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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

HOLLYWOOD SKY ENTERTAINMENT, INC., Plaintiff and Respondent, v. HENRY BOGER, Defendant and Appellant.	B276542 (Los Angeles County Super. Ct. No. BC518352)

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

Wolf, Rifkin, Shapiro, Schulman & Rabkin, and Mark J. Rosenbaum for Plaintiff and Respondent.

Henry Boger, in pro. per., for Defendant and Appellant.

Defendant and appellant Henry Boger (Boger), in propria persona, appeals an order denying his motion to set aside a default judgment obtained by plaintiff and respondent Hollywood Sky Entertainment, Inc. (Sky).[1]

As discussed below, Boger has not demonstrated any error in the trial court's refusal to set aside the default judgment. Therefore, the order is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Events leading up to entry of default judgment against Boger.*

On August 15, 2013, Sky filed suit against Boger, GGG Films LLC (GGG), and various other defendants, alleging, inter alia, that Sky was fraudulently induced to invest $398,500 in a motion picture and was not paid any share of the picture's revenues. Boger allegedly is the sole owner of GGG.

Proofs of service filed September 24, 2013 indicate that Boger individually, and as GGG's agent for service, was served on September 17, 2013, by substituted service on a competent member of his household, at 8161 Manitoba Street #1, and thereafter copies of the documents were mailed to the same address.

On November 5, 2013, the clerk entered the defaults of Boger and GGG, as requested.

On November 27, 2013, following entry of default, Sky filed a notice of errata and correction of clerical error in the proof of service. In the section pertaining to proof of service by mail, the

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[1] Boger's in propria persona status does not entitle him to greater consideration than other litigants and attorneys. (*Harding v. Collazo* (1986) 177 Cal.App.3d 1044, 1056.)

original proof of service stated that Boger was served by mail with a copy of the summons and complaint in the matter of "*Brewer vs. Lazarus*." The corrected proof of service by mail, dated November 25, 2013, indicated that on September 17, 2013, Boger was served by mail in the matter of "*Hollywood Sky vs. GGG Films LLC*." The corrected proof of service was signed by the same process server.

On December 16, 2013, Sky served Boger with a request for entry of default judgment.

The matter proceeded to a default proveup on Sky's written declaration, and on March 10, 2015, the trial court entered a default judgment against Boger and GGG. The trial court awarded Sky damages of $398,500, as well as prejudgment interest and costs, for a total of $532,553.42.

Sky assigned the judgment to Richard L. Albert (Albert) and on November 3, 2015, Sky filed an acknowledgement of assignment of judgment and served it on Boger.

2. *Boger's motion to set aside the default judgment.*

On May 13, 2016, Boger filed a motion to set aside the default judgment on the grounds that: service of summons did not result in actual notice (Code Civ. Proc., § 473.5);[2] the clerk improperly entered default and the default was void because Sky did not serve a statement of damages (§ 425.11); and Boger was entitled to relief under section 473, subdivision (b), on the basis of excusable neglect, because the default was entered as a result of Boger's mistaken belief that no default would be entered absent

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

proper service of summons and/or proper service of a statement of damages.[3]

3. *Sky's opposition to the motion to vacate the default judgment*.

On June 23, 2016, Sky filed opposition to Boger's motion, arguing, inter alia, that the motion was untimely under section 473, because it was not brought within a reasonable time not exceeding six months after entry of judgment, and was also untimely under section 473.5. Further, Boger had actual notice of the lawsuit because Boger sat for his deposition in this matter on June 11, 2014; a portion of the deposition transcript was attached as an exhibit.[4] In addition, Sky argued that Boger's motion was not accompanied by a supporting declaration, and thus failed to show with admissible evidence any grounds for vacating the judgment. Also, Boger failed to satisfy the requirement of attaching a copy of a proposed answer to his motion for relief.

4. *Boger's reply*.

Boger filed a reply declaration in which he asserted he learned of the judgment against him on April 22, 2016, when his personal bank account was levied upon, and that he promptly moved thereafter to set aside the default judgment, less than one

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[3] Boger's moving papers were not accompanied by either a supporting declaration or a responsive pleading (as required by § 473, subd. (b) & § 473.5, subd. (b)).

[4] The deposition transcript showed that Boger acknowledged receiving a subpoena for the deposition, and when asked why he did not answer the summons and complaint, he stated: "I never received it."

month later. Although he attended his deposition, he did not receive a summons and complaint, and thus did not know that he was "part of a lawsuit."

5. *Trial court's ruling denying Boger's motion to set aside the default judgment*.

On July 12, 2016, after hearing the matter, the trial court entered an order denying Boger's motion, stating in relevant part:

"As a preliminary matter, it is not accompanied by a responsive pleading. This motion is also not accompanied by a declaration from Defendant Boger; although he has signed a 'verification' that 'I, Henry Boger, declare under penalty of California law that the statements in the preceding Motion to Set Aside Default Judgment made by me are true and correct,' this does not comply with CCP § 2015.5, which requires that the declarant declare that the statements made are made under 'penalty of perjury' and state the location where the declaration or affidavit is being executed. Defendant Boger does not state where the verification is made or that the contents are based upon his personal knowledge, as required by Evidence Code §§ 700–704."

In addition, the trial court found the motion was untimely "under either CCP §§ 473.5 and/or 473(b). Defendant Boger's default was entered on November 5, 2013; a copy of the 'Request for Entry of Default' had been mailed to him on November 1, 2013. On December 16, 2013, plaintiff's application for default judgment was filed and served by mail on Defendant Boger. . . . On June 11, 2014, Defendant Boger sat for his deposition in this action (i.e., a fact which obviously belies his 'lack of actual notice' argument). . . . On March 10, 2015, default judgment was filed

against Defendant Boger. . . . On November 3, 2015, [Sky] assigned the rights and title to the judgment to Albert; notice of said assignment was mailed to [Boger on] November 2, 2015. Albert attests that '[n]one of the documents mailed to Boger by me or my office at any time to the Property, or mail served on Boger, were returned as undeliverable by the U.S. Post Office.' "

The trial court continued, "Defendant Boger alternatively contends that the summons and complaint was not properly served upon him, which is a CCP § 473(d) argument: '[w]here service of summons has not resulted in actual notice to a party in time to defend the action, the court is empowered to grant relief from a default or default judgment. [CCP § 473.5]. This section is designed to provide relief where there has been proper service of summons (e.g., by substitute service or by publication) but defendant nevertheless did not find out about the action in time to defend. Typically, these are cases in which *service was made by publication*. [See *Randall v. Randall* (1928) 203 C 462, 464–465; *Trackman v. Kenney* (2010) 187 C.A.4th 175, 180]. *Compare -- improper service of summons*: If the summons was not properly served, relief from default or default judgment should be sought under CCP § 473(d) (relief from *void* judgments).' Weil & Brown, CAL. PRAC. GUIDE: CIV. PRO. BEFORE TRIAL (The Rutter Group 2016) 5:420 (emphasis theirs).

"Defendant Boger, however, is not entitled to CCP §473(d) relief, inasmuch as the evidence reflects that he was properly served with the summons and complaint. . . . [¶] . . . [¶] The proof of service filed by plaintiff on September 24, 2013 reflects that Defendant Boger was sub-served with the summons and complaint on September 17, 2013. The proof of service also indicates the process server mailed a copy of the summons and

complaint to the same address. Service by a registered process server creates a presumption which Defendant Boger must overcome by admissible evidence, which he has failed to do. *See* Evidence Code § 647."

Finally, the trial court noted that at the time of oral argument, Boger "admitted to living at the address [where service was made] at the time service was made."

This timely appeal followed.[5]

CONTENTIONS

Boger contends that irrespective of statutory deadlines, an appellate court has the power to set aside a void judgment. He further contends the trial court never acquired fundamental personal jurisdiction over him, and thus the judgment must be reversed with directions to dismiss the action with prejudice.

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[5] Boger's notice of appeal, filed July 22, 2016, specified a "default judgment" entered on July 11, 2016. In fact, the default judgment was entered on March 10, 2015, while the order denying the motion to set aside the default judgment was entered on July 12, 2016. We therefore construe the July 22, 2016 notice of appeal to refer to the July 12, 2016 order denying Boger's motion to set aside the default judgment. Although Sky contends Boger's purported appeal from the default judgment is untimely and should be dismissed, it is clear the parties understood that Boger's appeal is from the July 12, 2016 order denying the motion to vacate the default judgment, not from the default judgment. Sky's respondent's brief addressed the merits of Boger's appeal from the order denying the motion to set aside the default judgment, and Sky clearly was not misled by the erroneous specification in Boger's notice of appeal.

DISCUSSION

1. *Trial court properly denied Boger's motion for relief.*

a. *The scope of issues on review; the grounds which Boger raised below in moving to set aside the judgment are not at issue on appeal.*

The difficulty in addressing Boger's appeal is the shifting nature of his arguments. In the appellant's opening brief, Boger disregards the trial court's extensive ruling, portions of which we have set forth above. The opening brief does not even mention section 473, section 473.5, or section 425.11, on which he relied in the trial court. Instead, the opening brief asserts "Boger did not seek relief from the default judgment pursuant to any statutory scheme, but rather, directly attacked it for lack of personal jurisdiction due to fraudulent service."

In fact, in his moving papers below, Boger did seek relief pursuant to three specific statutory provisions: section 473, subdivision (b) (excusable neglect); section 473.5 (service of summons did not result in actual notice); and section 425.11 (statement of damages not served before entry of default). However, Boger does not address those statutory grounds in his opening brief. Therefore, those issues have been forfeited. (*Foxen v. Carpenter* (2016) 6 Cal.App.5th 284, 295 [failure to raise a claim of error in the opening brief forfeits the argument].)

We now turn to Boger's appellate arguments.

b. *No merit to the issues which Boger attempts to raise on appeal.*

Boger contends the trial court never acquired jurisdiction over him "because he was never served with a summons and complaint[,] contrary to the fraudulent representation of the process server's return, and therefore, the judgment is void." In

support, Boger "requests review, de novo, of the isolated documents on page 93, page 85, page 82, and page 63" of the clerk's transcript. He contends these four documents "speak for themselves as insufficient" and therefore the motion to set aside the default was erroneously denied. He asserts "[a] sleuth may observe that the 'file stamp' at the top right of the first page of each Proof-of-Summons document and the 'signature' at the bottom of the second page of each are indeed a machine copy of the other."

Boger's arguments are improper. A party " 'may raise a new issue on appeal if that issue is purely a question of law on undisputed facts.' " (*Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 813.) Here, Boger has "made no effort to show that [his] argument[s] fall within the scope of that exception to the general rule that new issues cannot be raised for the first time on appeal." (*Ibid.*) Moreover, contrary to Boger's theory, the documents he references in the clerk's transcript do not establish as a matter of law that he was not duly served. Specifically:

Page 63 of the clerk's transcript is a copy of the summons issued by the clerk on August 15, 2013, with an attachment listing additional parties, including Boger. The summons has no bearing on the later events relating to *service* of the summons.

Pages 82 and 85 are the first pages of the proofs of service of summons on GGG and Boger, respectively, both filed on September 24, 2013. As for page 93, that is a conformed copy of the September 24, 2013 proof of service of summons on Boger. Boger asserts the file stamps on pages 82 and 85 are an exact match, and the signatures of process server Daryl Crismon are also an exact match. Boger theorizes that "[u]nless the 'file

stamp' and 'signature' [were] imprinted by machine, it would be impossible for the first page of the two documents (p. 82 and p. 85) to perfectly match. It stretches logic and reasonableness to conclude that the two documents were separately produced by human hand. The documents (p. 82; p. 85; p. 93) were manipulated."

We reject Boger's contention that these documents facially establish that they were fabricated and that he was not duly served. The return of Crismon, a registered process server, "establishes a presumption, *affecting the burden of producing evidence*, of the facts stated in the return." (Evid. Code, § 647, italics added.) Boger, after failing to proffer any evidence in his moving papers below, is now asking this court to scrutinize the proofs of service and to weigh the evidence de novo, and to determine as a matter of law that these documents were in fact altered.

We cannot do so. Instead, Boger was required to present these arguments, with supporting evidence, to the trial court in the first instance. "Even in cases where the evidence is undisputed or uncontradicted, *if two or more different inferences can reasonably be drawn from the evidence* this court is without power to substitute its own inferences or deductions for those of the trier of fact, which must resolve such conflicting inferences in the absence of a rule of law specifying the inference to be drawn." (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631, italics added.) Here, the face of the documents does not compel the conclusion that they were fabricated. Because the proofs of service in the clerk's transcript fail to unequivocally establish that Boger was not served with the summons and complaint, he

is not entitled to reversal of the order denying his motion to set aside the default judgment.

DISPOSITION

The order denying Boger's motion to set aside the default judgment is affirmed. Sky shall recover its costs on appeal.

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EDMON, P. J.

We concur:

LAVIN, J.

DHANIDINA, J.*

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