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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE SEMLER COMPANIES/MALIBU, L.P., Plaintiff and Respondent, v. COLETTE PELISSIER, Defendant and Appellant.	B294570 (Los Angeles County Super. Ct. No. SC128428)

APPEAL from an order of the Superior Court of Los Angeles County, Lawrence H. Cho, Judge. Affirmed.

Murphy Rosen and David E. Rosen for Defendant and Appellant.

Evan L. Bardo for Plaintiff and Respondent.

INTRODUCTION

Appellant Colette Pelissier (Pelissier) challenges the trial court's denial of her motion to set aside a default judgment (Motion). Pelissier claimed she did not receive proper notice of the breach of contract complaint filed by respondent The Semler Companies/Malibu, L.P. (Semler) and that her failure to timely answer the complaint was reasonable and excusable.

We find no abuse of discretion and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant leased property from Semler. On August 17, 2017, after Pelissier withheld rent due to habitability issues, Semler filed an unlawful detainer action against her. Semler obtained a default judgment against appellant and writ of possession in the unlawful detainer case. However, the monetary portion of the default judgment was later set aside.

On November 29, 2017, Semler then filed a complaint for breach of contract to recover monetary damages arising from appellant's alleged breach of the lease agreement. Semler completed substitute service by leaving a copy of the summons and complaint with Alex Castro, one of Pelissier's employees, and by mailing the same documents to her home address. On February 26, 2018, after Pelissier failed to respond to the complaint, Semler served her with a notice of request for entry of default. On February 28, 2018, the court entered a default against Pelissier. On May 1, 2018, the court entered default judgment against her.

Pelissier moved to set aside entry of default and the default judgment, alleging she was improperly served. She also argued that any mistake she made in failing to respond to the complaint and summons was reasonable and excusable. On November 21,

2018, the trial court heard argument on the Motion and on December 3, 2018, the court denied it.

Pelissier timely appeals.

DISCUSSION

Pelissier moved to set aside entry of default and the default judgment under Code of Civil Procedure section 473, subdivision (b),[1] which allows the court to relieve a party from a judgment taken against him or her through "mistake, inadvertence, surprise, or excusable neglect;" and section 473.5, which allows the court to set aside a default judgment when service of a summons has not resulted in actual notice to a party in time to defend the action.

We review a challenge to a trial court's order denying a motion to set aside a default judgment for abuse of discretion. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981.) "Because the law favors disposing of cases on their merits," however, we scrutinize orders denying a motion to set aside a default judgment more carefully and resolve any doubts in applying section 473 in favor of the party seeking relief. (*Rappleyea v. Campbell*, at p. 980; *Lasalle v. Vogel* (2019) 36 Cal.App.5th 127, 135 (*Lasalle*).)

I. Pelissier Was Properly Served.

Section 415.20, subdivision (b) authorizes substituted service, in lieu of personal service, by leaving a copy of the summons and complaint at the home of the person to be served and thereafter mailing a copy to the person to be served at the address where the summons and complaint were left. The

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

summons and complaint must be left with a "competent member of" or "a person apparently in charge" of the household, who "shall be informed of the contents thereof." (§ 415.20, subd. (b).)

On appeal, Pelissier argues there is no evidence the process server described the contents of the documents to Castro or that Castro would have understood any such description because English was not his first language. She also argues the court abused its discretion by finding Castro was "apparently in charge" of her household when the process server delivered the summons and complaint to her home.

A. There is no evidence Castro did not understand the nature of the summons and complaint.

In her opening brief, Pelissier claims English was Castro's second language and points to a sworn declaration she submitted to the trial court as evidence. Yet, nothing in the declaration states English was Castro's second language or that he did not speak English well enough to understand the process server's description of the summons and complaint. Indeed, the only description of Castro is that he "is not my personal assistant and does not live in my home. [¶] . . . Mr. Castro works for me as an errand runner who also helps to let in maintenance workers at my home when I am not available." Pelissier had the burden of establishing entitlement to relief from the judgment by a preponderance of the evidence. (*Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1423.) To qualify for discretionary relief under section 473, the " 'proper procedure' " is to submit " 'affidavits or testimony demonstrating a reasonable cause for the default.' " (*Huh v. Wang*, at pp. 1419, 1422.) There must be " 'some showing – some evidence –' " of the circumstances justifying the default. (*Id.* at p. 1422.) Without any such

evidence, we cannot credit Pelissier's assertion that Castro did not speak English well enough to understand the summons and complaint.

Pelissier also claims there is "no evidence" that the contents of the documents were described to Castro; yet, the proof of service itself states the process server informed Castro "of the general nature of the papers." Pelissier did not produce a declaration from Castro, or any other contrary evidence, demonstrating the process server did not describe the papers to Castro. Again, Pelissier failed to produce evidence to support this assertion.

B. Castro was "apparently in charge" of Pelissier's premises when the summons and complaint were served.

Pelissier also alleges the trial court had "absolutely no basis" for concluding Castro was "apparently in charge" of her premises when the complaint was served. Not so.

First, Pelissier claims the trial court discounted her sworn statement that Castro was an errand runner, not a personal assistant. In the very next paragraph of her brief, however, Pelissier quotes a portion of the order in which the court directly addresses this statement: "[b]y Plaintiff's own admission, substituted service was made on Alex Castro who 'works for me as an errand runner who also helps to let in maintenance workers at my home when I am not available.' This admission indicates that Castro was 'apparently in charge' of the premises when the Complaint was served, regardless of whether or not Castro was actually Defendant's personal assistant." The court not only considered her sworn statement, but quoted it in the order denying the motion.

Pelissier then contends the trial court "had absolutely no basis" for concluding Castro was "apparently in charge" of her premises when the complaint was served. Yet, as stated above, the evidence upon which the court reached its conclusion was that Castro ran errands for appellant and allowed maintenance workers into the premises when she was not there. Clearly, the court found this was enough evidence to establish that Castro appeared to be in charge of the premises when the complaint was served. Pelissier's disagreement with the court's conclusion does not render it baseless.

In any event, we find no abuse of discretion. Section 415.20 authorizes substituted service upon a person "closely connected" to the defendant. (Judicial Council of Cal., com., reprinted at Deering's Ann. Code of Civ, Proc. (2105 ed.) foll. § 415.20, p. 449.) " 'The evident purpose of Code of Civil Procedure section 415.20 is to permit service to be completed upon a good faith attempt at physical service on a *responsible person* . . . .' [Citation.] Service must be made upon a person whose 'relationship with the person to be served makes it more likely than not that they will deliver process to the named party.' " (*Bein v. Brechtel-Jochim Group, Inc.* (1992) 6 Cal.App.4th 1387, 1393.)

In *Ellard v. Conway*, for example, the court found substitute service was proper when the summons and complaint were served on the manager of a private, commercial post office box. (*Ellard v. Conway* (2001) 94 Cal.App.4th 540, 543, 545.) The manager informed the process server he knew the defendants, and that the defendants received mail there. (*Id.* at p. 547.) On this evidence, the court concluded it was "more likely than not" the manager would deliver the summons and complaint to the defendants. (*Ibid.*)

Here, the evidence indicates Castro had an even closer connection to Pelissier than the manager of the post office box in *Ellard*. Castro was routinely present at Pelissier's home, even when she was not there. She entrusted him to allow workers in and out of her home when she was absent. It can therefore be reasonably inferred that Pelissier believed Castro was a "responsible person" capable of managing her household when she was not home. (*Bein v. Brechtel-Jochim Group, Inc.*, *supra*, 6 Cal.App.4th at p. 1393.) Whether Pelissier called Castro her personal assistant or errand runner is irrelevant; what matters is whether there was a close enough connection between Pelissier and Castro that it would be more likely than not that Castro would deliver the summons and complaint to her. The fact that he was present when she was not home and was responsible for monitoring who could walk in and out of her doors when she was absent is more than enough to establish Castro was "apparently in charge" of the household when the process server arrived.

We find no abuse of discretion.

II. Pelissier's Failure to Respond Was Not Reasonable or Excusable

When default judgment is entered against a party, the court may "relieve a party . . . from a judgment . . . taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." (§ 473, subd. (b).) Neglect is only excusable if "a reasonably prudent person under similar circumstances might have made the same error." (*Austin v. Los Angeles Unified School Dist.* (2016) 244 Cal.App.4th 918, 929.)

A. The court did not abuse its discretion in finding Pelissier's failure to open her mail was not excusable.

Pelissier argued in the trial court that her failure to respond to the complaint was excusable because she believed previous litigation involving Semler was dismissed or set aside when she moved out of the property and therefore she did not review the documents when she received them in the mail. She also stated that when she received the summons and complaint in the mail, she did not review them because she assumed they were related to the previous unlawful detainer case. The court determined that Pelissier's failure to review her mail did not constitute a reasonable mistake or excusable neglect.

On appeal, Pelissier argues she would have acted to prevent a default if she "had been aware that the documents were related to a new matter." Yet, she does not explain why mailing a summons and complaint to her mailing address was not sufficient to make her aware of a new lawsuit. Pelissier merely states she was "embroiled in a lawsuit involving the same courthouse and the same parties at the time the Complaint in the instant case was mailed to her." "Thus," she contends, "her failure to review the documents based on her belief that her attorneys were handling the case on her behalf was certainly within reason and, as such, constitutes reasonable mistake and excusable neglect."

The court disagreed and we find no abuse of discretion in reaching this conclusion. In our view, a reasonably prudent person would review all legal documents received in the mail,

even if they appeared to be related to a previously set aside lawsuit.[2]

Additionally, we are not persuaded that Pelissier believed or had reason to believe the complaint in this case arose from the unlawful detainer case. Assuming she looked at the contents as she now states, she would have seen the very first page of the complaint states in bold, capital letters that it is a complaint for breach of contract, not unlawful detainer. If she indeed failed to take account of the nature of the complaint when it was clearly before her in bold, capital letters, it was entirely within the court's discretion to conclude this failure was not reasonable or excusable. Indeed, " 'the only occasion for the application of section 473 is where a party is unexpectedly placed in a situation to his injury without fault or negligence of his own and against which ordinary prudence could not have guarded.' " (8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court,

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[2] The trial court stated in its opinion denying Pelissier's motion that Pelissier did not open the mail containing the summons and complaint. Semler also states Pelissier did not open or review the documents. In her reply brief, Pelissier disputes this characterization, arguing she never stated in the trial court that she did not open her mail, just that she never reviewed it. Pelissier argues that the fact she assumed the documents were related to the unlawful detainer case "implies that she at least looked at the documents prior to making that mistaken assumption." In addition, Pelissier states three times in her opening brief that the name of the parties and courthouse were the same on the complaint in this case as those in the unlawful detainer case. From these statements, we presume Pelissier did in fact open the piece of mail containing the documents and at least briefly looked at the complaint.

§ 158, pp. 753–754; *Elms v. Elms* (1946) 72 Cal.App.2d 508, 513; *Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1206.) It is not a stretch to expect an ordinary, prudent person to review legal documents received in the mail.

Although section 473, subdivision (b)'s broad remedial provisions are to be liberally applied to carry out the policy of permitting trial on the merits, courts " ' "do not act as guardians for incompetent parties or parties who are grossly careless as to their own affairs." ' " (*Hopkins & Carley v. Gens* (2011) 200 Cal.App.4th 1401, 1415.) Here, the trial court could reasonably conclude that Pelissier's default was not the result of mistake or excusable neglect, but rather "was the consequence of [her] failure to take reasonably prudent steps to avoid entry of judgment." (*Hearn v. Howard*, *supra*, 177 Cal.App.4th at p. 1207.)

B. There is no evidence Pelissier was not notified of entry of default.

Pelissier states that neither she nor her attorneys were served with or given notice of entry of default in the trial court. Therefore, she argues, her failure to respond to the complaint constitutes excusable neglect under *Lasalle, supra,* 36 Cal.App.5th 127. We disagree.

First, Pelissier has not provided us with any records indicating this issue was argued in the trial court. While her counsel stated in the Motion that he was not served with notice of entry of default, the Motion did not contain any legal arguments as to how or why such alleged failure was improper or contributed to her failure to respond to the complaint. These statements appear only in two brief sentences within a 10-page motion.

Pelissier has therefore forfeited this theory as grounds for relief on appeal. "It is well established that issues or theories not properly raised or presented in the trial court may not be asserted on appeal, and will not be considered by an appellate tribunal. A party who fails to raise an issue in the trial court has therefore waived the right to do so on appeal." (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 117.)

In any event, *Lasalle* does not stand for the proposition that a plaintiff's failure to notify a defendant of entry of default renders excusable the defendant's failure to respond to the initial complaint. In *Lasalle*, the Fourth District held that an attorney's failure to timely respond to a complaint was excusable in part because she was notified by "unsatisfactory means [e-mail] of an unreasonably short deadline [one day]" to respond to the complaint. (*Lasalle*, *supra*, 36 Cal.App.5th at pp. 138–140.) The *Lasalle* court did not address whether a defendant must be served with notice of entry of default; it was considering the extent to which giving a defendant inadequate notice of an intent to request a default bears on the reasonableness of the delay. Furthermore, this was but one of five factors the court considered in its analysis; the court also determined that defendant's failure to timely answer the complaint was excusable based on facts provided in her declaration. (*Id.* at p. 140.) The court also considered the lack of prejudice to plaintiff if the default were set aside, an issue which, as stated below, Pelissier has forfeited on appeal. (*Ibid.*)

Lasalle does not support Pelissier's argument that not receiving notice of a default entered in February 2018 somehow justifies her failure to respond to a complaint filed in November 2017.

III. Prejudice

In exercising its discretion whether to grant a motion to set aside under section 473, the trial court "may properly consider" whether the party opposing the motion would be prejudiced by the delay. (*Aldrich v. San Fernando Valley Lumber Co.* (1985) 170 Cal.App.3d 725, 740.) If not, only " 'very slight evidence' " is required to justify a court setting aside the default. (*Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233; *Lasalle*, *supra*, 36 Cal.App.5th at p. 135, fn. 5.)

Pelissier asserts the trial court "made no finding at all" regarding any prejudice Semler would suffer if the default were set aside and therefore it committed an abuse of discretion warranting reversal. Semler, however, counters that the trial court heard and considered evidence and argument about prejudice at the hearing on the Motion, which the court took into account in its decision. Although we are not convinced a trial court *must* consider prejudice in exercising its discretion whether to set aside a judgment, especially where there is scant evidence the default was excusable, we cannot evaluate the issue because Pelissier did not provide us with a record of the hearing.

An appellant must provide an adequate record of every contested issue to enable meaningful review; failure to do so compels us to resolve the issue against the appellant. (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 187.) If the record is inadequate, the appellant defaults and the trial court's decision should be affirmed. (*Ibid.*)

Here, no court reporter was present at the hearing on Pelissier's motion; thus, no transcript could be produced. Nonetheless, it is Pelissier's obligation to provide a settled statement of the hearing pursuant to California Rules of Court, rules 8.163 and 8.137 if she wants us to consider issues that were addressed at that hearing. Pelissier does not deny that the prejudice issue was addressed at the hearing on her Motion; rather, she boldly claims Semler, on appeal, cannot rely on the evidence of prejudice he presented at the hearing because it is outside the record. This evidence is "outside the record," however, because Pelissier deliberately excluded it. We cannot allow Pelissier to omit a portion of the record, argue an issue involving evidence contained in that omitted portion of the record, and then expect us to resolve the issue against Semler.

The absence of any record of a hearing "precludes a determination that the court abused its discretion." (*Wagner v. Wagner* (2008) 162 Cal.App.4th 249, 259.) And, it is " 'elementary and fundamental that on a clerk's transcript on appeal the appellate court must conclusively presume that the evidence is ample to sustain the findings.' " (*National Secretarial Service, Inc. v. Froehlich* (1989) 210 Cal.App.3d 510, 521–522.) Our review is limited to determining whether any error "appears on the face of the record." (*Id.* at p. 521; see Cal. Rules of Court, rule 8.163.)[3]

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[3] California Rules of Court, rule 8.163 provides: "The reviewing court will presume that the record in an appeal includes all matters material to deciding the issues raised. If the appeal proceeds without a reporter's transcript, this presumption applies only if the claimed error appears on the face of the record."

We do not know what took place at the hearing on Pelissier's Motion. We cannot evaluate whether the court fully considered the prejudice issue and whether prejudice factored into the court's decision to deny Pelissier's Motion. Based on Semler's uncontested representation that the court heard evidence of prejudice at the hearing on the Motion, and absent any contrary evidence on the face of the record, we presume the court properly exercised its discretion in denying the Motion.

DISPOSITION

The order is affirmed. Respondent is awarded costs on appeal.

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STRATTON, J.

We concur:

BIGELOW, P. J.

WILEY, J.