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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ALLIED INTERSTATE, INC.,

Plaintiff and Respondent,

v.

GTS HOME HEALTH  
SERVICES, INC.,

Defendant and Appellant.

B237823

(Los Angeles County  
Super. Ct. No. EC053626)

APPEAL from an order of the Superior Court of Los Angeles County,  
William D. Stewart, Judge. Affirmed.

Law Offices of Ali Taheripour and Ali Taheripour for Defendant and  
Appellant.

Sakamaki & Baumgartner and Francis Sakamaki for Plaintiff and  
Respondent.

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Defendant and appellant GTS Home Health Services, Inc. (GTS) appeals an order denying its motion to vacate a default judgment obtained by plaintiff and respondent Allied Interstate, Inc. (Allied).

Although GTS contends it was not duly served with the summons and complaint, the record establishes it was served with the papers and simply failed to file an answer. Accordingly, the order denying GTS's motion to vacate the entry of default and default judgment is affirmed.

### **FACTUAL AND PROCEDURAL BACKGROUND**

On July 20, 2010, Allied filed suit against GTS seeking damages in the sum of \$53,331.11. Allied pled it was the assignee and owner of claims which had been assigned to it by State Compensation Insurance Fund, and that on August 12, 2004, Allied sent GTS a summary of transactions indicating that GTS owed a balance of \$53,331.11. Further, GTS had not objected thereto and thus impliedly agreed that the account was correct. "An account therefore was stated between the parties on August 12, 2004." Based thereon, the complaint set forth causes of action for account stated, book account and quantum meruit.

On July 27, 2010, Allied served GTS by substituted service. The proof of service indicated the summons, complaint and related documents were served on GTS, a California corporation, by service on "Solak Avedissan, Registered Agent," at 13363 Saticoy Street, Suite 101, in North Hollywood. The documents were left with or in the presence of "John Doe, Person in Charge, a Middle Eastern male approx. 30-35 years of age, 5'4"-5'6" in height, weighing 140-160 lbs. with black hair," who was informed of the general nature of the papers. Thereafter, on July 28, 2010, the summons, complaint and related documents were mailed to GTS at the same location.

GTS did not answer the complaint. On October 1, 2010, the clerk entered GTS's default on the complaint, pursuant to Allied's request for entry of default.

Thereafter, on December 7, 2010, following a default proveup by Allied, the trial court entered a default judgment against GTS.

1. *GTS's initial motion to vacate the judgment, wherein it admitted it was served with the summons and complaint.*

On June 1, 2011, nearly six months after entry of the default judgment, GTS filed a motion to vacate the judgment. However, said motion was taken off calendar.

Although the motion filed June 1, 2011 is not the subject of this appeal, the supporting declaration therein is highly relevant to the issues before this court. Said motion was supported by the declaration of George Terstpanyan, who stated in pertinent part:

“3. Plaintiffs filed there [sic] complaint on July 20, 2010 alleging money and common counts. [¶] 4. *Upon being served and given I do not understand the English language, I showed the Summons and Complaint to my bookkeeper, Colak Avestian.* [¶] 5. Mr. Avestian indicated to me that it was nothing all he had to do was to write a letter to Court explaining his situation and the Court will dismiss the matter. Mr. Avestian indicated that he would take care of the said letter. [¶] 6. I trusted Mr. Avestian and thought the matter was taken care of. Only recently, given the length of the pending case, I learned that this action whereas now there is a judgment entered against my company and the answer has been stricken. I had viable defenses which have never been properly presented. I immediately sought to circumstance of the undersigned. [¶] 7. I do not speak English and was simply trusting the promises of my bookkeeper. I plead to this Honorable Court to allow for me to pursue my meritorious defenses without prematurely and procedurally aborting my legal rights.” (Italics added.)

Although the June 1, 2011 motion was taken off calendar, the motion and supporting declaration of Terstpanyan are part of the record on appeal. The Terstpanyan declaration amounts to a judicial admission that GTS was actually served with the summons and complaint.

2. *GTS's second motion to vacate.*

On August 16, 2011, GTS filed another motion to vacate the entry of default and the December 7, 2010 default judgment. The motion was based on the ground that GTS “was never properly served with process in this action and the default and default judgment entered against GTS are void.” The moving papers asserted that “Mr. Avedissan’s address for service of process as GTS’s agent for service of process is not the North Hollywood address where Allied’s process server left copies of the summons and complaint with an unidentified ‘John Doe.’ To the contrary, as evidenced by the California Secretary of State’s website, Solak Avedissan’s correct address for service of process upon GTS is 18500 Ventura Boulevard, Suite 202 in Tarzana. (Exhibit 2.)<sup>[1]</sup> As evidenced by his accompanying Declaration, no process server delivered to Solak Avedissan copies of the summons and complaint in this action, no process server has appeared at his office in Tarzana and Solak Avedissan has not received copies of Allied’s summons and complaint addressed to his Tarzana office. Simply stated, Solak Avedissan was not served with process in this action.”

On October 7, 2011, the matter came on for hearing. At the hearing, the trial court noted that in the previous motion, the declarant “said that he did receive the summons and complaint and gave it to the bookkeeper.”

In response, GTS’s attorney stated, “That was a prior motion, your honor, and frankly, that was a misunderstanding.”

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<sup>1</sup> Exhibit 2, appended to the moving papers, was a printout from the Secretary of State’s website showing that GTS’s business address is 13363 Saticoy Street, Suite 101, in North Hollywood, while its agent for service of process is Solak Avedissan, located at 18500 Ventura Boulevard, Suite 202, in Tarzana.

After taking the matter under submission, the trial court denied GTS's motion to vacate the entry of default and default judgment. This timely appeal followed.<sup>2</sup>

### **CONTENTIONS**

GTS contends: the trial court erred in entering a default judgment in favor of Allied because all of Allied's claims against GTS were time-barred; GTS may assert the statute of limitations on appeal, even though it did not assert that defense below; and Allied failed to effectuate service of process upon GTS because Allied failed to serve GTS's agent for service of process at the address specified with the California Secretary of State.

### **DISCUSSION**

1. *No basis for relief under section 473.*

As a preliminary matter, GTS is not entitled to relief under section 473. The statute states in pertinent part: "Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, *and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken.*" (§ 473, subd. (b), italics added.)

The operative motion for relief from the default judgment was filed on August 16, 2011, more than eight months after the trial court entered the default judgment. Therefore, section 473, by its terms, is inapplicable.

2. *No basis for relief under section 473.5 because GTS admittedly received actual notice of the complaint.*

Section 473.5, which extends the time for seeking relief from a default judgment, states in pertinent part at subdivision (a): "*When service of a summons*

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<sup>2</sup> The order is appealable as an order after final judgment. (Code Civ. Proc., § 904.1, subd. (a)(2).)

All further statutory references are to the Code of Civil Procedure, unless otherwise specified.

*has not resulted in actual notice to a party* in time to defend the action and a default or default judgment has been entered against him or her in the action, he or she may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the action. The notice of motion shall be served and filed within a reasonable time, but in no event exceeding the earlier of: (i) two years after entry of a default judgment against him or her; or (ii) 180 days after service on him or her of a written notice that the default or default judgment has been entered.” (Italics added.)

Here, the Terstpanyan declaration which accompanied GTS’s initial motion to vacate contained an admission that GTS was actually served with the summons and complaint. To reiterate, the declarant stated: “*Upon being served and given I do not understand the English language, I showed the Summons and Complaint to my bookkeeper, Colak Avestian.*” Given the contents of GTS’s earlier declaration, the trial court properly rejected GTS’s claim that it was not served with the complaint.

3. *Statute of limitations defense is unavailing to GTS.*

Finally, GTS contends the trial court erred in entering a default judgment because the complaint, on its face, is time-barred. GTS asserts the complaint is infirm because it pled the cause of action accrued on August 12, 2004, yet Allied did not file suit until July 20, 2010, well beyond the four-year statute of limitations. (§ 337.)

GTS’s argument is unavailing. It is settled that the statute of limitations is an affirmative defense which “must be affirmatively pleaded, by demurrer or answer. If it is not so pleaded, its benefits are waived.” (43 Cal. Jur. 3d Limitation of Actions § 229, fns. omitted.) Because GTS failed to answer or demur, it waived the affirmative defense.

**DISPOSITION**

The order denying GTS's motion to vacate the default and default judgment is affirmed. Allied shall recover its costs on appeal.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.