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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

LINDSAY STEWART,

Cross-Complainant and Appellant,

v.

CYNTHIA KAUANUI,

Cross-Defendant and Respondent.

D058137

(Super. Ct. No. 37-2008-00092293-
CU-BC-CTL)

APPEAL from an order of the Superior Court of San Diego County, Richard E. L. Strauss, Judge. Affirmed.

Lindsay Stewart brought claims against Cynthia Kauanui for defamation and intentional interference with prospective economic advantage. Less than six months later, the court granted Stewart's motion for terminating sanctions based on Kauanui's discovery violations and ordered a default to be taken against Kauanui. After a default prove-up hearing, the court entered a default judgment awarding Stewart compensatory damages of \$2,808,869 and punitive damages of \$500,000 plus 25 percent of the amount

Kauanui recovers in an unrelated wrongful death case involving the death of Kauanui's son.

Shortly after the default was entered, Kauanui moved to set aside the order and judgment under Code of Civil Procedure section 473, subdivision (b).¹ After allowing the parties to engage in limited discovery and conducting three hearings, the court granted the motion, finding "the default judgment . . . was the result of mistake, inadvertence, surprise, or excusable neglect." The court thus restored the case to the civil active list.

Stewart appeals, contending the court abused its discretion in granting relief under section 473, subdivision (b). We do not reach this argument because the entry of default and the default judgment are void as a matter of law. The undisputed record shows Kauanui was not served with a statement of damages before the court ordered the entry of default. Thus, the default and default judgment violated Kauanui's statutory and due process rights and are thus void. Accordingly, we affirm the court's order vacating the entry of default and default judgment.

FACTUAL AND PROCEDURAL SUMMARY

Kauanui was president of Jet Set Management Group, Inc. (Jet Set), a talent agency representing models and actors. Jet Set employed Stewart as director of its children's division. In 2008, Stewart left Jet Set and started her own talent agency.

¹ All further statutory references are to the Code of Civil Procedure unless otherwise specified.

In September 2008, Jet Set sued Stewart and her new talent agency, claiming Stewart violated her employment and confidentiality agreements, including by taking Jet Set clients with her when she opened her new agency. Stewart then served Jet Set with several sets of discovery requests.

About seven months later, on April 23, 2009, Stewart filed a cross-complaint against Jet Set and also named Kauanui as a cross-defendant. As is relevant here, Stewart alleged two causes of action against Kauanui: defamation and intentional interference with prospective economic advantage. Stewart claimed Kauanui had falsely represented that Stewart had embezzled money and/or was being investigated for embezzlement and that Stewart had "stole[n] clients" from Jet Set. Stewart's causes of action against Jet Set included unlawful discrimination based on sexual orientation, wrongful constructive discharge, invasion of privacy, and intentional infliction of emotional distress. The cross-complaint did not identify the amount or nature of Stewart's claimed damages against either defendant. Kauanui and Jet Set were represented by attorney Karl Schoth.

The next month, on May 27, 2009, Stewart moved for discovery sanctions against Jet Set and Kauanui, claiming they had failed to comply with discovery obligations. At the time, Stewart had not propounded discovery on Kauanui, except for noticing her deposition. Jet Set and Kauanui did not file an opposition to the motion. On June 19, 2009, the court granted the motion against Jet Set and awarded Stewart \$2,975 in sanctions. One week later, Jet Set dismissed its complaint against Stewart and her talent agency.

Shortly after, in mid-July 2009, Stewart, as a cross-complainant, served several sets of discovery requests on Kauanui, including a request for admissions, a request for production of documents, and multiple sets of interrogatories. On several days in mid-June through August 2009, Stewart's counsel took Kauanui's deposition.

Although Kauanui's discovery responses were due by mid-August, Kauanui did not provide any written response or responsive documents. After making numerous informal attempts to obtain Kauanui's compliance with her discovery obligations, Stewart's counsel moved ex parte for an order that Kauanui's counsel (Schoth) meet and confer regarding the discovery issues.

At the September 3 ex parte hearing on this motion, Schoth told the court that his client was a "disorganized person" and he would provide the outstanding discovery responses (with no objections) by September 4. However, he did not meet this deadline. Instead, on September 9, Schoth produced a limited amount of responsive documents and unverified responses.

On that same date, Stewart filed a motion to request the court to shorten the time for a motion to compel seeking evidentiary and financial sanctions. At a hearing the next day, Schoth told the court he had difficulty producing the documents, but he is "ready and will be delivering all verified responses" by September 14. The court nonetheless set a briefing schedule for the parties to file briefs regarding Stewart's sanctions motion, and stated that if any of the discovery responses were inadequate, Stewart's counsel should address these issues in the briefing. The court also stated that it was "prepared to issue

sanctions and any other action deemed necessary if these orders cannot be carried through." At the time, the trial date was scheduled for October 9, 2009.

Pursuant to the court's briefing schedule, on September 17, Stewart filed a motion for terminating, evidentiary, or issue sanctions, or \$28,850 in monetary sanctions. Although an opposition was due six days later, Kauanui's attorney did not file a response to the motion.

Meanwhile, on September 23, Jet Set filed for Chapter 7 bankruptcy protection and notified the parties that the litigation against it was now stayed. At about the same time, Kauanui filed her answer to Stewart's cross-complaint.

One week later, on October 1, 2009, the court issued a tentative ruling granting terminating sanctions against Kauanui, stating that Kauanui had "abused the discovery process" and had "prevented [Stewart] from obtaining information necessary to the preparation of her case." The court stated: "With an impending trial date of October 9, 2009, this abuse, coupled with [Kauanui's] failure to oppose this motion, warrants the imposition of terminating sanctions." Shortly before or after this order, Kauanui's attorney, Schoth, served verified responses and documents responsive to Stewart's requests.

On October 2, the court held a hearing on Stewart's sanctions motion. Schoth appeared at the hearing. The court noted that Schoth's opposition to the sanctions motion filed the day before was untimely. Schoth explained to the court that his client was responsible for some of the delay but that an unexpected computer problem — where he lost his client's entire file — had also precluded him from timely responding to the

discovery requests. The court and counsel then discussed at length the nature of the outstanding discovery and the reasons for the failure of Schoth and/or Kauanui to properly respond to the discovery. At the conclusion of the hearing, the court stated it would continue the hearing for one week and would defer making a final order until the parties had met and conferred concerning the nature and extent of any outstanding discovery.

At the October 9 continued hearing, Stewart's counsel stated that although she had received additional responses to the discovery requests, there remained "a series of things [still] missing," including a computer disk that Kauanui had discussed at her deposition. Schoth countered by asserting that no such disk exists and claiming that Stewart had received all responsive discovery. Schoth also pointed out that Stewart's counsel had the opportunity to take Kauanui's deposition over multiple days. He also repeated his explanations for the delays, including his computer problems and his client's "extreme disorganization."

After allowing both counsel to argue at length, the court stated it was granting Stewart's motion for terminating sanctions and striking Kauanui's answer. The court stated it did not have "any sense of confidence" that Kauanui had responded properly to the discovery requests or that Stewart had the information "to properly prosecute this case" The court also noted that based on the facts before it, it appeared that Kauanui was primarily responsible for the discovery violations and that it was "not blaming Mr. Schoth." At the conclusion of the hearing, Stewart's counsel said he would prepare the documents, and would obtain a date for the prove-up hearing.

On the same date (October 9), the court prepared a minute order stating:
"Stewart's Motion for Terminating Sanctions is granted. The Court finds that based on cross-defendant Cindy Kauanui's failure to provide discovery responses and noncompliance with court ordered deadlines, she has abused the discovery process. *Court orders that cross-defendant Cindy Kauanui's answer to the cross-complaint be stricken and default entered against her.* [¶] [Stewart's attorney] is directed to prepare necessary documents." (Italics added.)

Ten days *later*, on October 19, Stewart's counsel signed a section 425.11 "STATEMENT OF DAMAGES" form, claiming the following damages: (1) pain, suffering, and inconvenience (\$300,000); (2) emotional distress (\$300,000); (3) loss of earnings (\$160,000); (4) loss of future earnings capacity (\$450,000); (5) reputational damages (\$400,000); and (6) lost profits (\$450,000). Stewart also sought punitive damages in the amount of \$1 million.

About two weeks later, on November 3, the clerk entered Kauanui's default.²

Ten days later, on November 13, the court filed a written order granting Stewart's motion for terminating sanctions and ordering the entry of default. In the order, the court stated that Kauanui had engaged in a pattern of discovery misconduct and violation of court orders and detailed those violations. The court further found Stewart would be prejudiced if the court excused Kauanui's misconduct and that further orders would not

² Although this document is file-stamped November 3, 2009, the superior court clerk's office did not physically file the entry of default until January 7, 2010 because of administrative problems in the clerk's office. The court later ordered the file-stamp date to reflect a November 3, 2009 filing.

result in Kauanui's compliance with discovery obligations. The court also stated that "As required by Code of Civil Procedure section 425.11 and *Morgan v. Southern Cal. Rapid Transit Dist.*, 92 Cal.App.3d 976 (1987), a Statement of Damages has been personally served on Cross-Defendant Kauanui" The court ordered that Kauanui's answer be stricken, and the clerk of the court enter a default. The court directed Stewart's counsel to schedule a default judgment prove-up hearing.

About six weeks later, Kauanui filed a substitution of attorney form replacing her former counsel with new counsel.

About two weeks later, on January 5, 2010, Kauanui's new attorneys filed a section 473 motion for relief from the entry of default and a request that the court stay the default prove-up proceedings until this motion could be heard. Kauanui's new counsel, Alex Tomasevic, filed a supporting declaration stating that his client had been unaware of the default until he inadvertently discovered the court's default order while researching another matter for Kauanui.

Kauanui also filed a declaration under penalty of perjury stating she was unaware of the entry of default and did not know that Stewart's counsel had moved for terminating sanctions. Kauanui said she was unaware of the status of the case until "well *after* I retained [new counsel] . . . in November of 2009, to represent me in another matter. [¶] . . . In general I had no idea that the status of written discovery and meeting of court-ordered deadlines was so dire as to threaten the termination of my case — until well *after* the court had already struck my answer. At all times I had believed that generally I was doing what was required of me with respect to discovery, and that I had provided

everything that was asked of me in that regard. [¶] . . . I relied on my previous attorney, Mr. Schoth, to inform me as to discovery and other deadlines. [¶] . . . When I learned of these recent developments, I was utterly shocked. I have since replaced Mr. Schoth [¶] . . . I am committed to providing any appropriate outstanding discovery on whatever schedule this honorable court imposes and complying with whatever directives are given to me by the court."

On February 11, 2010, Kauanui filed an ex parte motion seeking to continue the default prove-up hearing until after her motion to set aside the default could be heard. The court denied the request.

One week later, on February 18, the court held the default prove-up hearing, and then entered judgment in favor of Stewart, awarding her: (1) compensatory damages of \$2,808,869; (2) punitive damages of \$500,000 plus "25 % of the proceeds due . . . Kauanui in the *Kauanui v. . . . Cravens et al.* case" (the case involving the wrongful death of Kauanui's son); and (3) costs of \$18,082.18.

Kauanui thereafter filed extensive section 473 moving papers, including her own supplemental declaration in which she detailed the fact that Schoth had not communicated with her regarding the status of the case, she was unaware of the discovery problems, and was (and continues to be) committed to providing all necessary discovery. Although Schoth refused to file a declaration attesting that he was to blame for the discovery violations, Kauanui sought relief under the mandatory relief provisions of section 473, subdivision (b) based on a declaration Schoth filed in opposition to the terminating sanctions motion in which he acknowledged that his computer problems were

a cause for a delay in producing the responses and responsive documents. Kauanui also argued that she was entitled to relief under the discretionary provisions of section 473, subdivision (b) because her counsel engaged in " 'positive misconduct' " that effectively severed the attorney-client relationship.

Stewart vigorously opposed the motion, challenging the factual assertions in Kauanui's declaration, and arguing that Kauanui had failed to establish a basis for relief under the mandatory or discretionary provisions of section 473, subdivision (b). Stewart argued that Kauanui's factual claims were inconsistent with her own prior statements and conduct and her counsel's representations. Stewart additionally argued that Kauanui was not entitled to discretionary relief because Kauanui's supporting papers showed, at most, that her counsel had committed legal malpractice, which is not a basis for vacating a judgment under section 473, subdivision (b). Stewart further argued that the mandatory provisions of section 473, subdivision (b) were inapplicable because Schoth did not file the required attorney-fault declaration and he has never claimed primary responsibility for, nor was he the cause of, the discovery abuses.

In a tentative ruling, the court granted Kauanui's section 473 motion. Citing the declarations of Kauanui and her new counsel, the court found the default judgment "was the result of mistake, inadvertence, surprise, or excusable neglect." After granting Stewart two continuances to conduct limited discovery and submit additional briefing, the court affirmed its tentative ruling, and ordered that the default judgment be set aside, "reinstating [Kauanui's] answer . . . and restoring the case to the civil active list."

DISCUSSION

I. *Summary of Appellate Contentions and Conclusions*

In her opening appellate brief, Stewart contends the court erred in vacating the default and default judgment under section 473, subdivision (b) because Kauanui was not entitled to relief under the discretionary or mandatory provisions of this code section.

Kauanui responded by arguing that the court properly exercised its discretion to conclude she was entitled to relief because the default was the result of her counsel's "mistake, inadvertence, surprise, or excusable neglect." (§ 473, subd. (b).) Kauanui alternatively argued that the record supported her entitlement to relief under the mandatory "attorney fault" provisions of section 473, subdivision (b). Kauanui additionally raised several arguments pertaining to the propriety of the default judgment, including that the entry of default and default judgment were void as a violation of her due process rights because she did not have proper notice of the claimed damages before the default was taken. Although Stewart filed a 49-page reply brief, she did not respond to this latter due process argument. We thereafter notified Stewart's counsel of the need to address this argument at oral argument and permitted Stewart to file supplemental briefing on this issue.

We conclude the order vacating the entry of default and default judgment must be affirmed because Kauanui was not given notice of the claimed damages a reasonable time before the court ordered Kauanui's default be taken. (See §§ 425.11, subd. (c), 425.115, 580, 585.) Absent this notice, the entry of default and default judgment are void as a matter of law. Contrary to Stewart's contentions, we may properly consider this issue

even though Kauanui did not file a protective cross-appeal. Based on our conclusion that the default judgment is void on due process grounds, we do not reach Stewart's arguments challenging the trial court's authority to vacate the judgment under the mandatory and/or discretionary provisions of section 473, subdivision (b).

II. *Legal Principles*

"It is fundamental to the concept of due process that a defendant be given notice of the existence of a lawsuit and notice of the specific relief which is sought in the complaint served upon him. The logic underlying this principle is simple: a defendant who has been served with a lawsuit has the right, in view of the relief which the complainant is seeking from him, to decide not to appear and defend. However, a defendant is not in a position to make such a decision if he or she has not been given full notice.' (*In re Marriage of Lippel* (1990) 51 Cal.3d 1160, 1166.)" (*Van Sickle v. Gilbert* (2011) 196 Cal.App.4th 1495, 1520 (*Van Sickle*).

"To effectuate this due process principle, California law provides that where a plaintiff seeks to recover money or damages, the amount sought generally must be stated in the complaint. (§ 425.10, subd. (a)(2).)" (*Van Sickle, supra*, 196 Cal.App.4th at p. 1520.) An exception applies where a complaint seeks damages for personal injury or wrongful death, or seeks punitive damages. (§§ 425.11, 425.115; *Van Sickle, supra*, 196 Cal.App.4th at p. 1520; *Schwab v. Southern California Gas Co.* (2004) 114 Cal.App.4th 1308, 1320.) In these cases, the plaintiff must provide this information by serving a separate written statement of damages described in section 425.11 (compensatory damages) and section 425.115 (punitive damages). (See *Van Sickle, supra*, 196

Cal.App.4th at pp. 1520-1521.) "Sections 425.11 and 425.115 provide methods for satisfying the due process requirement of notice while honoring the bar against pleading a specific amount of damages in the [specified circumstances]." (*Id.* at p. 1521.)

Consistent with these principles, the Legislature has provided that a *default judgment* "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." (§§ 580, 585, subs. (a), (b).) Sections 580 and 585 embody the due process requirement of reasonable notice, and "a default judgment greater than the amount specifically demanded is void as beyond the [trial] court's jurisdiction." (*Greenup v. Rodman* (1986) 42 Cal.3d 822, 826 (*Greenup*); *Van Sickle, supra*, 196 Cal.App.4th at p. 1521.)

For these same reasons, an *entry of default* is void if a required statement of damages was not served on the defendant (or cross-defendant) *before* the default was taken. (*Schwab v. Rondel Homes, Inc.* (1991) 53 Cal.3d 428, 435; *Van Sickle, supra*, 196 Cal.App.4th at p. 1521; *Schwab v. Southern California Gas Co., supra*, 114 Cal.App.4th at p. 1320; *Matera v. McLeod* (2006) 145 Cal.App.4th 44, 60-62 (*Matera*).) Section 425.11, subdivision (c) provides: "If no request is made for the statement [of damages] . . . , the plaintiff shall serve the statement on the defendant *before a default may be taken*." (Italics added.) This statute "require[s] that, *before a default may be entered*, the defendant must be served, in the same manner as a summons, with notice of the amount of money damages or other relief sought." (*Schwab v. Southern California Gas Co., supra*, 114 Cal.App.4th at p. 1320, italics added.) Although the Legislature did not establish a "hard and fast rule regarding the precise . . . timing of the service of the

section 425.11 statement of damages," the courts require that the notice must be served "*a reasonable period of time before default may be entered.*" (*Id.* at p. 1322, italics added.)

The key factor in determining whether proper notice has been given is whether the defendant had sufficient notice of the amount of claimed damages to permit a reasoned decision whether to take actions to respond to the claims.

These principles apply equally if the default results from the failure to answer *or* from a discovery terminating sanction. (*Greenup, supra*, 42 Cal.3d at pp. 827-829; *Van Sickle, supra*, 196 Cal.App.4th at p. 1521; *Electronic Funds Solutions, LLC v. Murphy* (2005) 134 Cal.App.4th 1161, 1175; *Schwab v. Southern California Gas Co., supra*, 114 Cal.App.4th at p. 1320; *Morgan v. Southern Cal. Rapid Transit Dist.* (1987) 192 Cal.App.3d 976, 986.) More than 25 years ago, the California Supreme Court held that a defendant has a due process right to receive prior notice of the maximum amount of liability even where the default is the result of willful discovery abuses. (*Greenup, supra*, 42 Cal.3d at pp. 827-829.) Even "obstreperous" defendants "guilty of reprehensible conduct" are entitled to the due process protection of notice. (*Id.* at p. 829.) "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." (*Ibid.*; see *Matera, supra*, 145 Cal.App.4th at pp. 60-61.)

Where, as here, the material facts pertaining to notice are undisputed, the issue whether the "default judgment complied with constitutional and statutory requirements

are questions of law as to which we exercise independent review." (*Falahati v. Kondo* (2005) 127 Cal.App.4th 823, 828.) Further, because of its jurisdictional nature, the claim that a defendant was not given timely notice of damages before entry of default and default judgment can be raised for the first time on appeal. (*People ex rel. Lockyer v. Brar* (2005) 134 Cal.App.4th 659, 666; *Matera, supra*, 145 Cal.App.4th at p. 59 [holding court had discretion to consider for the first time on appeal the issue whether "plaintiffs had failed to provide actual notice of the amount of damages sought a reasonable time before the entry of defaults"]; *National Diversified Services, Inc. v. Bernstein* (1985) 168 Cal.App.3d 410, 417.)

III. Analysis

On October 9, 2009, the trial court issued a minute order granting Stewart's motion for terminating sanctions and expressly ordering that "*Kauanui's answer to the cross-complaint be stricken and default entered against her.*" (Italics added.) Ten days later, on October 19, Stewart's counsel executed a statement of damages pursuant to sections 425.11 and 425.115, claiming a total of \$2,060,000 in compensatory damages on her defamation and intentional interference claims, and seeking \$1 million in punitive damages.

Although the record is unclear as to the precise date that this statement of damages was served upon Kauanui (or her counsel), it is undisputed that the document was served at some time between October 19, 2009 and November 13, 2009. The statement of damages could not have been served before October 19 because it was signed by counsel on that date. The statement of damages could not have been served later than November

13, because on that date the court signed an order stating that the statement of damages had been personally served on Kauanui.

At the prove-up hearing held on February 18, 2010, the court awarded damages that exceeded the damages claimed in Stewart's statement of damages. Specifically, the court awarded compensatory damages of \$2,808,869 and, in her written statement of damages, Stewart had claimed \$2,060,000. Additionally, the court awarded punitive damages of \$500,000 plus an uncertain amount (25 percent of the amount recovered in a wrongful death lawsuit involving Kauanui's son). At the prove-up hearing, Stewart's counsel said that Kauanui's attorneys had claimed the wrongful death recovery might possibly be as large as \$5 million. In the statement of damages, Stewart requested \$1 million in punitive damages. The default judgment was void to the extent it awarded a monetary recovery greater than the amounts identified in Stewart's statement of damages.

But more fundamental, the entry of default was void for lack of notice and thus the court had no jurisdiction to award any amount in the default judgment. Stewart did not prepare and serve a statement of damages until *after* October 9, 2009, the date that the court struck Kauanui's answer and ordered her default to be entered. The court's October 9 minute order terminated Kauanui's right to defend the case and therefore a statement of the claimed damages was required to be served on Kauanui before this date. For purposes of the due process requirement embodied in sections 580, 585, 425.11, and 425.115, a statement of damages must have been served before the court's October 9 minute order. (See *Schwab v. Southern California Gas Co.*, *supra*, 114 Cal.App.4th at

pp. 1324-1326; *Matera, supra*, 145 Cal.App.4th at pp. 60-62; see also *Van Sickle, supra*, 196 Cal.App.4th at pp. 1521, 1530-1531.)

In this respect, this case is indistinguishable from *Matera, supra*, 145 Cal.App.4th 44. In *Matera*, the plaintiffs moved for terminating sanctions on January 14, 2005 and served the defense counsel with a statement of damages on February 8, 2005. (*Id.* at p. 52.) Two days later, on February 10, the court held a hearing on the plaintiffs' motion for terminating sanctions. (*Ibid.*) At the conclusion of the hearing, the court issued a minute order, in which the court stated it was granting the plaintiffs' motion, ordering the defendants' answer stricken, ordering defendants' defaults, and scheduling a prove-up hearing. (*Ibid.*) Four days later, the court signed an order reflecting these rulings. (*Ibid.*) After a prove-up hearing held two months later, the court entered a default judgment. (*Id.* at p. 53.)

On this record, the reviewing court found the default judgment was void and that the defaults must be vacated because the defendants were not given adequate notice of the plaintiffs' claimed damages. (*Matera, supra*, 145 Cal.App.4th at pp. 60-62.) The court explained that "plaintiffs personally served a statement of damages on defendants' attorney only two days before the court struck the defendants' answer and entered their defaults. The statement of damages demanded \$250,000 in general damages, \$1 million in punitive damages, and \$200,000 in attorney fees, and the court later awarded a total of \$596,305 in compensatory and punitive damages, plus \$83,782 in attorney fees. We conclude that two days before the entry of default was not a reasonable period of time to apprise the defendants of their substantial potential liability for purposes of due process.

We therefore conclude that the default judgment is void and that the defaults must be vacated." (*Matera, supra*, 145 Cal.App.4th at p. 62, fn. omitted.)

The notice defect was even more evident in this case. In *Matera*, the statement of damages was served two days *before* the minute order granting the terminating sanctions. (*Matera, supra*, 145 Cal.App.4th at p. 62.) Here, the statement of damages was served at least 10 days *after* the court's minute order that granted Stewart's motion to strike Kauanui's answer and ordered the entry of Kauanui's default. Kauanui had no notice of the claimed damages before the court eliminated her right to defend the action. This violated her due process rights.

To the extent Stewart argues that Kauanui was served with the statement of damages before the default was "entered" by the court (November 3) and before the court's more formal default order (November 13), this argument does not change our conclusion. Although the formal entry of the default did not occur until November 3, the October 9 minute order expressly stated that the "Court orders [Kauanui's] answer to the cross-complaint be stricken and default entered against her." Thus, as in *Matera*, it was the minute order that was the critical date for the notice issue. Although certain steps needed to be taken after the minute order to make the entry of default effective, the minute order striking Kauanui's answer as a terminating sanction and ordering the entry of default led inexorably to the entry of default, and thus required prior notice of the claimed damages. (See § 585, subds. (a), (b); *Matera, supra*, 145 Cal.App.4th at p. 62.)

At oral argument and in a supplemental letter brief, Stewart's counsel cited two cases to support Stewart's argument that the date the court clerk entered the default (and

not the date the court ordered the default) is the effective date for purposes of determining whether the statement of damages was timely served. (See *Schwab v. Southern California Gas Co.*, *supra*, 114 Cal.App.4th 1308; *California Novelties, Inc. v. Sokoloff* (1992) 6 Cal.App.4th 936.) The holdings of these decisions do not support this argument. Moreover, both *Schwab* and *California Novelties* arose after a defendant failed to answer the operative pleading. In this circumstance, a default is entered without any specific order from the court; the court clerk enters the default in the exercise of its ministerial duties after a plaintiff files a request for entry of default. (See *Pelayo v. J. J. Lee Management Co., Inc.* (2009) 174 Cal.App.4th 484, 497; *Goddard v. Pollock* (1974) 37 Cal.App.3d 137, 142.) Here, the default arose not from a clerk's ministerial function, but from a court order granting terminating sanctions and Kauanui's default. Service of a statement of damages was required a reasonable time before this order.³

Stewart argues the notice issue is not properly before us because Kauanui did not cross-appeal from the default judgment. However, under section 906, the propriety of the default and default judgment is within our appellate jurisdiction. Section 906 provides that, at a respondent's request, a reviewing court "may review" an "intermediate ruling . . . for the purpose of determining whether or not the appellant was prejudiced by

³ During oral argument, appellant's counsel asked to submit a supplemental letter brief regarding the issue whether the entry of default and default judgment were void for lack of timely notice of claimed damages. Because counsel had not provided this letter to respondent's counsel, we instructed him to serve a copy of the letter on opposing counsel. After the letter was served, we reviewed and considered it. We decline respondent's request to strike the letter, and conclude it is unnecessary to provide respondent with an opportunity to file a written opposition to the letter.

the [claimed] errors" The court's default judgment falls within this rule because: (1) it was a predicate ruling leading to the order vacating the judgment; and (2) even assuming the court erred in vacating the judgment under section 473, subdivision (b), Stewart was not prejudiced because vacation of a void judgment is required on constitutional grounds. We reject Stewart's contention that section 906 is not controlling because the code section states it is inapplicable to any order "from which an appeal might have been taken." This exception does not apply here because the default judgment (which is appealable) was *vacated*. A party is not required to appeal from a judgment or order that has been vacated by the court.

IV. *Conclusion*

We affirm the trial court's order setting aside the default judgment and the entry of default, and ordering the answer reinstated. (See *Matera, supra*, 145 Cal.App.4th at p. 62 [vacation of default for lack of notice necessarily requires the court also to vacate the order striking an answer].) Upon remand, the trial court will have discretion to determine whether to impose monetary sanctions or other consequences for the conduct that led the court to impose the terminating sanctions.

In reaching these conclusions, we echo the cautionary advice recently given by the Third District Court of Appeal that a party seeking a terminating sanction should ensure a statement of damages has been filed to provide sufficient notice to the defendant or cross-defendant before the court rules on the motion. (See *Van Sickle v. Gilbert, supra*, 196 Cal.App.4th at pp. 1530-1531.) "If every plaintiff seeking to strike the defendant's answer as a terminating sanction were to take this step, then precious time and resources

. . . would not be wasted by the parties and the courts, as in this case, in litigating and adjudicating a default judgment that simply cannot stand." (*Ibid.*)

In concluding the default judgment must be reversed on due process grounds, we do not reach the issue whether the court properly exercised its discretion in awarding relief under section 473, subdivision (b). However, nothing in this opinion should be construed as suggesting the court abused its discretion in granting the relief. We note the law provides a trial court with broad discretion in ruling on section 473 motions, and "[c]ombined with the strong policy favoring resolutions on the merits, this deference produces an especially strong appellate presumption" in favor of section 473 rulings granting relief from default. (*Shapiro v. Clark* (2008) 164 Cal.App.4th 1128, 1139-1140.)

DISPOSITION

Order affirmed. The parties to bear their own costs.

HALLER, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.