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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

SALVADOR MARTINEZ et al., Plaintiffs and Appellants, v. EL 7 MARES RESTAURANT et al., Defendants and Respondents.	B283805 (Los Angeles County Super. Ct. No. BC559547)

APPEAL from an order of the Superior Court of Los Angeles County. Michelle Williams, Judge. Affirmed.

James McKiernan Lawyers, James McKiernan for Plaintiffs and Appellants.

Law + Brandmeyer, Yuk K. Law and Elizabeth A. Evans, for Defendants and Respondents.

INTRODUCTION

On October 6, 2012, plaintiffs' decedent, Diego Martinez, was stabbed to death by Andre Arriaga Preciado in the parking lot of El 7 Mares Restaurant (restaurant).[1] Diego Martinez's parents, Salvador Martinez and Teresa Martinez, and minor children, Aiden Martinez and Diego Aaron Martinez (collectively, appellants), sued for the wrongful death of their son and father. They obtained a $1.12 million default judgment against the restaurant and its owner, Sergio Diaz Salazar (collectively, respondents). Respondents successfully moved to set aside the default and default judgment on the basis the judgment was void for lack of proper service of the summons and complaint. (Code Civ. Proc., § 473, subd. (d).)[2] The trial court denied appellants' motion for reconsideration. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A number of facts in this matter are not in dispute. Mr. Martinez's family retained an attorney shortly after his death and submitted a claim with the restaurant's insurer. Counsel and the insurer's claim representative, Mark Sewell, regularly communicated for more than a year. The restaurant was not

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[1] This information was included in points and authorities filed in the trial court by the restaurant's counsel, who described Preciado as an "assailant[, unaffiliated with the restaurant,] who stabbed [appellants'] relative to death in the parking lot of [the] restaurant after business hours with no advanced warning."

[2] All undesignated statutory citations are to the Code of Civil Procedure.

involved in these communications. The insurer denied the claim in writing in February 2014, and Sewell "never received any correspondence or communication from [appellants'] counsel" during the following three years. Sewell also was not advised by the restaurant that a lawsuit was ever filed. On March 3, 2017, Sewell received a fax from appellants' counsel advising that a default judgment had been entered six weeks earlier.

Additional undisputed facts are evident from the appellate record: Appellants' wrongful death action was filed October 3, 2014. Only the restaurant and Preciado were named as defendants. Appellants used the optional Judicial Council form complaint. In the form boilerplate, Does 1 through 25 were alleged to be "the agents or employees of other named defendants [acting] within the scope of that agency or employment," while Does 26-50 were alleged to be "persons whose capacities are unknown to [appellants]."[3]

Per the statements of damages, each plaintiff sought $6 million in damages. A "Sergio Salazar Diaz" was identified as Doe 1 in an amendment filed March 27, 2015. A default was entered against the restaurant on April 16, 2015, and against

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[3] The fillable portion of the form complaint alleged that on October 6, 2012, at El 7 Mares Restaurant, "The defendants, and each of them, negligently, carelessly and recklessly acted and conducted themselves and/or maintained, supervised and safeguarded their premises, . . . and/or interviewed, hired, employed, monitored and supervised their agents and employees for their premises, . . . and/or allowed guests, patrons and others to congregate in, around and outside their premises, . . . so as to directly and proximately cause and/or contribute to the death of Diego Martinez." No other facts concerning the circumstances of Mr. Martinez's death were alleged.

"Sergio Salazar Diaz" on June 9, 2015. A default prove-up hearing was conducted on January 23, 2017, and the trial court entered a default judgment against respondents the same day in the total sum of $1.12 million.[4] Respondents' motion to set aside the default judgment was filed March 30, 2017. The trial court issued a detailed tentative ruling on Friday, May 5, 2017, before the hearing on Monday afternoon, May 8. At the hearing, the trial court adopted the tentative ruling and granted respondents' motion. Appellants' motion for reconsideration was denied July 10, 2017.

The disputed facts center on the name of the restaurant owner and appellants' service of the summons and complaint on respondents. In service documents on the restaurant, appellants identified the restaurant owner as "Salvador Diaz." In the Doe amendment and service documents on the Doe defendant, appellants identify the restaurant owner as Sergio Salvador Diaz. The restaurant owner's name is Sergio Diaz Salvador (hereafter, Diaz Salvador).

Turning to the service issues, appellants first attempted service on the restaurant by mailing a Notice and Acknowledgment of Receipt. The restaurant's manager, Bernardo Quezada, and Diaz Salazar denied ever receiving the service documents.

On January 24, 2015, a process server left a copy of the summons and complaint and related documents at the restaurant, identified as a business organization of unknown form owned by "Salvador Diaz." The proof of service indicates

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[4] On the date of the default prove-up hearing, appellants voluntarily dismissed Preciado without prejudice and Does 2-50 with prejudice.

service on the restaurant was accomplished by substituted service on "Salvador Diaz-Owner," as the "[p]erson (other than the party [El 7 Mares Restaurant]) served on behalf of an entity or as an authorized agent (and not a person under item 5b on whom substituted service was made)." The service documents were handed to "Jane Doe,"[5] whom the process servicer identified as the receptionist. Three days later, another employee of appellants' attorney service mailed the service documents to "El 7 Mares restaurant, attention: Salvador Diaz - Owner."

Respondents submitted a declaration by Quezada, who stated the physical description of "Jane Doe" did not match anyone employed by the restaurant and, in any event, that person "would not have been a suitable individual to accept service of any legal documents on behalf of [the] restaurant." All employees on the restaurant premises were instructed to promptly deliver any legal documents to him, and no one at the restaurant ever gave him any documents pertaining to appellants' lawsuit.

According to the process server's declaration, he failed in two attempts to personally serve individual defendant Diaz Salazar (as noted above, identified in all service documents as "Sergio Salazar Diaz") at the restaurant. Diaz Salazar was not in the restaurant on the first attempt, and the business was closed on the second. Thereafter, the process server left the service documents for Diaz Salazar at the restaurant with "Aida Doe," the "Person in Charge." Diaz Salazar submitted a declaration under penalty of perjury advising he was not the owner of the

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[5] Substituted service may be made upon an individual without obtaining his or her legal name. (*Trackman v. Kenney* (2010) 187 Cal.App.4th 175, 184.)

restaurant when appellants' decedent died, but he did not identify the previous owner by name. Diaz Salazar denied ever receiving the service documents.

Because respondents' motion was based on a lack of jurisdiction, appellants had the burden to establish effective service of the summons and complaint. (*American Express Centurion Bank v. Zara* (2011) 199 Cal.App.4th 383, 387 (*American Express*).) Insofar as service on the restaurant was concerned, appellants sought to satisfy this burden by obtaining judicial notice of certain documents they contended would establish that "Salvador Diaz," the individual they named on the summons, was the owner of the restaurant. The trial court denied their request and concluded that even if it took judicial notice of the documents, none connected a person named "Salvador Diaz" to the restaurant "in any way." Citing *Ramos v. Homeward Residential, Inc.* (2014) 223 Cal.App.4th 1434 (*Ramos*), the trial court held appellants "failed to show that service on a Salvador Diaz, via substitute service on Jane Doe, was proper, as they failed to show that Salvador Diaz bears any relationship to the [r]estaurant."

The issues concerning individual defendant Sergio Diaz Salazar involved different arguments to, and analyses by, the trial court. All of appellants' documents referred to him as "Sergio Salazar Diaz" instead of "Sergio Diaz Salazar." The trial court rejected respondents' argument that transposing the last two names resulted in a void default or default judgment.

The summons issued for Diaz Salazar gave the trial court pause, however. In its tentative ruling, the trial court announced it was inclined to grant the individual defendant's motion based on *Carol Gilbert, Inc. v. Haller* (2009) 179 Cal.App.4th 852 (*Carol*

Gilbert, Inc.) because the court file did not contain "a summons that correctly identifies Defendant as a Doe defendant." The tentative ruling was issued the Friday before a Monday hearing on respondents' motion. The trial court advised, "If [appellants have] such document, and if the 4/08/15 summons is not the summons issued to [Diaz Salazar, appellants] must bring the document to the hearing on this matter for consideration."

The hearing on respondents' motion was not reported.[6] Appellants' counsel did not bring a different summons to the hearing. The trial court declared the default judgment void and set it and the default itself aside, giving respondents 30 days to file an answer.

Appellants promptly sought reconsideration. (§ 1008.) Attorney James McKiernan submitted a declaration that included a photocopy of the actual summons he stated was served on Diaz Salazar. McKiernan conceded he did not personally attempt substituted service on either defendant. The attorney added he had never asked the attorney service to return the summons to him, so he was unable to retrieve it over the weekend before the Monday afternoon hearing on respondents' motion. There was no declaration from the process server.

At the hearing on appellants' motion for reconsideration, the trial court noted, as do we, that the summons produced in support of the motion for reconsideration "is different" from the summons in the court file, although they both bear the same file-

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[6] Appellants did not provide this court with a suitable substitute for a reporter's transcript.

stamp date, April 8, 2015.[7] The trial court denied appellants' motion for reconsideration, finding the summons was always within appellants' control and should have been presented in opposition with respondents' motion to set aside the default and default judgment.

DISCUSSION

I. Governing Law

A default judgment is void for lack of personal jurisdiction unless the defendant was properly served with a summons in the manner prescribed by statute. (*OC Interior Services LLC v. Nationstar Mortgage LLC* (2017) 7 Cal.App.5th 1318, 1330-1331.) As noted, a defendant's jurisdictional challenge places the burden on the plaintiff to establish effective service of the summons and complaint. (*American Express, supra,* 199 Cal.App.4th at p. 387.) Courts examine the judgment roll–i.e., the summons, proof of service of the summons, complaint, default, and default judgment–to determine whether service was effective. (§ 670,

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[7] For example, the April 8, 2015 summons in the court file bears the court seal and the signature stamp of the clerk; the summons counsel produced does not. The superior court's file stamp in the upper right corner is not the same on the two summonses for Diaz Salazar.

Nor have appellants offered an explanation for the summons for the restaurant that was produced at the motion for reconsideration. That summons is also dated April 8, 2015 and indicates the restaurant was served pursuant to section 415.95. But it could not be the summons that was served on the restaurant; according to the process server's proof of service, the restaurant was served with the summons on January 24, 2015, months before the "conformed copy" was issued.

subd. (a); *Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1441 (*Dill*).) We review de novo the trial court's conclusion that service on defendants was defective. (*Ramos, supra,* 223 Cal.App.4th at pp. 1440-1441.) Statutes governing substituted service of process are to be "'liberally construed to effectuate service and uphold jurisdiction if actual notice has been received by the defendant.'" (*Ellard v. Conway* (2001) 94 Cal.App.4th 540, 544.)

Section 415.20 authorizes substituted service on a person, e.g., individual, corporation, or unincorporated association, by leaving a copy of the summons and complaint with someone other than that person at the person's usual place of business or abode and then mailing a copy to the person at the same address where the summons and complaint were left. (§ 415.20.) Substituted service on an individual is proper only after personal service has been attempted "with reasonable diligence." (§ 415.20, subd. (b).)

When a business entity of form unknown is sued, section 415.95 governs service of process. That section provides in part, "A summons may be served on a business organization, form unknown, by leaving a copy of the summons and complaint during usual office hours with the person who is apparently in charge of the office of that business organization, and by thereafter mailing a copy of the summons and complaint by first-class mail, postage prepaid, *to the person to be served* at the place where a copy of the summons and complaint was left. Service of a summons in this manner is deemed complete on the 10th day after the mailing." (Italics added.) Personal service is not required for a business entity of form unknown. (*Ibid.*)

II. Analysis

A. Service on the restaurant

The parties agree the restaurant is a "business organization, form unknown." Effective service on the restaurant accordingly required compliance with section 415.95.

As appellants note, section 415.95 does not require service on an agent for service of process or on a particular corporate officer or designee. In this respect section 415.95 differs from section 416.10, which applies to service of process on corporations. But section 415.95 does require a copy of the summons and complaint to be mailed "to the person to be served." In the proof of service appellants filed with the court, they identified the person to be served as "Salvador Diaz - Owner." Appellants in fact mailed a copy of the service documents to "Salvador Diaz - Owner" at the restaurant.

Once respondents challenged jurisdiction, appellants had the burden to demonstrate that "Salvador Diaz" was the proper person to be served, i.e., a person connected to the restaurant. They failed to do so, and service of process was ineffective for that reason.

Appellants seek to avoid this result by characterizing "Salvador Diaz" as a "Random Name" that was "a superfluous and unnecessary entry on the proof of service" and distinguishing *Ramos, supra,* 223 Cal.App.4th 1434, upon which the trial court relied, on the basis that decision involved service on a corporation, not a business organization of unknown form. We are not persuaded.

In *Ramos*, the Court of Appeal determined substituted service on a corporation was ineffective because plaintiff incorrectly identified the person to be served on the corporation's behalf. *Ramos* relied on *Dill, supra,* 24 Cal.App.4th 1426, where the Court of Appeal held "the distinction between a 'party' and a 'person to be served' on behalf of that party . . . is central to the statutory scheme governing service of process. 'The words "person to be served" are words of precision, used throughout the act, intended to refer to the "individual" to be served, and not to the "party." (*Id.* at p. 1435.) As *Dill* explained, "[t]he distinction holds true even for individual defendants . . . . [I]f the defendant is a competent adult, he or she may be served directly, and thus the party and the person to be served are one and the same [citation]. However, if the defendant is a child or incompetent adult, the person to be served is the defendant's parent or guardian." (*Id.* at p. 1435, fn. 7.)

The principle applies here. Pursuant to section 415.95, substituted service on a "business organization, form unknown" is effective only if a copy of the summons and complaint is mailed "to the person to be served." Appellants' proof of substituted service expressly identified the person to be served as one Salvador Diaz. Although appellants subsequently mailed the summons and complaint to Salvador Diaz, they failed to establish anyone by that name had any connection to the restaurant. Service of process on the restaurant was ineffective.

B. Service on Diaz Salvador

As discussed above, Doe 1 was mentioned in the check-the-box portion of the Judicial Council form complaint as a defendant whose name was unknown, but who was an agent or employee of

either the restaurant or Preciado, the other named defendant. The sole substantive allegations are reproduced in footnote 3, *ante*. The proof of service of the summons and complaint on Diaz Salvador indicates he was served via substituted service both as an individual defendant and Doe 1. The original summons in the trial court's file was not so precise; neither the individual defendant nor the Doe box was checked. The trial court concluded *Carol Gilbert, Inc., supra,* 179 Cal.App.4th 852 was controlling and, accordingly, ruled service of process on Diaz Salazar was defective. We agree.

Carol Gilbert, Inc. also involved service of process on an individual who was sued as a Doe defendant. There, although the declaration of service identified the defendant as "Amit Haller sued herein as Doe I," the summons Haller actually received identified him not as a Doe, but "as an individual defendant." (*Carol Gilbert, Inc., supra,* 179 Cal.App.4th at p. 856.) The Court of Appeal held the omission was fatal: "Nothing in the summons hinted to [the defendant], let alone 'made clear' to him, that the summons was served on him as Doe 1. . . . Nor does anything in his conduct show that he knew the summons did, or was intended to, hale him personally into court." (*Id.* at p. 863.) Moreover, where "the summons is defective, it has some tendency *in itself* to deprive the defendant of the unmistakable notice to which he is entitled. At least one court has declared . . . that a defendant served with defective process was not at fault for 'ignoring service,' because he 'was under no duty to act upon a defectively served summons.'" (*Id.* at p. 865.)

Here, the proof of service indicates the summons, complaint and related service documents were left for "Sergio Salazar Diaz" at the restaurant on April 16, 2015, and mailed to him at the

restaurant address on the same date. The proof of service also indicates "Sergio Salazar Diaz" was served both as an individual defendant and as Doe 1. However, the only summons in the trial court's file, although file-stamped April 8, 2015–a date after the Doe amendment was filed–does not bear Diaz Salazar's name anywhere and has no checked boxes to indicate how he or any other defendant was served. The summons and complaint did not impart notice to Diaz Salazar that he was sued as Doe 1 and was defective for that reason.

C. Evidence Code section 641 and 647 presumptions

Evidence Code sections 641 and 647 create rebuttable presumptions: the former, that a letter correctly addressed and properly mailed is presumed to be received in the ordinary course of mail; the latter, that the return of a registered process server establishes a presumption of the facts stated in the return. (See, e.g., *Bear Creek Master Assn. v. Edwards* (2005) 130 Cal.App.4th 1470, 1486 [presumption of Evidence Code section 641 may be rebutted by a denial of receipt; *Fernandes v. Singh* (2017) 16 Cal.App.5th 932, 940 [presumption of Evidence Code section 647 may be rebutted by contrary evidence].)

Here, both presumptions were challenged via declarations by the restaurant manager and Diaz Salazar. The trial court was free to credit these declarations, and they provided sufficient evidence to rebut the Evidence Code presumptions. Moreover, appellants have not explained how the presumptions, even if not rebutted, provided anything more than actual notice. Actual notice alone is "not a substitute for proper service and is not sufficient to confer jurisdiction." (*American Express , supra,* 199 Cal.App.4th at p. 392.)

D. Appellants' motion for reconsideration

Finally, we find no error in the trial court's denial of appellants' motion for reconsideration. Section 1008, subdivision (a) requires that a motion for reconsideration be based upon new or different facts, circumstances, or law. A party seeking reconsideration must also provide an explanation for not producing the evidence earlier. (*New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 212.) A motion for reconsideration is properly denied when it is based on evidence that could have been presented in connection with the original motion, but was not. (*Hennigan v. White* (2011) 199 Cal.App.4th 395, 406.)

The summons for Diaz Salazar that was actually included with the substituted service and the mailed copy must have existed in April 2015, when appellants assert the individual defendant was served.[8] That summons is part of the judgment roll. (§ 670, subd. (a).) In their motion for reconsideration, appellants necessarily admitted the summons existed, but asserted it simply was not filed with the court. A failure to file a summons may be of no consequence in the usual case. But where the defendant challenges in personam jurisdiction, the summons is a critical document. Its import should have been apparent as soon as respondents' motion to set aside the default judgment was filed. It should have been produced before or at the hearing on respondents' motion.

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[8] If that summons did not exist at that time, service was unquestionably defective.

Additionally, counsel was not competent to provide a declaration concerning the summons that was belatedly produced. Appellants retained a registered process server, so counsel's statement that the submitted document was "a copy of the Summons that was served by substituted service upon Sergio Salazar Diaz as Doe 1 in 2015" could not have been based on personal knowledge. Although one might expect the attorney of record to prepare a service packet for a registered process server, include a completed summons, and retain a copy in the law firm files, apparently that was not the case here: A reasonable inference from the declaration by appellants' counsel is that the attorney service had the only copy. But the attorney service was acting on appellants' behalf, so the documents in its files must be deemed to be under the law firm's control as well.

DISPOSITION

The order of the superior court is affirmed. Respondents are awarded costs on appeal.

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DUNNING, J.*

We concur:

MANELLA, P. J.

WILLHITE, J.

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