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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

STANLEY M. TOY, JR. M.D., Cross-complainant and Respondent, v. FLAVIO RODRIGUEZ, Cross-defendant and Appellant.	B282240 (Los Angeles County Super. Ct. No. BC406661)

APPEAL from an order of the Superior Court of Los Angeles County. Mark A. Borenstein, Judge. Affirmed.

Law Offices of Alexandria C. Phillips and Alexandria C. Phillips for Cross-defendant and Appellant.

Law Offices of David J. Wilzig and David J. Wilzig; Howard Posner for Cross-complainant and Respondent.

Cross-defendant and appellant Flavio Rodriguez (appellant) appeals from a November 14, 2016 order vacating a default judgment entered against cross-complainant and respondent Stanley M. Toy, Jr. (respondent) and reinstating respondent's cross-complaint against him. We affirm the trial court's order.

BACKGROUND

In September 2016, respondent filed a motion to vacate a September 2, 2015 default judgment entered against him and in favor of appellant and to reinstate his cross-complaint against appellant on the ground that neither respondent nor his then counsel were served with notice of the trial or entry of judgment. The motion was supported by the declaration of Frank Lizarraga, respondent's counsel at the time of the trial. Lizarraga stated in his declaration that he filed and served a notice of change of address on September 4, 2012, and that he never received notice of the September 2, 2015 trial date or any of the final status conference hearings in the case.

Appellant opposed the motion to set aside the judgment, arguing that Lizarraga had actual notice of the trial. In support of his opposition, appellant submitted the declaration of his counsel, Alexandria Phillips, who stated that on August 27, 2015, she served appellant's trial brief and trial exhibits on Lizarraga by mail at two different addresses -- the one Lizarraga used before the September 4, 2012 notice of change of address, and the one he used thereafter.

At an October 20, 2016 initial hearing on respondent's motion, Phillips admitted that she did not send a notice of trial to Lizarraga at his correct address. The trial court noted that an amended proof of service filed by appellant indicated that Lizarraga had been served by mail on August 27, 2015, with a copy of appellant's trial brief and trial exhibits and that he

accordingly appeared to have been given actual notice of the trial. The trial court concluded, however, that even if service of the trial brief and trial exhibits on Lizarraga constituted actual notice of the trial, that notice was untimely under Code of Civil Procedure section 594.[1] The court then set a further hearing to determine whether respondent had acted with diligence in bringing his motion to set aside the judgment under section 473, subdivision (d).

A further hearing on respondent's motion was held on November 14, 2016, at which Lizarraga, Lizarraga's secretary, Nancy Beltran, and Phillips testified. Beltran and Lizarraga both described their firm's calendaring and electronic document management system, and both testified that none of the pretrial or posttrial documents in this case were ever entered into that system. Lizarraga further testified that his office never received appellant's trial brief or trial exhibits and that he did not know that a default judgment had been entered against respondent until he was contacted by respondent's current counsel in July or August of 2016.

At the conclusion of the hearing, the trial court found that respondent and Lizarraga had not received notice of the September 2015 trial date or the default judgment, and that respondent had acted diligently in moving to vacate the judgment. The court then granted respondent's motion to set aside the judgment and to reinstate his cross-complaint.

A minute order granting respondent's motion to vacate the judgment and to reinstate his cross-complaint against appellant was entered on November 14, 2016. The November 14, 2016 minute order states that the parties waived notice. The order

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

further states that respondent's counsel was "to submit the proposed order and to comply with [California Rules of Court rule] 3.1312." Respondent's counsel does not appear to have submitted a proposed order, as the record contains neither a proposed order nor a signed final order.

On November 21, 2016, the trial court issued a minute order that states:

> "On November 14, 2016 the Court granted [respondent's] motion to vacate the judgment and reinstate his cross complaint against [appellant]. The Court set a hearing on [appellant's] request for fees and costs under [section] 473(c) for January 18, 2017 at 9:15 a.m. Although the Court is not, at this time, reconsidering its decision on its own motion, the Court orders [respondent] and his counsel to permit [appellant's counsel] to review the Time Matters entries in [respondent's former counsel's] computer system for August and September 2015 to confirm there were no mail items logged into the system concerning this case. Counsel shall jointly report to the Court at the hearing on the [section] 473(c) request the results of this disclosure.
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> "The Judicial Assistant is ordered to serve a copy of this Minute Order by first class United States mail on counsel for [appellant] who is then ordered to serve a copy on counsel for [respondent]."

The clerk's certificate of mailing states that a copy of the November 21, 2016 order was served on appellant's counsel by first class mail on November 21, 2016.

On November 30, 2016, appellant served a notice of court minute order that included a copy of the November 21, 2016 order.

On January 25, 2017, appellant filed a motion for reconsideration of the November 14, 2016 order vacating the judgment and reinstating respondent's cross-complaint.

At the March 30, 2017 hearing on the motion for reconsideration, the trial court stated at the outset that it was "inclined to grant reconsideration and to consider the new evidence that I believe was provided, but to also, as I did before, grant the motion to vacate and set aside the judgment." The trial court explained that although the declaration by appellant's counsel that accompanied the motion for reconsideration "didn't completely comply with local [section] 1108, it nevertheless provided new information that resulted from the minute order that I sent requiring . . . [respondent's former trial counsel's] time matters system." After considering the additional evidence submitted, the trial court reaffirmed its previous finding that respondent had acted with diligence and reiterated its decision to vacate the judgment. The parties waived notice of the trial court's ruling. Although the trial court stated that a minute order denying the motion for reconsideration would be entered, the record on appeal does not include such an order.

Appellant filed the instant appeal on April 25, 2017.

DISCUSSION

I. Motion to dismiss appeal

Respondent moved to dismiss appellant's appeal from the November 14, 2016 order as untimely under rule 8.104(a) of the California Rules of Court.[2]

Rule 8.104(a)(1) provides:

> "(a) Unless a statute or rules 8.108, 8.702, or 8.712 provide otherwise, a notice of appeal must be filed on or before the earliest of:

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[2] All further references to "rules" are to the California Rules of Court.

> "(1)(A) 60 days after the superior court clerk serves on the party filing the notice of appeal a document entitled 'Notice of Entry' of judgment or a filed-endorsed copy of the judgment, showing the date either was served;
>
> "(B) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled 'Notice of Entry' of judgment or filed-endorsed copy of the judgment, accompanied by proof of service; or
>
> "(C) 180 days after entry of judgment."

A "judgment," as used in rule 8.104(a) includes an appealable order. (Rule 8.104(e).) "The entry date of an appealable order that is entered in the minutes is the date it is entered in the permanent minutes." (Rule 8.104(c)(2).)

Respondent argues that the November 21, 2016 order that the superior court clerk served by mail on appellant's counsel constituted notice of entry of the trial court's November 14, 2016 order, thereby triggering the 60-day limitations period for filing a notice of appeal from the November 14, 2016 order under rule 8.104(a)(1)(A). Respondent contends the last day to file a notice of appeal was January 20, 2017, and that appellant's notice of appeal filed on April 25, 2017, was untimely. Although appellant does not directly dispute respondent's calculation of the filing deadline, respondent's argument is incorrect.

The November 21, 2016 minute order served on appellant by the superior court clerk did not constitute notice of entry of the November 14, 2016 order vacating the judgment under rule 8.104(a)(1)(A). The November 21, 2016 order is not entitled "Notice of Entry" of the November 14, 2016 order, and there is no evidence in the record to support respondent's assertion that the

superior court clerk mailed to appellant's counsel a file-stamped copy of the November 14, 2016 order as required by rule 8.104(a)(1)(A). Rather, the record indicates that the parties waived notice of the November 14, 2016 order.

The order that is the subject of this appeal was entered in the superior court's permanent minutes on November 14, 2016.[3] Appellant had 180 days from that date, until May 14, 2017, to file a notice of appeal. (Rule 8.104(a)(1)(C), (c)(2).) The notice of appeal filed on April 25, 2017, was timely.[4] We therefore consider the merits of appellant's appeal.

II. Order vacating the judgment

A. Standard of review

A motion to set aside a judgment is within the sound discretion of the trial court and will not be reversed absent a clear showing of abuse of that discretion. (*Phillipine Expert & Foreign Loan Guarantee Corp. v. Chuidian* (1990) 218 Cal.App.3d 1058, 1077.) Any factual conflicts in the evidence must be resolved in favor of the prevailing party, and all presumptions are in favor of the correctness of the order. (*Ibid.*; *McCreadie v. Arques* (1967) 248 Cal.App.2d 39, 45 (*McCreadie*).)

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[3] Although the record indicates that respondent's counsel offered to submit a proposed order granting the motion to vacate the judgment and reinstating respondent's cross-complaint, the record contains neither a proposed order nor a signed and filed order granting respondent's motion to vacate the judgment.

[4] Because we conclude the notice of appeal was timely filed, we do not address the parties' arguments as to whether appellant's motion for reconsideration of the November 14, 2016 order was timely filed, or whether the trial court's consideration of that motion extended appellant's time to file a notice of appeal under rule 8.108(e).)

Appellant incorrectly contends a de novo standard applies in reviewing the trial court's assessment of the evidence and its factual determination that appellant failed to give respondent timely notice of trial. When reviewing factual determinations, an appellate court does not reweigh the evidence but must give the prevailing party the benefit of every reasonable inference that can be drawn from the evidence. (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 544, overruled on another ground by *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574, 580.)

B. Applicable law

1. Section 594

Section 594 provides that a trial may not take place unless the adverse party was given at least 15 days notice of the trial date. The statute provides, in relevant part:

> "(a) In superior courts either party may bring an issue to trial or to a hearing, and, in the absence of the adverse party, unless the court, for good cause, otherwise directs, may proceed with the case and take a dismissal of the action, or a verdict, or judgment, as the case may require; provided, however, if the issue to be tried is an issue of fact, proof shall first be made to the satisfaction of the court that the adverse party has had 15 days' notice of such trial . . . . If the adverse party has served notice of trial upon the party seeking the dismissal, verdict, or judgment at least five days prior to the trial, the adverse party shall be deemed to have had notice.
>
> "(b) The notice to the adverse party required by subdivision (a) shall be served by mail on all the parties by the clerk of the court not less than 20 days prior to the date set for trial. . . . If notice is not served by the clerk as required by this subdivision, it may be served by mail by any party on the adverse party not less than 15 days prior to the date set for

> trial . . . . If notice is served by a party, proof may be made by introduction into evidence of an affidavit or certificate pursuant to subdivision (1) or (2) of Section 1013a or other competent evidence. The provisions of this subdivision are exclusive."

(Code Civ. Proc., § 594.)

The notice requirement under section 594 is mandatory and jurisdictional; a judgment entered following a trial conducted in violation of the requirement is void. (*Urethane Foam Experts, Inc. v. Latimer* (1995) 31 Cal.App.4th 763, 767 (*Urethane Foam*).)

2. Section 473, subdivision (d)

Section 473, subdivision (d) provides in relevant part: "The court may, . . . on motion of either party after notice to the other party, set aside any void judgment or order." Failure to exercise reasonable diligence in moving to set aside a default judgment may be grounds for refusing relief. (*McCreadie, supra,* 248 Cal.App.2d at p. 46.)

C. No abuse of discretion

The trial court set aside the default judgment entered against respondent after finding that neither respondent nor his then counsel had received notice of the trial date or notice of entry of the judgment. The trial court further found that respondent had acted diligently in moving to vacate the judgment. Substantial evidence supports those findings. Both Lizarraga and his secretary testified that none of the pretrial or posttrial documents in this case were received in their office. The trial court found that testimony to be credible.

Appellant argues that "section 594 is directed only at the *initial trial date,* not at continued trial dates." He maintains that the statute does not apply to the instant case because respondent's counsel had actual notice of an initial April 27,

2011 trial date that was subsequently vacated, as well as a May 22, 2013 continued trial date that was also subsequently vacated. *People ex rel. San Francisco Bay etc. Com. v. Smith* (1994) 26 Cal.App.4th 113 (*San Francisco Bay*), on which appellant relies as support for this argument, is distinguishable. Tenwinkle, the defendant in that case, sought to vacate a default judgment entered against him on the ground that he had not been given 15 days' notice of an April 14, 1992 trial date. Tenwinkle had appeared for trial on March 5, 1992, and following an in chamber settlement conference, the trial judge in open court continued the matter to March 23, 1992. On March 23, the trial was again continued to April 7, but the record did not disclose whether Tenwinkle was present. On April 7, when Tenwinkle was apparently not present, the trial was again continued to April 14. (*Id.* at pp. 128-129.) The April 14, 1992 trial proceeded in Tenwinkle's absence. In rejecting Tenwinkle's argument that the resulting judgment was void as to him, the court in *San Francisco Bay* concluded that Tenwinkle's presence at the March 5, 1992 settlement conference gave him actual notice that the matter had been continued, and that he had a duty to keep himself "'informed by diligent inquiry of all subsequent continuances.' [Citation.]" (*Id.* at p. 129.)

In the instant case, neither respondent nor his counsel had actual notice of the September 2, 2015 trial date. Appellant fails to explain how notice of the April 11, 2011 and May 23, 2013 initial trial dates -- vacated years before the September 2, 2015 trial date -- constituted actual notice of the trial. Neither respondent nor his counsel received notice of or attended the final status conferences at which the September 2, 2015 trial date was set.

Appellant contends the trial court lacked statutory authority to set aside the judgment under section 473,

subdivision (d) because the judgment entered against respondent was not void on its face. The judgment was void because respondent had no notice of the trial (§ 594; *Urethane Foam, supra,* 31 Cal.App.4th at p. 767) and the trial court properly exercised its discretion to set aside the judgment under section 473, subdivision (d).

Finally, appellant argues that respondent should be denied relief because of his attorney's "intrinsic mistake and negligence." Appellant claims that Lizarraga's failure to appear at trial was the result of Lizarraga's mistaken belief that he no longer represented respondent. That claim is contradicted by the evidence. Lizarraga testified that his firm never ceased representing respondent and that he never withdrew as counsel of record. Lizarraga further stated that he did not appear at any of the status conferences held on and after June 11, 2014, or at the September 2, 2015 trial because he received no notice of those dates. Appellant fails to establish any abuse of discretion by the trial court.

DISPOSITION

The order granting the motion to vacate the judgment and reinstating respondent's cross-complaint is affirmed. Respondent is awarded his costs on appeal.

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_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT