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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ALLEN B. SHAY, Plaintiff and Appellant, v. KEVIN L. EVANS, Defendant and Respondent.	B235999 (Los Angeles County Super. Ct. No. GC042005)

APPEAL from the judgment the Superior Court of Los Angeles County. Joseph F. De Vanon, Jr., Judge. Affirmed.

Law Offices of Nate G. Kraut, Nate G. Kraut; Allen Shay, in pro. per., for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

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This is plaintiff Allen Shay's second appeal in this case. (See *Shay v. Schauble* (Mar. 28, 2012, B227335) [nonpub. opn.].) On December 16, 2008, plaintiff sued defendants Kevin L. Evans, Helen Jackson, and Katrina Schauble for falsely telling others he was homosexual. His original verified complaint stated causes of action for slander per se, intentional infliction of emotional distress, and negligent infliction of emotional distress against each defendant. The trial court sustained Schauble's and Jackson's demurrers to the slander claim, finding it was untimely, and the sham pleading doctrine barred further amendment. Plaintiff thereafter filed an amended complaint, omitting Schauble and Jackson from the slander cause of action, and the remaining claims were tried to the jury. Evans never answered and did not participate in the proceedings.

The trial court granted defendant Jackson's motion for a directed verdict, and the jury reached a unanimous defense verdict for defendant Schauble. We affirmed the judgment and orders in our unpublished opinion in *Shay v. Schauble*, *supra*, B227335, finding the demurrers to the slander claim were correctly sustained without leave to amend, and the directed verdict was properly granted because defendant Jackson owed no duty of care to plaintiff, and her comments about defendant's sexual orientation were not extreme and outrageous. (*Ibid*.)

After the jury returned its verdict, plaintiff asked for "judgment [to be] entered as to Kevin [Evans]." The court responded that it would enter judgment, but reserved the issue of damages for further consideration in light of the evidence presented at trial. Later, and without further hearing, the trial court issued a minute order dismissing Evans, concluding the evidence against him was insufficient to establish liability as a matter of law, and that a judgment against Evans would be inconsistent with the jury's findings for defendant Schauble.

In this appeal, plaintiff contends the trial court improperly dismissed Evans without notice or an opportunity to be heard, violating plaintiff's right to due process; that dismissal was an improper sanction (monetary sanctions against his counsel for delay in seeking a default judgment would have been more appropriate); and that the

court should have entered judgment against Evans. Because plaintiff has failed to provide a sufficient record to demonstrate any prejudicial error, we affirm.

FACTS

We incorporate the record filed in plaintiff's first appeal (*Shay v. Schauble*, *supra*, B227335) and limit the facts to those relevant to plaintiff's claims against Evans. Plaintiff is a real estate broker, working primarily in Pasadena and Altadena, with a client base that is 95 percent African-American. In 2006, plaintiff discovered there were rumors he was homosexual or bisexual spreading through these communities. In early 2008, he found out that defendant Evans told plaintiff's friend, Lidia Belay, "he was gay." Homophobia is "pretty rampant" among African-Americans, and following the spread of rumors about plaintiff's sexual orientation, his business declined. In 2006, plaintiff earned approximately $580,000, but his earnings declined in 2007 and 2008 to $160,000 and $108,000, respectively. Plaintiff also suffered anxiety attacks, depression, hives, headaches, sleep difficulties, nightmares, and other health problems after learning about the rumors.

The Civil Case Summary in plaintiff's supplemental appendix shows that Evans never answered or otherwise appeared. It also shows that no request for entry of default was ever filed by plaintiff, and that no proof of service of the summons and complaint was filed. Plaintiff's appendices also do not include a proof of service of the summons and complaint upon Evans. Consequently, Evans's status is unclear from the record provided. Nevertheless, on June 24, 2010, after the jury returned a verdict in Schauble's favor, plaintiff requested that the court enter judgment against Evans. The trial court responded it would "enter judgment . . . as to Evans, [and] reserve the issue of damages and give that some thought." When the court asked whether plaintiff had anything else to present as to Evans, plaintiff responded, "No." The matter was submitted, with plaintiff to "[w]ait until [the court] issue[d] a ruling."

On June 30, 2010, without further hearing, the trial court issued an unsigned minute order on the submitted matter: "A review of the court file shows that no default was ever requested as to defendant Evans until after the time of trial. More

importantly, however, is that the evidence regarding Mr. Evans occurred when Ms. Lidia Belay was on the stand. Ms. Belay on June 22, 2010 testified that Evans made the statement to her in 2007 'that he (Shay) was gay.' That is the extent of the statement by Evans. The Court finds as a matter of law that such statement standing alone is insufficient to establish a cause of action or to result in recoverable damages. To allow a judgment against defendant Evans would be inconsistent with the jury's findings as to defendant Schauble. Accordingly, default judgment is denied and defendant Evans is dismissed." The court signed a judgment of dismissal on August 12, 2011, and this timely appeal followed.[1]

DISCUSSION

Plaintiff complains that his claims against Evans were dismissed without notice or an opportunity to be heard, that dismissal was an improper sanction for the late request for entry of a default judgment, and that he is entitled to a judgment against Evans based on the evidence adduced at trial. Plaintiff characterizes the dismissal as a sanction for his attorney's failure to seek timely entry of default against Evans. But the trial court's order specifies other reasons for the dismissal, including a failure of proof.

Defaults and default judgments must be promptly procured, and sanctions may be imposed for failure to do so within set time limits. (See, e.g., Cal. Rules of Court, rule 3.110(g), (h) [a request for entry of default must be filed within 10 days after the time for service of a responsive pleading has elapsed, and a default judgment must be requested within 45 days after entry of default].) Rule 3.110(g) provides that "[t]he court may issue an order to show cause why sanctions should not be imposed if the

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[1] Code of Civil Procedure section 581d provides that "[a]ll dismissals ordered by the court shall be in the form of a written order signed by the court and filed in the action and those orders when so filed shall constitute judgments and be effective for all purposes . . . ." Notwithstanding the earlier unsigned minute order purporting to dismiss the case, the dismissal did not become an appealable order until the later filing of the signed order.

plaintiff fails to timely file the request for the entry of default." As a general rule, sanctions cannot be imposed without notice and an opportunity to be heard (*Reid v. Balter* (1993) 14 Cal.App.4th 1186, 1193) or against a faultless client for an attorney's case management violations. (*Levitz v. The Warlocks* (2007) 148 Cal.App.4th 531, 535-536.)

However, judgments, including dismissals, are presumed correct, and it is plaintiff's burden to demonstrate prejudicial error. Plaintiff bears the burden of providing an adequate record to establish prejudicial error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564, 566; *Altman v. Poole* (1957) 151 Cal.App.2d 589, 593.) A default judgment may not be entered unless plaintiff files proof of service of the summons and complaint on defendant, as well as a timely application for entry of default. (Code Civ. Proc., §§ 585, 587; *Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1444; see also *Fidelity Creditor Service, Inc. v. Browne* (2001) 89 Cal.App.4th 195, 205.) Plaintiff's appendices do not include proof of service of the summons and complaint upon Evans, or service of a request for entry of default. (Cal. Rules of Court, rule 8.124(b)(1)(B) [appendix must contain any item that is "necessary for proper consideration of the issues"].) "[I]f the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed." (*Mountain Lion Coalition v. Fish & Game Com* (1989) 214 Cal.App.3d 1043, 1051, fn. 9.)

On this record, we cannot determine whether plaintiff is entitled to a judgment in his favor, and therefore cannot assess whether reversal would be an idle act. (See, e.g., *Berkeley v. Alameda County Bd. of Supervisors* (1974) 40 Cal.App.3d 961, 965 [reversal unnecessary if it would have no practical effect].) It is apparent that there was nothing else for plaintiff to offer in support of the judgment he sought against Evans, and that the matter was submitted to the trial court for decision, without the promise of any future hearing. When plaintiff was asked whether he had "something additional [he] would have presented as to Evans," he responded "No." Presumably, this included anything necessary to overcome any procedural hurdle to the sought-after

judgment. Plaintiff has not demonstrated otherwise in the appendices he assembled to prosecute this appeal.

DISPOSITION

The judgment is affirmed.

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GRIMES, J.

WE CONCUR:

RUBIN, Acting P. J.

FLIER, J.