Filed 9/28/17 Estrella v. BT Catering CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

HECTOR ESTRELLA, Plaintiff and Respondent, v. BT CATERING, Defendant and Appellant.	B280601 (Los Angeles County Super. Ct. No. BC552483)

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

Bruce M. Warren for Defendant and Appellant.

JML Law, Joseph M. Lovretovich, David F. Tibor, Jennifer A. Lipski, Stephen J. Wiard and Brooke C. Bellah for Plaintiff and Respondent.

Defendant and appellant BT Catering appeals from the trial court's order denying it relief from the default judgment on plaintiff and respondent Hector Estrella's (Estrella) complaint. BT Catering argues that the court should have set aside the judgment against it as void because it was never served with the operative complaint upon which default was entered and because the complaint failed to specifically plead the damages awarded. In the alternative, BT Catering argues that relief from default was warranted based on mistake or surprise. As we shall explain, the court did not err. BT Catering's litigation conduct constituted a general appearance in the action and put it on notice of the claims against it, and thus, BT Catering forfeited any complaint regarding defective service. In addition, Estrella's statement of damages provided sufficient evidence to support the damage award, and any mistake or surprise in the matter was the result of BT Catering's counsel's litigation strategy. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

A. Estrella's Employment with BT Catering

Estrella worked as a cook for BT Catering from October 2011 until June 2013. Estrella, who is Latino, claimed that during his employment, Bent Thomsen, the owner of BT Catering, subjected him to constant racist ridicule, discriminatory conduct and derogatory remarks. Also, according to Estrella, throughout his employment he was repeatedly denied meal periods and rest breaks, and BT Catering failed to pay him overtime wages. Estrella alleged that after he complained, BT Catering retaliated against him by reducing his hours, and in June 2013, firing him.

B. Estrella's Prelitigation Contact with BT Catering

Estrella retained counsel, JML Law, and in mid-June 2014, Estrella filed charges with the Department of Fair Employment and Housing (DFEH) against BT Catering and Thomsen. The DFEH issued a right-to-sue letter. On June 18, 2014, Estrella's counsel sent a demand letter to BT Catering's counsel, Bruce Warren, describing the factual and legal basis of Estrella's wage and hour claims.

C. The Complaint and Service

On July 22, 2014, JML Law, on behalf of Estrella, filed a complaint in the Los Angeles County Superior Court, alleging 11 causes of action against BT Catering, including claims under the Fair Employment and Housing Act (FEHA) for racial discrimination, racial harassment, failure to prevent discrimination and harassment, retaliation, and wrongful termination, as well as claims for failure to pay overtime wages, to allow meal and rest breaks, waiting time penalties, and failure to provide accurate itemized wage statements.

On the same day that JML Law filed Estrella's complaint, JML Law also filed a complaint in the Los Angeles County Superior Court in an unrelated discrimination and wage and hour employment case, *Diaz v. Castlerock Environmental, Inc.,* Case No. BC552482 (the *Diaz* case). Unbeknownst to Estrella's counsel at the time,[1] when the complaints in Estrella's case and

[1] Until BT Catering sought for relief from the default judgment, JML Law was apparently unaware that the complaint that was initially scanned and uploaded into the firm's internal database differed from the complaint that was filed in the superior court.

Diaz's case were scanned into JML Law's electronic database, the caption pages for the complaints were switched. Accordingly, the complaint in the *Diaz* case was inadvertently placed behind the caption page for the complaint in Estrella's case (the mixed-up complaint).

On August 6, 2014, the mixed-up complaint, the summons and civil case cover sheet[2] were served on BT Catering by substituted service and a copy of the summons and the mixed-up complaint was served by mail. Shortly after that, Estrella filed the proof of service of summons in the court.

According to Thomsen, he gave the documents he had been served with to Warren. In early August 2014, Warren wrote to JML Law requesting a copy of the complaint and service package and a notice of acknowledgement. Warren indicated that he would make an appearance on behalf of the defendants. On August 12, 2014, JML Law sent Warren via email copies of documents that had been scanned into JML Law's internal electronic file for the case, including the summons, the mixed-up complaint, civil case cover sheet, notice of acknowledgement and notice of case management conference.

Although Warren had represented to JML Law that he would accept service on behalf of BT Catering and Thomsen, he failed to file an answer, demurrer, motion or other pleading in response. In addition, even though he suspected that his clients had been served with the wrong complaint—the mixed-up complaint—because the copy served on them contained allegations about other parties (Diaz and his employer), Warren failed to notify JML Law of the error. Likewise, Warren did not check the superior court's file to determine if the mixed-up complaint had been filed in the court.

---

[2] Both the summons and the civil case cover sheet served on BT Catering pertained to Estrella's case.

According to Warren, he did not file a response to the mixed-up complaint (or take any other action to alert JML Law or the court of the mistake) because he knew the court would likely give Estrella leave to amend to correct it. Instead, Warren decided that because the mixed-up complaint did not assert any claims against his clients, they had nothing to defend against, and accordingly, he planned to allow a default judgment to be entered in the case. Thereafter, he planned to move for relief from the default judgment and to request an order dismissing the case based on *Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267 (*Kim*).[3]

D. BT Catering Litigation Conduct

Nonetheless, in August 2014, Warren began propounding discovery on behalf of BT Catering and Thomsen, including three separate sets of form interrogatories, two sets of special interrogatories, two requests for production of documents and two separate requests for admission. Some of the discovery requests were specifically tailored to Estrella's wage and hour claims and others broadly sought information about all of Estrella's claims against the defendants. Also in August 2014, Warren served Estrella with an offer to compromise under Code of Civil Procedure section 998.[4] BT Catering also issued a check to Estrella for his unpaid overtime claim.

After receiving some of Estrella's discovery responses, Warren sent several "meet and confer" letters requesting further responses, threatening to file motions to compel and indicating his

---

[3] In *Kim*, the Court of Appeal reversed a trial court order granting default judgment because the operative complaint filed and served on the defendant did not allege any cause of action against them. (*Kim, supra,* 201 Cal.App.4th at pp. 281-286.)

[4] Subsequent statutory references are to the Code of Civil Procedure.

intent to seek sanctions against Estrella. In response, Estrella served further responses to the discovery requests.

In October 2014, Estrella served written discovery requests on BT Catering. BT Catering served no response to any of Estrella's discovery requests.

On November 18, 2014, the trial court held a case management conference (CMC), at which counsel for only Estrella's appeared. The court continued the CMC to January 2015, and despite providing notice of the continued CMC, Warren failed to appear. Estrella's counsel informed the court that Warren had represented to JML Law that he was counsel for the defendants and that Warren stated that he would make an appearance for BT Catering. The court continued the CMC a second time, and ordered Warren to appear.

Warren appeared at the February 20, 2015 CMC hearing and represented to the trial court that he was authorized to accept service on behalf of BT Catering and Thomsen, but that he was not authorized to file any documents with the trial court because BT Catering allegedly did not want to incur the costs for an appearance. Warren did not inform the trial court that the mixed-up complaint that had been served on his clients did not allege any causes of action against them. According to Estrella's counsel, following the hearing, Warren stated that he was waiting for Estrella to secure a default judgment so that his client could get the matter discharged in bankruptcy court.

E. Default Judgment

In February 2015, Estrella filed and subsequently served a statement of damages. Estrella's statement of damages identified: $30,000 in special damages for lost earnings and benefits; $250,000 in general damages for emotional distress; $50,000 in attorney fees; and punitive damages in the sum of $1,000,000.

On October 1, 2015, Estrella filed a request for entry of default of BT Catering,[5] and the clerk entered the default of BT Catering on the complaint that had been filed in the trial court.

On March 3, 2016, Estrella filed and served his default "prove-up" package, which included a summary of the case in support of request for default judgment, reiterating the 11 legal claims asserted against BT Catering and the factual basis supporting those claims. Additionally, Estrella filed the supplemental declaration, which described the factual basis for his emotional distress damages he sought in connection with the wrongful termination, discrimination, and retaliation causes of action. On August 16, 2016, the trial court entered a default judgment against BT Catering in the amount of $75,684.95.[6]

F. BT Catering's Efforts to Seek Relief from Default

On August 25, 2016, Warren sent Estrella's counsel a letter in which he conveyed to Estrella's counsel for the first time that he had been sent via email (and that his clients had allegedly been served) with the mixed-up complaint that did not appear to plead any claims against BT Catering or Thomsen. Warren demanded that Estrella stipulate to vacate the judgment and enter judgment for appellant. Estrella's counsel refused.

On September 6, 2016, BT Catering filed its motion to vacate default judgment, and enter a judgment in its favor based on

---

[5] The request for entry of default was served on BT Catering on September 30, 2015, prior to its filing.

[6] The judgment entered specified the breakdown of the award as $60,500 in damages, $14,690 in attorney fees, and $494.95 in costs. The $60,500 consisted of $10,500 in economic damages ($6,000 for unpaid overtime wages, plus $4,500 for total lost wages), as well as $50,000 for emotional distress damages.

Kim, *supra*, 201 Cal.App.4th 267, or in the alternative for an order for relief from default under section 473, subdivisions (a)(1) and (b).

On October 26, 2016, the trial court denied BT Catering's motion to vacate. The court rejected BT Catering's argument that it was entitled to relief under the *Kim*. The court further held that "[t]o the extent that BT Catering takes issue with the variance between the [c]omplaint that it was served with and the [c]omplaint that was filed with the [c]ourt, BT Catering is challenging the propriety of service." On that basis, the court found that BT Catering had made a general appearance in the action through its litigation conduct, and thus forfeited any objection to defective service. The court further concluded that BT Catering was not entitled to relief based on lack of actual notice or surprise because "[t]he evidence establishes that BT Catering had knowledge of the actual allegations and claims against it throughout the litigation of this case." Additionally, the court concluded that the judgment against BT Catering was not void for failure to plead specific damages, because the statement of damages was appropriate and sufficient.

BT Catering timely appealed.

DISCUSSION

On appeal, BT Catering contends the trial court erred in failing to vacate the default judgment. BT Catering argues that the judgment against it should have been set aside as void because: (1) it is based on a complaint that was never served on BT Catering; or (2) the prayer for relief in the complaint failed to specifically plead the damages awarded. In the alternative, BT Catering argues that the court abused its discretion when it failed to grant it relief from default based on mistake or surprise. BT Catering's claims lack merit.

A. No Error in Refusing to Set Aside the Judgment as Void Based on a Failure of Service of the Complaint

The court obtains jurisdiction to enter a judgment against a person only if the person is named as a party and is properly served with the complaint and notice of the action. "[T]he rights of a person can not be affected by a suit to which he is a stranger." (*Whitney v. Higgins* (1858) 10 Cal. 547, 551.) And in general, a default judgment entered against a defendant who was not served with a summons and complaint in the manner prescribed by statute is void. (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1200.) Nonetheless, by appearing in a case, a stranger to an action may forfeit the right to object that he was not named in the complaint or properly served because his appearance and participation in the action operates as consent to jurisdiction. (*Tracy Press, Inc. v. Superior Court* (2008) 164 Cal.App.4th 1290, 1297 [a person not named as a defendant in a complaint may become a party by voluntarily appearing and undertaking the defense of the action]; *Fireman's Fund Ins. Co. v. Sparks Construction, Inc.* (2004) 114 Cal.App.4th 1135, 1145–1146, 1150 [even though two entities had not been properly named as defendants or properly served with the operative complaint, by making a general appearance they subjected themselves to the court's jurisdiction and became parties to the action]; *Tyrrell v. Baldwin* (1885) 67 Cal. 1, 3–4 [judgment upheld against defendants who were neither named in the complaint nor properly served because the defendants appeared and defended the action on the merits].) Thus, "[a] general appearance by a party is equivalent to personal service of summons [and complaint] on such party." (§ 410.50, subd. (a); *Fireman's Fund Ins. Co. v. Sparks Construction, Inc., supra,* 114 Cal.App.4th at p. 1145.)

"An appearance is general if the party contests the merits of the case or raises other than jurisdictional objections. [Citations.]" (*366–386 Geary St., L.P. v. Superior Court* (1990) 219 Cal.App.3d 1186, 1193–1194.) Participating in discovery on the merits constitutes a general appearance. (*Factor Health Management v. Superior Court* (2005) 132 Cal.App.4th 246, 250.)

Here, based on the record before us it appears that Estrella never served BT Catering with the filed version of the complaint upon which the court granted default. The default judgment, however, is not void. BT Catering forfeited any objection to the failure of service of the complaint when BT Catering's counsel made a general appearance by litigating its defense of the action. BT Catering's counsel engaged in extensive discovery on the merits of the claims, including propounding multiple sets of discovery requests and engaging in the meet-in-confer process, receiving discovery responses, serving a section 998 offer to compromise and appearing at the CMC. The totality of BT Catering's participation in the action operated as consent to the jurisdiction of the person and the issues, dispensed with the requirement of service of process. BT Catering's general appearance in the action made up for a complete failure to serve a summons and complaint. (*Oats v. Oats* (1983) 148 Cal.App.3d 416, 420 [service of summons and complaint is required to give the defendant notice of the action, as due process demands; but once the defendant appears in the action, this purpose has been served].)

In reaching this conclusion, we observe that the cases BT Catering cites are distinguishable and do not assist it. In all of them the defendants were either unaware of the lawsuit or claims against them or did not engage in litigation of the merits of the operative complaints. (See *Manson, Iver & York v. Black* (2009) 176 Cal.App.4th 36, 46 [default judgment set aside as void where defendant served but not properly named in the complaint, and

defendant did not respond or participate in the litigation]; *Falahati v. Kondo* (2005) 127 Cal.App.4th 823 [default vacated where the defendant was not aware of the claims against him alleged in the amended complaint and did not have an opportunity to defend on the merits before default entered]; *Schwab v. Rondel Homes, Inc.* (1991) 53 Cal.3d 428, 433 [default vacated where defendants were unaware of the amount of damages sought]; *Electronic Funds Solutions, LLC v. Murphy* (2005) 134 Cal.App.4th 1161, 1174 [default vacated as void where the damage award exceeded the amount plead in the complaint and no other notice of the damages provided to defendant]; *Levine v. Smith* (2006) 145 Cal.App.4th 1131, 1136 [same]; *Griffin Dewatering Corp. v. Northern Ins. Co. of New York* (2009) 176 Cal.App.4th 172, 179 [judgment reversed because the promise upon which defendant found liable was not alleged in the complaint].)

In contrast here, even though BT Catering was apparently served with the mixed-up complaint that did not assert any claims against it, BT Catering was aware of the actual claims based on its prelitigation correspondence from Estrella, the information disclosed in Estrella's discovery responses and Estrella's default package. And, as discussed elsewhere here, BT Catering engaged in litigation on the merits. As the court observed in *Fireman's Fund Ins. Co.*, "[a] defendant who has actual knowledge of the action and who has submitted to the authority of the court should not be able to assert a violation of rules which exist only to bring about such knowledge and submission." (*Fireman's Fund Ins. Co. v. Sparks Construction, Inc., supra,* 114 Cal.App.4th at p. 1148.) Consequently, the court did not err in failing to set aside the default judgment as void based on a failure of service of the complaint.

B. No Error in Refusing to Set Aside the Judgment as Void Based on a Failure of Complaint to State Damages

In general, when recovering damages in a default judgment, the plaintiff is limited to the damages specified in the complaint. (*Sole Energy Co. v. Hodges* (2005) 128 Cal.App.4th 199, 206, fn. 4; see also § 580.) Where, however, the plaintiff is seeking to recover for wrongful death or personal injury, the plaintiff may not state the amount of damages sought in the complaint, but instead must file a statement of damages under section 425.11, setting forth the nature and the amount of damages sought. (§ 425.10) The plaintiff must also serve the statement on the defendant before a default may be taken. (§ 425.11; *Electronic Funds Solutions, LLC v. Murphy, supra,* 134 Cal.App.4th at pp. 1176-1177.) And if a trial court grants a default judgment which exceeds the amount demanded in the complaint or where the plaintiff fails to file (and serve) a statement of damages if required, the judgment may be vacated as void. (*Id.* at p. 1174; *Levine v. Smith*, *supra*, 145 Cal.App.4th at p. 1136.)

Here, Estrella's complaint did not state an amount of damages sought, but five months before seeking BT Catering's default, Estrella filed and served a statement of damages disclosing the amounts Estrella sought for lost earnings, emotional distress, attorney fees and punitive damages. BT Catering asserts, however, that a statement of damages was neither permitted nor required in this case because Estrella's case did not seek recovery for personal injuries or wrongful death, and thus the judgment entered for $75,684.95 is void because it exceeded the amount sought in the complaint. We disagree.

Although Estrella did not allege causes of action for wrongful death or personal injury in his complaint, section 425.11 has been interpreted to apply to claims other than wrongful death and

personal injury. In fact, courts look to the nature of the action rather than the type of claim or extent of damages pled to determine whether section 425.11 applies. (*Rodriguez v. Cho* (2015) 236 Cal.App.4th 742, 752.) Relevant here, courts have found section 425.11 to apply to discrimination claims seeking recovery for non-incidental emotional, physical injuries and mental distress damages. (See *Schwab v. Rondel Homes, Inc.*, *supra*, 53 Cal.3d at p. 435 [holding section 425.11 statement of damages required in a civil rights and housing discrimination action where plaintiff sought damages for mental and emotional distress].)

In our view, section 425.11 applied. Estrella's complaint alleged that defendants' racial discrimination, harassment and retaliation caused him to suffer stress, anxiety, depression, humiliation, emotional trauma and continuing health conditions. He described the effects in detail in his supplemental declaration submitted for the default prove-up hearing. The emotional, physical and mental damages awarded ($50,000) were not incidental to these claims. Thus, Estrella properly filed and served the statement of damages required by section 425.11, subdivision (b). (*Schwab v. Rondel Homes, Inc., supra,* 53 Cal.3d at p. 435.) In addition, although Estrella's wage and hour claims do not involve personal injury, those claims are sufficiently connected to the discrimination, harassment, termination and retaliation claims that section 425.11 applies to all of the causes of action. (See *Jones v. Interstate Recovery Service* (1984) 160 Cal.App.3d 925, 930 [holding that section 425.11 applies to all causes of action where non-personal injury claims were tied so closely to the personal injury claims].) In any case, the most important point is that BT Catering had notice of the amount of damages sought.

C. The Court Did Not Err When It Denied Relief from Default Based on Mistake or Surprise

BT Catering also sought relief from the default judgment pursuant to the discretionary portion of section 473, which provides in pertinent part: "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, subd. (b).) A party seeking relief under section 473 bears the burden of proof. (*In re Marriage of Kieturakis* (2006) 138 Cal.App.4th 56, 80.)

Here BT Catering claims it was entitled to relief under section 473, subdivision (b) based on mistake or surprise because its counsel, Warren, was surprised to discover that the complaint filed in the court differed from the one served on BT Catering. And that BT Catering mistakenly assumed that the mixed-up complaint—that failed to contain any claims against it and concerned other unrelated parties—was the operative complaint in this case.

In our view, the trial court properly exercised its discretion in concluding that BT Catering failed to demonstrate that the default judgment was entered as result of mistake or surprise. (See *State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 611–612 ["There is nothing in section 473 to suggest it 'was intended to be a catch-all remedy for every case of poor judgment on the part of counsel which results in dismissal.' "].) Mistake is not a ground for relief under section 473, subdivision (b), when "the court finds that the 'mistake' is simply the result of professional incompetence, general ignorance of the law, or unjustifiable negligence in discovering the law." (8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 155, p. 749.)

Further, "[t]he term 'surprise,' as used in section 473, refers to ' "some condition or situation in which a party . . . is unexpectedly placed to his injury, without any default or negligence of his own, which ordinary prudence could not have guarded against." ' [Citation.]" (*State Farm Fire & Casualty Co. v. Pietak, supra*, 90 Cal.App.4th at p. 611.)

Based on the record, it is clear that after the mixed-up complaint was served, Warren suspected that something was amiss. He admits that he did not alert Estrella's counsel (or the court) that the caption page and the body of the complaint served on the defendants appeared to be from two different cases because he knew that Estrella would correct the error. Nonetheless, once the case got underway Warren had to know that Estrella's counsel (and the court) were unaware of this error. But Warren said nothing, and instead continued to litigate and engage in discovery on the merits for over a year. Also based on the discovery responses from Estrella, Warren had to realize that Estrella's counsel was conducting the litigation not based on the mixed-up complaint, but instead on the existence of another complaint. Warren, however, did nothing to discover what had been filed in the trial court. A prudent lawyer would have acted differently in a number of respects. At the very least, a reasonable lawyer would have checked the court's file to determine whether the mixed-up complaint had been filed. Warren's mistake, in failing to check the court file before the default judgment was entered, and his surprise, at discovering that the complaint filed in the court was not the one served, are not reasonable. Warren's errors were of his making—the result of his professional miscalculations and his intentional, risky and ultimately unsuccessful strategy to take advantage of opposing counsel's inadvertent clerical error. His actions do not warrant remedy under section 473, subdivision (b), and the court

did not abuse its discretion in denying BT Catering's motion for relief from default judgment.

DISPOSITION

The judgment is affirmed. Respondent is awarded his costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.