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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

JAZZ BUILDERS, INC.,
Cross-complainant and Appellant,

v.

EARTH ENERGY SYSTEMS, INC.,

Cross-defendant;

NAVIGATORS SPECIALTY
INSURANCE COMPANY,

Intervener and Respondent.

A139221

(Marin County Super. Ct.
No. CIV075851)

I. INTRODUCTION

Two homeowners brought a construction defect suit in Marin County Superior Court seeking damages from their general contractor, Jazz Builders, Inc. (Jazz Builders) and various parties involved with the development of the subdivision in which their home was built. Jazz Builders filed a cross-complaint for indemnity against all subcontractors and the project architect. All of the cross-defendants except for one, a bankrupt subcontractor, Earth Energy Systems, Inc. (Earth Energy), eventually entered appearances or were dismissed as parties, but Earth Energy never appeared. Early in the proceedings, Jazz Builders took Earth Energy's default, but did so without first giving notice of the amount of claimed damages in the manner prescribed by law. After several years of litigation, all remaining parties to the action, except for Earth Energy, entered into a settlement. And as part of the final resolution of the case, Jazz Builders obtained a default judgment against Earth Energy based on the earlier entered, defective default.

More than two years later, Jazz Builders returned to Marin County Superior Court and moved to set aside the default judgment and to restore the case to the active trial calendar. It grounded the motion on section 473, subdivision (d) of the Code of Civil Procedure,¹ which may be invoked to attack a void judgment at any time, arguing that its own failure to provide proper notice of damages before seeking Earth Energy’s default rendered the judgment void. The trial court denied relief, and Jazz Builders filed this appeal. After the main briefs were filed, we requested supplemental briefing on whether, having requested entry of a default judgment and received all of the damages it requested, Jazz Builders is an “aggrieved” party with standing to appeal under section 902, and whether, absent an unsuccessful attempt to enforce that default judgment, there is a sufficiently ripe controversy for us to decide in this case.

For reasons explained further below, we will dismiss the appeal on our own motion. Because Jazz Builders requested entry of the default judgment and obtained all the relief it sought, it is not an aggrieved party entitled to appeal, and, since it has not yet tried to enforce that judgment, the dispute here, if there is a genuine dispute, is not ripe for adjudication.

II. BACKGROUND

This appeal arises out of construction litigation relating to one of the homes in a 31-unit residential subdivision development known as “French Ranch,” located in San Geronimo in West Marin County. In December 2007, homeowners Linda and Gery Gomez filed a lawsuit in Marin County Superior Court (the *Gomez* Action) seeking damages against their home building contractor, Jazz Builders, and its two principal owners, in addition to French Ranch LLC, the subdivision developer (collectively, the “Jazz Builders Defendants”). Jazz Builders tendered the defense of the *Gomez* Action to its liability insurer, North American Capacity Insurance Company (NACIC), and NACIC accepted the tender. The Jazz Builders Defendants then entered their appearances,

¹ Unless otherwise specified, all further statutory citations are to the Code of Civil Procedure.

represented by counsel appointed by NACIC, Boornazian, Jensen & Garthe (the Boornazian law firm).

Among the many construction and design defects alleged in the *Gomez* Action were problems relating to a geothermal heat exchange system that had been installed by Earth Energy. In August 2008, Jazz Builders filed a cross-complaint against the architect who designed the Gomezes' home and all eight subcontractors on the project, including Earth Energy. The thrust of the cross-complaint was for indemnity in amounts not yet ascertainable. There was no demand for any specific amount of damages, attributable to Earth Energy, to any of the other cross-defendants alone, or to the cross-defendants in the aggregate.

All of the cross-defendants eventually entered their appearances in the *Gomez* Action or were dismissed as parties, except for Earth Energy. After encountering difficulties finding Earth Energy for service of process, Jazz Builders discovered that it was a suspended corporation, and on that basis obtained leave to effect substituted service through the Secretary of State. Earth Energy was validly served through the Secretary of State shortly thereafter. Neither Earth Energy nor its liability insurer, Navigators Specialty Insurance Company (Navigators), responded to a courtesy notice from the Boornazian law firm in early December 2008 that a default would soon be taken if no appearance for Earth Energy were made.

On December 23, 2008, Jazz Builders sought and obtained entry of Earth Energy's default. Before taking this default, however, Jazz Builders failed to plead the amount of its claimed damages as required by section 425.10.² Because section 580 stood as a bar to any relief against Earth Energy by default judgment in excess of the damages pleaded in the cross-complaint, the failure to plead damages with specificity undermined the validity of the default as the basis for entry of a default judgment, should that step

² Section 425.10, subdivision (a)(2) provides that a complaint or cross-complaint shall contain "A demand for judgment for the relief to which the pleader claims to be entitled. If the recovery of money or damages is demanded, the amount demanded shall be stated."

become necessary later.³ Jazz Builders nonetheless litigated for the next two and one-half years without taking steps to cure this potential section 580 defect in its default against Earth Energy.

Proceeding without the absent Earth Energy, the remaining parties to the *Gomez* Action reached a settlement of their claims and cross-claims in February of 2010. Following that settlement, Jazz Builders applied for entry of a default judgment against Earth Energy on May 24, 2010. In support of its application for entry of default judgment, Jazz Builders filed a Case Summary pursuant to California Rules of Court, rule 3.1800(a)(1), supported by sworn declarations. The Case Summary and the supporting declarations provided itemized amounts for the costs, attorney's fees, and settlement payments that Jazz Builders claimed were indemnifiable by Earth Energy, and asked the court to enter judgment in accordance with those amounts.

Specifically, Jazz Builders advised the court that (1) Earth Energy's share of proportionate fault for damages in the *Gomez* Action was estimated to be 58 percent, (2) NACIC had spent \$697,487.16 defending and resolving claims in the *Gomez* Action, and (3) the Jazz Builders Defendants had spent \$146,591.23 in defending both the *Gomez* Action and a 2005 arbitration by one of the plaintiffs in the *Gomez* Action, and in investigating and "attempting" to repair defects attributable to Earth Energy. Based on this showing, and without drawing the court's attention to the fact that it might be proposing anything unusual, Jazz Builders submitted a proposed form of judgment awarding recovery not only in favor of Jazz Builders, for \$114,099.24, but also in favor of non-party NACIC, for \$408,029.99.⁴ Jazz Builders provided no legal authority for

³ Section 580 provides that "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, or in the statement provided for by Section 425.115"

⁴ Based on the accounting breakdown in the Case Summary of the amounts spent respectively by Jazz Builders and NACIC, the requested amounts appear to correspond roughly to the respective shares of defense and settlement costs incurred, on the one hand, by Jazz Builders before NACIC accepted the tender of the defense, and on the other hand, by NACIC after it accepted tender of the defense, all as discounted to reflect

awarding money directly to a stranger to the litigation, and, beyond giving an accounting for the claimed recoverable amounts, gave no explanation for the split recovery between NACIC and Jazz Builders. On July 26, 2010, the court entered a default judgment against Earth Energy, without change, in the form proposed.

Eighteen months passed before any steps were taken to enforce the judgment, but eventually, on February 1, 2012, NACIC—acting alone, without Jazz Builders, and represented by the Boornazian law firm—made the first attempt. It filed a judgment creditor action in Marin County Superior Court (the *NACIC* Action) seeking to collect its portion of the judgment directly from Navigators pursuant to Insurance Code section 11580. Navigators removed the *NACIC* Action to the United States District Court for the Northern District of California based on diversity of citizenship, and filed a motion for judgment on the pleadings. In support of its motion, Navigators argued that the default judgment taken against Earth Energy was void, advancing three grounds for this contention: (1) NACIC was never a party to the *Gomez* Action, (2) neither the complaint nor the request for entry of default in the *Gomez* Action disclosed the amount of damages sought against Earth Energy with sufficient particularity, and (3) neither Earth Energy nor Navigators was properly served with the request for entry of default or the request for entry of default judgment.

The District Court granted Navigator’s motion on October 4, 2012, based solely on the first of these three grounds. It explained, “Here, Jazz Builders did not transfer its interest under the *Gomez* judgment to NACIC, and it is precisely because the Superior Court purported to issue judgment in favor of NACIC, without a corresponding intervention, transfer or subrogation, that [Navigators] objects. While NACIC appears to argue that, by virtue of its indemnity rights, it is entitled to stand in Jazz Builders’ shoes, it identifies no authority for its apparent position that the indemnity relation justifies

Earth Energy’s estimated share of liability (except for a portion of the remediation costs for work “solely attributable to Earth Energy,” for which 100 percent recovery was requested), and with interest added to reflect the different amounts awarded and the different time periods to which these recoverable amounts were attributable.

dispensing with the ordinary strictures applied to default judgments. . . . [T]here is insufficient reason to displace the general rule that “[a] judgment in favor of a person who is not a party to the action is obviously beyond the authority of the court” and hence is void.’ [Moore v. Kaufman (2010) 189 Cal.App.4th 604, 615]. The judgment in Gomez, to the extent it is entered in favor of NACIC and against Earth Energy[,], is void, and hence unenforceable in this action.”

Six months later, in March 2013, Jazz Builders returned to Marin County Superior Court and sought to re-open the Gomez Action, filing a “Motion of Cross-Complainant Jazz Builders, Inc. To Set Aside Void Default Judgment And Entry Of Default As Against Cross-Defendant Earth Energy Systems, Inc. And To Restore Cross-Complaint of Jazz Builders, Inc. To Active Case Management Calendar,” and ultimately serving it by regular mail on the designated agent for service of the defunct Earth Energy and on counsel for Navigators. Navigators intervened at that point to oppose the motion. NACIC remained absent; it made no attempt to intervene and continued to be a non-party, as it was throughout the prior proceedings in the Gomez Action. According to Jazz Builders, because Earth Energy was given no notice of the damages sought against it prior to entry of its default, the default judgment is void in its entirety. Jazz Builders made the motion under section 473, subdivision (d), which may be invoked at any time, “by either party,” unlike motions brought pursuant to section 473, subdivision (b) on grounds of mistake, inadvertence, surprise or excusable neglect, which must be filed within six months of entry of judgment, and may be made only by the party against whom judgment was taken.

The trial court denied Jazz Builders’ motion on two grounds. First, the court noted that the District Court in the NACIC Action found the default judgment void only “to the extent it was entered in favor of NACIC,” that “[t]here was no apparent attempt to enforce the default judgment by Jazz Builders,” and that there was no finding in the NACIC Action “that the default judgment is void as to Jazz Builders.” It went on to explain that, because the court “had jurisdiction over Jazz Builders Inc. and over the Gomez action, . . . the default judgment may have been, at best, potentially voidable, but

it was not void.” Thus, the court ruled, relief was not available under section 473, subdivision (d). Second, looking to the only possible alternative ground for relief, section 473, subdivision (b), the court found that the motion “fails to identify the mistake, inadvertence [or] excusable neglect [under section 473, subdivision (b)].” In any event, the court concluded, as a request for relief under section 473, subdivision (b), “Jazz Builders’ motion is about two years too late.”

Jazz Builders filed this appeal, and Navigators is the sole respondent.

III. DISCUSSION

A. Jazz Builders May Not Appeal The Trial Court’s Denial Of Its Motion To Vacate Because It Has Not Been Aggrieved And Thus Has No Standing To Appeal Under Section 902.

Under section 902, “Any party aggrieved may appeal in the cases prescribed in this title.” The requirement that only an aggrieved party has standing to appeal is strictly applied by appellate courts. (See *Kunza v. Gaskell* (1979) 91 Cal.App.3d 201, 206 [“The rule is strictly applied by reviewing courts which hold generally that only *aggrieved* parties may appeal.”].) “One is considered ‘aggrieved’ whose rights or interests are injuriously affected by the judgment. [Citations.] Appellant’s interest ‘ “must be immediate, pecuniary, and substantial and not nominal or a remote consequence of the judgment.” ’ ” (*County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 737.) Something more than conjecture and speculation about future harm is required to support standing under section 902. (Cf. *Aetna Life Ins. Co. v. Haworth* (1937) 300 U.S. 227, 240–241 [A justiciable controversy “must be definite and concrete, touching the legal relations of parties having adverse legal interests. [Citations.] It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.”]; *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 169–172 (*Pacific Legal Foundation*).)

Without addressing the threshold question of appealability under section 902—at least initially, before we inquired about it—Jazz Builders has founded its position in this

appeal on an array of cases holding that adherence to section 580 is a matter of fundamental jurisdiction (*Greenup v. Rodman* (1986) 42 Cal.3d 822, 826–827; *Schwab v. Southern California Gas Co.* (2004) 114 Cal.App.4th 1308, 1321), that a default judgment taken without proper notice of damages or other relief sought is void on its face (see *In re Marriage of Lippel* (1990) 51 Cal.3d 1160; *Becker v. S.P.V. Construction Co.* (1980) 27 Cal.3d 489, 492–493; *Schwab, supra*, 114 Cal.App.4th 1308), and that a section 473, subdivision (d) motion attacking such a judgment may be brought at any time, even years after it was entered (see *Dhawan v. Biring* (2015) 241 Cal.App.4th 963, 967–968 [more than six years after entry of judgment]; *Rodriguez v. Cho* (2015) 236 Cal.App.4th 742 [two years after entry of judgment]). (See 8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 207, pp. 812–813 [“A judgment or order that is invalid on the face of the record . . . may be set aside on motion, with no limit on the time within which the motion must be made”] [collecting cases].)⁵ For its part, Navigators responds with the contention that a default judgment entered without following proper procedures is merely voidable as a judicial act in excess of jurisdiction (see *Lee v. An* (2008) 168 Cal.App.4th 558) and that an attack on a voidable judgment is subject to principles of estoppel even years after the fact (see *Conservatorship of O’Connor* (1996) 48 Cal.App.4th 1076, disapproved on another point in *Donovan v. RRL*

⁵ These cases follow the approach taken in the Restatement Second of Judgments, section 65 (1982) (Restatement Second). According to the drafters of the Restatement Second, section 65, “Relief sought on the ground of the invalidity of the judgment may be obtained without regard to time limits The fact that the challenge may be asserted after judgment gives it additional weight and effect.” (Rest.2d Judgments § 65, com. b, p. 155.) The rationale for this rule is that, because of the fundamental importance of fair notice, permitting belated attacks on default judgments that are void for lack of adequate notice promotes strict adherence to the boundaries of jurisdiction. But notably, this rationale presupposes that the party given the right to bring a delayed challenge will be the one who was deprived of notice (i.e. the party against whom judgment was rendered). (See *id.* [“When the person against whom judgment was rendered did not have adequate notice, then the judgment is unjust because there was a denial of a fair opportunity to defend the action. . . . The right to challenge jurisdiction makes him an instrument for confining judicial authority to its prescribed limits.”], italics added.)

Corp. (2001) 26 Cal.4th 261, 280). But Navigators, too—at least until prompted—has framed the issues presented in this appeal without addressing section 902.

The twist in this case, present in none of the authority cited by either party, is that, as the party responsible for the section 580 violation, Jazz Builders seeks to attack its own default judgment. Once NACIC’s attempt at enforcement had been stymied in the *NACIC* Action, Jazz Builders, by its motion to vacate, doubled back and sought to restore things to the status quo ante in this case, before the default judgment was entered. Now that it too has been stymied, Jazz Builders asks us to reverse the denial of its motion to vacate. This we cannot do. Jazz Builders currently holds a judgment awarding it all the damages it sought, but has simply never tried to collect. It has therefore suffered no discernible injury flowing from the order under review and has no standing to appeal under section 902.

In support of its position that it may appeal the trial court’s order, Jazz Builders cites two cases stating the denial of a section 473 motion is appealable (see *Winslow v. Harold G. Ferguson Corp.* (1944) 25 Cal.2d 274; *Generale Bank Nederland v. Eyes of the Beholder Ltd.* (1998) 61 Cal.App.4th 1384), and a case involving an order denying a motion to set aside an allegedly void judgment (*Security Pac. Nat. Bank v. Lyon* (1980) 105 Cal.App.3d Supp. 8). But to have standing for any appeal, the appellant must also have been aggrieved by a judgment. (§ 902 [party “aggrieved” may appeal].) And it has long been recognized that “[a] party cannot appeal from a judgment in his favor.” (*Maxwell Hardware Co. v. Foster* (1929) 207 Cal. 167, 170; see 9 Witkin, *Cal. Procedure* (5th ed. 2008) Appeal, § 41, p. 102 [“Ordinarily, if the judgment or order is in favor of a party, the party is not aggrieved and cannot appeal”].) Thus, an appeal from the denial of a section 473 motion must rest on aggrievement from an underlying adverse judgment.

Hensley v. Hensley (1987) 190 Cal.App.3d 895 (*Hensley*) is illustrative. In that case, a neighbor dispute over hillside slippage, the plaintiff, Campbell, sued her neighbors, the Hensleys, for negligent excavation. Even though Campbell failed to specify the amount of damages sought in the complaint, she eventually obtained a default judgment in the amount of \$34,541. Arguing that the failure to give proper notice of

damages before seeking entry of default rendered the damages award void, the Hensleys filed a section 473 motion seeking to modify the judgment and reduce the damages to zero. The trial court went further, and vacated the judgment entirely. (190 Cal.App.3d at pp. 897–898.) The appellate court dismissed the Hensleys’ appeal, explaining that “it is . . . well settled by statute, case law, and logic that only an aggrieved party may bring the appeal. [Citations.] [¶] Our Supreme Court has defined an aggrieved party as one ‘whose rights or interests are injuriously affected by the judgment. [Citations.]’ ” (*Id.* at pp. 898–899.) To be aggrieved, an appealing party must have suffered injury flowing from the order under review that is “ ‘ ‘ ‘immediate, pecuniary, and substantial and not nominal or a remote consequence’ ” ’ ” (*Id.* at p. 899.)

Although the Hensleys did not obtain the exact relief they sought, the trial court’s order in substance was in their favor, since it gave them “total relief from the default judgment. The immediate result is the same,” the appellate court held. (*Hensley, supra*, 190 Cal.App.3d at p. 899.) “[T]he Hensleys are no longer burdened by a money judgment against them. If anyone, it is the plaintiff who has suffered an ‘immediate, pecuniary, and substantial’ injury by losing the default judgment.” (*Ibid.*) And “[e]ven if the court committed prejudicial error in making its order, the error was invited by the Hensleys, who may not assert it.” (*Ibid.*) Similarly, here, Jazz Builders may not now attack the very judgment it requested in May 2010. While there is an exception to the rule that a party may not appeal an adverse ruling on a motion to set aside a judgment in its favor “[w]here a party [was] awarded less than was demanded, including an amount in damages” (*Hensley, supra*, 190 Cal.App.3d at p. 899), that exception does not apply in this case because Jazz Builders demanded only \$114,099.24 in damages, exactly the amount it was awarded, which makes this case an even clearer instance of lack of aggrievement than *Hensley* was.

- B. The Doctrine Of Invited Error Bars Jazz Builders From Claiming It Is An Aggrieved Party At This Point In The Proceedings, And Since We Would Have To Speculate About What Might Happen Should It Seek To Enforce The Default Judgment In The Future, The Controversy Presented By This Appeal Is Unripe For Adjudication.

Jazz Builders insists it does not matter that it is attacking its own default judgment because a section 473, subdivision (d) motion may be brought by “either party after notice to the other party” (§ 473, subd. (d).) Even assuming Jazz Builders had statutory authority to bring a section 473, subdivision (d) motion based on nothing more than notice by regular mail directed to a dissolved, non-appearing party’s designated agent and that party’s insurer, the availability of a section 473, subdivision (d) motion to “either side” does not trump section 902. Jazz Builders is not in a position to argue otherwise. The difficulty it brought on itself by failing to comply with section 580, by obtaining entry of a default at the outset of the *Gomez* Action, and then, years later, after the case had settled, when the recoverable amounts were known, choosing to seek a default judgment that named NACIC as a recipient of damages, while taking no steps to cure the original defect in the default with respect to Earth Energy, constitutes invited error.

It is unclear what tactical calculations drove Jazz Builders to ask for entry of a default judgment under these circumstances and in this form, but its motives are irrelevant, for the approach it took was clearly a considered one. “The invited error doctrine is an application of the estoppel principle: ‘Where a party by his or her conduct induces the commission of error, the party is estopped from asserting it as a ground for reversal.’ ” (*Bonfigli v. Strachan* (2011) 192 Cal.App.4th 1302, 1314; see *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 212.) “[A]ppellate courts generally are unwilling to second guess the tactical choices made by counsel during trial. Thus where a deliberate trial strategy results in an outcome disappointing to the advocate, the lawyer may not use that tactical decision as the basis to claim prejudicial error.” (*Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1686.)

Jazz Builders contends the invited error doctrine does not apply, and invokes the basic principle that jurisdiction cannot be conferred by waiver or estoppel. But it is not jurisdiction Jazz Builders is estopped from denying. Under the circumstances here, the doctrine of invited error bars Jazz Builders from claiming on appeal that it was aggrieved by entry of the default judgment it proposed (and hence by the order denying the motion to set aside), since it received in that judgment everything it requested. (*H.D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1362 [“ ‘It is the settled rule that the voluntary acceptance of the benefit of a judgment or order is a bar to the prosecution of an appeal therefrom.’ ”].) In short, the damages it once found satisfactory cannot be recharacterized as injury sufficient to support standing on appeal, since any such injury was self-inflicted.

If Jazz Builders does seek enforcement of its default judgment at some point in the future, we cannot know what positions the parties would take or what the outcome might be. We might guess, given the basis for the trial court’s ruling, but without an attempt to enforce and a record surrounding it, the prospective dispute on this point is unripe for adjudication. (See *Pacific Legal Foundation, supra*, 33 Cal.3d at pp. 169–172.) That, too, defeats standing under section 902. We express no view whether, on this record, the default judgment against Earth Energy is void in its entirety, as Jazz Builders claims, or merely voidable and therefore insulated from collateral attack years after the fact on estoppel grounds, as Navigators claims. These issues have not been presented to us in the proper manner—by an aggrieved party with standing to appeal, and presenting a ripe controversy.

IV. DISPOSITION

The appeal is dismissed, and the parties are to bear their own costs.

Streeter, J.

We concur:

Ruvolo, P.J.

Rivera, J.

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