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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

JANET DENISE PHELPS, Plaintiff, Cross-Defendant, and Appellant, v. HARRY MISTHOS, Defendant, Cross-Complainant, and Respondent.	A129963 (Solano County Super. Ct. No. FCS029808)

Plaintiff and cross-defendant Janet Denise Phelps, citing her poor health as an excuse, failed to answer two sets of discovery requests from defendant and cross-complainant Harry Misthos. The trial court granted Misthos terminating sanctions and entered judgment against Phelps for $384,971.71. Phelps argues the sanctions were improper and the damage award unfounded and excessive. We conclude the trial court had discretion to grant terminating sanctions, but that its damage award must be reduced. We therefore modify the judgment and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In autumn of 2002, Phelps leased a 22-acre, mixed-use (residential and commercial) property in Fairfield, California, from Misthos for five years at $5,000 per month. In addition, Phelps paid Misthos $100,000 for an option to purchase the property, on specified terms, at any time during the lease period. Until Phelps exercised her purchase option, she would shoulder half of the real estate taxes on the property. Under the parties' written agreement, Phelps could pay her monthly rent within the first 10 days

of each month without penalty. After the tenth day, however, she would face a late penalty of $100 per day. Late rent in two consecutive months, or in three of five consecutive months, would breach the lease, and terminate the option to purchase and forfeit the option payment.

The parties agree Phelps paid rent on time up until March 2006. Misthos asserts Phelps stopped paying rent at this point. Although Phelps contends she paid her March 2006 rent, she concedes she stopped paying rent thereafter. She claims Misthos left portions of the property in unlivable and dangerous conditions making her ill. She also claims Misthos mislead her about the property in several respects and thwarted her attempts to pay rent.

Misthos filed a complaint in arbitration in February 2007. Phelps responded with this lawsuit in June 2007. Her verified first amended complaint sought return of the $100,000 option payment and various relief for Misthos's alleged misrepresentations and breaches of the lease agreement. Losing a motion to compel arbitration, Misthos answered and filed a cross-complaint on February 13, 2008.

Misthos's cross-complaint, for breach of contract and waste, prayed for relief as follows: past-due rent of $60,000; "fifty percent (50%) of the property taxes for 2006 and 2007;" "damages for the unlawful detention . . . at the rate of $166.67 per day from November 1, 2007 until entry of judgment;" $100 per day penalty for late rent since March 11, 2006; determination that the $100,000 is forfeited; forfeiture of the agreement and possession of the property; damages to the property, including the swimming pool, plum trees, and grapevines, for an amount to be proved at trial; attorney fees and costs incurred in the action; and other proper relief. The body of the cross-complaint alleged Phelps's inaction necessitated fixing the swimming pool at a cost "in excess of $30,000," and alleged Misthos had "incurred attorneys fees and costs related to the arbitration action in a sum in excess of $10,000.00."

Meanwhile, Misthos also filed an unlawful detainer action against Phelps. He prevailed, and the court issued a writ of execution for possession of the property and instructed the Solano County sheriff to evict Phelps on April 22, 2008.

Although, the arbitration and unlawful detainer action had each concluded, this lawsuit continued, and its focus quickly shifted to discovery. According to a proof of service and declarations submitted by Misthos, one of his attorneys personally served Phelps with document requests and form interrogatories at the property on the morning of April 22, 2008, the date of her eviction. Phelps never responded. On July 15, 2008, Misthos's counsel sent a letter to Phelps requesting her then late discovery responses and stating he would turn to the court for assistance if she did not furnish responses within 10 days. On August 20, 2008, Misthos moved to compel and for sanctions. Phelps did not timely oppose the motion, and after a hearing on September 24, 2008, that neither party attended, the trial court granted it, ordered responses without objection within 15 days, and ordered sanctions of $790 to paid within 30 days. (Phelps did, however, attend mediation on September 23, 2008, one day before the hearing on Misthos's motion to compel.)

On October 7, 2008, Phelps moved the court to set aside its September 24 discovery order[1] and to permit her to file an opposition to Misthos's motion to confer. She blamed her failure to timely oppose the motion on a chronic illness and claimed, in her proposed opposition, that she had not been served with the discovery requests and saw them for the first time on September 2, as attachments to Misthos's motion. Following a hearing on November 7, 2008, at which Phelps appeared, the trial court denied Phelps's motion and ordered her to pay another $500 in sanctions within 15 days.

Instead of turning her attention to preparing discovery responses, Phelps, on November 24, 2008, filed another motion to try and undo the trial court's September 24 discovery order. Phelps's new argument: Misthos inadequately served his opposition to her motion to set aside, because the postage meter marking on the mailing envelope did not have a date. The proof of service on the opposition showed service by mail on October 23, 2008, and Phelps conceded she actually collected the opposition from her

[1] The trial court did not reduce its September 24, 2008, ruling to a formal written order until November 13, 2008, after this motion.

mailbox on November 4, 2008, three days before the hearing. The court found service proper and denied Phelps's motion.

On January 7, 2009, Misthos filed a first motion for terminating sanctions for Phelps continuing failure to provide discovery. In early February 2009, Phelps requested a 60-day "continuance of all proceedings" on the court's calendar. The trial court granted the request, but denied a later request for 30 additional days, viewing Phelps's second request as potentially "abusive." Phelps filed no opposition to the motion for terminating sanctions, did not appear for the hearing on the motion, and, meanwhile, did not serve the missing discovery responses. On April 17, 2009, the trial court granted the motion for terminating sanctions, and also imposed another $790 in monetary sanctions.[2] It dismissed Phelps's complaint in its entirety, but made no mention of Misthos's cross-complaint. The trial court later set a trial setting hearing on the cross-complaint for September 24, 2009.

On August 27, 2009, Misthos, having still received no discovery responses, moved for terminating sanctions a second time, this time asking the trial court to strike Phelps' answer to his cross-complaint.

On November 3, 2009, Phelps moved to set aside the order dismissing her complaint, reiterating her illness excused her neglect of her lawsuit. She submitted a declaration of her own outlining her history of physical illness and depression, a corroborating declaration of Carl Pullen, a list of prescriptions she has filled, a nurse practitioner's letter stating Phelps suffers from (without specificity) "several chronic, debilitating illnesses," and test results from an unrelated 2001 spinal injury.

On November 10, 2009, Phelps opposed Misthos's second motion for terminating sanctions. In addition to blaming her illness, Phelps asserted Misthos's discovery requests were now partially irrelevant given her complaint had been dismissed. With her opposition, she provided most of the same documents supporting her November 3, 2009,

[2] The trial court reduced this order to a formal written order on May 5, 2009.

motion to set aside but also, under seal, a letter from her doctor explaining her diagnosis and condition and noting the onset of her symptoms was October 2006.

On November 25, 2009, the trial court granted Misthos's second motion for terminating sanctions, struck Phelps's answer to Misthos's cross-complaint, and scheduled a "prove-up" hearing.

Before the prove-up hearing, on March 23, 2010, the trial court denied Phelps's November 3, 2009, set aside motion, having postponed the hearing on that motion after granting Phelps yet another extension of time based on her assertions of poor health. The trial court criticized Phelps for failing to make discovery responses for nearly two years, after a court order, and after Misthos's first motion for terminating sanctions. The trial court also rejected her claim that poor health was to blame: "this claim is not adequately established by her medical evidence, and is also belied by the multiple motions and other documents she has filed after the court's issuance of the order compelling responses." The trial court also denied reconsideration of its order denying Phelps's November 24, 2008, motion to invalidate service.

The prove-up hearing eventually took place on April 6, 2010. The trial court required Phelps be given notice of the hearing, but Phelps did not appear. Misthos and his attorney presented evidence of damages: $130,000 in lost rent from March 2006 through April 22, 2008, the date Phelps vacated the property; $78,000 ($100 a day for 780 days) in late payment penalties; $10,596.20 for 2006 and 2007 property taxes; $43,287.99 for fees and costs in this case; and $9,799.62 for another attorney fees and costs in the unlawful detainer process. In addition, Misthos presented evidence of: $11,450 for pool repairs; a $1,135.84 unpaid water bill; a $297.03 unpaid garbage bill; $2,911.05 for irrigation pump repair costs; and additional $636.83 for irrigation system repair costs; $509.15 to replace missing irrigation pipe; $214 to rekey locks when Phelps left without returning keys; $644 for used propane; an estimated $18,200 to repair prune trees; $35,000 for lost sales of prunes and grapes; $1,500 for removal of Phelps's property; $25,000 for items missing from a barn; $460 to replace a stove; $280 to tear out a sink; $180 for a faucet; $500 for a stove hood; $300 for a dishwasher; $120 for a

garbage disposal; an alter and columns removed from a chapel at $250 each; $1,600 for a missing crystal cross; $10,000 for a missing chandelier; $1,500 for repainting; and $750 for repairs to an air conditioning unit.

At the end of the hearing, the trial court asked Misthos if he had "heard everything that your attorney has told me here this morning?" Misthos said, "I think so." The trial court then continued: "All right. And if you were asked questions about each of those items, would your answers be consistent with your attorney's representations?" Misthos replied, "Yes."

The trial court signed and filed a form judgment, prepared by Misthos, the same day as the hearing. A box is checked to indicate the judgment follows a "court trial" and not "default." It erroneously states Phelps was present. It goes on to award $384,971.71, as Misthos had sought.

Neither Misthos nor the trial court appears to have provided Phelps with notice of entry of judgment. Her notice of appeal from the trial court's April 6, 2010 orders, filed October 4, 2010, just made the applicable 180-day deadline under California Rules of Court, rule 8.104(a).[3]

DISCUSSION

Terminating Sanctions

The first issue on appeal is whether terminating sanctions against Phelps were appropriate.

"Failing to respond or to submit to an authorized method of discovery" is an obvious "misuse" of the discovery process. (Code Civ. Proc., § 2023.010, subd. (d).)[4] Failing to respond to interrogatories or document requests after a court order compelling responses opens the delinquent party to terminating sanctions. (§§ 2030.290, subd. (c) [interrogatories]; 2031.320, subd. (c) [document requests].) In such cases, "[t]he court may impose a terminating sanction by one of the following orders: [¶] (1) An order

[3] All further rule references are to the California Rules of Court.

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

striking out the pleadings or parts of the pleadings of any party engaging in the misuse of the discovery process. [¶] (2) An order staying further proceedings by that party until an order for discovery is obeyed. [¶] (3) An order dismissing the action, or any part of the action, of that party. [¶] (4) An order rendering a judgment by default against that party." (§ 2023.030, subd. (d).)

"We review discovery orders for an abuse of discretion. [Citation.] Sanction orders are 'subject to reversal only for arbitrary, capricious or whimsical action.' (*Sauer v. Superior Court* (1987) 195 Cal.App.3d 213, 228 . . . ; see also *Lang v. Hochman* (2000) 77 Cal.App.4th 1225, 1244 . . . , quoting *Kuhns v. State of California* (1992) 8 Cal.App.4th 982, 988 . . . [' "In choosing among its various options for imposing a discovery sanction, a trial court exercises discretion, subject to reversal only for manifest abuse exceeding the bounds of reason." '].)" (*Liberty Mutual Fire Ins. Co. v. LCL Administrators, Inc.* (2008) 163 Cal.App.4th 1093, 1102.) "A decision to order terminating sanctions should not be made lightly. But where a violation is willful, preceded by a history of abuse, and the evidence shows that less severe sanctions would not produce compliance with the discovery rules, the trial court is justified in imposing the ultimate sanction." (*Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 262, 279-280.) Yet while the trial court has "discretion to impose a lesser sanction, our task is not to supplant our own judgment for that of the trial court, but to ascertain whether the trial court abused its discretion by imposing a terminating sanction." (*Electronic Funds Solutions, LLC v. Murphy* (2005) 134 Cal.App.4th 1161, 1183.)

The trial court did not abuse its discretion here. Before resorting to terminating sanctions, the court issued an order compelling Phelps to respond to Misthos's discovery. It repeatedly ordered monetary sanctions, first in connection with granting Misthos's motion to compel and then repeatedly after Phelps continued to attack that order rather than provide the discovery Misthos sought and the court had ordered. Not once did Phelps even suggest she would eventually answer Misthos's discovery. Not after the first motion for terminating sanctions (filed nine months after, and granted one year after, service of discovery), and not even after the second motion for terminating sanctions

(filed nearly a year-and-a-half after, and granted nearly *two years* after, service of discovery).

The trial court also acted well within its discretion in rejecting Phelps's medical excuses. The court observed her claim of debilitating health was "belied by the multiple motions and other documents she has filed after the court's issuance of the order compelling responses." The court was positioned to assess Phelps's condition, and we will not substitute our judgment for the trial court's determination. (*Mooney v. Garcia* (2012) 207 Cal.App.4th 229, 235 [" 'In determining whether an abuse of discretion has occurred, a court may not substitute its judgment for that of the [lower tribunal] . . . and if reasonable minds may disagree as to the wisdom of [its] action, its determination must be upheld . . . .' "].) Moreover, it is indeed astounding that Phelps could devote energy to motion practice, and attend case events including the mediation one day before the hearing on Misthos's initial motion to compel, yet, at the same time, could not muster any energy over the course of two years, despite a court order, to answer two sets of discovery. It was Phelps who brought this lawsuit on herself by suing Misthos in June 2007, well after her symptoms surfaced in 2006. Only in 2008, however, in connection with Misthos's discovery requests did her condition seem to interfere with the litigation.

Finally, substantial evidence supports the trial court's apparently implicit determinations, which Phelps challenges on appeal, that Phelps was in fact served with the contested discovery and the discovery was relevant. (Cf. *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956 ["When no statement of decision is requested and issued, we imply all findings necessary to support the judgment."].) First, a proof of service and declarations of Misthos's attorneys show one of his attorneys personally served Phelps with the document requests and form interrogatories on the morning of April 22, 2008. That the times each declarant recounts for the events surrounding service varied by 15 minutes or so did not require the trial court to find service did not occur. The testimony of even one witness is sufficient to support a court's factual determination, and the trial court here was free to credit Misthos's evidence of service over Phelps's contrary contention. (*In re Marriage of Mix (*1975) 14 Cal.3d 604,

614; *Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 968 [appellate court defers to the trier of fact on the credibility of witnesses]; *Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631 [appellate court does not reverse a trial court's decision simply because the evidence could have been weighed differently].)

Second, we reject Phelps's relevance argument. Focusing only on the court's granting of the second motion for terminating sanctions (which struck her answer to Misthos's cross-complaint), Phelps asserts discovery about how she became ill while on the property was relevant to her complaint alone, and had no bearing on Misthos's cross-complaint. Obviously, this presents no coherent challenge to the order dismissing Phelps's complaint as a sanction. In addition, the origins of Phelps's illness was obviously relevant to the cross-complaint. If, for example, the illness arose from conditions Misthos created, that would affect Misthos's claim for back rent.

Accordingly, the trial court did not abuse its discretion in granting terminating sanctions in response to Phelps's unwavering, knowing refusal to answer Misthos's discovery. (See *Jerry's Shell v. Equilon Enterprises, LLC* (2005) 134 Cal.App.4th 1058, 1069 ["Repeated failure to respond to discovery and to comply with court orders compelling discovery provides ample grounds for imposition of the ultimate sanction."]; *Mileikowsky v. Tenet Healthsystem*, *supra*, 128 Cal.App.4th at pp. 279-280 [appropriate when "record is replete with evidence of . . . failures to answer discovery requests despite numerous extensions sought and granted" even when motion for terminating sanctions prompted responses]; *Electronic Funds Solutions v. Murphy* (2005) 134 Cal.App.4th 1161, 1183-1184 ["[d]efendants' persistent failure to comply with the court's discovery orders"].)

For these same reasons, we reject Phelps's further contention that her neglect of the litigation was excusable.[5]

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[5] While Phelps argues her neglect was excusable, she did not file a motion under section 473, subdivision (b) for relief from the April 2010 default judgment.

Motion to Invalidate Service

We next turn to Phelps's argument that the trial court should have invalidated service of Misthos's opposition to her October 7, 2008, motion to set aside the order compelling discovery, and, as a result, should have allowed her a second try at her motion to set aside. To start, we find no error in the trial court's conclusion that service of the opposition was proper. Phelps relies on section 1013a, subdivision (3)'s presumption of invalidity when a "postage meter date on the envelope is more than one day after the date of deposit for mailing contained in the affidavit." Even assuming that the lack of a date here falls under subdivision (3)'s presumption, the trial court had evidence, namely the proof of service and eventual receipt by Phelps, from which it could reasonably conclude the presumption had been rebutted. In addition, it appears from our review of the proof of service that subdivision (1) of section 1013a, governing service when the server *personally* deposits mail with the postal service, applies, not subdivision (3), applicable when the person merely relies on a business' mail handling practices. Subdivision (1) does *not* contain the same presumption against validity. (*Tobin v. Oris* (1992) 3 Cal.App.4th 814, 825-826, disapproved on other grounds by *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 983, fn. 12.)

In any event, Phelps has shown no prejudice from the allegedly invalid service. (See *Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 308 [no reversal without reasonable probability the error resulted in miscarriage of justice]; *Quail Lakes Owners Assn. v. Kozina* (2012) 204 Cal.App.4th 1132, 1137 ["Absent an explicit argument that a procedural error caused prejudice, we are under no obligation to address the claim of error."].) She has not demonstrated how the allegedly invalid service prevented her from doing any act that would have caused the trial court to grant her motion to set aside. She concedes she received the opposition before the motion hearing. She appeared at the November 7, 2008, hearing and had the opportunity to make arguments related to the opposition, but did not. She does briefly suggest, now on appeal, she would have raised a new argument in a hypothetical reply brief—that service of the initial discovery requests never occurred based on the slightly varying times found

in Misthos's declarations supporting service. She did not, however, as she should have, raise this with the court at the November 7 hearing, nor in her subsequent November 24 motion to invalidate service. And, as we have already discussed, the time discrepancies in the declarations were minor. It is unreasonable to believe the trial court would have reached a different conclusion on Phelps's motion to set aside the order compelling discovery—or its ultimate grant of terminating sanctions—had it been appraised of these discrepancies, which were plainly already before it in the declarations themselves.

Accommodation of Phelps's Disability

We next consider the trial court's handling of accommodations for Phelps under Rule 1.100 and Phelps's contention that Misthos improperly took advantage of Phelps's disability. Rule 1.100 grants persons with disabilities full and equal access to the judicial system. (Rule 1.100(b).) A party may present a request for accommodation in written format or orally. (Rule 1.100(c)(1).) The applicant must describe the accommodation sought and state the impairment necessitating the accommodation. (Rule 1.100(c)(2).) A request may be denied for only three reasons, that is, the applicant failed to satisfy the requirements, the requested accommodation would "create an undue financial or administrative burden," or the requested accommodation would "fundamentally alter the nature of the service, program, or activity." (Rule 1.100(f).) A denial of accommodations may be reviewed only by a writ of mandate sought within 10 days of the date that the court's response to the request was delivered or sent to the petitioner. (Rule 1.100(g)(2).)

Phelps never made any request to the trial court under rule 1.100. She brought no writ proceeding under rule 1.100(g). On the other hand, the trial court granted her several continuances, up to the point it believed she was abusing the trial court's process. We find no error or abuse of discretion.

Nor do we find Misthos improperly took advantage of Phelps's disability to "prevent a true adversary hearing" in this case. (*Olivera v. Grace* (1942) 19 Cal.2d 570, 577.) Phelps was frequently engaged in the case, only not when it came to providing court-ordered discovery.

Damages

Given that terminating sanctions and default judgment against Phelps were proper, we now assess the trial court's award of $384,971.71 in damages following the April 6, 2010 prove-up hearing.

Relief Limited by Cross-Complaint

Phelps asserts the judgment against her is in the nature of a default judgment and the trial court could not award damages in excess of those pleaded in Misthos's cross-complaint.

Principles of due process require that defendants receive notice of the specific relief a plaintiff seeks prior to entry of default. (*Van Sickle v. Gilbert* (2011) 196 Cal.App.4th 1495, 1520-1521.) "[A]ctual notice of the damages sought is not sufficient; due process requires 'formal notice.' " (*Stein v. York* (2010) 181 Cal.App.4th 320, 326.) Thus, certain statutory provisions have been enacted "to ensure that a defendant who declines to contest an action does not thereby subject himself to open-ended liability." (*Greenup v. Rodman* (1986) 42 Cal.3d 822, 826.) In particular, section 580 provides: "The relief granted to the plaintiff, if there is no answer, cannot exceed that demanded in the complaint, in the statement required by Section 425.11 [for personal injury cases], or in the statement provided for by Section 425.115 [for punitive damages]." (§ 580, subd. (a).)

"This rule applies to defaults entered as a terminating sanction for misuse of the discovery process—the situation here—as well as to routine defaults, where a defendant fails to file an answer." (*Simke, Chodos, Silberfeld & Anteau, Inc. v. Athans* (2011) 195 Cal.App.4th 1275, 1286 (*Simke*).) "[D]ue process requires notice to defendants, whether they default by inaction or by wilful obstruction, of the potential consequences of a refusal to pursue their defense. Such notice enables a defendant to exercise his right to choose—at any point before trial, even after discovery has begun—between (1) giving up his right to defend in exchange for the certainty that he cannot be held liable for more than a known amount, and (2) exercising his right to defend at the cost of exposing himself to greater liability." (*Greenup v. Rodman, supra,* 42 Cal.3d at p. 829.)

While true that the trial court here categorized its judgment as one "after court trial" and not "by default," it was merely adopting the proposed judgment and language of Misthos's counsel. Substance, not form, controls the type of judgment. (Cf. *Garamendi v. Golden Eagle Ins. Co.* (2004) 116 Cal.App.4th 694, 705, fn. 3 ["fact that the minute order prepared by the courtroom clerk referred to a 'default judgment' has no significance"].) The trial court clearly struck Phelps' answer and ordered a "prove-up hearing," the procedure for default judgments, not court trials. Moreover, "[t]he striking of a defendant's answer as a terminating sanction leads inexorably to the entry of default." (*Matera v. McLeod* (2006) 145 Cal.App.4th 44, 62.) Section 580 itself makes this explicit, hinging its limitation on damages not on default but on whether "there is no answer." (§ 580, subd. (a).)

We therefore conclude section 580 applies to this case, and we next consider whether the damages award exceeded the scope of the cross-complaint. (See *Electronic Funds Solutions, LLC v. Murphy*, *supra*, 134 Cal.App.4th 1161, 1173-1177.) Phelps contends the cross-complaint only prayed for $60,000 and that Misthos, based on section 580, can recover no more than that. We agree the trial court awarded damages beyond those authorized by the cross-complaint, but do not view $60,000 as the ceiling of Phelps's liability.

There is no dispute that past-due rent of $60,000 is recoverable under section 580. Nor is there a section 580 problem with Misthos's request for holdover rent and late penalties, at the rates of $167 per day and $100 per day. These amounts are easily calculated. A pleading that does not provide a total dollar amount for a type of damage may nonetheless permit, by simple math, easy calculation of the ultimate award. In that case, a defendant has the requisite notice under section 580. (*People ex rel. Lockyer v. Brar* (2005) 134 Cal.App.4th 659, 668 [defendant could multiply penalty times number of violations].) Misthos's cross-complaint also gave sufficient notice of the $43,287.99 award of costs and attorney fees incurred in the action. Section 580 does not require a pleading to give a specific dollar amount for these items, because these items are not "damages" under that section. (*Simke*, *supra*, 195 Cal.App.4th at p. 1289.)

There are problems, however, with the other damages Misthos sought in his prayer. First, Misthos sought half of the 2006 and 2007 real estate taxes, but did not specify the amount of these taxes. It is not enough to state a category or type of damages sought, the complaint must associate a dollar amount with each. (*Parish v. Peters* (1991) 1 Cal.App.4th 202, 215-216 ["No dollar amount was assigned to any of these kinds of damages."]; cf. *Van Sickle v. Gilbert* (2011) 196 Cal.App.4th 1495, 1527 [even though a "defendant may have access to materials from which it can calculate the extent of its liability is not a substitute for *notice from the plaintiff* of the amount of money the plaintiff is seeking"].)

Second, Misthos's payer for damages to the property, including the swimming pool, plum trees, and grapevines, " 'in an amount according to proof' at trial" is defective. Such a prayer gives no useful notice. (*Levine v. Smith* (2006) 145 Cal.App.4th 1131, 1136; *Becker v. S.P.V. Construction Co.* (1980) 27 Cal.3d 489, 494.) Misthos, however, did allege in his cross complaint that Phelps's inaction necessitated fixing the swimming pool at a cost "in excess of $30,000.00." Allegations in the body of a complaint can sufficiently flesh out amorphous demands in the prayer for purposes of notice under section 580. (*National Diversified Services, Inc. v. Bernstein* (1985) 168 Cal.App.3d 410, 417-418.) Thus, Misthos can recover the $11,450 for pool repairs he established at the April 6 prove-up hearing. In contrast, however, Misthos's reference to $10,000 spent on attorney fees for an arbitration action in the body of the complaint did not similarly afford sufficient notice to Phelps. (Cf. *Simke, supra*, 195 Cal.App.4th at p. 1292 ["attorney fees incurred in prior representation and sought by client in subsequent legal malpractice case are damages"].) Not only does the prayer omit reference to these damages, it appears Misthos sought fees at the prove-up hearing for the *unlawful detainer* action and not the arbitration; thus Misthos did not prove the fees he alleged incurred. (See *Heidary v. Yadollahi* (2002) 99 Cal.App.4th 857, 868 ["The court cannot allow a plaintiff to prove different claims or different damages at a default hearing than those pled in the complaint."].)

Misthos contends we may look beyond the cross complaint—to, for example, a case management statement—for evidence that Phelps was on notice of particular damages. We may not. (*Electronic Funds Solutions, LLC v. Murphy*, *supra*, 134 Cal.App.4th at p. 1176 ["Strictly construed, serving a statement of damages cannot satisfy section 580 in an action not involving personal injury or wrongful death."]; *National Diversified Services, Inc. v. Bernstein*, *supra*, 168 Cal.App.3d at pp. 417-418 ["Except for personal injury or wrongful death cases,4 a defendant must be notified by the prayer [citation] or allegations in the body of the complaint of the damages sought."], fn. omitted; cf. *Parish v. Peters*, *supra*, 1 Cal.App.4th at pp. 205, 210-211 [statement can supplement in personal injury case].)

Accordingly, the damages that pass section 580 muster are: $130,000 in back rent and holdover rent, $78,000 ($100 a day for 780 days) in late payment penalties; $43,287.99 for fees and costs incurred in this case; and $11,450 for pool repairs. Phelps, however, raises other challenges to these amounts, which we now consider.

Adequacy of Damages Evidence

Phelps generally contends the evidence at the prove-up hearing was inadequate because it came through Misthos's attorney and documentation, not live testimony from Misthos. But Misthos stated under oath that if he had been "asked questions about each of those items [of damages his attorney recounted] . . . [his] answers [would] be consistent with [his] attorney's representations" In any event, the trial court may consider hearsay testimony at the prove-up hearing (see Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2012) ¶ 5:211, p. 5-52) and the attorney's testimony about what Misthos had communicated to him was therefore adequate.

Rent

Phelps argues she should not have to pay any of the rent due on the property because Misthos kept the property in an uninhabitable condition. This argument goes to the merits of the parties' lawsuit, however, not to whether a certain type of damages, rent, is allowable. The default judgment, properly entered, "operates as an admission of the

allegations of the complaint" and Phelps cannot now claim rental damages are not due in whole or part. (*Steven M. Garber & Associates v. Eskandarian* (2007) 150 Cal.App.4th 813, 824.)

Late Fees

Phelps also challenges the $78,000 in late fees at $100 per day, as legally impermissible.

"California law has also long recognized that a provision for liquidation of damages for contractual breach—for example, a preset late payment penalty—can under some circumstances be designed as, and operate as, a contractual forfeiture. To prevent such operation, our laws place limits on liquidated damages clauses. Under the 1872 Civil Code, a provision by which damages for a breach of contract were determined in anticipation of breach was enforceable only if determining actual damages was impracticable or extremely difficult. (1872 Civ. Code, §§ 1670, 1671.)" (*Ridgley v. Topa Thrift & Loan Assn.* (1998) 17 Cal.4th 970, 976-977 (*Ridgley*).) As amended in 1977, the Code continues to apply that strict standard, presuming liquidated damages void when sought from "[a] party to a lease of real property for use as a dwelling by the party." (Civ. Code, § 1671, subds. (c)(2), (d); *Ridgley*, at p. 977.)

"Damages resulting because of the wrongful withholding of money are fixed by law ([Civ. Code,] § 3302) and the other damages resulting because of a borrower's default on an installment, such as administrative and accounting costs, would not appear to present extreme difficulty in prospective fixing. 'Extreme' means 'existing in the highest or greatest possible degree . . . going to great or exaggerated lengths . . . going beyond the limits of reason, necessity or propriety . . . .' (Webster's Third New Internat. Dict. (1961) p. 807.)" (*Garrett v. Coast & Southern Fed. Sav. & Loan Assn.* (1973) 9 Cal.3d 731, 741, fn. 11.)

"Pursuant to these principles, charges for late payment of loan installments have been held unenforceable where they bore no reasonable relationship to the injury the creditor might suffer from such late payments." (*Ridgley*, *supra*, 17 Cal.4th at p. 978.) "If the amount charged is designed to greatly exceed the lender's damages, then its

primary purpose is to compel prompt payment by the threat of charges that bear little or no relationship to the lender's actual loss. As a result, it is a penalty." (*Utility Consumers' Action Network, Inc. v. AT&T Broadband of Southern California, Inc.* (2006) 135 Cal.App.4th 1023, 1036.) Put another way, if the late penalty provision is so harsh that no reasonable person would pay late if given the choice, the provision's purpose " 'is to hold over . . . the larger liability as a threat to induce prompt payment of the lesser sum' " and it is " unenforceable as a penalty.' " (*Sybron Corp. v. Clark Hosp. Supply Corp.* (1978) 76 Cal.App.3d 896, 901.)

In one case, "a late payment charge equal to 2 percent annual interest on the loan balance prorated to the period of default" was an invalid forfeiture. (*Ridgley, supra,* 17 Cal.4th at p. 978, citing *Garrett v. Coast & Southern Fed. Sav. & Loan Assn., supra,* 9 Cal.3d at pp. 734-742.) Here, Misthos's own calculations put the late fee at 2 percent *per day* and are far more akin to a penalty than an estimate of damages. Misthos presented no evidence to the trial court that the $100 per day penalty bore any relation to recouping damages for late payments, or that such damages would be difficult to calculate after the fact. (See *Vincent v. Grayson* (1973) 30 Cal.App.3d 899, 911 ["respondent did not plead or prove that it would be impractical or difficult to fix actual damages"].) On appeal, Misthos merely claims the $100 penalty is reasonable because "it is nearly impossible to calculate the loss in damages due to the loss of value of the property" should payments cease. Damages to the property, such as untended orchards, however, bear no relation at all to unpaid or late rent.

We will not allow an unlawful damages award, even on default judgment. " 'Plaintiffs in a default judgment proceeding must prove they are entitled to the damages claimed.' " (*Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 288; see *Vincent v. Grayson, supra,* 30 Cal.App.3d at p. 911 [reaching "whether the damages awarded at the default hearing were erroneous as a matter of law" and noting an acceleration clause "construed as a liquidated damages provision . . . would be unenforceable"].) Therefore, we reverse the $78,000 award of late fees.

In sum, the damages Misthos may recover, based on the record before us, are: $130,000 in back rent and holdover rent, $43,287.99 for fees and costs incurred in this case; and $11,450 for pool repairs. This comes to a total of $184,737.99. We modify the judgment to this amount. (*Kim v. Westmoore Partners, Inc., supra,* 201 Cal.App.4th at p. 286 [" 'Ordinarily . . . the appropriate action is to modify the judgment to the maximum amount warranted by the complaint.' "].)

Refund of Option Payment

Finally, Phelps argues we should reverse the court's judgment to the extent it declares she is not entitled to a refund of her $100,000 option payment. Unlike late fees, however, "consideration paid for a freely negotiated option does not constitute liquidated damages or a penalty because the payment obligation does not arise on a breach of contract by the optionee, but as an alternative to performance." (*Allen v. Smith* (2002) 94 Cal.App.4th 1270, 1279.) In fact, " '[p]ayment of the option price avoids any issue for the seller of whether retention of the deposit is enforceable as liquidated damages.' " (*Ibid.*) The question left, then, is whether Misthos is entitled to retain the option amount. But that is a question that goes to the merits of the lawsuit, which may not properly be challenged on appeal from default judgment. (*Steven M. Garber & Associates v. Eskandarian*, *supra*, 150 Cal.App.4th at p. 824.)

DISPOSITION

We affirm the judgment, but modify it to reflect a reduced damages award of $184,737.99.

_____
Banke, J.

We concur:

_____
Marchiano, P. J.

_____
Margulies, J.