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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

AMANDA LEWIS, Plaintiff and Respondent, v. AP-COMMERCE PLAZA, LLC, et al., Defendants and Appellants.	B278718 (Los Angeles County Super. Ct. No. BC555302)

APPEALS from a judgment and postjudgment order of the Superior Court of Los Angeles County, Elia Weinbach and Michelle Williams Court, Judges. Appeal from the judgment dismissed. Appeal from the postjudgment order affirmed.

Kirk & Myers, Amit Palta; Greines, Martin, Stein & Richland, Robert A. Olson and Jonathan H. Eisenman for Defendants and Appellants.

Law Office of Herb Fox and Herb Fox; A. Liberatore, and Anthony A. Liberatore for Plaintiff and Respondent.

"[A] default judgment entered against a defendant who was not served with a summons in the manner prescribed by statute is void." (*Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1444.) Defendants argue here that the process server fabricated the service of summons and, as a result, did not serve it in the prescribed manner. The trial court rejected the fabrication argument, found service valid, and denied defendants' motion to set aside a default judgment as void. On appeal, we decline defendants' invitation to reweigh the trial court's credibility determinations. We affirm the order denying defendants' motion to set aside the default judgment.

The appeal from that order was consolidated with an appeal from the judgment. We dismiss the appeal from the judgment because defendants have abandoned it.

FACTUAL BACKGROUND[1]

1. Service of Process

In August 2014, plaintiff Amanda Lewis (plaintiff or Lewis) sued AP-Commerce Plaza, LLC (AP) and Abbey Management Company, LLC (Abbey Management) (collectively defendants) for premises liability.

Process server Albert Palomera (Palomera) completed proofs of service of summons for both defendants. Palomera declared under penalty of perjury as follows: "On 1/26/2015 at 11:43 a.m. I left the documents [summons, complaint, civil case cover sheet, and others] . . . with . . . Dennis Loput,

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[1] We summarize only the facts relevant to issues raised on appeal and thus do not describe the substantive allegations in the complaint.

Vice President and Legal Department/Authorized to accept service." Palomera described Loput as male, Caucasian, 63 years old, 5 foot 8 inches tall, weighing 170 pounds, and having salt and pepper hair.

It is undisputed that Evelin Orozco mailed the same documents on January 27, 2015 to Donald G. Abbey, defendants' registered agent for service of process. On appeal, it also is undisputed that defendants discovered the complaint in their files and that they had actual notice of it.

2. Default Entered

On April 8, 2015, default was entered against defendants.

3. First Motion to Set Aside Default

On October 7, 2015, defendants moved to set aside the default. They argued "that Defendants did not have actual notice of the action prior to the entry of default, that lack of notice was merely [due] to mistake, inadvertence, surprise and excusable neglect." In support of defendants' motion, Mary Tillman (whose title was not disclosed in her declaration) averred that "if the Complaint was properly served, it may merely have not been forwarded to me or another supervising entity, who would have responded to the Complaint." On November 13, 2015, the trial court denied defendants' motion to set aside default.

Defendants' motion for reconsideration included Dennis Loput, Jr.'s (Loput) declaration, in which he averred that he did not recall receiving the service of process. He further indicated that he was the Vice President of Abbey Management and of a related entity that was the managing member of AP. According to Loput, "[a]t the time the complaint associated to this action was allegedly served . . . the Complaint would have come to me

and then [been] forwarded to the legal department, where a paralegal would then notify Ms. Mary Tillman." The trial court denied defendants' request for reconsideration.

4. Judgment

On September 27, 2016, the trial court entered a judgment in the amount of $337,693. On November 1, 2016, defendants appealed from the judgment.

5. Second Motion to Set Aside the Default

On November 21, 2016, defendants moved to set aside the default judgment (second motion), arguing that it was void because "Lewis's proofs of service . . . are a sham." According to defendants, Palomera fabricated the information in the proofs of service and never actually served Loput. Loput speculated that Palomera may have "Googled" the name Dennis Loput and used a computer-generated picture to describe Loput's father rather than Loput. According to defendants: "Lewis did not serve Dennis Loput, Jr., or anyone else authorized by [defendants] . . . to receive process. Because Lewis never properly served . . . [defendants] with process, the default judgment is void."

Loput provided a declaration in support of the motion. He averred that he did "not recall ever being served with a complaint [in this matter], including on January 26, 2015." Loput further averred that Palomera's description of the person served did not match his characteristics. He described himself as 45 years old, 5 foot 11 inches tall, having brown hair, and weighing 210 pounds.

In another declaration attached only to his reply brief (reply declaration), Loput averred that Palomera's description did

not match either him or anyone else who worked in the office where Palomera claimed to have delivered the documents. Loput acknowledged that he was present at the time that Palomera claimed to have delivered the documents but indicated that his father was not. Citing the rule that evidence first appearing in reply generally is not considered, and finding that defendants did not serve the reply in a proper manner, the trial court refused to consider Loput's reply declaration.

6. Lewis's Opposition to the Second Motion

Lewis opposed defendants' second motion and supported her opposition with Palomera's declaration. Palomera averred: "On January 26, 2015, I arrived at the location at approximately 11:35 to 11:40 a.m." "Upon entering the suite, I was greeted by a receptionist." "I informed the receptionist that I was there to serve legal documents upon AP-COMMERCE PLAZA, LLC and THE ABBEY MANAGEMENT, LLC in the care of Donald G. Abbey or whomever was in charge or authorized to accept service of the documents." "In response to my stated purpose, the receptionist asked me to take a seat. She also told me that someone would be with me in a few minutes to accept service." "I waited approximately five minutes or so and out of an office came a male Caucasian." "Upon seeing the gentleman, I repeated that I had legal documents to serve. The person accepted the documents and took them from me with his hand. Upon receiving the papers he confirmed that he was authorized to accept service for the agent Donald G. Abbey for both defendants." "Also, when I handed him the documents, as consistent with my custom and practice, I asked him for his name and he provided me with the name 'Dennis Loput.' The person did not specify Junior or Senior." "I also asked for the man's title

and he said that he was Vice President and in the Legal Department." "In preparing the Proofs of Service for this job, at no time did I ever Google the name Dennis Loput."

7. Order Denying Defendants' Second Motion

The trial court denied defendants' second motion on two independent grounds. The trial court concluded that it was an improper request for reconsideration of defendants' earlier motion and that Lewis's "service was proper." The conclusion that service was proper was dispositive of defendants' argument that the judgment was void for lack of service.

The trial court made the following findings: "In this case, Donald G. Abbey, Defendants' registered agent for service of process, was the person served with the summons and complaint. He was served via substitute service on Dennis Loput. Plaintiff's process server declares that he entered Defendants' premises, told the receptionist he had legal documents to serve, waited while she brought someone back to the reception area, was introduced to a Dennis Loput, who stated that he was authorized to receive the documents and stated that his title was vice president and he worked in the legal department. [Code of Civil Procedure section] 415.20[, subdivision] (a) permits substitute service on any individual 'apparently in charge' at the office. Loput represented himself to be such individual, and therefore service of process on him was proper. The Court notes that Plaintiff followed up by mailing the documents." The trial court relied on Palomera's averment that Loput "represented himself" to be the person " 'apparently in charge' " of accepting service of process.

DISCUSSION

We first discuss the threshold issues raised by both parties. We then turn to the critical issue: Did the trial court err in concluding that the judgment was not void for lack of proper service of process? As we shall explain, that issue turns on a disputed credibility determination, and defendants demonstrate no error.

A. Threshold Issues

The parties raise several threshold issues, all of which are easily resolved. First, although this court consolidated two appeals, defendants raise no issue with respect to their appeal from the judgment. We therefore deem that appeal abandoned and dismiss it.[2] (*Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1488, fn. 3.)

Second, Lewis's argument that the trial court could not consider the second motion because an appeal from the judgment was pending lacks merit. A void judgment may be attacked at any time, even when an appeal is pending. (*Andrisani v. Saugus Colony Limited* (1992) 8 Cal.App.4th 517, 523 (*Andrisani*); *Macmillan Petroleum Corp. v. Griffin* (1950) 99 Cal.App.2d 523, 533.) Lewis's argument that only a judgment void on its face may be set aside is not well-founded. (*Fallon v. Superior Court* (1939) 33 Cal.App.2d 48, 51-52 [although other procedures may be preferable when a judgment is not void on its face, the trial court may set aside a void judgment even if an appeal is pending].) Had the trial court set aside the judgment, the appeal pending

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[2] Defendants' do not dispute the contention that they have abandoned their appeal from the judgment.

from the judgment would have been rendered moot. (*Andrisani*, *supra*, 8 Cal.App.4th at p. 523.)

Third, defendants do not show either that the trial court abused its discretion in refusing to consider Loput's reply declaration or that the failure to consider that declaration prejudiced them. " 'The general rule of motion practice, which applies here, is that new evidence is not permitted with reply papers. . . . "[T]he inclusion of additional evidentiary matter with the reply should only be allowed in the exceptional case." ' " (*Carbajal v. CWPSC, Inc.* (2016) 245 Cal.App.4th 227, 241.) This was not an exceptional case. Moreover, defendants demonstrate no prejudice. Although Loput repeatedly tweaked his declaration, the critical points remained the same: He did not recall accepting service and the description of the person served by the process server did not match his physical characteristics. The additional information in his reply declaration was not material.

Finally, actual notice is insufficient to demonstrate proper service. (*American Express Centurion Bank v. Zara* (2011) 199 Cal.App.4th 383, 390-391 (*Zara*); *Gilbert, Inc. v. Haller* (2009) 179 Cal.App.4th 852, 855, 862-866.) " '[C]ompliance with the statutory procedures for service of process is essential to establish personal jurisdiction. [Citation]. Thus, a default judgment entered against a defendant who was not served with a summons in the manner prescribed by statute is void.' " (*Zara, supra*, 199 Cal.App.4th at p. 387; see also *Lebel v. Mai* (2012) 210 Cal.App.4th 1154, 1165 [" 'no California appellate court has gone so far as to uphold a service of process solely on the ground the defendant received actual notice when there has been a

complete failure to comply with the statutory requirements for service' "].)

B. Substantial Evidence Supported the Trial Court's Conclusion that Defendants Were Properly Served

Defendants' argument that service was improper depends on their premise that the proof of service was fabricated. Absent that premise, there was no dispute that service was consistent with Code of Civil Procedure sections 415.20, and 416.10. Section 416.10 permits serving a corporation by delivering a copy of the summons and complaint to the "person designated as agent for service of process." (§ 416.10, subd. (a).) Section 415.20 permits leaving it at the office of that person "with the person who is apparently in charge thereof, and by thereafter mailing a copy of the summons and complaint . . . to the person to be served." (§ 415.20, subd. (a).) Putting aside defendants' fabrication argument, the documents for both defendants were served on the person apparently in charge (Loput) and mailed to the registered agent for service of process (Abbey).

We now turn to whether the proofs of service were fabricated. According to defendants, "the disparity between Dennis Loput, Jr.'s appearance and the description in the proofs of service was evidence that the proofs were fabricated." Specifically, Loput's initial declaration in support of defendants' second motion to set aside the default identifies discrepancies between his characteristics and those describing him in the proofs of service. Additionally, Loput did not recall being served.

Defendants ignore the important counter-evidence provided in Palomera's declaration. Given the conflicting evidence concerning whether or not Loput was served, the trial court was

not required to credit Loput's version. (*Zara, supra,* 199 Cal.App.4th at p. 390 ["the trial court was not required to accept . . . self-serving evidence contradicting the process server's declaration"]; see also *Yolo County Dept. of Child Support Services v. Myers* (2016) 248 Cal.App.4th 42, 49 [deferring to the trial court's credibility determinations in evaluating whether process was served]; *Transamerica Title Ins. Co. v. Hendrix* (1995) 34 Cal.App.4th 740, 741-742 [same]; *Vezie v. Young* (1947) 81 Cal.App.2d 748, 750 [same].) Even absent explicit credibility determinations, "[w]e may not reweigh the trial court's implicit credibility determination." (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1319.)

Given the trial court's credibility determination, substantial evidence supported the trial court's order denying defendants' second motion to set aside the default.[3] (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479 [applying substantial evidence test to review trial court's findings granting relief from default]; *Giorgio v. Synergy Management Group, LLC* (2014) 231 Cal.App.4th 241, 247 [in reviewing a motion to vacate a default and set aside a judgment "the trial court's express and implied factual determinations are not disturbed on appeal if

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[3] An appellate court reviews de novo a trial court's determination that a judgment is void. (*Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 496.) However, as in this case, when the evidence is in conflict, the appellate court must defer to the trial court's factual determinations under the substantial evidence test. (*Ramos v. Homeward Residential, Inc.* (2014) 223 Cal.App.4th 1434, 1441, fn. 5.) Defendants' argument that this court should review their motion to vacate de novo fails to acknowledge the conflicting evidence in Palomera's and Loput's declarations.

supported by substantial evidence"]; see *Conesco Marketing, LLC v. IFA & Ins. Services, Inc.* (2013) 221 Cal.App.4th 831, 841 ["We will not revisit the trial court's factual determination [that judgment debtor properly served] if supported by substantial evidence"].) According to Palomera, he recalled handing the documents to a person who identified himself as Dennis Loput. He informed both the receptionist and the person taking the documents that his purpose was to serve documents on defendants. Palomera's declaration supported the finding that Loput represented himself to be "apparently in charge." The trial court expressly found that Abbey "was served via substitute service on Dennis Loput."

The fact that other courts have reached different conclusions when a description in the proof of service is challenged does not show that the trial court was required to discredit Palomera. Therefore, *Zara* does not compel a different conclusion. In that case, the defendant "declared that he was not served" and the proof of service identified someone who did not match the defendant's description. (*Zara*, *supra*, 199 Cal.App.4th at p. 390.) The process server provided no evidence other than what was in the proof of service and therefore the "uncontradicted evidence [was] that the process server did not personally serve defendant." (*Ibid.*) Here, in contrast, Loput never averred that he was not served, but only that he did not recall being served. And importantly, the process server provided a declaration credited by the trial court. *Zara*'s holding that a "false proof of service" does not support jurisdiction, does not apply here because substantial evidence supported the trial court's conclusion that the proof of service was not false. (*Id.* at p. 393.)

If anything, *Zara* supports the conclusion that the trial court's credibility determinations cannot be reweighed by this court. The *Zara* court explained: " 'When an issue is tried on affidavits, the rule on appeal is that those affidavits favoring the contention of the prevailing party establish not only the facts stated therein but also all facts which reasonably may be inferred therefrom, and where there is a substantial conflict in the facts stated, a determination of the controverted facts by the trial court will not be disturbed.' " (*Zara, supra*, 199 Cal.App.4th at p. 387.) Applying that principle ineluctably leads to the result that Palomera served the person "apparently in charge" and then the documents were mailed to Abbey; nothing more was required. In short, defendants fail to show that substantial evidence did not support the trial court's finding that the proof of service was not fabricated. Without that showing, their claim that the judgment is void because service was never effectuated necessarily fails.[4]

[4] The trial court also concluded that defendants' second motion was essentially a motion for reconsideration. This was an independent ground for denying defendants' motion, and we need not consider it.

DISPOSITION

The appeal from the default judgment is dismissed. The January 13, 2017 order denying defendants' motion to set aside the default judgment is affirmed. Lewis is awarded her costs on appeal.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.