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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

HERMAN COTHRAN, Defendant and Appellant, v. MICHAEL DEKHTYAR et al., Plaintiffs and Respondents.	B243521 (Los Angeles County Super. Ct. No. BC460343)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael M. Johnson, Judge. Affirmed.

Herman Cothran, in pro. per., for Defendant and Appellant.

Christopher Brainard for Plaintiffs and Respondents, Michael Dekhtyar and Microfoodery, Inc.

The defendant and appellant Herman Cothran appeals from the default judgment entered against him and in favor of the plaintiffs and respondents, Michael Dekhtyar and Microfoodery, Inc. (collectively, the plaintiffs). The defendant contends that the trial court abused its discretion in denying his motion to set aside the default because the evidence established that he had not been served with the summons and complaint. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The trial court proceedings as evidenced by the limited record before us were as follows. In 2003, the defendant and Dekhtyar began collaborating on developing a restaurant in Pomona, California. On July 12, 2003, the defendant assigned a patent for a "food oven" to Microfoodery, Inc. The defendant and Dekhtyar then formed Microfoodery, Inc. to build models based on the patent. On June 13, 2007, the defendant sued the plaintiffs in U.S. District Court for patent infringement. The federal action would ultimately be dismissed for failure to prosecute.

The restaurant opened in 2009 but failed to turn a profit. On July 13, 2010, Dekhtyar sued the defendant in state court for claims arising out of the failure of the restaurant. On January 10, 2011, Dekhtyar dismissed the action without prejudice.

On April 27, 2011, the plaintiffs filed this lawsuit against the defendant for breach of written contract, fraud, and other claims arising out the assignment of the oven patent. The plaintiffs filed a proof of service indicating that, on July 19, 2011, the defendant was served with the summons and complaint at his listed address at a "mailbox store" in Las Vegas, Nevada.[1] In an attached declaration, the registered

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[1] Code of Civil Procedure, section 415.20, subdivision (b) provides "[i]f a copy of the summons and complaint cannot with reasonable diligence be personally delivered to the person to be served . . . a summons may be served by leaving a copy of the summons and complaint at the person's dwelling house, usual place of abode, usual place of business, or usual mailing address other than a United States Postal Service post office box, in the presence of a competent member of the household or a person apparently in charge of his or her office, place of business, or usual mailing address . . . and by thereafter mailing a copy of the summons and of the complaint . . . at the place where a copy of the summons and complaint were left."

process server stated that he had attempted to personally serve the defendant at this location, and on the fourth attempt, had left the documents with the store manager. The process server thereafter mailed the documents addressed to the defendant's mail box at that location.

The defendant did not file a responsive pleading and, on November 3, 2011, default was entered against him. On March 8, 2012, on the eve of the default prove-up hearing, the defendant (who was not represented by counsel) filed a motion to set aside the default pursuant to Code of Civil Procedure sections 473 and 473.5 on the ground that the "[p]roof of service filed by Plaintiff[s] and/or Plaintiff[]s['] attorney in this matter was a fabrication." The motion was supported by the defendant's declaration and that of his acquaintance, Rene Moore. Notably, the defendant's declaration was executed outside of California and did not state that it was made under penalty of perjury under the laws of the State of California as required by Code of Civil Procedure section 2015.5. In the defendant's declaration, he stated that he "was never served with [the] summons and complaint in this matter" and was "surprised when [he] heard that default and default judgment has been entered" against him. In Moore's declaration, he stated that, at some unspecified time, he had informed the defendant about this case and the defendant had responded that "he knew nothing about [] this lawsuit" and had not been served with notice of the action.

In opposition, the plaintiffs submitted the process server's declaration described above. In addition, the plaintiffs filed a declaration by another registered process server stating that, in March 2012, he had unsuccessfully attempted to personally serve a subpoena on the defendant at the defendant's new address in Wisconsin, and that the commercial building located at that address housed a radio station and "looked abandoned."

The appellate record does not include any reply filed by the defendant or a reporter's transcript of the hearing on the motion. On May 2, 2012, the trial court

denied the motion.[2] Default judgment was entered on July 3, 2012, providing that the subject patent had been validly assigned to Microfoodery, Inc., and then to Dekhtyar. The defendant timely appealed.[3]

CONTENTION

The defendant contends that the trial court erred in denying his motion to set aside the default because the evidence established that he was not served with the summons and complaint.

DISCUSSION

1. *Applicable Law*

The defendant's motion was based primarily on section 473.5, but he also raises sections 473, subdivisions (b) and (d).[4] Section 473.5 provides for setting aside a default "[w]hen service of a summons 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." (Section 473.5, subd. (a).) A party who has not received such notice "may serve and file a notice of motion to set aside the default or default judgment

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[2] The court's order is also not in the record, but its tentative ruling setting out its reasoning for denying the motion is included.

[3] The defendant filed a motion for reconsideration after judgment was entered and now contends that he is also appealing from the trial court's denial of that motion on August 24, 2012. The defendant's notice of appeal only addresses the trial court's May 2, 2012 order denying the motion to set aside the default and the judgment entered on July 3, 2012. A notice of appeal must identify the order or judgment being appealed. (Cal. Rules of Court, rule 8.100(a)(2).) Here, as the notice of appeal did not identify the August 24, 2012 order denying the motion for reconsideration, we lack jurisdiction to review that order. (*DeZerega v. Meggs* (2000) 83 Cal.App.4th 28, 43-44.) We also note that the trial court's entry of judgment divested it of authority to rule on the motion for reconsideration. (*Safeco Ins. Co. v. Architectural Facades Unlimited, Inc.* (2005) 134 Cal.App.4th 1477, 1482.)

[4] The defendant's motion to set aside the default and default judgment indicated that he was seeking relief under section 473.5. However, since he mentions both sections 473(b) and 473(d) in his motion and in his appellate briefs, we address them here as well.

and for leave to defend the action." (*Ibid.*) "A party seeking relief under section 473.5 must provide an affidavit showing under oath that his or her lack of actual notice in time to defend was not caused by inexcusable neglect or avoidance of service. [Citations.]" (*Anastos v. Lee* (2004) 118 Cal.App.4th 1314, 1319.)

The moving party has the burden of showing good cause for relief from a default or a default judgment. (*Tunis v. Barrow* (1986) 184 Cal.App.3d 1069, 1079-1080.) In addition, on appeal, it is the appellant's burden to affirmatively demonstrate reversible error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) We review an order denying a section 473.5 motion to set aside a default for abuse of discretion. (*Ellard v. Conway* (2001) 94 Cal.App.4th 540, 547.)

Section 473, subdivision (b) provides that a court may set aside a default or default judgment taken against a party "through his or her mistake, inadvertence, surprise, or excusable neglect." Section 473, subdivision (d), provides that "[t]he court may . . . on motion of either party after notice to the other party, set aside any void judgment or order." " '[A] default judgment entered against a defendant who was not served with a summons in the manner prescribed by statute is void.' [Citation.]" (*Sakaguchi v. Sakaguchi* (2009) 173 Cal.App.4th 852, 858.) A ruling on a motion to set aside under section 473 " 'rests within the sound discretion of the trial court, and will not be disturbed on appeal in the absence of a clear showing of abuse of discretion, resulting in injury sufficiently grave as to amount to a manifest miscarriage of justice.' " (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1200.)

2. *The Trial Court Did Not Abuse Its Discretion in Denying the Motion to Set Aside Default*

a. *Section 473.5*

The filing of a proof of service by a registered process server creates a rebuttable presumption of proper service. (Evid. Code, § 647.) Here, the plaintiffs filed a proof of service from a registered process server stating that the process server served the defendant on July 19, 2011 by leaving copies of the summons and complaint with the

manager of the mailbox store where the defendant's address was located and thereafter mailing the documents to that address.

The service effected here was similar to that in *Hearn v. Howard, supra,* 177 Cal.App.4th 1193, where the evidence showed that the process server attempted to personally serve the defendant three times at his business address, a private post office box rental store; on the third attempt, the process server left the documents with the mail store clerk; and he subsequently mailed the documents to the same address. (*Id.* at p. 1202.) The *Hearns* court found that the statutory requirements of substitute service had been met. (*Ibid.*) Here, likewise, the plaintiffs' proof of service showed that substitute service had been properly effected, and therefore, the burden had shifted to the defendant to rebut the presumption that service was valid.

The defendant's motion to set aside the default was supported only by his declaration[5] and that of Rene Moore. The defendant's declaration made the conclusory statement that he "was never served with [the] summons and complaint in this matter" but did not specifically respond to the process server's claims that the summons and complaint had been left with the mailbox store manager as well as mailed to the defendant's address. The defendant did not deny that the address was correct nor did he challenge the manner of service. The defendant also did not state whether he had retrieved his mail at that address or whether the store manager had acknowledged that the summons and complaint had been given to him. Moore's declaration was similarly ineffective as it did not provide a time frame within which the defendant had denied receiving notice of this action.

Even if these declarations were sufficient to rebut the presumption established by the process server's proof of service, it was for the trial court to "consider the declarations [], assess credibility, and determine the facts." (*Fredrics v. Paige* (1994)

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[5] As a preliminary matter, the defendant's declaration was inadmissible because it did not comply with Code of Civil Procedure section 2015.5. (*Bombardier Recreational Products, Inc. v. Dow Chemical Canada ULC* (2013) 216 Cal.App.4th 591, 604.)

29 Cal.App.4th 1642, 1647.) Here, the trial court held a hearing, received and weighed the evidence from both sides, and apparently found the defendant's evidence "suspect and unbelievable," while finding the plaintiff's evidence "clear and persuasive." " 'When an issue is tried on affidavits . . . 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.' " (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 108.) It was within the trial court's discretion to reject the defendant's declarations and accept those submitted by the plaintiffs. Accordingly, we will not disturb the trial court's determination that the defendant did not meet his burden of showing good cause for relief from default.

Furthermore, the defendant did not meet his burden of "provid[ing] an affidavit showing under oath that his [] lack of actual notice in time to defend was not caused by inexcusable neglect or avoidance of service. [Citations.]" (*Anastos v. Lee, supra*, 118 Cal.App.4th at p. 1319.) The trial court was particular concerned about this latter issue, but defendant's supporting declaration did not address it. On appeal, the defendant cites to evidence – some of which was submitted in support of the motion for reconsideration – explaining why he used multiple out-of-state addresses to receive mail while this case was pending in the trial court. However, according to the record before us, that evidence was not before the trial court when the defendant moved to set aside the default, and therefore, we cannot consider it on appeal from that order.

As (1) the trial court acted within its discretion when it determined that the defendant's evidence was not credible, and (2) the defendant did not meet his burden of providing an affidavit showing he had not avoided service, the trial court did not err in denying the motion to set aside the default under section 473.5.

b. *Section 473, Subdivision (b)*

The defendant contends he is entitled to relief under section 473, subdivision (b), which allows a court to set aside a default or default judgment if it finds that there has been "mistake, inadvertence, surprise, or excusable neglect." Here, the defendant's declaration in support of his motion for relief failed to demonstrate how or if there was

any mistake, inadvertence or excusable neglect on his part. He does claim he was surprised when he learned about the default and default judgment, but he does not state when he was surprised, or how he proceeded thereafter in a way that constituted reasonable diligence. Moreover, the trial court did not find his evidence credible in any event. Therefore, it was within the court's discretion to deny the motion based upon section 473, subdivision (b).

c. *Section 473, Subdivision (d)*

The defendant also argues that he was entitled to relief under section 473, subdivision (d), because he was never served with the summons and complaint. As stated above, the filing of a valid proof of service creates a rebuttable presumption of proper service. (Evid. Code, § 647.) Although the defendant argues that the weight of the evidence established that the process server "fabricated" the declaration, it was for the trial court to consider the declarations and assess the credibility of the witnesses. (*Fredrics v. Paige, supra,* 29 Cal.App.4th at p. 1647.)

Here, the trial court evidently found the defendant's and Moore's declarations not credible, and rejected the defendant's claim that the plaintiffs had engaged in fraud by submitting a falsified proof of service. "[A] determination of the controverted facts by the trial court will not be disturbed.' [Citations.]" (*Lynch v. Spilman* (1967) 67 Cal.2d 251, 259.) Accordingly, we will not disturb the trial court's determination that the process server's declaration was credible, and the defendant had, in fact, been properly served. On this ground, the trial court did not abuse its discretion in denying the defendant's motion to set aside the default under section 473, subdivision (d).

DISPOSITION

The judgment is affirmed. The plaintiffs are to recover their costs on appeal.

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LAVIN, J.*

WE CONCUR:

KITCHING, Acting P. J.

ALDRICH, J.

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