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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

DOROTHY LACEY, et al.,

Plaintiffs and Respondents,

v.

SHORELINE FOODS, INC.,

Defendant and Appellant.

B283236

(Los Angeles County
Super. Ct. No. BC539265)

APPEAL from an order of the Superior Court of Los Angeles County, Edward B. Moreton, Jr., Judge. Reversed with directions.

Rostam Law, Inc., Glen Mertens and Carlos A. De La Paz
for Defendant and Appellant.

Todd Elliot Lavin for Plaintiffs and Respondents.

INTRODUCTION

Plaintiffs Dorothy and Dietrich Lacey sued Roscoe's House of Chicken and Waffles in Long Beach ("Roscoe's") and obtained default judgments against Roscoe's. Subsequently, plaintiffs moved to amend the default judgments to add Shoreline Foods, Inc., the owner of Roscoe's, as a defendant/judgment debtor pursuant to Code of Civil Procedure section 187.¹ Shoreline appeals the court's order granting plaintiffs' motion, arguing that the court erred because Roscoe's was never properly served and Shoreline was not properly represented in the underlying litigation. We agree and reverse the order adding Shoreline as a defendant/judgment debtor and vacate the default judgment against Roscoe's.

FACTS AND PROCEDURAL BACKGROUND

1. Complaint and Defective Service

On March 13, 2014, plaintiffs filed their complaint, alleging that they suffered food poisoning after dining at Roscoe's in Long Beach on March 17, 2012. The complaint named as the defendant "Roscoe's House of Chicken and Waffles in Long Beach."²

On April 21, 2014, plaintiffs filed a proof of service stating that on April 1, 2014, a registered California process server delivered a copy of the summons and complaint to "Elmo 'Doe' " who was described as a "Manager" of the Roscoe's Long Beach

¹ All subsequent statutory references are to the Code of Civil Procedure unless indicated otherwise.

² Roscoe's House of Chicken and Waffles in Long Beach is not a legal entity. Plaintiffs apparently failed to determine the legal owner of Roscoe's during the nearly two years between the alleged food poisoning and the filing of the complaint.

location. The proof of service indicated that personal service was made at the restaurant's address. The summons and complaint were never mailed to Roscoe's. (See § 415.95 [service on a business organization, form unknown, must be accomplished by first class mail and personal service].) Roscoe's never filed a responsive pleading.

2. Default Judgments

On May 20, 2014, plaintiffs mailed a request for entry of default against Roscoe's to "Attn: Manager/Elmo" at the restaurant's address. The trial court entered default judgments against Roscoe's on September 14, 2015.

3. Default Prove-Up

On September 14, 2015, plaintiffs testified and submitted evidence at the prove-up hearing. The court entered judgments against Roscoe's, awarding \$250,487 in damages to Dorothy Lacey and \$25,000 in damages to Dietrich Lacey.

4. Plaintiffs Sought to Add East Coast Foods as Defendant and Judgment Debtor

On October 5, 2015, the trial court issued a writ of execution on each of the plaintiffs' judgments. The sheriff's department refused to execute the writs of execution because "Roscoe's House of Chicken & Waffles" was not a legal entity.

In March 2016, plaintiffs' counsel obtained a copy of a fictitious business name statement that identified East Coast Foods, Inc. as a corporation conducting business under the names "Roscoe's House of Chicken N' Waffles" and "Roscoe's." Based on this information, plaintiffs filed a motion to amend the judgment to add East Coast as a defendant/judgment debtor.

In the motion to add East Coast as a defendant, plaintiffs alleged that when drafting their complaint, "nowhere was

plaintiffs' counsel able to locate a verified legal name or dba for defendant." Counsel continued, "Usually checking defendant's website on the Internet will reveal a corporate name or entity description. But the only information gleaned from defendant's website was defendant's various locations and the name they used when addressing themselves, that being: Roscoe's House of Chicken & Waffles." Plaintiffs' counsel also stated he had searched the Secretary of State's website without success. Plaintiffs' counsel explained that because of this, they sued Roscoe's and not its owner. Plaintiffs stated that because they could not execute their default judgments on Roscoe's, plaintiff's counsel consulted an attorney who was a collection specialist. "Apparently with this attorney's internet access to public records, or simply due to his superior knowledge, he was able to determine East Coast Foods, Inc. was the name of the corporation doing business as Roscoe's."

In April 2016, East Coast filed a notice to stay proceedings in the trial court based on its pending bankruptcy proceeding. In September, plaintiffs filed a motion for relief from the stay in the bankruptcy court. East Coast responded with a declaration from its president, asserting East Coast was not the owner of Roscoe's in Long Beach.³

5. Plaintiffs Sought to Add Shoreline Foods as a Defendant and Judgment Debtor

During the hearings in bankruptcy court, plaintiffs discovered that the appellant, Shoreline Foods, Inc., owned Roscoe's in Long Beach. On January 28, 2017, plaintiffs filed a

³ As East Coast is not a party to this appeal, we do not further address its role, if any, in this litigation.

second motion to amend their judgments, this time requesting to add appellant Shoreline as a defendant/judgment debtor.

On March 7, 2017, Shoreline filed an opposition. Shoreline argued that adding Shoreline as a defendant/judgment debtor after the judgments had been entered violated its due process right to defend itself. Shoreline argued that it did not have control of the underlying litigation, nor was it virtually represented therein because there was no actual litigation or defense put forth for Shoreline or any named defendant. Shoreline contended that because plaintiffs did not properly serve the summons and complaint in April 2014, the trial court lacked personal jurisdiction over Shoreline. Shoreline also asserted that if plaintiffs' counsel had simply searched the publicly available fictitious business name records at the outset when filing plaintiffs' complaint, he would have discovered the proper authorized agent for service.

On March 13, 2017, plaintiffs filed a reply arguing that they properly served the summons and complaint pursuant to section 416.10, subdivision (b).

The trial court heard plaintiffs' motion on April 18, 2017. After taking the matter under submission, the court ruled: "Plaintiff[s] Dorothy Lacey and Dietrich Lacey have established by a preponderance [of] the evidence that Shoreline Foods Inc. owns and operates Roscoe's House of Chicken and Waffles. . . . Therefore, Plaintiffs' motion to amend the judgment to add Shoreline Foods Inc. as a defendant/judgment debtor is granted."

DISCUSSION

Shoreline argues that the order adding Shoreline as a defendant/judgment debtor must be reversed because the order violated Shoreline's due process rights. "The decision to grant or

deny the motion lies within the sound discretion of the trial court [citation] and will not be disturbed on appeal if there is a legal basis for the decision and substantial evidence supports it.” (*Highland Springs Conference & Training Center v. City of Banning* (2016) 244 Cal.App.4th 267, 280.)

1. The Court Abused Its Discretion in Adding Shoreline as a Defendant/Judgment Debtor

“Section 187 grants every court the power and authority to carry its jurisdiction into effect. [Citation.] This includes the authority to amend a judgment to add an alter ego of an original judgment debtor, and thereby make the additional judgment debtor liable on the judgment. [Citation.] Amending a judgment to add an alter ego of an original judgment debtor ‘ “is an equitable procedure based on the theory that the court is not amending the judgment to add a new defendant but is merely inserting the correct name of the real defendant.” ’ ” (*Highland Springs Conference & Training Center v. City of Banning, supra*, 244 Cal.App.4th at p. 280.)

To prevail on a motion to add a defendant/judgment debtor, the judgment creditor must show, by a preponderance of the evidence, that: “(1) the parties to be added as judgment debtors had control of the underlying litigation and were virtually represented in that proceeding; (2) there is such a unity of interest and ownership that the separate personalities of the entity and the owners no longer exist; and (3) an inequitable result will follow if the acts are treated as those of the entity alone.” (*Relentless Air Racing, LLC v. Airborne Turbine Ltd. Partnership* (2013) 222 Cal.App.4th 811, 815–816.)

Here, there is no evidence that supports the first prong. Shoreline never had any control of the underlying litigation nor

were any of its interests represented below. Rather, plaintiffs obtained default judgments against a non-entity, Roscoe's, without identifying the owner of the restaurant prior to filing and serving the lawsuit, and without properly serving anyone.

2. Plaintiffs Failed to Properly Serve Roscoe's

Plaintiffs failed to even comply with the statute by which a plaintiff may properly serve an unknown business entity. Section 415.95, subdivision (a) (the statute identified on the proof of service) requires that summons on "a business organization, form unknown," be accomplished by "leaving a copy of the summons and complaint during usual office hours with the person who is apparently in charge of the office of that business, and by thereafter mailing a copy of the summons and complaint by first-class mail, postage prepaid, to the person to be served at the place where a copy of the summons and complaint was left." Nowhere in the record is there any evidence that plaintiffs complied with the mailing requirements for proper service of an unknown business entity.

Although they did not brief the issue, plaintiffs asserted at oral argument that service complied with Code of Civil Procedure section 415.95, subdivision (a) because they enlisted the services of a registered process server to serve the summons and complaint. Plaintiffs misconstrue the presumption created by the Evidence Code for proofs of service completed by a register process server. Evidence Code section 647 states that "[t]he return of a [registered] process server . . . establishes a presumption, affecting the burden of producing evidence, of the *facts stated in the return*." (Emphasis added.) Here, the process server checked the box indicating personal service but did not check a box indicating service by mail. Thus, there is a

presumption that a manager named Elmo was personally served, but there is no presumption that service by mail was completed. Service, thus, did not comply with the requirements for service on an unknown business entity under Code of Civil Procedure, section 415.95, subdivision (a).

Plaintiffs argue in their appellate brief, as they did in response to Shoreline's motion in the trial court, that they properly served Roscoe's pursuant to section 416.10. But that provision applies to corporations. The complaint was served on "Roscoe's." Plaintiff s do not contend on appeal that "Roscoe's" is a corporation. Section 416.10 is inapplicable.

Even if section 416.10 were to apply in this setting, the statute requires personal service of the summons and complaint on the corporation's designated agent for service of process, or "the president, chief executive officer, or other head of the corporation, a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a controller or chief financial officer, a general manager, or a person authorized by the corporation to receive service of process." (§ 416.10, subds. (a)-(b).) Plaintiffs personally served "Elmo 'Doe,'" who the process server described as a manager at the restaurant. There is no evidence that Elmo held any of these positions listed in the statute. There is no evidence that Elmo, as a manager at the restaurant, had "sufficient character and rank" within the corporation that owned Roscoe's to put the true owner on notice of the lawsuit. (*Gibble v. Car-Lene Research, Inc.* (1998) 67 Cal.App.4th 295, 313 [general manager "includes any agent of the corporation 'of sufficient character and rank to make it reasonably certain that the defendant will be apprised of the service made' "].)

Both plaintiffs' failure to identify the owner and properly serve Roscoe's as an unknown business entity contributed to Shoreline's lack of notice of the lawsuit and inability to launch any kind of defense. Plaintiffs failed to do their due diligence to ascertain the name and status of a party they intended to sue. To allow plaintiffs to add Shoreline as a judgment debtor at this juncture, would violate Shoreline's right to due process.⁴ (*NEC Electronics Inc. v. Hurt* (1989) 208 Cal.App.3d 772, 781 [due process requires "some active defense of the underlying claim"].)

3. The Court Lacked Personal Jurisdiction Over Roscoe's; the Default Judgments Must Be Vacated

Because plaintiffs failed to validly serve Roscoe's, the court lacked personal jurisdiction over Roscoe's when it issued its judgments. (*Ziller Electronics Lab GmbH v. Superior Court* (1988) 206 Cal.App.3d 1222, 1229 ["in personam jurisdiction over defendant depends upon valid service and demonstration of minimum contacts"].) The default judgments must therefore be vacated. (*Strathvale Holdings v. E.B.H.* (2005) 126 Cal.App.4th 1241, 1249 ["When a court lacks jurisdiction in a fundamental sense, an ensuing judgment is void."].)

⁴ Plaintiffs assert that Shoreline forfeited this appeal by failing to provide a reporter's transcript. We disagree. There was no live testimony or other evidence presented at the hearing. And, plaintiffs do not identify any matter addressed at the hearing that was not addressed in the Clerk's Transcript. We conclude the reporter's transcript is not necessary to evaluate whether the court erred in allowing plaintiffs to add Shoreline as a defendant/judgment debtor. (See *People ex rel. Harris v. Shine* (2017) 16 Cal.App.5th 524, 533.)

DISPOSITION

We reverse the order granting the motion to add Shoreline as a defendant/judgment debtor. We order the trial court to vacate the default judgments against Roscoe's.⁵ Defendant Shoreline Foods, Inc. is awarded costs on appeal.

RUBIN, J.

WE CONCUR:

BIGELOW, P.J.

GOODMAN, J.*

⁵ At oral argument, counsel for Shoreline advised the court that he would accept service of process on Shoreline's behalf.

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