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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

LORETTA NICHOLSON HARRISON, Respondent v. RICHARD HARRISON, Appellant,	B277649 (Los Angeles County Super. Ct. No. NWD26716)

APPEAL from order of the Superior Court of Los Angeles County, Shirley K. Watkins, Judge. Affirmed.

Law Offices of Jeffrey A. Slott, Jeffrey A. Slott, Jeffrey Alpert, Dean Asher, for Appellant.

Therese Harris Law Offices and Therese S. Harris, for Respondent.

Appellant Richard Harrison (husband) appeals the denial of his motion to vacate judgment under Code of Civil Procedure section 473, subdivision (d).[1] Respondent Loretta Nicholson Harrison (wife) obtained a default judgment in a marriage dissolution action in 1974. Husband contends the default judgment is void due to faulty service. Because the judgment is not void on its face, and because husband brought his motion to vacate more than two years after entry of default judgment, the court correctly denied the motion to vacate. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Husband and wife were married in California in March 1961. They had three children together: Richard, born November 1962; Robert, born July 1964; and Sebastian, born September 1965. On March 27, 1970, wife filed a petition seeking legal separation. In the petition, wife sought custody of the children, spousal support, child support, a determination of property rights, attorney fees, and costs. Wife served the petition by publication, filing a proof of publication in May 1970. No responsive pleading was filed.

On October 5, 1972, wife filed an amended petition. The key change was that instead of seeking legal separation, the amended petition sought an order of dissolution. The court issued a new summons on the amended petition.

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

According to the proof of service filed with the court on November 8, 1973, wife served husband by registered mail to the family home address in Rome where husband continued to live. The documents were mailed September 10, 1973, and the return receipt was signed and dated September 14, 1973.

On November 8, 1973, wife filed a request for entry of default and mailed a copy of the request to husband at his Rome address. In early 1974, the court entered an "interlocutory judgment of dissolution of marriage" granting wife custody of the three children and directing husband to pay "as and for child support the sum of $250.00 per month per child on the first day of each month beginning January 1, 1974, until further order of court." The court also divided separate property and ordered husband to pay $500 in spousal support for 42 months, plus $2,000 in attorney fees. The interlocutory judgment stated, "The court acquired jurisdiction of the respondent on 9-14-73 by [s]ervice of process on that date, respondent not having appeared within the time permitted by law." On August 27, 1974, the court entered a final judgment of dissolution, and the clerk of court mailed notice of entry of judgment to husband at his Rome address. In 1976, wife obtained a modification of husband's visitation rights and a restraining order against husband. Husband moved to Malibu, California about 30 years ago.

In May 2015, wife obtained an abstract of support judgment and an execution lien in her favor for $420,208.32,

which was the judgment amount including interest. In March 2016, wife served husband with an application and order for appearance and examination, with an examination hearing date of March 30, 2016. Husband did not appear, and the court set a hearing date of June 3, 2016 for an Order to Show Cause (OSC) re Contempt.

On the day before the scheduled June 3, 2016 OSC hearing, husband filed a request to set aside and vacate default and default judgment, supported by a declaration with attachments. Husband sought relief under section 473, subdivision (d), on the grounds that the default and default judgment were void. Husband also filed an ex parte application for stay of enforcement of default judgment.

On June 3, 2016, at the previously scheduled OSC hearing, the court stayed the judgment debtor exam and set a July 22, 2016 hearing date for wife's motion to compel and husband's motion to vacate. Wife filed an opposition to the motion to vacate on July 11, 2016.

After a hearing on July 22, 2016, at which both husband and wife testified, the court denied the motion to vacate.[2] The court's order states in relevant part: "[Husband's] Motion to Set Aside Default and Default Judgment is DENIED. Among other things, the court does

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[2] The court also granted wife's motion to compel post-judgment discovery and a judgment debtor exam. It ordered discovery responses without objections delivered by September 12, 2016, set the exam for September 14, 2016, and awarded attorney fees and costs in favor of wife.

not find credible the testimony of [husband] concerning denial of his receipt of notice and his denial of having ongoing knowledge of this matter. The court accepts the evidence in support of the entry of default and finds that [husband] elected to ignore the child support matter until now, to his detriment. The court finds that having been given repeated timely notices over the years of the child support orders, he elected to ignore them. The court also finds that [husband's] arguments in support of his position ring hollow and that he knew he had an obligation to support his children but made a conscious decision to ignore the court's orders."

Husband filed a notice of appeal on September 9, 2016.

DISCUSSION

Relief from default or default judgment

"Although a trial court has discretion to vacate the entry of a default or subsequent judgment, this discretion may be exercised only after the party seeking relief has shown that there is a proper ground for relief, and that the party has raised that ground in a procedurally proper manner, within any applicable time limits." (*Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 495 (*Cruz*).)

Differing time limits apply depending on the grounds for relief asserted.[3] "[S]ection 473.5 permits the court to set aside a default or default judgment if the defendant, 'through no inexcusable fault of his own, [received] no actual notice' of the action, provided that relief is requested within a reasonable time, but not more two years after the entry of the default judgment. [Citation.] In addition, under subdivision (d) of Code of Civil Procedure section 473, the court may set aside orders and judgments that are "'void,'" including orders and judgments void for want of fundamental jurisdiction or personal jurisdiction." (*Bae*, *supra*, 245 Cal.App.4th 89 at p. 97.) There is no time limit for filing a motion to vacate if a default judgment is attacked as void on its face. (*Ramos v. Homeward Residential, Inc.* (2014) 223 Cal.App.4th 1434, 1440 (*Ramos*); *Trackman v. Kenney* (2010) 187 Cal.App.4th 175, 181 (*Trackman*); *Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1441

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[3] To provide a complete discussion, we briefly describe several other grounds for relief from default judgment not relevant to this particular case. "Under Code of Civil Procedure section 473, subdivision (b), a party may seek relief on the grounds of 'mistake, inadvertence, surprise, or excusable neglect' within 'a reasonable time,' but not more than six months after the entry of the default or default judgment." (*Bae v. T.D. Service Co. of Arizona* (2016) 245 Cal.App.4th 89, 97 (*Bae*).) Courts may also grant relief from a default or default judgment on equitable grounds such as extrinsic fraud or extrinsic mistake. (*Id.* at pp. 97–98; *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981.)

(*Dill*); see § 473, subd. (d).) If a default judgment, although facially valid, is void due to lack of proper service of process, relief is only available within the two-year time limit set forth in section 473.5. (*Trackman*, *supra,* at p. 180; *Bae*, *supra*, at p. 97, citing *Gibble v. Car–Lene Research, Inc.* (1998) 67 Cal.App.4th 295, 301, fn. 3.)

Husband's contentions on appeal center around whether the default judgment was void based on improper service of the amended petition. His arguments do not appear to distinguish between a facially void judgment and one that can be shown to be void based on evidence outside the judgment roll. Because the court considered the judgment roll as well as additional evidence, we review both possibilities.

Standard of review

We review de novo the trial court's determination of whether a default judgment is facially void. (*Ramos*, *supra*, 223 Cal.App.4th at p. 1440; see *Cruz*, *supra*, 146 Cal.App.4th at p. 496.) When a motion to vacate a default judgment is decided based on affidavits or other evidence, we return to the abuse of discretion standard. (*Ramos*, *supra*, at pp. 1440–1441.) We defer to factual determinations made by the trial court when the evidence is in conflict, whether the evidence consists of oral testimony or declarations. (*Id.* at p. 1441; *Dill*, *supra*, 24 Cal.App.4th at p. 1441.) In applying the abuse of discretion standard of review in the context of a

motion vacate a default judgment we determine "whether that decision exceeded the bounds of reason in light of the circumstances before the court. [Citation.] In doing so, we determine whether the trial court's factual findings are supported by substantial evidence [citation] and independently review its statutory interpretations and legal conclusions [citations]." (*County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1230.)

The judgment is not facially void

Nothing in the judgment roll alone demonstrates the default judgment to be void. Husband argues it was legally impermissible for wife to serve the summons and amended petition by mail. He further claims service was invalid because the proof of service incorrectly identified the documents being served. Finally, he argues that the court lacked jurisdiction to enter default judgment against him. We reject each of these arguments.

"'A judgment or order is said to be void on its face when the invalidity is apparent upon an inspection of the judgment-roll.' [Citation.]" (*Dill*, *supra*, 24 Cal.App.4th at p. 1441.) In the context of a default judgment, "the judgment roll is limited to the summons, proof of service of the summons, complaint, request for entry of default, copy of the judgment, . . . and, if service was by publication, affidavit for publication and order directing it. (§ 670, subd. (a).)" (*Ramos*, *supra*, 223 Cal.App.4th at p. 1440.)

Mail service permitted

Without adequate legal support, husband argues that between 1970 and 1974, it was not permissible to serve an amended petition for dissolution by mail. If a defendant "has failed to appear in the action, service of an amended complaint in the manner provided for service of summons, while not necessarily a requirement for personal jurisdiction [citation], is an essential prerequisite to a valid default judgment [citation]." (*Engebretson & Co. v. Harrison* (1981) 125 Cal.App.3d 436, 443 (*Engebretson*); but see *In re Marriage of Rhoades* (1984) 157 Cal.App.3d 169, 172 [setting aside default judgment granting dissolution, where original petition only sought separation and there was no doubt that amended petition seeking dissolution was not properly served].)

Husband's argument ignores the fact that since 1970, California law has permitted out of state service of a summons and complaint by mail. Valid service is accomplished "by sending a copy of the summons and of the complaint to the person to be served by first-class mail, postage prepaid, requiring a return receipt. Service of a summons by this form of mail is deemed complete on the 10th day after such mailing." (§ 415.40.) The proof that a summons was served outside the state "shall include evidence satisfactory to the court establishing actual delivery to the person to be served, by a signed return receipt or other evidence." (§ 417.20, subd. (a); see also

Stamps v. Superior Court (1971) 14 Cal.App.3d 108, 110 [return receipt marked "unclaimed" will not suffice as a valid proof of service].)

Because the judgment roll included a proof of service with a return receipt bearing the same date as the date the interlocutory judgment states the court acquired jurisdiction over husband, the judgment shows facially valid service.

Technical deficiencies in a proof of service do not establish that service was invalid

Husband contends service of the amended summons and petition was defective because the proof of service did not comply with section 1013a. He argues that because the titles that appear on the proof of service do not match the titles of the documents served, service was defective. We reject this argument.

The statutory language states that when a document is served by mail, the affidavit or certificate that serves as proof of the service must set forth "the exact title of the document served and filed in the cause" as well as "the name and residence or business address of the person making the service," among other requirements. (§ 1013a, subds. (1)–(3).) Statutes providing for service of process ""should be liberally construed to effectuate service and uphold the jurisdiction of the court if actual notice has been received by the defendant, and in the last analysis the question of service should be resolved by considering each situation from

a practical standpoint.""" (*Pasadena Medi-Center Associates v. Superior Court* (1973) 9 Cal.3d 773, 778.)

The proof of service filed with the court is a form with pre-printed text and checkboxes. The relevant text has the declarant stating, "I served the summons and . . ." followed by checkboxes for *Petition (Marriage)*, *Blank Confidential Questionnaire (Marriage)*, *Order to Show Cause (Marriage)*, *Blank Responsive Declaration*, and *Blank Financial Declaration*. The checkboxes for *Petition (Marriage)* and *Blank Confidential Questionnaire (Marriage)* were marked. Husband argues that because the proof of service did not identify the document as an *Amended Summons and Petition for Dissolution*, wife's request to enter husband's default judgment should have been rejected. Despite husband's efforts to convince this court that the title of the document served was *Petition for Dissolution*, the word "dissolution" was never part of the document title. The titles on the relevant documents were *Summons (Marriage) on Amended Petition* and *Amended Petition (Marriage)*. We find it immaterial that the proof of service referred to a summons and a *Petition (Marriage)*, rather than including the full titles of the documents. We are unaware of any case holding differently, and certainly the distinction is not material enough to render the default or default judgment facially void.

A court does not lose its preexisting jurisdiction based on a defective proof of service, nor does any purported defect necessarily invalidate the fact that the document was

properly served. "*Jurisdiction depends on the fact of service*, rather than the proof thereof." (*M. Lowenstein & Sons, Inc. v. Superior Court* (1978) 80 Cal.App.3d 762, 770, overruled on another point in *Johnson & Johnson v. Superior Court* (1985) 38 Cal.3d 243, 255, fn. 7.) When a proof of service that complies with the applicable statutory requirements is filed, it creates a rebuttable presumption that service was proper. (*Floveyor Internat., Ltd. v. Superior Court* (1997) 59 Cal.App.4th 789, 795 (*Floveyor).*) If the proof of service is deficient, the burden shifts to the party attempting service, here wife, to prove the service was valid. (*Dill*, *supra*, 24 Cal.App.4th at pp. 1442–1443.) Even if we were to find the proof of service invalid based on the absence of the word "amended" from the title, that finding would only mean there is no rebuttable presumption of valid service. (*Floveyor*, *supra*, at p. 795.) We would still conclude that the trial court's denial of the motion to vacate included an implied finding that the summons and amended petition were validly served in accordance with the requirements of section 415.40, and there is substantial evidence to support such a finding. (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 58 (*Fladeboe*) [doctrine of implied findings requires the appellate court to infer the trial court made all factual findings necessary to support its decision].)

Regardless of whether the amended petition was properly served, the court retained jurisdiction to award child support and spousal support

Husband argues that if the amended summons was not properly served, the court lacked jurisdiction to enter default judgment. Husband is only partly correct. He does not challenge the validity of the original petition or its service by publication, so there is no question that the court validly acquired personal jurisdiction over him. If the amended summons and petition were not properly served, the default judgment would only be invalid to the extent it granted relief beyond what wife sought in the original petition. (*Rodriguez v. Cho* (2015) 236 Cal.App.4th 742, 755 ["[w]hen we reverse a judgment on the ground that the damages awarded exceeded those pled, the court may modify the judgment by reducing it to the amount specified in the complaint, or the plaintiff may choose to amend the complaint to state the full amount of damages he or she seeks"].)

Even if we were to agree that service of the amended petition was somehow invalid—which we do not—such invalidity would not deprive the court of jurisdiction to enter default judgment. The judgment would only be void to the extent it granted relief beyond that requested in the original complaint. If wife had not sought child and spousal support in her original complaint, the court's award of such amounts would be void and subject to attack. (*In re Marriage of Lippel* (1990) 51 Cal.3d 1160, 1167–1171 [interpreting section 580 as depriving a trial court of jurisdiction to enter

default judgment for child support where petitioner has not checked the box seeking child support].) Here, wife's original petition—filed on March 27, 1970, and served by publication—checked the necessary boxes on the Judicial Council form to notify both husband and the court that wife was seeking child and spousal support. Accordingly, the monetary awards for child support and spousal support contained in the default judgment remain valid, regardless of the validity of the order of dissolution.

Motion to vacate for improper service is untimely

Husband's remaining arguments rely upon evidence outside the judgment roll to argue that the judgment was void for improper service. Any motion to vacate default judgment based on such external evidence would be untimely.

A defendant against whom default judgment is rendered has only two years to set aside the default judgment as void based on improper service. (*Trackman*, *supra*, 187 Cal.App.4th at p. 180; *see Bae*, *supra*, 245 Cal.App.4th at p. 97.)

Husband claims that the default judgment is void because his signature is not on the return receipt filed with the proof of service for the summons and amended petition. We can infer from the court's decision to deny the motion to vacate that the court disbelieved husband's declaration and his testimony. (*Fladeboe*, *supra*, 150 Cal.App.4th at p. 58

[doctrine of implied findings requires the appellate court to infer the trial court made all factual findings necessary to support its decision].) Regardless, because husband's motion was filed more than two years after default judgment, it was untimely.

Husband also claims that an earlier divorce judgment obtained in Mexico would serve as grounds for vacating default judgment in this case. Again, because the motion was brought more than two years after entry of default judgment, it was untimely.

DISPOSITION

The order denying the motion to vacate default and default judgment is affirmed. Costs on appeal are awarded to respondent Loretta Nicholson Harrison.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

RAFAEL, J.*

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