonetheless, the trial court may not enter a default judgment when the complaint's allegations do not state a cause of action. [Citations.] No judgment can rest on such a complaint, as a defendant in default ' "admits only facts that are well pleaded." ' [Citations.]" (*Los Defensores, Inc. v. Gomez* (2014) 223 Cal.App.4th 377, 392 (*Los Defensores*).)

Thus, "[o]ur inquiry here into the complaint's adequacy is akin to that triggered by a general demurrer, namely, whether

the complaint lacks factual allegations indispensable to the asserted claims. [Citations.] A court must indulge reasonable inferences in support of the factual allegations in the complaint; mere uncertainties and other defects subject to a special demurrer do not bar a default judgment against the defendant. [Citations.] Nonetheless, the absence of essential factual allegations is fatal to a [default] judgment against the defendant. [Citation.]" (*Los Defensores*, *supra*, 223 Cal.App.4th at pp. 392–393.) Accordingly, where the defaulting defendant argues on appeal from a default judgment that the complaint does not state facts sufficient to constitute a cause of action against him, our standard of review is de novo. (*Gutierrez v. Carmax Auto Superstores California* (2018) 19 Cal.App.5th 1234, 1242 ["appellate courts conduct a de novo review to determine whether the pleading alleges facts sufficient to state a cause of action under any possible legal theory"].)

b. *The complaint fails to allege facts sufficient to state a cause of action against Nematpour as a hirer of the room at the Hotel and as an organizer of the ev*ent.

As stated in the respondents' brief, Ghaffarpour's theory is that Nematpour, as an organizer of the June 2006 election event that was conducted at the Hotel, is liable for "orchestrat[ing] the event and direct[ing] the security guards during it." Similarly, in opposing Nematpour's motion to dismiss under the five-year rule, Ghaffarpour explained below that in December 2013, shortly after Nematpour was identified as one of the individuals who rented the room for the event, Ghaffarpour filed a Doe amendment naming Nematpour as Doe 3.

The fundamental problem for Ghaffarpour is that the complaint is devoid of any facts to state a cause of action against

Nematpour as a hirer of the room and an organizer of the event at the Hotel. The complaint does not allege that Nematpour, or any Doe defendant, hired a room at the Hotel. The complaint also does not contain any allegation that Nematpour, as a hotel patron, directed the security guards during the event. What the complaint does allege is that Does 1 through 50 "*were the owners and operators*" of the Hotel, and that it was the owners and operators of the Hotel that hired SW Security to provide security for the event.[6] (Italics added.)

Thus, the operative complaint, filed in 2007, did not allege a cause of action against unknown Doe defendants for having hired the room for the election and having directed the security guards during the event.[7] In an apparent attempt to avoid the statute of limitations, in December 2013, Ghaffarpour simply named Nematpour as Doe 3, that is to say, as one of the owners and operators of the Hotel. However, Nematpour admittedly was not an owner and operator of the Hotel—according to

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[6] Although the caption of the complaint named as defendants "DOES 1 THROUGH 100, INCLUSIVE," there were no factual allegations with respect to Does 51 through 100.

[7] A complaint "may not be amended to add a new defendant after the statute of limitations has run. [Citations.] The only exception to this rule is when the original complaint states a cause of action against a Doe defendant and the plaintiff is unaware of the true identity of that party at the inception of the suit. Upon ascertaining the true name of the Doe defendant, the plaintiff may amend the complaint even after the expiration of the statute of limitations. [Citations.]" (*McGee Street Productions v. Workers' Comp. Appeals Bd.* (2003) 108 Cal.App.4th 717, 724-725.)

Ghaffarpour, Nematpour was one of the individuals who rented the room at the Hotel where the election event was conducted. This was made clear in the papers submitted by Ghaffarpour in support of the default prove-up, which stated that Nematpour was one of the two individuals who "rented one of [the] meeting rooms [at the Hotel] . . . to be used as a polling place for the presidential elections for the Islamic Republic of Iran."

In reviewing the sufficiency of a complaint, although the factual allegations are deemed true, " 'where an allegation is contrary to law or to a fact of which a court may take judicial notice, it is to be treated as a nullity.' [Citation.] The court may take judicial notice of such records as appellant's affidavits [citation] and prior complaints in the same action [citation]." (*Amid v. Hawthorne Community Medical Group, Inc.* (1989) 212 Cal.App.3d 1383, 1387.) Given Ghaffarpour's statements in the default prove-up papers and elsewhere that Nematpour rented the room at the Hotel for the event, we disregard the allegation in the complaint that Nematpour was an owner and operator of the Hotel.

As a result, the complaint lacks any factual allegations with respect to Nematpour's role in the incident. Although Ghaffarpour seeks to hold Nematpour liable in tort based on his purported role in hiring a room at the Hotel and in directing the security guards during the event, the complaint is bereft of any factual allegations with respect to Nematpour's capacity as a hirer of the room, let alone any factual allegations of wrongdoing by Nematpour. Simply stated, the absence of such essential factual allegations "is fatal to a [default] judgment" against Nematpour. (*Los Defensores*, *supra*, 223 Cal.App.4th at p. 393.)

c. *Proceedings on remand.*

Having determined the default judgment must be reversed because it was based on a complaint that failed to state a cause of action against Nematpour, the remaining issue is the appropriate disposition of this matter. Because Ghaffarpour could not proceed to a default prove-up and default judgment on the ill-pled complaint, we conclude the trial court abused its discretion in striking Nematpour's answer as a discovery sanction.

Therefore, on remand the trial court is directed to vacate its January 2, 2018 order on Ghaffarpour's motion for terminating sanctions, insofar as the order struck Nematpour's answer and ordered the entry of his default. The January 9, 2018 entry of default by the clerk shall also be vacated, and Nematpour's answer shall be reinstated. The trial court may then consider whether an alternative sanction should be imposed for Nematpour's failure to appear for his court-ordered deposition or issue other orders to ensure Nematpour's appearance at his deposition. (§ 2023.030, subd. (d)(2).)

Once Nematpour's default is vacated, because the operative complaint fails to state a cause against Nematpour, on remand Nematpour shall be entitled to move for dismissal by way of a motion for judgment on the pleadings or a motion for summary judgment. Nematpour also shall be entitled to bring a motion to dismiss the action on the ground it is barred by the two-year statute (§ 335.1) or by Ghaffarpour's failure to bring the matter to trial within five years. (§§ 583.310, 538.360.)

Our ruling also does not preclude Ghaffarpour from bringing a motion for leave to amend. We express no opinion as to Ghaffarpour's ability to truthfully allege a cause of action

against Nematpour at this juncture, as that issue is beyond the scope of this appeal.

DISPOSITION

The default judgment entered on March 22, 2018 is reversed. The matter is remanded to the trial court with directions to vacate both the January 2, 2018 order striking Nematpour's answer and the clerk's January 9, 2018 entry of default, to reinstate Nematpour's answer, and to conduct further proceedings not inconsistent with this opinion. Nematpour shall recover his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

JONES, 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.