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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

TIM CULLEN, et al., Plaintiffs and Respondents, v. ANDREW J. HILLMAN, Defendant and Appellant.	B293988 (Los Angeles County Super. Ct. No. BC667767)

APPEAL from a judgment of the Superior Court of Los Angeles County, William F. Fahey, Judge. Reversed and remanded with directions.

James S. Bell for Defendant and Appellant.

Rokita Law and Amanda Michelle Rokita for Plaintiffs and Respondents.

INTRODUCTION

Andrew J. Hillman appeals the trial court's denial of his motion to set aside default, and challenges the terms of the default judgment entered against him. Plaintiffs below have not filed a respondents' brief.

On appeal, Hillman asserts that substituted service on his wife at their residence in Texas was insufficient, and therefore the court's entry of default and the default judgment are void for lack of personal jurisdiction. We disagree, finding that substituted service was properly effected.

Hillman also asserts that default should have been set aside under the mandatory provision of Code of Civil Procedure section 473, subdivision (b),[1] based on his attorney's affidavit of fault regarding Hillman's failure to answer the complaint. We agree that under the circumstances, relief from default was mandatory, and the trial court erred by denying Hillman's motion. We therefore reverse the judgment, and remand the case with directions to grant Hillman's motion to set aside default under the mandatory provision of section 473, subdivision (b).

FACTUAL AND PROCEDURAL BACKGROUND

A. Allegations

Plaintiffs Valley Herbal Healing Center, Inc. (VHHC); Cullen's Management, LLC; and Tim Cullen filed their second amended complaint (SAC) on November 6, 2017.[2] It named as defendants Hillman; Equity Growth, LLC; Allan Steven Cohen; Diego Torres; and Eric Dominguez. The complaint alleged a

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

[2] The original and first amended complaints are not included in the record on appeal.

rather complicated set of facts that are largely irrelevant to this appeal, so we summarize them only briefly.

Plaintiffs alleged that VHHC was a nonprofit corporation "authorized by state and local law to engage in herbal growth and dispensation." Cullen was apparently the owner, and he sought to sell the following assets: management rights to VHHC, "a California non-profit with a coveted pre-Interim Control Ordinance, Proposition D-compliant license for the dispensation of herbal medication"; the leasehold interest, which included a 20,000-square-foot growing operation, plants, lights, commercial HVAC equipment, and "a fast-food or Starbucks-like drive-thru for the dispensation of herbal medication"; the "legally operational systems" for the business, including skilled employees who had passed required screenings; and "other chattels required for Cullen's operation and management of VHHC." The SAC referred to these as "the Assets."

The SAC alleged that in June 2016 Hillman and Cullen orally agreed that Hillman would purchase the Assets for $7 million, payable in a deposit of $2.025 million, and monthly payments of $500,000 until the purchase price was satisfied. Hillman made the initial $2.025 million payment, but failed to make the first monthly installment on time. Rather than make the second monthly installment, Hillman tried to renegotiate the purchase price. The SAC alleged that Hillman used proprietary information from VHHC, including VHHC's licenses, to open "a for-profit grow and or dispensary." Hillman and his attorney misrepresented to authorities that his for-profit business was operating under VHHC's legally compliant status.

The SAC alleged that Cullen met with Hillman to attempt to negotiate a resolution to their disputes. The parties agreed

that Cullen would reduce the purchase price, and Cullen, Hillman, and others (including guarantors) entered a written contract based on their agreement. The SAC alleged that defendants breached the written agreement by failing to make the agreed payments.

The SAC asserted 10 causes of action. The only cause of action that named Hillman as a defendant was the first cause of action for breach of oral contract, asserted by Cullen's Management. In this cause of action, the SAC alleged that "[u]nder the parties' Oral Agreement, entered into in June 2016, Hillman agreed to pay Cullen a total of $7 million for the Assets." It alleged that Hillman breached the agreement by failing to make timely installment payments, and then Hillman "made extortive threats" to Cullen. As a result of this breach, the parties entered into the written agreement, which was also breached. The SAC alleged that the "minimum direct contractual damages inflicted by Defendant Hillman" was $2,634,750.00, plus interest and additional damages according to proof. The remaining causes of action, which did not list Hillman as a defendant, were conversion, trespass to chattels, breach of written contract, breach of written guarantee, declaratory relief, reformation, indemnification, and two causes of action for negligent misrepresentation.

B. Settlement and dismissal of the other defendants

Default was entered as to Hillman on March 14, 2018. Apparently plaintiffs and the other defendants settled. On May 8, 2018, plaintiffs filed a notice of dismissal without prejudice, stating that the parties present at a mandatory settlement conference had reached a settlement, and "[a]s a result of the settlement put on the record, the Court dismissed the complaint

and cross complaints between the" parties present.[3] The notice also stated that the settlement "did not disturb, and left remaining in place, the default on Plaintiff's Second Amended Complaint entered by the clerk against Defendant Andrew Hillman on March 14, 2018."

On May 31, 2018, Hillman and three other defendants[4] jointly filed an ex parte application seeking clarification of a court ruling entered on April 24, 2018. According to the ex parte application, the ruling stated that the case was "dismissed without prejudice and will be dismissed with prejudice upon completion of the terms of the settlement entered into by and among Plaintiffs, the EG Defendants and Dominguez." Hillman and the other defendants sought clarification as to whether the dismissal applied to the entire case, including claims against Hillman, such that no default judgment could be entered against Hillman.

Plaintiffs opposed the ex parte application, stating that Hillman's default had been entered on March 14, 2018, after substituted service on Hillman's wife by a registered process server in Texas. Plaintiffs asserted that as a result, Hillman lacked standing to do anything but move to set aside his default.

The court denied the ex parte application in a written ruling on June 4, 2018. The court noted that Hillman was in default, and stated, "While the Court as a courtesy allowed [Hillman's] attorney Bell to be heard on the [ex parte]

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[3] The record on appeal does not contain information about any cross-complaints.

[4] These defendants were Equity Growth, LLC; Cohen; and Torres, referred to collectively in the ex parte application as "the EG defendants."

Application, it is settled that a defaulted party is 'out of court' and has no standing. Nor will the Court consider the May 30, 2018 declaration of attorney Bell or the exhibits he provides." The court held that "there was no settlement agreement reached by or on behalf of Hillman." The court set a hearing for an order to show cause (OSC) regarding default judgment, and ordered plaintiffs to file their default package by July 2, 2018.

C. Motion to vacate default

1. *Motion*

On July 3, 2018, Hillman moved to vacate default under section 473, subdivision (d) (section 473(d)), which allows the court to "set aside any void judgment or order," and section 473, subdivision (b) (section 473(b)), which allows for relief from actions taken as a result of "mistake, inadvertence, surprise, or excusable neglect." Hillman asserted that the default was void for lack of personal jurisdiction because he had not been properly served. In the motion and attached declaration, Hillman stated that he lived in Texas with his wife, Erin.[5] The motion stated that in May 2017, "months before" plaintiffs filed their first amended complaint, Bell had informed plaintiffs' counsel that he was "representing Hillman in connection with this case."

Erin stated in a declaration that on October 9, 2017, she was at the residence she shared with Hillman on Inwood Road in Dallas, Texas. Erin stated that she saw a man who had gained access to the gated property; she guessed that he had come in with construction workers who were at the house, or with the mail truck, for which Erin had opened the gate. Erin told the man to leave, and the man "threw a stapled packet of papers

[5] We follow the parties' lead and refer to Erin Hillman by her first name. We intend no disrespect.

through our open front door and said, 'no problem, just give that to your husband' or words to that effect." Erin said she left the papers on Hillman's desk. She stated that prior to this encounter, "no one ever approached me asking if [Hillman] was home or available to receive court documents or other papers." Hillman stated in a declaration that he did not recall ever seeing or reviewing the documents.

On October 24, 2017, Bell emailed plaintiffs' counsel and stated that "someone left a copy of a summons and complaint on [Hillman's] doorstep while he was out," which "does not constitute proper service." Plaintiffs' counsel responded that substituted service on Erin was proper under California law. Hillman argued that plaintiffs had not filed a declaration of diligence as to attempted personal service for the first amended complaint.

Hillman also stated in the motion that Bell learned in November 2017 that a second amended complaint had been filed, and it was served by overnight mail to Hillman's address on "Inwood *Dr*.," but Hillman lived on "Inwood *Rd*." Hillman's motion stated, "[B]ased on Plaintiff's [*sic*] failure to effect service of the Summons and FAC or SAC on Hillman, Mr. Bell concluded the Court had not acquired jurisdiction over Hillman and, based on that conclusion, decided not to file an answer or other pleading responsive to the SAC. . . . Mr. Hillman played no part in that decision."

Bell stated in a declaration that on April 1, 2018, he had emailed plaintiffs' counsel Zein Obagi and told him that after speaking with Hillman, Bell "determined that [Hillman] was never properly served with a copy of the summons and Second Amended Complaint," and asked that default be set aside.

Plaintiffs agreed to set aside the default, and Obagi signed a stipulation to that effect. Meanwhile the other parties had settled, and according to Bell, counsel for some of the other defendants told him that the settlement addressed all claims and defendants in the case, and the entire case had been dismissed. Obagi and Bell then had an email exchange attempting to clarify the extent of the dismissal, leading to the ex parte application summarized above. Obagi later informed Bell that he was withdrawing consent to vacate default, since Hillman had failed to file the stipulation or a responsive pleading.

Hillman also asserted that default should be set aside under section 473(b), which states that "the court shall, whenever an application for relief is made . . . accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." Hillman argued that Bell's "affidavit of fault" made clear that Bell alone had concluded that service was improper, therefore the default was not due to Hillman's own actions, and relief from default was mandatory.

2. *Opposition*

Plaintiffs opposed Hillman's motion. They argued that a registered process server in Texas attempted to serve Hillman 10 times at an address on Lakehurst Avenue in Dallas. Eventually, a neighbor told the server that Hillman had moved, the process server found the new address, and substituted service on Erin

was completed. Erin admitted that the papers had been served, and that she left them on Hillman's desk. Plaintiffs argued that Erin's declaration about the process server throwing papers at her was not credible, since the process server stated that "Erin Hillman" had been served, suggesting that Erin had identified herself. When the notices of default were mailed to Hillman, he marked them "return to sender." Plaintiffs also asserted that the "Road"/"Drive" difference in the address was irrelevant, because there was no evidence that mailed documents were sent to the wrong place or that such an error would prevent delivery.

Plaintiffs also argued that Hillman's statement that he never received the documents was not credible, in light of Bell's email on October 24, 2017 that someone "left a copy of a summons and complaint on [Hillman's] doorstep while he was out." Moreover, Obagi sent the proof of service to Bell on October 24, 2017. Plaintiffs asserted that Hillman's intentional choice to disregard service did not constitute a mistake or neglect, and section 473 relief was not available following a "deliberate refusal to act." Plaintiffs also noted that Hillman did not timely seek relief from default, instead filing the ex parte application despite his lack of standing.[6]

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[6] Plaintiffs also submitted a criminal complaint from the United States District Court for the Northern District of Texas, charging Cohen and Hillman with possessing, distributing, or intending to distribute 100 kilograms or more of marijuana. The attached special agent's affidavit stated that the FBI began investigating Hillman and Cohen after the Los Angeles Sheriff's Department provided information that they were shipping marijuana from "a medical marijuana facility" they had purchased in Los Angeles County to Dallas, Texas via FedEx. The declaration included details about shipped packages,

Hillman filed a reply, asserting that attempts to serve Hillman at his former residence were not sufficient to warrant substituted service. Hillman further contended that actual notice was insufficient.

3. *Ruling*

The trial court denied Hillman's motion in a written ruling. The court noted that a hearing was held on August 8, 2018 (no reporter's transcript is included in the record on appeal), and "Bell chose not to attend but sent an attorney who was not fully familiar with the case and could not answer many of the Court's questions." The court took the matter under submission. Bell then filed a supplemental brief, which the court struck "because it is unauthorized."

The court found that Hillman had been properly served. It rejected Hillman's argument that plaintiffs were required to attempt service at his *present* address before completing substituted service on Erin. The court noted that in *Ellard v. Conway* (2001) 94 Cal.App.4th 540 (*Ellard*), a case cited by Hillman, the initial attempt at personal service was also to the wrong address, and substituted service was completed at the accurate address thereafter. The court stated, "So too in this case. The Court holds that on October 9, 2017 there was proper substituted service on Hillman of the amended complaint and summons. Relief under CCP 473(d) is not warranted."

Turning to Hillman's arguments under section 473(b), the court stated that "the record shows that Hillman must have seen and reviewed the amended summons and complaint." The court

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package pickups, and recorded conversations involving Hillman and Cohen. Plaintiffs asserted that Hillman was in federal prison at the time the motion to vacate default was filed.

found Hillman's claim that he never saw the summons and complaint "unbelievable." The court noted that Hillman "quickly got his attorney involved," and "Bell's declaration admits that he was aware of the summons and complaint no later than October 24, 2017 when he sent an email to plaintiffs' attorney protesting the manner of service." Bell requested a certificate of service and Obagi sent it to him, but Hillman "did not file a motion to quash service or take any other action." The court stated that it would "not turn a blind eye to Hillman's attempt to deceive by falsely stating that he is he does [*sic*] 'not recall ever seeing or reviewing' the amended summons and complaint."

The court cited *Lang v. Hochman* (2000) 77 Cal.App.4th 1225, 1248: "[A] party can rely on the mandatory provision of section 473 only if the party is totally innocent of any wrongdoing and the attorney was the sole cause of the default or dismissal." The court continued, "[I]t is clear that Hillman knew of, and agreed to, the decision not to contest service upon him. Hillman at a minimum advised Bell about the amended summons and complaint and, more likely than not, provided those documents to Bell. . . . So Hillman and Bell decided not to appear and they also chose not to file a motion to quash service." The court denied the motion, because Hillman "shares responsibility for failing to contest service and the delays in this case. Mandatory relief under CCP 473(b) is not available on these facts."

4. *Default judgment*

Plaintiffs filed a default judgment package on September 20, 2018. They asserted that the principal damages from Hillman's breach, accounting for payments from Hillman and mitigation from Equity Growth, totaled $2,951,000. Plaintiffs also sought $440,519.18 in interest, beginning from the dates

Hillman's payments were due. In his declaration, Obagi stated that plaintiffs also sought $520 in costs.

The court entered a default judgment for plaintiff Tim Cullen against defendant Hillman for damages of $2,951,000, interest of $440,519.18, and costs of $520, for a total of $3,392.039.18. Notice of entry of judgment was served on Hillman on September 26, 2018. Hillman timely appealed.

DISCUSSION

On appeal, Hillman challenges the court's order denying his motion to set aside default, as well as the substance of the default judgment itself. We begin with his challenges to the motion order. As discussed below, we find that service was proper and default was not void for lack of jurisdiction. However, Hillman was entitled to set aside default under the mandatory provision of section 473(b), because the evidence showed that Hillman's failure to appear was based on his attorney's determination that service was not proper, and the evidence does not support the court's finding that Hillman participated in making that decision. Hillman's challenges to the judgment itself are therefore moot.

A. Default was not void for lack of personal jurisdiction

Under section 473(d), the court may "set aside any void judgment or order." This subdivision allows a court to "set aside a default judgment which is valid on its face, but void, as a matter of law, due to improper service." (*Ellard, supra*, 94 Cal.App.4th at p. 544.) Hillman contends that the default and default judgment are void because he was not properly served, and the trial court erred in denying his motion to vacate default on this basis. We disagree.

"Where the question on appeal is whether the entry of default and the default judgment were void for lack of proper service of process, we review the trial court's determination de novo." (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1200.) Plaintiffs did not file a respondents' brief. Nevertheless, "'[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.)

Hillman asserts that substituted service on Erin was ineffective because the process server did not satisfy the "reasonable diligence" requirement in section 415.20, subdivision (b). That subdivision states, "If a copy of the summons and complaint cannot with reasonable diligence be personally delivered to the person to be served . . . , a summons may be served by leaving a copy of the summons and complaint at the person's dwelling house, usual place of abode . . . , or usual mailing address . . . , in the presence of a competent member of the household . . . , at least 18 years of age, who shall be informed of the contents thereof, and by thereafter mailing a copy of the summons and of the complaint by first-class mail, postage prepaid to the person to be served at the place where a copy of the summons and complaint were left." (§ 415.20, subd. (b).)

"[A]n individual may be served by substitute service only after a good faith effort at personal service has first been made: the burden is on the plaintiff to show that the summons and complaint 'cannot with reasonable diligence be personally delivered' to the individual defendant. [Citations.] Two or three attempts to personally serve a defendant at a proper place

ordinarily qualifies as "'reasonable diligence.'"" (*American Express Centurion Bank v. Zara* (2011) 199 Cal.App.4th 383, 389.)

Hillman focuses on the phrase "a proper place" in the case law, and argues that the process server's ten attempts to serve him at the wrong address cannot constitute reasonable diligence, because none of those attempts were at a proper place. The trial court relied on *Ellard, supra*, 94 Cal.App.4th 540, in finding effective substituted service. In *Ellard*, a process server attempted service at the defendants' home in Anaheim, but there was no answer at the door and the server saw that mail at the address reflected a different family name. (*Id*. at p. 543.) The gate guard told the process server that the defendants had moved. The plaintiffs' counsel learned from the United States Postal Service that the defendants' new mailing address was the "Postal Annex" in Anaheim. (*Ibid.*) The process server then went to the Postal Annex, learned from the manager that the defendants received mail there, and left copies of the summons and complaint with the manager. (*Ibid.*) Copies of the summons and complaint were later mailed to the defendants at the Postal Annex address. (*Ibid.*) The trial court eventually entered default and default judgment, and the defendants attempted to vacate the judgment because they were not properly served. (*Id*. at p. 544.) The trial court denied their motion and the defendants appealed. (*Ibid.*)

On appeal, the *Ellard* defendants argued, as Hillman does here, that attempted service at their former residence did not constitute attempted service at a "proper place." (*Ellard, supra*, 94 Cal.App.4th at p. 545.) The court acknowledged that the Anaheim residence "was not the *proper* place to serve the

[defendants] because they moved." (*Id*. at p. 545.) The court held, however, that the process server was not required to do anything more before serving the Postal Annex manager: "[T]he process server was reasonably diligent in attempting personal service on the [defendants]." (*Ibid*.)

Hillman asserts that *Ellard* does not "suggest that prior attempts to personally serve a defendant at his or her former residence count toward the exercise of reasonable diligence required by Section 415.20." In fact, that is exactly what the *Ellard* court found: It was sufficient under section 415.20 that the plaintiffs attempted to serve defendants at their former residence, discovered the defendants did not live there, found the defendants' new mailing address, and completed substituted service at the new address. The facts here are extremely similar, in that the process server made ten attempts to serve Hillman at his former address, then found Hillman's new address, and substitute-served Hillman at that address by leaving the papers with Erin. Under the reasoning of *Ellard*, no more was required.

Hillman relies on *Zirbes v. Stratton* (1986) 187 Cal.App.3d 1407, which found that substituted service on a defendant was ineffective. There, the summons and complaint were left at the defendant's parents' house, which was not her residence, and at a restaurant with her estranged husband, where the defendant had once been employed. The Court of Appeal held that because neither location was the defendant's residence or business, service was not effective. (*Id*. at pp. 1417-1418.) The same is not true here; Hillman does not dispute that the home on Inwood Road was his "dwelling house," or "usual place of abode." *Zirbes* is therefore not instructive.

Hillman also argues that substituted service was not effective because under section 415.20, subdivision (b), substituted service must be followed by "mailing a copy of the summons and of the complaint by first-class mail, postage prepaid to the person to be served at the place where a copy of the summons and complaint were left." (§ 415.20, subd. (b).) Hillman argues that the process server mailed documents to an address on Inwood Drive, but his home is on Inwood Road. He asserts that the process server's "failure to comply with that mailing requirement rendered the substituted service on Hillman ineffective."

The filing of a proof of service that complies with applicable statutory requirements creates a rebuttable presumption that the service was proper. (*Floveyor Internat., Ltd. v. Superior Court* (1997) 59 Cal.App.4th 789, 795; Evid. Code, § 647.) Here, Hillman did not provide any evidence, or even suggest, that mail addressed to Inwood Drive in Dallas would not make its way to the appropriate address on Inwood Road in Dallas. Moreover, Obagi stated in his declaration that notations on the proofs of service stating that documents were mailed to "Inwood Drive" were "scriveners errors that were not reflected on the actual packages sent to Mr. Hillman." Hillman cites no authority holding that a minor discrepancy in a mailing address renders service ineffective, and we have found none. Without additional evidence suggesting that the mail was likely to be mis-routed or likely to be sent to the incorrect location, the inclusion of the word "Drive" on the proof of service is not sufficient to overcome the presumption that service was proper.

In addition, we note that Hillman does not dispute that he had actual notice of the lawsuit. His declaration artfully states

that he was "never personally served" with summons and complaint, and he did "not recall" reviewing the papers served to Erin. However, the record makes clear that Hillman's attorney Bell was aware of the service no later than October 24, 2017, because he emailed Obagi about it. "[P]re-1969 service of process statutes required strict and exact compliance. However, the provisions are now to be liberally construed to effectuate service and uphold jurisdiction if actual notice has been received by the defendant." (*Bein v. Brechtel-Jochim Group, Inc.* (1992) 6 Cal.App.4th 1387, 1392, citing *Pasadena Medi-Center Associates v. Superior Court* (1973) 9 Cal.3d 773, 778.) Here, where substituted service was completed and Hillman had actual notice, we are unpersuaded by Hillman's arguments that service was ineffective because various minor technicalities were not met.

We therefore find that substituted service was effective, and the default was not void for lack of personal jurisdiction. The trial court's ruling on this issue was not erroneous.

B. Hillman was entitled to mandatory relief under section 473(b)

Hillman asserts that the trial court also erred by denying his request for mandatory relief under section 473(b). "[I]f the prerequisites for the application of the mandatory provision of section 473, subdivision (b) exist, the trial court does not have discretion to refuse relief." (*Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 612.) On the other hand, relief is not mandatory "when the court finds the default was not in fact the attorney's fault, for example when the attorney is simply covering-up for the client." (*Rogalski v. Nabers Cadillac* (1992) 11 Cal.App.4th 816, 821.) "Whether section 473, subdivision (b)'s requirements have been satisfied in any given

case is a question we review for substantial evidence where the evidence is disputed and de novo where it is undisputed." (*Martin Potts & Associates, Inc. v. Corsair, LLC* (2016) 244 Cal.App.4th 432, 437 (*Martin Potts*).)

"Section 473(b) contains two distinct provisions for relief from default. The first provision, presented here only for context, is discretionary and broad in scope: 'The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect.' (§ 473(b).) The second provision is mandatory, at least for purposes of section 473, and narrowly covers only default judgments and defaults that will result in the entry of judgments." (*Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 838 (*Even Zohar*).) The mandatory provision states, "Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." (§ 473(b).)

The "specific purposes of section 473(b)'s provision for relief based on attorney fault [are] to 'relieve the innocent client of the burden of the attorney's fault, to impose the burden on the erring

attorney, and to avoid precipitating more litigation in the form of malpractice suits.'" (*Even Zohar, supra*, 61 Cal.4th at p. 839.) Here, the trial court denied Hillman's motion upon the finding that "Hillman is not 'totally innocent' but instead shares responsibility for failing to contest service and the delays in this case." The court found that Hillman and Bell both agreed not to appear: "[I]t is clear that Hillman knew of, and agreed to, the decision not to contest service upon him. Hillman at a minimum advised Bell about the amended summons and complaint and, more likely than not, provided those documents to Bell. . . . So Hillman and Bell decided not to appear and they also chose not to file a motion to quash service." Based on these facts, the court held that relief under section 473(b)'s mandatory provision was not available.

On appeal, Hillman asserts that the trial court erred, because "the trial court's finding that Hillman attempted to deceive it into granting him relief is not supported by substantial evidence." We agree. The evidence does not support the trial court's conclusion that Hillman—rather than (or in addition to) Bell—decided substituted service was defective, and therefore no responsive pleading was required. The court understandably questioned the credibility of Hillman's claim in his declaration that he did not recall seeing the summons and complaint. But whether Hillman *knew* about the complaint does not address whether Hillman—rather than Bell—decided whether service was effective or if a response was necessary. The trial court also stated that the "reply brief (at p. 7) admits that *Hillman* decided that 'the substituted service was defective.'" This conclusion is not supported by the language in the reply. In addition, arguments supporting a motion do not constitute evidence.

(*Hebberd-Kulow Enterprises, Inc. v. Kelomar, Inc.* (2013) 218 Cal.App.4th 272, 283.)

Bell's declaration stated that he alone decided service was not proper, and Hillman played no part in that decision. Hillman's declaration said nothing about whether service was legally sufficient, or who made the decision that a response was unnecessary. Thus, the court's conclusion that Hillman personally contributed to the default, and therefore was not "innocent" for purposes of section 473(b), was not supported by substantial evidence.[7]

In light of Bell's admission of fault, and the lack of evidence that Hillman contributed to the error, relief from default was mandatory. "[T]he trial court does not have discretion to refuse relief under section 473, subdivision (b), if attorney mistake, inadvertence, surprise, or neglect is shown." (*Gee v. Greyhound Lines, Inc.* (2016) 6 Cal.App.5th 477, 491.) Relief is mandated without regard to whether the attorney mistake or neglect was excusable. (*Jackson v. Kaiser Foundation Hospitals, Inc.* (2019) 32 Cal.App.5th 166, 174.)

The trial court's denial of Hillman's motion to vacate default was therefore erroneous, and must be reversed. We note that "mandatory relief comes with a price—namely, the duty to pay 'reasonable compensatory legal fees and costs to opposing counsel or parties' (§ 473, subd. (b))." (*Martin Potts, supra,* 244

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[7] There is a split of authority as to whether mandatory relief under section 473(b) is available "when the error lies partly at the client's feet and partly at the attorney's." (See, e.g., *Martin Potts* (2016) 244 Cal.App.4th 432, 442; *Gutierrez v. G & M Oil Co, Inc.* (2010) 184 Cal.App.4th 551, 557-558.) Because the evidence does not suggest Hillman is at fault, the split of authority is not at issue in this case.

Cal.App.4th at p. 438.) On remand, Cullen is entitled to seek recovery under this provision.

Because we find that Hillman was entitled to have default vacated under the mandatory provision of section 473(b), we do not address his arguments that he was also entitled to relief under the discretionary provision of section 473(b), or that the default judgment was void due to errors in the judgment.

DISPOSITION

The default judgment is reversed, and the case is remanded with directions to vacate the order denying Hillman's motion to vacate default, and enter a new order granting that motion under the mandatory provision of Code of Civil Procedure, section 473, subdivision (b). The parties shall bear their own costs on appeal.

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COLLINS, J.

We concur:

WILLHITE, ACTING P.J.

CURREY, J.