

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

DEBRA S. JOHNSON-CHAMP et al.,

Plaintiffs and Appellants,

v.

THOMAS HELO, et al.,

Defendants and Respondents;

GEORGE SCHWARY,

Real Party in Interest and
Respondent.

B281958

(Los Angeles County
Super. Ct. Nos. PC055683,
PC057073)

APPEAL from orders of the Superior Court of Los Angeles County. Stephen Pfahler, Judge. Affirmed.

Champ & Associates and Michael W. Champ for Plaintiffs and Appellants.

Thomas Helo, in pro. per., for Defendant and Respondent Helo.

Law Offices of Nicholas S. Nassif and Nicholas S. Nassif for Defendant and Respondent Wat Thai of Los Angeles.

Gravitas Law Group and David J. Scharf for Real Party in Interest and Respondent George Schwary.

Plaintiffs and appellants Debra S. Johnson-Champ and Michael W. Champ (collectively, plaintiffs) appeal from orders vacating a default and default judgment entered against defendant Thomas Helo (Helo)¹ and recalling and quashing the writ of execution, following the trial court's grant of a motion by real party in interest and respondent George Schwary (respondent) requesting such relief. We affirm the trial court's orders.

BACKGROUND

The parties

Plaintiffs are attorneys who represented Helo in various legal matters. Respondent is the assignee of a note and deed of trust dated April 23, 2012, by Wat Thai (the Wat Thai Note and Deed of Trust) that had been assigned to Helo on September 30, 2013. Helo assigned the Wat Thai Note and Deed of Trust to respondent as security for a line of credit respondent extended to Helo on October 8, 2013, and evidenced by a promissory note and security agreement (the Schwary Note and Security Agreement).

The instant action

On May 9, 2014, plaintiffs filed the instant action against Helo for intentional infliction of emotional distress, defamation, and conversion. On July 25, 2014, plaintiffs filed a proof of service of summons, declaration of due diligence, and a statement of damages. The proof of service was signed by John Lippert and stated that the summons had been served on Helo by substituted service on July 23, 2014, by leaving a copy of the summons and complaint with an individual named Roge, the apparent owner of the business located at 9250 Reseda Boulevard, Suite 238, Northridge, California, 91324 (the Reseda Boulevard address).

¹ Thomas Helo, in pro. per., has joined in respondent Schwary's brief.

The proof of service further stated that another copy of the documents were thereafter mailed to Helo on July 24, 2014, at the Reseda Boulevard address where the documents had been left. The declaration of due diligence filed with the proof of service of summons also signed by Lippert stated that he had attempted personal service on Helo at the Reseda Boulevard address on June 28, 2014, July 21, 2014, July 22, 2014, and July 23, 2014.

Plaintiffs filed a request for entry of default against Helo on September 2, 2014. The clerk of the Los Angeles County Superior Court entered default against Helo on that date. On October 30, 2014, plaintiffs filed a request for court judgment seeking \$250,000 in special damages and \$750,000 in general damages. The trial court entered judgment against Helo in the amount of \$1,000,575 on November 20, 2014, and plaintiffs filed a notice of entry of judgment the following day. On March 3, 2015, the superior court clerk issued a writ of execution and on March 4, 2015, the trial court granted plaintiffs' uncontested ex parte application for a turnover order in aid of execution that ordered Helo to transfer the Wat Thai Note and Deed of Trust to the Los Angeles County Sheriff as the levying officer.

Dispute concerning Wat Thai Note and Deed of Trust

Under the terms of the Wat Thai Note and Deed of Trust that had been assigned to Helo, Wat Thai was required to pay Helo interest in the amount of \$5,000 per month and a lump sum of \$1 million in April 2017. Wat Thai stopped making monthly payments to Helo on February 28, 2015, when plaintiffs served Wat Thai with the turnover order issued by the trial court and demanded that payments be made to them. Wat Thai thereafter made a total of \$65,000 in payments to plaintiffs between March 30, 2015 and March 30, 2016.

On February 24, 2016, respondent filed with the California Secretary of State a UCC financing statement with the Schwary Note and Security Agreement. On April 1, 2016, respondent recorded in the Los Angeles County Recorder's Office a short form deed of trust and assignment of rents assigning to him Helo's interest in the Wat Thai Note and Deed of Trust.

On April 1, 2016, respondent sent a letter to Wat Thai's attorney stating that Helo had defaulted on the Schwary Note and that respondent was exercising his right to collect payments owed to Helo under the Wat Thai Note. On April 5, 2016, respondent sent a letter to Wat Thai demanding payment and advising Wat Thai that failure to pay would result in foreclosure under the Deed of Trust.

On May 11, 2016, plaintiffs sent a letter to Wat Thai stating that it had defaulted on the Wat Thai Note, that plaintiffs were exercising the right to accelerate the payments due, and demanding payment of the full amount due. On May 24, 2016, Wat Thai filed a complaint in interpleader and deposited \$1,005,250, the entire balance of the Wat Thai Note, plus interest, with the superior court clerk.² In November 2016, the trial court consolidated the Wat Thai interpleader action with the instant action.

Respondent's motion to vacate default

On January 30, 2017, respondent filed a motion to vacate the default and default judgment entered against Helo and to recall and quash the writ of execution, arguing that the superior court clerk lacked jurisdiction to enter default against Helo on September 2, 2014. Plaintiffs opposed the motion, arguing, among other things, that Helo had been personally served on

² Wat Thai joined in respondent Schwary's brief.

three separate occasions and that Helo's default was actually entered on September 18, 2014.

The trial court granted respondent's motion and issued orders vacating the default and default judgment, and recalling and quashing the writ of execution. The court thereafter ruled that plaintiffs had no stake in the Wat Thai interpleader action. This appeal followed.

DISCUSSION

I. Standard of review

A motion to set aside a judgment is within the sound discretion of the trial court and will not be reversed absent a clear showing of abuse of that discretion. (*Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian* (1990) 218 Cal.App.3d 1058, 1077 (*Philippine Export*).) Any factual conflicts in the evidence must be resolved in favor of the prevailing party, and all presumptions are in favor of the correctness of the trial court's order. (*Ibid.*; *McCreadie v. Arques* (1967) 248 Cal.App.2d 39, 45 (*McCreadie*).)

Plaintiffs incorrectly contend a de novo standard applies in reviewing the trial court's assessment of the evidence and its factual determination regarding the manner in which they served Helo. When reviewing factual determinations, an appellate court does not reweigh the evidence but must give the prevailing party the benefit of every reasonable inference that can be drawn from the evidence. (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 544, overruled on another ground by *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574, 580.)

II. Applicable law

A default may be entered only after the defendant has been properly served with a summons and has failed to answer or file another responsive pleading within the applicable time period. (Code Civ. Proc., § 585, subds. (a)-(c), (e).) A prematurely entered

default is invalid, as is any judgment entered following an invalid default. (*Schwab v. Southern California Gas Co.* (2004) 114 Cal.App.4th 1308, 1320 (*Schwab*).) A motion to vacate a prematurely entered default may be made at any time. (*Id.* at p. 1321.)

Code of Civil Procedure section 415.20 in effect at the time relevant to this appeal,³ authorizes substituted service, in lieu of delivery of the summons and complaint to a defendant personally, by leaving a copy of the summons and complaint during normal business hours at the defendant's usual mailing address (which could include a private business providing post office boxes (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1201-1202) with a person who is apparently in charge thereof, and by thereafter mailing a copy of the summons and complaint to the defendant by first-class mail, postage prepaid, at the place where a copy of the summons and complaint were left. (Code Civ. Proc., § 425.20, subds. (a), (b).) Service effected in this manner is deemed complete on the 10th day after the mailing. (*Ibid.*)

³ Code of Civil Procedure section 415.20 was amended, effective January 1, 2018, to add a new subdivision (c), which states that if the only address reasonably known for the person to be served is a private mailbox obtained through a commercial mail receiving agency, service of process may be effected on the first delivery attempt by leaving a copy of the summons and complaint with the commercial mail receiving agency. Subdivision (c) provides: "Notwithstanding subdivision (b), if the only address reasonably known for the person to be served is a private mailbox obtained through a commercial mail receiving agency, service of process may be effected on the first delivery attempt by leaving a copy of the summons and complaint with the commercial mail receiving agency in the manner described in subdivision (d) of Section 17538.5 of the Business and Professions Code."

A defendant served by substituted service has 40 days after the mailing to respond. (§§ 415.20, subd. (a) & (b), 415.95, subd. (a); see *Tsakos Shipping & Trading, S.A. v. Juniper Garden Town Homes, Ltd.* (1993) 12 Cal.App.4th 74, 85.)

III. Default against Helo was prematurely entered

The proof of service and certificate of due diligence filed by plaintiffs state that substituted service was made on Helo by delivering a copy of the summons and complaint to an individual named Roge on July 23, 2014, at the Reseda Boulevard address and that copies of those documents were mailed to the same address on July 24, 2014. Because Helo had 40 days after the mailing to respond (§§ 425.20, subds. (a) & (b), 415.95, subd. (a)), the earliest date on which the superior court clerk had jurisdiction to enter default against Helo was September 3, 2014 -- the 41st day after July 24, 2014. (*Ibid.*) At plaintiffs' request, the clerk entered default against Helo on September 2, 2014. That entry of default and the default judgment based thereon were void as a matter of law. (*Schwab, supra*, 114 Cal.App.4th at p. 1320.) The trial court had the authority to recall and quash the writ of execution based on the invalid judgment. (*Jones v. World Life Research Institute* (1976) 60 Cal.App.3d 836, 840; *Salveter v. Salveter* (1936) 11 Cal.App.2d 335, 337.)

Plaintiffs argue that default against Helo was entered, not on September 2, 2014, but on September 18, 2014, more than 40 days after the substituted service on Helo was deemed to be complete. As support for this argument, plaintiffs cite the declaration of Michael Champ submitted in opposition to respondent's motion to vacate the default and default judgment. In his declaration, Champ states that after he filed the request for entry of default on September 2, 2014, the superior court clerk contacted him on September 17, 2014, and informed him that she could not find the original proof of service on Helo and therefore

could not enter the default as requested. Champ told the clerk that he would provide a conformed copy of the proof of service that had been filed on July 25, 2014; however, when he located that document, he noticed that it contained an incorrect case number. Champ therefore prepared an amended proof of service, which he filed on September 18, 2014, and thereafter provided the court clerk with both a conformed copy of the original proof of service and the amended proof of service filed on September 18, 2014. Champ states in his declaration that default against Helo was not entered until after he provided both documents to the court clerk. Based on his own declaration, Champ claims that the default against Helo was actually entered on September 18, 2014, and that the clerk backdated the entry of default to September 2, 2014.

The Judicial Council form CIV-100 for request for entry of default signed and dated by the superior court clerk states that default was entered against Helo on September 2, 2014. That date, and not any alternative date suggested by Champ's declaration, is the relevant date for purposes of this appeal. Any factual conflict in the evidence presented by Champ's declaration must be resolved in favor of the trial court's order. (*Philippine Export, supra*, 218 Cal.App.3d at p. 1077; *McCreadie, supra*, 248 Cal.App.2d at p. 45.)

IV. Business and Professions Code section 17538.5 does not apply

Plaintiffs argue that the clerk's entry of default was not premature because Helo was personally served under Business and Professions Code section 17538.5. Subdivision (d)(1) of that statute provides:

“Every person receiving private mailbox receiving service from a CMRA⁴ in this state shall be required to sign an agreement, along with a USPS Form 1583, which authorizes the CMRA owner or operator to act as agent for service of process for the mail receiving service customer. Every CMRA owner or operator shall be required to accept service of process for and on behalf of any of their mail receiving service customers, and for two years after termination of any mail receiving service customer agreement. Upon receipt of any process for any mailbox service customer, the CMRA owner or operator shall (A) within 48 hours after receipt of any process, place a copy of the documents or a notice that the documents were received into the customer’s mailbox or other place where the customer usually receives his or her mail, unless the mail receiving service for the customer was previously terminated, and (B) within five days after receipt, send all documents by first-class mail, to the last known home or personal address of the mail receiving service customer. The CMRA shall obtain a certificate of mailing in connection with the mailing of the documents. Service of process upon the mail receiving service customer shall then be deemed perfected 10 days after the date of mailing.”

Plaintiffs contend the summons and complaint were personally served on Roge, the owner or operator of the CMRA at which Helo was receiving private mailbox service. There is no evidence, however, that Roge placed a copy of those documents in Helo’s mailbox within 48 hours of receiving them or that within five days after receipt, he sent the documents by first-class mail to Helo’s last known home or personal address. There is

⁴ Commercial mail receiving agency. (Bus. & Prof. Code, § 17538.5, subd. (c).)

accordingly no evidence that service was perfected under Business and Professions Code section 17538.5.

DISPOSITION

The orders vacating and setting aside the default and the default judgment entered against Helo and recalling and quashing the writ of execution are affirmed. Respondent Schwary is awarded his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT