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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

F & S INVESTMENT PROPERTIES, Plaintiff and Respondent, v. MICHAEL RAY NGUYEN-STEVENSON, Defendant and Appellant.	B281031, B281973 (Los Angeles County Super. Ct. No. BC614028)

APPEAL from orders and judgment of the Superior Court of Los Angeles County, Barbara Meiers, Judge. Affirmed in part and reversed in part.

Kinsella Weitzman Iser Kump & Aldisert, Alan Kossoff and Amber Melius for Defendant and Appellant.

Rosario Perry, A Professional Corporation, and Rosario Perry for Plaintiff and Respondent.

F & S Investment Properties (F & S) obtained a default judgment against Michael Ray Nguyen-Stevenson (Stevenson). Stevenson moved to set aside the judgment under Code of Civil Procedure section 473.5.[1] The court granted the motion and set aside the judgment on the condition that Stevenson file an answer within 15 days and pay to F & S $27,968.75 in attorney fees and costs. Stevenson appealed from this order and did not pay the conditional payment. The trial court thereafter vacated the order setting aside the judgment and reinstituted the default judgment. Stevenson also appealed from this order. We consolidated the appeals for purposes of argument and decision.

We reject Stevenson's contention that the court abused its discretion by conditioning the setting aside of the judgment on his payment of $27,968.75 to F & S. We agree with Stevenson, however, that his appeal from the order imposing the payment condition stayed further proceedings affecting that order and, therefore, the court did not have jurisdiction to reinstate the judgment.

FACTUAL AND PROCEDURAL SUMMARY

F & S owns commercial property in Corona, which it leased to Egypt Last Kings Clothing, LLC (ELK) in November 2013. Stevenson and Brian Barber signed the lease on behalf of ELK and guaranteed ELK's payment obligations.

In June 2015, before the lease term expired, ELK vacated the property and stopped paying the rent. According to F & S, ELK also left the premises "in gross disrepair, utility bills unpaid, and with hazardous environmental waste requiring clean-up."

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

In November and December 2015, F & S's counsel, Lee Dresie, exchanged emails with Stevenson's counsel, Renee Karalian, concerning disputes related to the lease. The e-mails included a list of issues that Barber had identified, including disputes about the condition of the property. Karalian proposed settling for a payment of $30,000. After a counteroffer from Dresie was not accepted, the attorneys discussed and scheduled mediation by a third party. ELK, Barber, and Stevenson ultimately cancelled the mediation and thereafter requested a meeting among the parties, to which F & S agreed. ELK, Barber, and Stevenson later cancelled that meeting.

On March 15, 2016, F & S filed a complaint against ELK, Barber, and Stevenson to recover damages for breach of lease, breach of guaranty, and waste. The next day, F & S's counsel, Kelly Raney, emailed a copy of the complaint to Karalian and asked if she would accept service of the summons and complaint on behalf of Stevenson. Karalian told Raney that she was not authorized to accept service.

On March 25, 2016, a process server attempted unsuccessfully to serve Stevenson at an address for an apartment complex in Los Angeles, which had been identified on an Internet site as a "current" address for Stevenson. A security guard informed the process server that Stevenson had not lived at that location for six years. On the same day, the process server attempted to serve Stevenson, Barber, and ELK at ELK's business location in Los Angeles. An employee told the process server to leave the premises and "take those papers" with him. After the process server dropped the papers on the floor, the employees threw the papers at the process server and into the process server's car.

On March 31, 2016, F & S successfully served Barber with the complaint.

On April 1, 2016, the process server attempted to serve Stevenson at a residence in a gated community in Calabasas, but was informed by security personnel that Stevenson no longer lived there. The United States Post Office for the Calabasas location informed the process server that there was no forwarding address for Stevenson.

On April 25, 2016, F & S filed an application with the trial court to serve Stevenson by publication, pursuant to section 415.50. The notice ran in the Los Angeles Daily Journal on four dates between May 31, 2016 and June 21, 2016. Service was completed on June 22, 2016.

The court entered Barber's and ELK's defaults on June 13, 2016 and Stevenson's default on July 29, 2016.

On August 18, 2016, the court entered default judgment against the three defendants, jointly and severally, in the amount of $186,275.

In September 2016, Raney (F & S's counsel) learned that the law firm of Knisella Weitzman Iser Kump & Aldisert LLP (Knisella Weitzman) was representing Stevenson in other legal matters. On September 19, 2016, Raney and Alan Kossoff, an attorney with Kinsella Weitzman, spoke by telephone about the default judgment. Kossoff told Raney he would speak with Stevenson about the matter and get back to Raney. After the call, Raney emailed to Kossoff papers relating to the default.

On September 27, 2016, Raney emailed Kossoff, asking whether Kossoff had had an opportunity to speak to Stevenson about the default judgment. Raney added that, if she had not heard from Kossoff by September 29, she would "proceed accordingly."

On September 29, Kossoff emailed Raney, stating that he could not "respond to the issues raised," but would contact her "[a]s soon as [he could] discuss [it]." Raney did not hear again from Stevenson's attorney until she received Stevenson's motion to set aside his default and the default judgment.

On December 7, 2016, Stevenson filed a motion to set aside the default judgment pursuant to section 473.5.[2] In declarations supporting the motion, Stevenson and Kossoff each stated that they were unaware of F & S's action against Stevenson until September 19, 2016. Stevenson stated that he did not read, and had not heard of, the Los Angeles Daily Journal and did not have actual notice of the lawsuit or default judgment from any source before September 19, 2016. Stevenson further stated that he "did not avoid service of the [a]ction," and he had not lived at the Calabasas address where F & S had attempted to serve him since May 2015.

Neither Stevenson nor Kossoff provided an explanation for the 11-week gap between the date they learned of the default judgment and the date they filed the motion to set it aside.

In opposing the motion, F & S argued that the default judgment should not be set aside because Stevenson was presumably aware of the action because his attorney (Karalian), his business (ELK), his business associate (Barber), and the ELK employees who chased the process server from his business were aware of the action, and that Stevenson evaded service and "neglected" the lawsuit. In the alternative, F & S argued that if

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[2] Section 473.5, subdivision (a) provides that: "When service of a summons has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered against him or her in the action, he or she may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the action."

the default judgment is set aside, that it be on the condition that Stevenson post a bond or pay to F & S its costs and attorney fees "in obtaining and attempting to enforce the default and default judgment."

At a hearing held on January 12, 2017, the trial court indicated that it would set aside the judgment on the condition that Stevenson pay "a substantial award of cost[s] and fees." The trial court then continued the hearing and directed F & S to submit a breakdown of its attorney fees and costs.

F & S submitted the following breakdown of its costs and fees: $1,323.75 for serving Stevenson by publication; $4,351.25 for preparing the default request; $6,247.5 to enforce the default judgment; $17,937.50 to oppose Stevenson's motion to set aside the default judgment; and $6,750 in "[a]nticipated" attorney fees related to the pending hearing.

On February 17, 2017, the trial court held the continued hearing on Stevenson's motion. The trial court reiterated that it would grant Stevenson's motion, and heard argument regarding the amount of fees sought by F & S. According to the court, F & S was "only entitled to the cost of fees to seek the default, attain the default, attend these motions about setting aside the default . . . and that's it." Specifically, the court found that F & S was not entitled to any reimbursement for serving Stevenson by publication.

Regarding F & S's contention that Stevenson had knowledge of the action and had evaded service, the court stated that F & S had presented "plenty of evidence" of Stevenson's knowledge and Stevenson "probably knew all about the fact that this lawsuit was on file." The court pointed to the fact that ELK and Barber had been served with the complaint and that Stevenson "knew that they had not paid the rents [and] that a lawsuit was anticipated." When Stevenson's counsel challenged the court's view of the evidence, the court suggested having F & S's attorney question Stevenson

under oath. Stevenson's attorney responded that he did "not want [Stevenson] cross-examined," and directed the discussion to another issue.

The trial court ultimately granted Stevenson's motion to set aside the default "on the condition an [a]nswer is filed within 15 days and [Stevenson] pay to [F & S] $27,968.75, in attorney fees and costs . . . expended in connection with the now set aside default and the opposition to [Stevenson's] motion. [¶] Said amounts are to be paid within 25 days or on [e]x [p]arte [a]pplication by [p]laintiff, the [a]nswer will be stricken and the default and default judgment will be forthwith reinstated" (the February order). The trial court also set dates for a final status conference and trial.

The amount of the conditional payment was the sum of $4,531.25 (attributable to efforts to prepare the entry of default and the default judgment), $6,187.50 (for efforts to enforce the default judgment), $12,000 (reduced from the request for $17,937.50 for the cost of opposing the motion to set aside the default), and $5,250 (for responding to Stevenson's supplemental papers and appearing for the hearing).

On February 21, 2017, Stevenson filed an answer to the complaint. Two days later, Stevenson filed a notice of appeal from the February order.

Based on Stevenson's appeal and his counsel's assertion that the appeal stayed proceedings in the trial court, neither Stevenson's attorney nor counsel for F & S appeared at the final status conference on March 21, 2017. When the trial court telephoned counsel for both parties regarding their failure to appear, Stevenson's attorney informed the court that the appeal from the February order stayed further proceedings in the trial court. The court thereafter issued a minute order directing the parties to brief whether the proceedings were stayed and the scope of such a stay in the absence of an undertaking. The trial court

also invited F & S to file an ex parte application to reinstate the default and default judgment. F & S did so on March 28.

On March 30, 2017, the trial court vacated the February order and reinstated the default judgment (the March order). According to the court, the February order was a non-appealable interlocutory order for the payment of money. Even if that order was appealable, the court explained, F & S's appeal did not stay further proceedings because F & S failed to file an undertaking pursuant to section 917.1.

On April 13, 2017, Stevenson filed a notice of appeal from the March order.[3]

DISCUSSION

I. The Appealability of the February Order

Stevenson appealed from the February order, challenging the condition that he pay $27,968.75 to obtain relief from the default judgment. We first address, and reject, F & S's contention that the February order was not an appealable order.

A conditional order granting a motion to vacate a default judgment is appealable if it is "self-executing. . . . [Citation.] It is only where the conditional order . . . contemplates or requires a second order setting aside the judgment, that the first order is interlocutory, and not appealable." (*Yarbrough v. Yarbrough* (1956) 144 Cal.App.2d 610, 613-614; accord, *Kirkwood v. Superior Court* (1967) 253 Cal.App.2d 198, 200; see generally Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2017) ¶ 2:168, p. 2-122.) Where an order is ambiguous, courts will

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[3] We assigned case No. B281031 to Stevenson's appeal of the February order and case No. B281973 to his appeal of the March order. We consolidated the appeals for purposes of argument and decision.

construe the order in favor of appealability if "it is susceptible of the reasonable interpretation that it is self-executing." (*Reeves v. Hutson* (1956) 144 Cal.App.2d 445, 451 (*Reeves*).)

In *Reeves*, the trial court ordered that "the default and default judgment heretofore entered . . . be and the same is set aside upon the following express terms and conditions," which included a payment by the defendants to the plaintiff's attorney followed by the phrase: "The default not to be set aside until the payment of costs and attorney fees is paid." (*Reeves*, *supra*, 144 Cal.App.2d at p. 448.) The reviewing court observed that the order is ambiguous in that the first sentence "provides that the default judgment 'is set aside,' " while the order later provides that "the 'default [is] not to be set aside until the payment of costs and attorney fees.' " (*Id.* at p. 451.) A reasonable construction, the court concluded, is that the order is a "self-executing order that set aside the default the moment the conditions precedent—the payment of costs and attorney fees—were performed." (*Ibid.*) It was therefore appealable. (*Ibid.*)

Here, the February order does not contemplate or require any further order to set aside the judgment. The first sentence is, like the order in *Reeves*, ambiguous. It initially provides that the motion to set aside the default judgment "is granted on the condition" that Stevenson file an answer and pay to F & S $27,968.75, which suggests that the judgment will be set aside if and when the condition is satisfied. The same sentence goes on to refer to the "now set aside default," indicating that the default has already been set aside. For our purposes, the ambiguity is immaterial. Regardless of whether the default judgment *will be* set aside upon Stevenson's fulfillment of the stated condition or *is* already set aside, no further order needs to be made to vacate the judgment; under either construction, the order is self-executing.

This conclusion is further supported by the second sentence of the February order, which states: "Said amounts are to be paid within 25 days or on [e]x [p]arte [a]pplication by [F & S], the [a]nswer will be stricken and the default and default judgment will be forthwith reinstated." By requiring F & S to take action to "reinstate" the judgment in the event the payment is not made, the order indicates that the judgment has been set aside, but is subject to being reinstated upon application by F & S showing that Stevenson failed to fulfill the payment condition.

By contrast, the court could have structured an interlocutory order by requiring Stevenson to show that he had satisfied the condition for vacating the judgment prior to issuing a second order vacating the judgment. The court did not do so.

Because the February order, as we construe it, does not contemplate or require a further order to set aside the judgment, it is a self-executing, appealable order.

II. The Condition Imposed by the February 17 Order Is within the Court's Discretion

Neither party challenges the trial court's determination that Stevenson was entitled to relief from the default judgment. The question presented is whether the court erred when it imposed the condition that Stevenson pay $27,968 in attorney fees and costs to F & S.

Under section 473.5, subdivision (c), a trial court may set aside a default judgment "on whatever terms as may be just and allow the party to defend the action." The phrase, "whatever terms as may be just," has been broadly construed to permit the court to impose "reasonable conditions to avoid prejudice or unfairness to plaintiff." (*Goya v. P.E.R.U. Enterprises* (1978) 87 Cal.App.3d 886, 894-895.) Such conditions may include the payment of costs and attorney fees to compensate the adverse party for the prejudice

or expense occasioned by the default and the granting of a motion for relief. (*Hearst v. Ferrante* (1987) 189 Cal.App.3d 201, 204; *Prieto v. Rivero* (1979) 95 Cal.App.3d 275, 277; *Daley v. County of Butte* (1964) 227 Cal.App.2d 380, 395-396.) More particularly, the conditions may include the payment of attorney fees incurred to defend against the defendant's motion to set aside the default judgment (*Vanderkous v. Conley* (2010) 188 Cal.App.4th 111, 118-119), as well as fees and costs incurred in obtaining the default (*Rogalski v. Nabers Cadillac* (1992) 11 Cal.App.4th 816, 823).

We review the court's imposition of conditions for an abuse of discretion. (*Goya v. P.E.R.U. Enterprises*, *supra*, 87 Cal.App.3d at pp. 894-895.) A court abuses its discretion "if the burden it imposes upon the defendant is wholly out of proportion to the burden imposed on the plaintiff by the default and its vacation. [Citation.] In the consideration or review of such a condition, '[e]ach case must be determined upon its own peculiar facts and circumstances.' [Citation.]" (*Shapiro v. Clark* (2008) 164 Cal.App.4th 1128, 1148.) Courts have considered "the history of the lawsuit, any delays in the procedural progress of the action and any circumstances bearing on prejudice and unfairness to plaintiff." (*Goya v. P.E.R.U. Enterprises*, *supra*, 87 Cal.App.3d at p. 893; see also *Hearst v. Ferrante*, *supra*, 189 Cal.App.3d at p. 204.)

Regarding the delay in seeking relief, Stevenson was informed of the default judgment on September 19, 2016, but did not file his motion to set aside the judgment until December 7, 2016. Neither Stevenson nor his attorney offered a meaningful explanation for the nearly 11-week delay.

The unfairness factor was addressed in *Kodiak Films, Inc. v. Jensen* (1991) 230 Cal.App.3d 1260 (*Kodiak*). In that case, the plaintiff purported to serve the defendant by serving a person at a house where defendant had not resided in the preceding six months,

and the court stated that the defendant's lack of notice of the lawsuit "was not caused by his avoidance of service or inexcusable neglect." (*Id.* at p. 1265.) The defendant was, in the court's view, "free from fault." (*Ibid.*) Under those circumstances, the court concluded that the plaintiffs were "relatively . . . less innocent," and that imposing a monetary award on the defendant, as the trial court had done, actually "creates unfairness by burdening the more innocent party with that expense." (*Ibid.*, italics omitted.) Accordingly, the court modified the trial court's order to delete the monetary condition. (*Ibid.*)

In the instant case, the court's order does not include any express findings regarding the parties' relative innocence or fault. The imposition of the payment condition, however, implies the finding that Stevenson was not relatively "innocent" with respect to notice and avoiding service of the complaint. Indeed, the court stated that Stevenson "probably knew all about the fact that this lawsuit was on file" and expressed doubt "that there was not an avoidance of service in this case and inexcusable neglect." Although the court did not specify what it meant when it referred to "plenty of evidence" indicating that Stevenson likely had been aware of and avoiding the lawsuit, reasonable inferences of such knowledge can be drawn from evidence that: F & S had been negotiating with Stevenson's counsel to resolve the dispute underlying the litigation for months before the complaint was filed in March 2016; Stevenson and Barber cancelled a scheduled mediation and a subsequent meeting scheduled to resolve the disputes; the day after the complaint was filed, F & S's counsel sent Stevenson's counsel a copy of the complaint and asked her if she would accept service on Stevenson's behalf, but she declined; Stevenson left no forwarding address after moving from his Calabasas residence; F & S served Stevenson's business partner (Barber) and Stevenson's company (ELK); and, when a process server attempted to serve Stevenson

at his place of business, employees told the process server that he needed to leave the premises and "take those papers" with him. The implied finding that Stevenson was comparatively "less innocent" (see *Kodiak*, *supra*, 230 Cal.App.3d at p. 1265) is strengthened by Stevenson's counsel efforts at the hearing to keep Stevenson from being questioned under oath.

Even if the foregoing facts do not establish that Stevenson had actual notice of the complaint prior to the entry of default, they do support the implied finding that, unlike the defendant in *Kodiak*, Stevenson was not "free from fault." (*Kodiak*, *supra*, 230 Cal.App.3d at p. 1265.) By contrast, there is nothing in the record to indicate that F & S lacked diligence in attempting to locate and personally serve Stevenson with the complaint. Thus, although the *Kodiak* court came to a different result on the facts in that case, its comparative innocence rationale supports the court's exercise of discretion in this case in requiring Stevenson to pay an award of costs and attorney fees as a condition of setting aside the default.

The amount of fees and costs conditionally imposed does not constitute an abuse of discretion. The amounts were incurred in connection with the entry of default and the default judgment, efforts to enforce the judgment, and the expense of opposing the motion to set aside the default judgment. Contrary to Stevenson's assertion, the conditional payment is not limited to covering the fees and costs incurred obtaining the default. The court may "impose on the defendant such terms as may be necessary to do complete justice between the parties" (*Gray v. Lawlor* (1907) 151 Cal. 352, 356), which may include fees incurred to defend against the defendant's motion (*Vanderkous v. Conley*, *supra*, 188 Cal.App.4th at pp. 118-119). The record of the hearing reflects the court's careful consideration of the particular amounts sought by plaintiffs and, consequently, its denial of requests for fees related to F & S's efforts to serve Stevenson by publication and its

substantial reduction of the fees F & S requested for responding to the motion to set aside the judgment. The record demonstrates that the court acted within its broad discretion in approving the reduced amount.[4]

III. The Trial Court's March 30, 2017 Order

In its March order, the court vacated the February order and reinstituted the default judgment. Stevenson contends that his appeal from the February order stayed further proceedings affecting that order and, as a result, the court did not have jurisdiction to make the March order. We agree.

Under section 916, subdivision (a), "the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order."

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[4] The dissent states that, in addition to modifying the February order to reduce the payment condition by $17,250, this court should "remand the case to the trial court so that F & S could specify whether the . . . $10,718.75 [it] incurred when preparing and enforcing the default judgment was generated while working on Stevenson's judgment exclusively or when working on the judgment against all defendants." (Conc. & dis. opn. *post*, at p. 10, italics omitted.) The $10,718.75 amount is the sum of (1) $4,531.25 F & S had sought for preparing the request to enter default and the default judgment, and (2) $6,187.50 related to serving and enforcing the default judgment. We decline to so direct the court. Stevenson failed to challenge the allocations at trial and he has not raised the issue on appeal. Nor is there anything in the record that suggests the allocations were wrong.

By purporting to set aside the February order, the March order indisputably affected the earlier order.

F & S argues that the appeal from the February order did not stay the trial court proceedings because Stevenson did not post an undertaking pursuant to section 917.1. Under that statute, an appeal from an order for "[m]oney or the payment of money" does not stay enforcement of the judgment or order in the trial court "[u]nless an undertaking is given." (§ 917.1, subd. (a)(1).)

Section 917.1 does not apply to the February order because that order is not an order for money or the payment of money; it is an order to set aside the judgment. Although the effectiveness of that order was conditioned in part upon Stevenson's payment of money to F & S, the order does not require Stevenson to make that payment and F & S could neither compel Stevenson to make it nor employ the tools for enforcing judgments to collect the amount of the conditional payment. (See § 680.270 [for purposes of the Enforcement of Judgments Act, a money judgment is "that part of a judgment that *requires* the payment of money" (italics added)].) Under the terms of the order, if Stevenson did not make the payment or file his answer, F & S had the right to request the default judgment be reinstated; but Stevenson had no obligation to make the conditional payment and F & S had no right to receive it. The February order was not, therefore, an order for money or the payment of money, and section 917.1 does not apply.

F & S does not cite any authority in support of its argument that section 917.1 applies here. The trial court, in its March order, relied on *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400. In that case, a defendant prevailed on an anti-SLAPP motion and was awarded his attorney fees. The plaintiff appealed and argued that enforcement of the attorney fees award was stayed by the appeal notwithstanding the failure to file an undertaking pursuant to section 917.1. The Court of Appeal disagreed, and held that an

order to pay attorney fees under the anti-SLAPP statute is an order for money or the payment of money under section 917.1, and, thus, required an undertaking to effect a stay. (*Id.* at pp. 1431-1434.) *Dowling* is inapposite here because it plainly involved an order for the payment of money, not, as in this case, an order for an act other than the payment of money (setting aside a judgment) that was conditioned upon the payment of money. We therefore reject the trial court's reliance on *Dowling*.

DISPOSITION

The February order setting aside the default judgment is affirmed. The March order vacating the February order and reinstating the judgment against Stevenson is vacated.

Stevenson shall have 25 days after the issuance of the remittitur to fulfill the condition imposed under the February order. If Stevenson does not timely fulfill that condition, the court may, upon ex parte application by F & S, strike Stevenson's answer and reinstate Stevenson's default and the default judgment.

The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

I concur:

CHANEY, J.

JOHNSON, J., Concurring and Dissenting.

I concur in Part I of the majority opinion, which holds that the trial court's February 17, 2017 order is an appealable order, as well as Part III of the majority opinion, which holds that the trial court did not have jurisdiction to enter the March 30, 2017 order. However, I dissent from Part II of the majority opinion, which holds that the trial court did not abuse its discretion when it imposed the condition that Michael Ray Nguyen-Stevenson (Stevenson) pay $27,968.75 in attorney fees and costs to F & S Investment Properties (F & S).

As discussed in the majority opinion, Stevenson appeals two trial court orders—the first, ordering that he pay $27,968.75 in attorney fees and costs to F & S after the trial court set aside the default judgment that had been entered against him; the second, reinstating the default judgment after Stevenson appealed the first trial court order without paying the $27,968.75. In my view, the trial court abused its discretion when it awarded F & S $17,250 in attorney fees for unsuccessfully opposing Stevenson's motion to set aside the default judgment. I would therefore modify the trial court's first order, reducing by $17,250 the attorney fees awarded to F & S. I would also remand so that F & S could clarify whether the remaining $10,718.75 it incurred when preparing and enforcing the default judgment was generated while working on Stevenson's judgment exclusively or while working on the judgment against *all* the defendants in this case.[1] As Stevenson is not required to

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[1] Contrary to the majority opinion at footnote 4, on appeal, Stevenson took issue with the $4,531.25 allegedly incurred by F & S when preparing the default judgment because it was unsupported by any accompanying documentation. Thus, it is unclear if this amount was generated when F & S prepared Stevenson's default judgment or when F & S prepared the default judgment against all

reimburse F & S for any attorney fees or costs incurred by F & S when obtaining default judgments against Stevenson's codefendants, any amount erroneously attributed to Stevenson in this respect also should be stricken. Given that the trial court's second order was based solely on Stevenson's failure to comply with the improper payment condition imposed in the first order, I would vacate the second order. Because Part III of the majority opinion holds that the trial court did not have jurisdiction to make the second order, I concur with that portion of the opinion.

Turning to Part II of the majority opinion, a motion to set aside a default judgment must be accompanied by an affidavit showing "that the party's lack of actual notice in time to defend the action was not caused by his or her avoidance of service or inexcusable neglect." (Code Civ. Proc., § 473.5, subd. (b).[2]) If the court finds the motion was timely under subdivision (a), and that, pursuant to subdivision (b), the defendant's lack of actual notice was not caused by his or her avoidance of service or inexcusable neglect, then it may set aside the default judgment "on whatever terms as may be just and allow the party to defend the action." (§ 473.5, subd. (c).) Section 473.5, subdivision (c), gives a trial court broad discretion to impose appropriate conditions when it sets aside a default. (See *Reeves v. Hutson* (1956) 144 Cal.App.2d 445.)

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three defendants. As noted by Stevenson, there is no basis for requiring Stevenson to reimburse F & S for attorney fees and costs associated with obtaining default judgments against his co-defendants. Furthermore, F & S admits on appeal that at least a portion of the $6,187.50 it incurred when enforcing the default judgment took into account expenses associated with all three defendants, rather than just Stevenson. Thus, clarification by F & S on remand would be appropriate here.

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

Nevertheless, while payment of a monetary award might well be a reasonable condition designed to avoid unfairness in certain circumstances, the burden is on the plaintiff to effect service in a manner designed to impart actual notice, and where that goal is thwarted through no fault of the defendant, a requirement that the defendant pay a monetary award as condition of relief would be unfair. (See *Kodiak Films, Inc. v. Jensen* (1991) 230 Cal.App.3d 1260 (*Kodiak*).)

In the exercise of its discretion, the trial court may consider a variety of factors, such as "the history of the lawsuit, any delays in the procedural progress of the action and any circumstances bearing on prejudice and unfairness to plaintiff." (*Goya v. P.E.R.U. Enterprises* (1978) 87 Cal.App.3d 886, 893.) As the history of this lawsuit was not lengthy when the trial court granted the motion for relief and Stevenson's counsel acted promptly after he was told of the default judgment, we turn to the issue of prejudice to F & S.[3] Here, the only true prejudice appears to be that F & S would "have to go back and try the case on the merits." (*Rogalski v. Nabers Cadillac* (1992) 11 Cal.App.4th 816, 822.) As the trial court initially told counsel for F & S: "You're not going to have any more prejudice than anybody else does who has to try a case when a defendant

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[3] The majority opinion stresses that neither Stevenson nor his counsel provided an explanation for the 11-week gap between the date they learned of the default judgment and the date they filed the motion to set it aside. However, once counsel was informed of the default judgment, he had six months in which to file a motion to set aside the judgment. (See § 473.5, subd. (a).) Although counsel had until March 18, 2017, in which to file the motion, he actually filed it on December 7, 2016. Thus, counsel filed the motion in less than half the time allotted under the law.

defends."[4] At a later hearing, however, the trial court said that F & S had in fact been prejudiced. "They've gone through this

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[4] On January 12, 2017, the trial court held its first hearing on Stevenson's motion to set aside the default judgment. The trial court heard argument as to whether Stevenson had met the requirements of section 473.5 and whether F & S was entitled to a monetary award. With respect to a monetary award, the trial court noted that the lawsuit had been filed only in March 2016, so it did not see any prejudice to F & S. "[A]ppellate courts have a very strong preference to see things tried on the merits" the trial court warned counsel for F & S. "And so I'm inclined, since not a huge amount of time has passed—it was from March of 2016 to now. Big deal. You're not going to have any more prejudice than anybody else does who has to try a case when a defendant defends." The trial court pressed counsel for F & S, which was seeking approximately $48,000 in attorney fees at the time: "What's been done on, quote, 'this case'? All you've done is to try and locate [Stevenson] which is something . . . done by process servers, not by lawyers at these rates." Furthermore, the trial court noted: "This was nothing but a breach of lease. . . . That's all. Here's the lease, here's the declaration, they didn't pay, give us a judgment." As the trial court noted, in such a case, "90 percent of the work [is] done by the client, not by [client's counsel]. They bring in all of the bills, what they paid to fix this or that. It means drawing up a two-page declaration by [the] client, that when they left, 'these were the damages, here's my attached bills, thank you very much.'" Indeed, the trial court stated that the attorney fees sought by F & S were "borderline outrageous." Nevertheless, the trial court warned Stevenson's attorney that it would be imposing a monetary award. "I'll set [the default judgment] aside, but there's going to be a substantial award of cost[s] and fees, and it will be conditioned on the payment of them within a certain period of time, and I'm going to order that an answer be almost immediately filed . . . ." On February 17, 2017, the trial court held the continued hearing on Stevenson's motion to set aside the default judgment. The court reiterated that it would grant Stevenson's motion. The court also stated that the attorney fees requested by F & S were still too high.

whole business of getting the default," the trial court observed. "They've gone through the process of trying to collect on that default. It's been costly in terms of attorney fee and effort . . . ."

The phrase "'upon such terms as may be just'" has been interpreted as authorizing a monetary award as compensation for the prejudice, expense or loss occasioned by setting aside a judgment or order. (*Jade K. v. Viguri* (1989) 210 Cal.App.3d 1459, 1474; *Kirkwood v. Superior Court* (1967) 253 Cal.App.2d 198, 201.) However, this concept does not encompass loss or expense occasioned solely by granting the defendant relief. (*Kodiak, supra,* 230 Cal.App.3d at p. 1265.) "Accordingly, where the defendant is free from fault and nothing more is at issue than the legal expense the plaintiff has incurred, it is error to condition relief from a default and default judgment pursuant to . . . section 473.5 on the payment of a monetary award." (*Ibid*.)

Kodiak identified circumstances where imposition of a monetary award to offset expenses incurred when obtaining a default judgment might be a reasonable condition.[5] For example, if a plaintiff personally served a defendant but, for some reason, the defendant nonetheless did not receive actual notice or "if the lack of notice has resulted from the defendant's *excusable* neglect, mistake or inadvertence, then the defendant is not entirely innocent and should not be placed in a better position than he would have enjoyed had he received actual notice." (*Kodiak*, *supra*, 230 Cal.App.3d at p. 1264.) However, as in *Kodiak*, those conditions

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Indeed, according to the court, F & S was "only entitled to the cost of fees to seek the default, attain the default, attend these motions about setting aside the default . . . and that's it."

[5] *Kodiak* did not specify whether the expenses incurred by the plaintiffs in that case consisted of attorney fees, costs or both. When I refer to expenses in this dissent, I am referring to both attorney fees and costs.

were not present here. It is undisputed that F & S never personally served Stevenson. Moreover, despite the skepticism the trial court expressed during the February 17, 2017 motion hearing, the court did not find that Stevenson had actual notice from any other method of service or that his lack of notice stemmed from any excusable neglect, mistake or inadvertence on his part. Therefore, in granting Stevenson relief from default, the trial court necessarily concluded that he was free from fault. Thus, here, as in *Kodiak*, "[a]ll that is at issue here is the considerable expense incurred in proving up the default judgment and thereafter attempting to collect on it." (*Ibid*.)

While I do not imply that F & S was inexcusably negligent or acted in anything other than good faith when attempting to serve Stevenson, I conclude that no factors justify shifting to Stevenson all the expenses F & S willfully undertook in defending the default and default judgment. (See *Kodiak*, *supra*, 230 Cal.App.3d at p. 1265.) Indeed, by seeking all the expenses it willfully undertook, F & S turns the notion of an attorney fee award on its head. It is well-established "that in the absence of a special statute or a contractual provision for attorney's fees, [a] prevailing party is not entitled to recover attorney's fees from his opponent." (*Olson v. Arnett* (1980) 113 Cal.App.3d 59, 67.) Here, however, the *losing* party contends that it is entitled to recover attorney fees from its opponent. I find no authority for this proposition. Consequently, in the circumstances presented here, I would hold that a monetary award compensating F & S for every expenditure it incurred in opposing Stevenson's request for relief is not a reasonable condition. (See *Kodiak*, at p. 1265.)

F & S argues that Stevenson, unlike the defendant in *Kodiak*, was on notice that F & S had filed suit based on his prior involvement in the underlying dispute, his alleged knowledge of F & S's successful service upon his codefendants, and the actual

notice provided to his former attorney. However, "'actual notice'" in section 473.5 is defined as "'genuine knowledge of the party litigant.'" (*Tunis v. Barrow* (1986) 184 Cal.App.3d 1069, 1077.) Therefore, imputed or constructive notice cannot suffice. (See *ibid.* ["'actual notice'" in § 473.5 "'does not contemplate notice imputed to a principal from an attorney's actual notice'"].) Indeed, in *Rosenthal v. Garner* (1983) 142 Cal.App.3d 891, Division Seven of this court reversed a trial court's decision denying a defendant's motion to set aside a default and default judgment where the plaintiff sent copies of the summons and complaint to the defendant's attorney, in addition to service by publication. (*Id.* at pp. 894-895.) The attorney did not tell the defendant about the complaint and did not respond to it. (*Id.* at p. 894.) The plaintiff argued that the attorney's knowledge should be imputed to the defendant. (*Id.* at pp. 895-896.) Division Seven rejected this argument, reasoning that the statute "mean[s] what it says when it refers to *actual* notice" and thus does not contemplate imputed or constructive notice. (*Id.* at p. 895.)[6]

F & S correctly notes that the defendant in *Kodiak* had no codefendants who could have informed him that they had been served with a lawsuit in which the defendant was also named. F & S also correctly notes that, unlike the plaintiff in *Kodiak*, F & S tried locating the defendant in multiple locations. However, *Kodiak* did not rely upon, or even cite, these factors when holding that the

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[6] *Rosenthal v. Garner*, *supra*, 142 Cal.App.3d at page 895 also rejected as "wholly illogical" the plaintiff's argument that a letter threatening a possible future lawsuit provided actual notice of litigation to be defended within the meaning of section 473.5. Thus, even if Stevenson suspected litigation was possible, or even probable, based on his involvement in the underlying dispute, under *Rosenthal*, this cannot suffice as actual notice.

trial court abused its discretion by conditioning relief on the payment of a monetary award.

While it may be error to award a plaintiff *all* the attorney fees and costs incurred in defending the default and default judgment, as the trial court did here, a court may still impose as a condition for relief from a default and default judgment that the moving defendant pay attorney fees and costs incurred by the plaintiff in initially obtaining the default judgment. (*Rogalski v. Nabers Cadillac*, *supra*, 11 Cal.App.4th at p. 823.) To that end, the trial court correctly informed F & S that the company was "entitled to the cost of fees to seek the default, attain the default, attend these motions about setting aside the default . . . and that's it." While there is no set limit on the amount of attorney fees and costs that may be imposed as a condition, other than the requirement that the amount be just, such a condition cannot be "out of all proportion to [the] prejudice or expense real parties in interest may have suffered." (*Kirkwood v. Superior Court*, *supra*, 253 Cal.App.2d at p. 201.)

Here, F & S sought approximately $36,500 in attorney fees and costs—$1,323.75 for serving Stevenson by publication, $4,531.25 for preparing the default request, $6,187.50 to enforce the default judgment, $17,937.50 to oppose Stevenson's motion to set aside the default judgment, and $6,750 in anticipated attorney fees. While the trial court found that F & S was not entitled to any reimbursement for serving Stevenson by publication, the court allowed the $4,531.25 incurred when preparing the default judgment as well as the $6,187.50 incurred in enforcing the default judgment. The trial court reduced the $17,937 sought in opposing Stevenson's motion to a flat $12,000. The trial court also reduced by $1,500 the $6,750 sought in additional attorney fees for preparing supplemental responses and appearing in court. Stevenson argues that awarding F & S $12,000 (and then an

additional $5,250) in attorney fees incurred in unsuccessfully opposing Stevenson's motion, was simply punitive.[7] In other words, it was "utterly disproportionate" to whatever disadvantage F & S may have suffered from the short delay it experienced in pursuing its lawsuit. (*Kirkwood v. Superior Court*, *supra*, 253 Cal.App.2d at p. 200.) This rings true. Indeed, F & S has not cited a case in which a defendant was required to reimburse a plaintiff for expenses incurred when opposing a motion to set aside a default judgment when the trial court found it was proper to set aside the judgment. To the contrary, when trial courts have awarded expenses under such a circumstance, appellate courts have deemed it to be an abuse of discretion. (See *Rogalski v. Nabers Cadillac*, *supra*, 11 Cal.App.4th at p. 822 [trial court abused discretion in awarding the plaintiff's expenses because if the plaintiff had "stipulated to set aside the defaults, none of the alleged prejudice would have resulted"]; see also *Weitz v. Yankosky* (1966) 63 Cal.2d 849, 859 [trial did not abuse discretion in denying the plaintiff's expenses where most were incurred after the plaintiff refused to agree to have default judgment set aside].)

Therefore, I would hold that the trial court abused its discretion when it awarded F & S $12,000 (and then an additional $5,250) in attorney fees for unsuccessfully opposing Stevenson's

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[7] Stevenson also takes issue with the $4,531.25 allegedly incurred by F & S when preparing the default judgment because it was unsupported by any accompanying documentation. Thus, it was unclear if this amount was generated when preparing Stevenson's default judgment or the judgment for all three defendants. As noted by Stevenson, there is no basis for requiring Stevenson to reimburse F & S for attorney fees and costs associated with obtaining defaults against his codefendants. On appeal, F & S admits that at least a portion of the $6,187.50 incurred when enforcing the default judgment took into account expenses associated with all three defendants, not just Stevenson.

motion to set aside the default judgment. Consequently, I would modify the trial court's February 17, 2017 order, reducing by $17,250 the attorney fees awarded to F & S. I would also remand the case to the trial court so that F & S could specify whether the remaining $10,718.75 incurred when preparing and enforcing the default judgment was generated while working on Stevenson's judgment exclusively or when working on the judgment against *all* defendants. As Stevenson is not required to reimburse F & S for any attorney fees and costs the company incurred when obtaining default judgments against Stevenson's codefendants, any amount erroneously attributed to Stevenson in this respect should also be stricken, in my opinion.

JOHNSON, J.