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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

LOUIS GLAZER et al.,

Plaintiffs and Respondents,

v.

MILTON CHARLES AULT III,

Defendant and Appellant.

B246821

(Los Angeles County
Super. Ct. Nos. BC407274 &
BC453705)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Joseph R. Kalin, Judge. Affirmed.

Pacific Premier Law Group and Arash Shirdel for Defendant and Appellant.

Lapidus & Lapidus and Daniel C. Lapidus for Plaintiffs and Respondents.

INTRODUCTION

Defendant Milton Charles Ault III (aka Todd Ault) appeals from the amended default judgment awarding plaintiffs Louis and Melanie Glazer \$1,416,000 and certain shares of stock. He contends the damages awarded exceeded those demanded in the complaint, which only prayed for damages according to proof at trial. A prayer for damages according to proof is sufficient under Code of Civil Procedure section 580 if a specific amount of damages is alleged in the body of the complaint. Viewing the whole of the complaint, it contains the particular amounts of damages awarded and otherwise, Ault stipulated to litigate the rights to 2,600 shares of stock that were interplead. Accordingly, we affirm the amended default judgment as it is valid and not entered in excess of the trial court's jurisdiction.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The default judgment*

Plaintiffs' action against Ault and his codefendants¹ (together defendants) sought damages for breach of fiduciary duty and fraud, among other things, in connection with investments Ault made on behalf of plaintiffs. The complaint alleged that plaintiffs suffered monetary damages as the result of \$1.1 million in three lines of credit granted to defendants (paragraph 22); a loan to defendants of \$260,000 secured by a promissory note (paragraph 25); \$56,000 given to defendants to purchase worthless stock, which purchase Ault had promised to unwind (paragraphs 39 and 40); and \$50,000 or 50,000 shares (paragraphs 37-38) as consideration for an agreement defendants allegedly breached to exchange 250,000 shares of unrestricted stock for 250,000 shares of restricted stock (paragraph 37) in a company called Patient Safety Technologies (PST),

¹ In addition to Ault, the complaint named as defendants Kristine Johnson Larsen Ault, Ault Glazer & Co. Inc. a Colorado corporation, Zealous Holdings, Inc., a Delaware corporation, Zealous, Inc., Zealous Asset Management LLC, a Delaware limited liability company, and Zealous Capital Markets LLC, a Delaware limited liability company. The notice of appeal was filed by Milton Charles Ault III only. There is no indication that any of the other codefendants in this action is a party to this appeal.

which stock plaintiffs allegedly paid for but never received. The complaint prayed for damages according to proof at trial.

Plaintiffs obtained relief from the automatic stay in Ault's Chapter 11 bankruptcy (case No. 8:09-bk-23696-ES). They then moved for terminating sanctions against Ault as a discovery sanction. The trial court granted the motion, struck Ault's answer, and entered his default. By this time, the trial court had already entered the defaults of other defendants.²

On October 1, 2010, after briefing and argument about whether plaintiffs' recovery was limited to \$25,000 in damages because the complaint prayed for damages according to proof, the trial court entered judgment (the default judgment) awarding plaintiffs \$1,416,000, plus attorney fees and costs, and directing defendants to "immediately transfer and/or release to Plaintiffs" (a) 2,600 preferred shares of PST stock, (b) 300,000 non-preferred shares of PST common stock; (c) all shares of BOOM! Studios stock within defendants' possession; and (d) 50,000 non-preferred shares of PST common stock.

In January 2011, PST filed an interpleader action, depositing \$13,600 with the trial court representing dividends payable on some of its stock named in the default judgment.

2. The settlement agreement

Nearly a year after entry of the default judgment, in September 2011, the parties and the interpleader plaintiff, PST, entered into a written settlement agreement (the settlement agreement). Among other things, the settlement agreement called for defendants to pay plaintiffs \$750,000 in increments over almost five years and to transfer the interplead PST stock and 200,000 shares of BOOM! Entertainment, Inc. stock to plaintiffs. The settlement agreement contained an express waiver by Ault. Paragraph 10 of the settlement agreement reads: "Upon execution of this Agreement, the Ault Defendants, and each of their respective successors, assigns, representatives and

² The other defaulting defendants were Kristine Ault, Ault Glazer & Co., Inc., Zealous, Inc., Zealous Asset Management, LLC, and Zealous Capital Markets, LLC.

beneficiaries, *waive and relinquish any right to directly or collaterally attack the validity or enforceability of the Glazer v. Ault Judgment [the default judgment] and any subsequent judgment including, but not limited to, any motion brought pursuant to Code of Civil Procedure § 473, any separate action to vacate such judgments or any appeal.*” (Italics added (hereafter, the waiver).) All parties signed the settlement agreement. Pursuant to a stipulation of the parties, the trial court entered an order retaining jurisdiction to enforce the settlement agreement until the lawsuit was dismissed or judgment was entered pursuant to the settlement agreement or otherwise.

3. *Ault’s motion to vacate the default judgment*

Eight months later, Ault moved to vacate the default judgment on the ground it was void on its face because the damages awarded exceeded those demanded in the complaint. (Code Civ. Proc., § 580.) Plaintiffs opposed the motion on the basis of the valid default judgment and Ault’s waiver in the settlement agreement. In support, Melanie Glazer declared that plaintiffs never received any money due under the settlement agreement.

The trial court granted Ault’s motion *in part*. The court ruled, pursuant to Code of Civil Procedure section 473, subdivision (d) authorizing it to correct mistakes in the judgment *sua sponte*, that it could excise those items of damages in the judgment that were greater than the amount demanded in the complaint. The court voided the relief awarded in paragraphs 2(b), (c), and (d) of the default judgment concerning the award to plaintiffs of certain shares of stock. The court did not void the award of monetary damages or the award of 2,600 preferred shares of PST stock.

The trial court rejected defendants’ contention that the waiver in the settlement agreement was “ ‘as worthless as the underlying default judgment.’ ” The court found that all of the settling defendants signed the waiver and noted that the right to appeal is waivable. Although the court declined to specifically enforce the waiver because neither side had moved for entry of judgment under Code of Civil Procedure section 664.6, it labeled as “*noteworthy that plaintiffs appear to be correct*” in insisting the waiver was enforceable. (Italics added.) The court explained that “[*T*he parties agreed to vacate the

[*default judgment*]" after the occurrence of certain events, and those events have not happened. (Italics added.) The issue as the court saw it, was not that the default judgment was void, but that "defendants have *contracted to waive their ability to attack the validity or enforceability of the default judgment . . .*" (Italics added.) The court effectively invited plaintiffs to bring a motion for specific relief (Code Civ. Proc., § 664.6). To our knowledge, plaintiffs have not done so.

After denying Ault's second motion to vacate the default judgment, on November 29, 2012, the trial court entered an amended judgment striking the relief awarding to plaintiffs those shares of stock listed in paragraphs 2(b), (c), and (d) of the default judgment (the amended judgment). Ault's timely appeal followed.

CONTENTIONS

Ault contends the amended judgment is void because it awarded damages in excess of the relief demanded in the complaint.

DISCUSSION

Ault's opening brief focuses on his unsuccessful efforts to have the entire default judgment vacated as void on the theory that all of the relief granted to plaintiffs exceeded that demanded in the complaint. (Code Civ. Proc., § 580.) Ault cites *Stein v. York* (2010) 181 Cal.App.4th 320, which states "If a default judgment awarded against a defendant exceeds the relief demanded in the complaint [citation], or is a different form of relief than that demanded in the complaint [citation], the defendant is 'effectively denied a fair hearing . . . [citations]' [Citation]. Thus, a default judgment in an amount greater than the amount demanded is void and subject to either direct or collateral attack. [Citation.]" (*Id.* at p. 326.)

However, a prayer for damages according to proof is not fatal to a default judgment under Code of Civil Procedure section 580 if a specific amount is alleged in the body of the complaint. (*Becker v. S.P.V. Construction Co.* (1980) 27 Cal.3d 489, 494.) "The notice requirement of section 580 was designed to insure fundamental fairness. Surely, this would be undermined if the door were opened to speculation, no matter how reasonable it might appear in a particular case, that a prayer for damages according to

proof provided adequate notice of a defaulting defendant's potential liability. If no specific amount of damages is demanded, the prayer cannot insure adequate notice of the demands made upon the defendant. [Citation.] Consequently, a prayer for damages according to proof passes muster under section 580 only if a specific amount of damages is alleged in the body of the complaint. [Citation.]" (*Ibid.*, fn. omitted; accord, *Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1209.)

Here, the specific allegations in the complaint notified defendants of \$1,466,000 in monetary damages and the trial court awarded them \$50,000 less than that amount. The complaint fairly put all defendants on notice of the damages plaintiffs alleged they suffered. We separately address each item of damages that Ault challenged.

(a) *the lines of credit*

Ault contends that the complaint does not state which defendant personally received the lines of credit, and does not allege how much of the lines of credit were actually used or how much was paid back. Similarly, Ault contends the allegations concerning the lines of credit are void because they violate the statute of frauds. (Civ. Code, § 1624.) The statute of frauds is a defense which a "defendant waives . . . by failing to (a) demur to the complaint, (b) object to the introduction of testimony to prove the oral agreement at the time of trial, or (c) make a motion to strike such testimony [Citations]." (*Pao Ch'en Lee v. Gregoriou* (1958) 50 Cal.2d 502, 506.)

All of Ault's contentions concerning the lines of credit damages are meritless. Each contention is really a challenge to the sufficiency of the evidence to support the prove-up, and not an argument that the complaint failed to put defendants on notice of their potential liability for the lines of credit. As such, these attacks on the lines of credit allegations do not undermine sufficiency of the complaint's notice to defendants that plaintiffs alleged to have been damaged in the amount of \$1.1 million based on the three lines of credit.

(b) *the \$260,000 promissory note*

Ault contends that that complaint's allegation he used "approximately \$260,000 of Plaintiffs' funds to secure office space for himself in Los Angeles" is insufficient to put

him on notice of the *exact* amounts alleged against him. (Italics added.) Ault is wrong as he ignores other places in the complaint where plaintiffs alleged more particularly that Ault “*refused to satisfy his obligations on that note by repaying Plaintiffs the \$260,000*” (paragraph 25); or “Plaintiffs agreed to loan Ault \$260,000 for Ault to secure office space for himself in Los Angeles, and Ault agreed to repay Plaintiffs this amount upon their demand” (paragraph 99) but that “*Ault breached this agreement based on . . . failing to repay Plaintiffs this amount upon their demand*” (paragraph 101).³ (Italics added.) These allegations are sufficiently specific to put defendants on notice of the exact amount of damages plaintiffs demanded based on the promissory note.

(c) *the promise to unwind*

Ault argues that the “**sole**” paragraph in the complaint concerning the \$56,000 taken from the Melanie Glazer Trust is found in paragraph 39 and that there is no cause of action concerning this debt except this passing “ ‘general allegation.’ ” (Bold, underlining, and italics in original.) Ault is obfuscating.

Paragraph 39 in the general allegations is not the only place that these funds are addressed. Paragraph 39 specifies \$56,000 taken from the Melanie Glazer Trust for purpose of purchasing worthless Ault Glazer & Co. stock. Paragraph 40 goes on to allege that Ault promised to unwind this trade but never did. The allegations in paragraphs 39 and 40 form a statement of a specific amount of damages later sought under plaintiffs’ theories of recovery alleged in the first cause of action for negligent misrepresentation (Ault induced plaintiffs to “plac[e their] assets under Ault’s care for investment”); the second cause of action for breach of fiduciary duty (Ault caused plaintiffs to invest in companies he managed); the 17th cause of action for fraud (Ault repeatedly promised he would sell the Ault Glazer & Co. stock); and the 22nd cause of action for violation of Business and Professions Code section 17200 (Ault used his

³ Ault attempts to confuse this promissory note with the consolidated promissory note alleged elsewhere in the complaint, by which plaintiffs, apparently unsuccessfully, sought approximately \$2 million from Ault-controlled entities.

position to put plaintiffs' money into shares of his own company). This item of damage was very clearly specified in the body of the complaint.

(d) *the 2,600 shares of PST stock*

Ault contends that nowhere in the complaint, directly or otherwise, did plaintiffs seek 2,600 shares of preferred PST stock and so that portion of the default judgment should be stricken. However, the complaint sought 10 times that amount as it alleged that Ault agreed to exchange 250,000 shares of free-trading PST stock for 250,000 shares of restricted stock. The 2,600 shares of PST stock were the subject of PST's interpleader complaint and certain defendants stipulated to litigating the rights to the interplead shares.

For the foregoing reasons, the damages awarded plaintiffs in the amended judgment are not in excess of the amounts sought in the complaint, with the result that the default judgment, as amended by the amended judgment of November 29, 2012, *is not void.*^{4 5}

⁴ No party has challenged the portions of the default judgment that the court deleted in its amended judgment of November 29, 2012. Therefore, we need not address those items of damages.

⁵ Plaintiffs contend, citing the waiver contained in the settlement agreement, that Ault is estopped to challenge the default judgment. Ault replies that any waiver in the settlement agreement "is worthless because the default judgment is void." Because we conclude that the amended default judgment is not void, Ault's contention is meritless. Accordingly, we deny as moot plaintiffs' motion to dismiss this appeal and for sanctions. Likewise, Ault's motion for sanctions and his motion to augment the record on appeal are denied. (Cal. Rules of Court, rules 8.155(a)(1)(A) & 8.276.)

DISPOSITION

The judgment appealed from, entered on November 29, 2012, is affirmed. Costs are awarded to Respondents.

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ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.