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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

BETTY LIM,

Cross-Complainant and Respondent,

v.

ROBERT DE VOGELAERE,

Cross-Defendant and Appellant.

B232431

(Los Angeles County
Super. Ct. No. BC416943)

APPEAL from an order of the Superior Court of Los Angeles County.

Abraham Khan, Judge. Affirmed.

Law Offices of William J. Beverly, and William Beverly for Cross-Defendant and Appellant.

Clark & Trevithick, Joel A. Goldman and Alisa S. Edelson for Cross-complainant and Respondent.

We affirm an order denying a motion to set aside a default judgment on a cross-complaint.

FACTS

The Underlying Events

Betty Lim and Robert De Vogelaere entered a business relationship, the scope and nature of which is not altogether clear from the record, connected with an entity known as Marine Pacific, LLC. In 2005, First Regional Bank made a \$1.3 million loan to Marine Pacific. De Vogelaere and Lim, identified as managing members of Marine Pacific, both executed a promissory note on behalf of Marine Pacific for the loan. Both De Vogelaere and Lim signed personal guaranties for the loan.

The Litigation

Two actions arose out of the loan transaction noted above. In June 2009, First Regional Bank filed a complaint against De Vogelaere and Lim for breach of guaranty. In September 2009, Lim filed a cross-complaint against De Vogelaere alleging tort, contract and indemnity claims. Pared to its core, Lim's cross-complaint alleged that De Vogelaere defrauded her into investing money in Marine Pacific, breached the operating agreement, breached his fiduciary duties in management of the enterprise. Further, it alleged that in the event Lim ended up owing money to First Regional Bank, she was entitled to indemnification from De Vogelaere. First Regional Bank served De Vogelaere with a summons and complaint by substituted service at a residence in Pacific Palisades. Lim served De Vogelaere with a summons and her cross-complaint by substituted service at a business office on Wilshire Boulevard. De Vogelaere defaulted both on the bank's complaint and on Lim's cross-complaint.

On June 11, 2010, Lim filed a request for court judgment on her cross-complaint against De Vogelaere. She sought judgment in the amount of approximately \$1.1 million. On June 11, 2010, the trial court entered a default judgment in favor of Lim and against De Vogelaere on Lim's cross-complaint in the full amount requested.

First Regional Bank filed a request for court judgment on its complaint for breach of guaranty against De Vogelaere. The trial court entered a default judgment in favor of First Regional Bank and against De Vogelaere on the bank's complaint for approximately \$300,000. On the same day, the trial court entered an order for "dismissal with retention of jurisdiction" as between First Regional Bank and Lim. The order was that Lim stipulated to make monthly payments (\$2,500) to the bank for one year, at the end of which the bank would dismiss its complaint against her for breach of guaranty. If she failed to make the payments the bank would be entitled to enter judgment against Lim upon agreed terms.

The Motion to Vacate the Default Judgments

De Vogelaere filed a motion pursuant to Code of Civil Procedure section 473, subdivision (d),¹ to set aside the \$300,000 default judgment entered in favor of First Regional Bank and against De Vogelaere on the bank's complaint, and to set aside the \$1.1 million default judgment entered in favor of Lim and against De Vogelaere on Lim's cross-complaint. In sum, De Vogelaere's motion to set aside argued that both judgments were void due to improper service of process. More specifically, De Vogelaere claimed that First Regional Bank had effected invalid substituted service of its complaint at an address "where [he] did not reside," and Lim effected invalid substituted service of her cross-complaint at an address "where he did not maintain his regular place of business, and [did not] . . . regularly receive[] mail at the times of the alleged service." De Vogelaere's motion was supported by declarations from business associates and by his own declaration, all of which laid out a chronology of his home and workplace addresses. According to the declaration, De Vogelaere's home address in Pacific Palisades where First Regional Bank effected substituted service of the complaint was his years-earlier, pre-divorce residence. Further, the address on Wilshire Boulevard where Lim effected substituted service of her cross-complaint was a business office that he vacated shortly

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

before service of process. De Vogelaere did not deny actual knowledge of the bank's complaint or of Lim's cross-complaint.

On December 15, 2010, the trial court entered an order granting De Vogelaere's motion to set aside the \$300,000 default judgment entered on October 18, 2010 in favor of First Regional Bank and against De Vogelaere on the bank's complaint. The court denied De Vogelaere's motion to set aside the \$1.1 million default judgment entered on June 11, 2010 in favor of Lim and against De Vogelaere on Lim's cross-complaint.

On April 13, 2011, De Vogelaere filed a notice of appeal from the trial court's order of December 15, 2010 denying his motion to set aside the \$1.1 million default judgment entered on June 11, 2010 in favor of Lim and against De Vogelaere on Lim's cross-complaint.

DISCUSSION

I. The Appellate Jurisdiction Issue

We first address Lim's contention that our court does not have jurisdiction to address De Vogelaere's appeal because his notice of appeal was untimely. We rejected Lim's contention on her earlier motion to dismiss De Vogelaere's appeal, and we do so again here.

De Vogelaere appeals an order denying his statutory motion pursuant to section 473 to vacate the default judgment entered against him on Lim's cross-complaint. An order denying a statutory motion pursuant to section 473 to vacate a default judgment is an independently appealable order made after judgment. (*Jade K. v. Viguri* (1989) 210 Cal.App.3d 1459, 1469.) The timeliness of an appeal from such an order is "calculated with reference to entry of such order, not with reference to entry of the default judgment." (*Ibid.*)

California Rules of Court, rule 8.104(a)(2), (a)(3), and (e), together provide that a notice of appeal shall be filed on or before the earliest of "60 days after the party filing the notice of appeal serves or is served by a party with a document entitled 'Notice of Entry' of judgment [or appealable order]," or "180 days after entry of judgment [or appealable order]." Here, as noted above, the trial court's order dated December 15, 2010,

denying De Vogelaere’s statutory motion pursuant to section 473 to vacate a default judgment, is the trigger for calculating the timeliness of De Vogelaere’s notice of appeal. (*Jade K. v. Viguri, supra*, 210 Cal.App.3d at p. 1469.)

The trial court’s order dated December 15, 2010, started the running of the time for filing a notice of appeal. De Vogelaere filed his notice of appeal on April 13, 2011. The number of days between the appealable order and the notice of appeal is 119 days. Because no “Notice of Entry” of the order dated December 15, 2010 was served in this case,² the 180-day time limit for filing the notice of appeal governed. De Vogelaere did not file his notice of appeal too late. All of Lim’s arguments offering calculations for the time to appeal based on reference to entry of default judgment on June 11, 2010, are not persuasive. Lim’s arguments mistakenly calculate the time for the filing of a notice of appeal as beginning to run from the entry of the default judgment, rather than from the post-judgment, independently appealable order from which De Vogelaere has taken his appeal.

California Rules of Court, rule 8.108(c) reads: “If, within the time prescribed by rule 8.104 to appeal from the judgment, any party serves and files . . . a valid motion – to vacate the judgment, the time to appeal *from the judgment* is extended for all parties until the earliest of: (1) 30 days after . . . a party serves . . . an order denying the motion or a notice of entry of that order; . . . or 180 days after entry of judgment.” (Italics added.)³

Lim’s reliance on California Rules of Court, rule 8.108(c), as applied in *Starpoint, supra*, 201 Cal.App.4th 1101, for a calculation that finds De Vogelaere’s notice of appeal to be untimely is not persuasive. In *Starpoint*, the issue was the timeliness of an appeal

² As we noted earlier in denying Lim’s motion to dismiss the current appeal, Lim served a “notice of ruling” on the trial court’s order denying De Vogelaere’s motion to vacate the default judgment on Lim’s cross-complaint. The “notice of ruling” did not trigger the running of a 60-day time limit for filing a notice of appeal.

³ A “valid motion to vacate the judgment” within the meaning of California Rules of Court, rule 8.108(c) means a motion to vacate filed within the time for filing a notice of appeal. (*Starpoint Properties, LLC v. Namvar* (2011) 201 Cal.App.4th 1101, 1108 (*Starpoint*).)

from a non-default judgment, and the extended time afforded under California Rules of Court, rule 8.108(c) for the filing a notice of appeal *from a judgment*, in the situation where an appellant filed a valid, that is, timely, motion to vacate the judgment. The Court of Appeal ruled the time for filing the notice of appeal from the judgment was too late because the appellant's motion to vacate the judgment had not been filed within the time for filing an appeal, and, thus, the extended time allowed under California Rules of Court, rule 8.108(c) could not be invoked. (*Id.* at pp. 1107-1109.)

The issue before us today is not the time for filing an appeal from a non-default judgment, but rather, the time for filing a notice of appeal from an independently appealable order denying a motion pursuant to section 473 to vacate a default judgment. Here, it is the order denying the motion that triggers the running of the time for filing a notice of appeal, not the entry of the underlying default judgment. (*Jade K. v. Viguri*, *supra*, 210 Cal.App.3d at pp. 1468-1469.)

II. The Default and Default Judgment

De Vogelaere contends the trial court abused its discretion in denying his statutory motion to set aside the default judgment because the “uncontested and incontrovertible” evidence in his motion proved that Lim effected substituted service on De Vogelaere at a business office that he had vacated. We disagree.

Section 473, subdivision (d), provides: “The court . . . may, on motion of either party after notice to the other party, set aside any void judgment or order.” De Vogelaere contends that the default judgment in favor of Lim is void due to improper service of process. The trial court rejected De Vogelaere's argument, and so do we.

Section 415.20, subdivision (b), provides that, when a copy of the summons and complaint cannot with reasonable diligence be personally delivered to a defendant, the summons and complaint may be served on the defendant by leaving them at his or her “usual mailing address” Here, the trial court found, as a combination of statutory interpretation and factual finding, that the address on Wilshire Boulevard where Lim served De Vogelaere was his “usual mailing address” within the meaning of section 415.20, subdivision (b), because he regularly received and picked-up mail at that address

at the time of substituted service. De Vogelaere's appeal challenges the trial court's statutory interpretation. We find no error.

The Code of Civil Procedure does not define "usual mailing address" as that term is used in section 415.20, subdivision (b). De Vogelaere argues a "former office that has been vacated and replaced by a new office is not a 'usual mailing address' even if some mail is actually received by [an] addressee [at the former office]." The implicit principle in De Vogelaere's argument is that a person may have only one "usual mailing address." His argument is not persuasive.

Statutes governing substituted service of process are to be "liberally construed" to effectuate service and to uphold jurisdiction when actual notice has been received by the defendant. (*Bein v. Brechtel-Jochim Group, Inc.* (1992) 6 Cal.App.4th 1387, 1392.) In our view, a liberal construction of the statutory language allowing substituted service at a person's "usual mailing address" cannot be reconciled with limiting substituted service to a single, mutually exclusive mailing address, where the evidence shows a person receives and picks up mail at more than one address. On the contrary, the everyday definition of the term "usual" in such a context must mean something more in the realm of "commonly or ordinarily employed" (see Webster's 3d New Internat. Dict. (2002) p. 2524.) than it does "used to the exclusion of another." We are satisfied that the trial court's correctly interpreted section 415.20, subdivision (b), to authorize substituted service at a commonly or ordinarily used mailing address, rather than an address used to the exclusion of another.

Applying the statutory interpretation to the facts in the record, we find no abuse of discretion in the trial court's decision to deny De Vogelaere's motion to vacate the default judgment on Lim's cross-complaint. The record shows as follows. The Wilshire Boulevard address was the business address for Marine Pacific, the limited liability enterprise in which De Vogelaere and Lim were the only members. De Vogelaere was the agent for service of process for Marine Pacific. De Vogelaere had rented an office at the Wilshire Boulevard address and ran a real estate business from there, including Marine Pacific's business. At about the same time that First Republic Bank filed its

action for breach of guaranty against De Vogelaere and Lim, De Vogelaere and Lim co-signed a letter to the bank to continue the foreclosure sale, and the letter was sent from the Wilshire Boulevard address.

In addition, De Vogelaere's former landlord stated that he had moved out at the time of service of the cross-complaint, but would still come "about once every two weeks" to pick up his mail and employees of De Vogelaere's former landlord told Lim's process server that De Vogelaere still received mail at the Wilshire Boulevard address and still picked up mail from the address. De Vogelaere himself admitted that he "did receive some residual mail [at the Wilshire Boulevard address] for a period of time."

It is also significant to note that less than one month after service of Lim's cross-complaint, De Vogelaere (through his lawyer) acknowledged that he had received the summons and cross-complaint and requested an extension of time to respond. Finally, and perhaps most significantly, in the months prior to and after service of Lim's cross-complaint, De Vogelaere was repeatedly served with pleadings in this case and another case, and was receiving and *responding* to correspondence that had been sent to the Wilshire Boulevard address. The pleadings and correspondence were not returned for an improper address. An attorney who indicated that he represented De Vogelaere acknowledged that De Vogelaere had received litigation papers.

It is correct, as De Vogelaere avers, that the evidence is undisputed that he moved to a new office. However, this does not mean that the Wilshire Boulevard address did not remain a "usual mailing address" in September 2009, when Lim substitute served him at that address.

De Vogelaere points out that substituted service is proper at a forwarding address at a postal annex where a defendant receives mail. (*Ellard v. Conway* (2001) 94 Cal.App.4th 540.) It does not necessarily follow, as De Vogelaere suggests, that service at a former address is necessarily always defective. Here, the evidence establishes that De Vogelaere continued to receive mail at his former address for a period of time, and that he in fact received actual notice of a summons and complaint by substituted service

at that former address. Under such circumstances, it cannot be said as a matter of law that substituted service was not effected at a “usual mailing address.”

DISPOSITION

The trial court’s order dated December 15, 2010, denying De Vogelaere’s motion to set aside his default judgment on Lim’s cross-complaint is affirmed. Respondent to recover costs on appeal.

BIGELOW, P. J.

We concur:

FLIER, J.

SORTINO, J.*

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