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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

TARA LANYON et al.,

Plaintiffs and Respondents,

v.

AMERICAN FINANCIAL NETWORK,
INC.,

Defendant and Appellant.

E053805

(Super.Ct.No. CIVVS900444)

OPINION

APPEAL from the Superior Court of San Bernardino County. Steve Malone,
Judge. Affirmed.

The La Cues Law Group and Jerry La Cues for Defendant and Appellant.

Law Offices of Jonathan T. Tasker and Jonathan T. Tasker for Plaintiffs and
Respondents.

Plaintiffs and respondents Tara Lanyon and Robert Torres filed an action arising
from alleged misrepresentations regarding a home loan. Plaintiffs took the default and
later obtained a judgment against defendant and appellant American Financial Network,

Inc. (AFN), which did business under the name “Bankers Capital.” AFN applied to the trial court to set aside the default, asserting extrinsic fraud or mistake. The trial court denied the motion, and AFN now appeals. We affirm.

FACTS AND PROCEDURAL HISTORY

Plaintiffs’ complaint alleged that they contacted Keller Williams Realty (the realtor) to purchase a home in Victorville. Shannon Million (the agent) was an agent for the realtor, who became plaintiffs’ agent to facilitate the purchase. The agent advised plaintiffs to use a mortgage broker, identified to plaintiffs only by the name “Anthony,” who worked for an entity called Bankers Capital. The agent and Anthony promised that the interest rate on the first and second mortgage loans would not exceed 7 and 8 percent, respectively. When plaintiffs went to sign the papers at escrow, however, they discovered that the documents stated much higher interest rates.

In order to induce plaintiffs to sign the documents, the agent and Anthony promised that plaintiffs would receive \$4,900 cash from the escrow. Plaintiffs signed the documents in January 2006. The money was never paid to plaintiffs, however. Also, when plaintiffs attempted to refinance the property to obtain the lower interest rate, they discovered that the property had never been fully conveyed to them.

Plaintiffs filed an action on February 2, 2009, naming as defendants the realtor, the agent, and AFN, as the owner of the business name “Bankers Capital.” The proof of service of summons shows that “John Sherman – Vice President” of AFN was served on March 9, 2009 at 10:46 a.m. Default was entered on the complaint against AFN on April

13, 2009. Plaintiffs dismissed the complaint without prejudice as to the realtor in May 2009. The agent was served by publication as of December 2009, and the agent's default was taken in January 2010.

In June 2010, plaintiffs filed packets requesting entry of a clerk's judgment on the defaults. A hearing was held June 29, 2010, upon which the court entered judgment against AFN in the amount of \$58,185.60, and against the agent for \$54,459.20.

Nearly six months later, on December 23, 2010, AFN paid a filing fee for a copy request. On January 31, 2011, AFN filed its first appearance in the action, a motion to set aside the default and default judgment. AFN moved for an order to set aside the default and default judgment, based on Code of Civil Procedure section 473.5, and on grounds of extrinsic fraud or extrinsic mistake.

AFN's moving papers asserted that it had not been served with the summons and complaint, contradicting the proof of service. A declaration of John Robert Sherman, the chief financial officer of AFN, averred that he "was not personally served with the complaint, on March 9, 2009," at 10:46 a.m. as recited in the proof of service. He checked his calendar for that date and found that he had not arrived at the office until approximately 11:30 a.m. on that day. He also stated that AFN "has never been served with the complaint or any other documentation related to this case." He claimed that he discovered the judgment in late November 2010, when trying to obtain a line of credit. He immediately requested the court documents, which he received on January 3, 2011. Thereafter he retained counsel and investigated the matter. He discovered that the

lawsuit involved a transaction between plaintiffs and “Anthony,” purportedly an employee of Bankers Capital, in January 2006. AFN had never used the business name “Bankers Capital” until December 2007, almost two years after the plaintiffs signed the contract. AFN never had an employee called “Anthony” during the period when plaintiffs alleged the property negotiations took place. Records of plaintiffs’ loan application showed that it was signed by a “Herbert Ayala” who was stated to be employed by Bankers Capital at an address in Riverside. AFN had never had a business at the Riverside address listed on the loan application. AFN had never done business or had any loan officer named Herbert Ayala, and it had never funded any loan related to the property plaintiffs had purchased. In short, while AFN may have been a successor to the name “Bankers Capital,” it was not the entity involved in plaintiffs’ transaction to purchase the property.

John Brian Sherman, AFN’s chief executive officer, also filed a declaration. He averred that he had “no recollection and no documentation for service of process on March 9, 2009.” He stated that he had “just recently learned of a proceeding involving [AFN] from plaintiffs”

Plaintiffs opposed AFN’s motion to set aside the default and default judgment. Plaintiffs’ attorney filed a declaration stating that, “shortly” after the summons and complaint had been served in March 2009, “I received a phone call from John Sherman stating that he had acquired the d.b.a. Bankers Capital, but was not responsible for the loan subject of the instant action. He represented he would furnish proof,” but plaintiffs’

attorney never received any such proof. Plaintiffs' attorney further argued that there had been no mistake, inadvertence, surprise or excusable neglect to obtain relief under Code of Civil Procedure section 473, subdivision (b). AFN had been served with the complaint, had communicated with plaintiffs' counsel about the action, but never filed an answer. The request to enter default was mailed to AFN at the service address, and the default judgment was also mailed to the service address in June 2010. Plaintiffs' opposition papers also included a copy of the proof of service of the summons and complaint, as well as a declaration of the process server, stating that he had served the papers on "John Sherman Vice President" of AFN, at AFN's business address, at 10:46 a.m. on March 9, 2009.

In reply, AFN objected to the declaration of plaintiffs' attorney, as stating things beyond the declarant's own knowledge (i.e., the service of summons by the process server), as well as hearsay (purported telephone call from "John Sherman"). An additional declaration of John Robert Sherman indicated that he had obtained a copy of the certified license history of loan officer Herbert Ayala, who had signed plaintiffs' loan application. That certified license history showed that Ayala had never worked for AFN, but had worked for an entity called Bankers Capital with an address in San Diego. AFN, including any time when it was doing business under the name Bankers Capital, had never had an address in San Diego.

The reply papers also pointed out that plaintiffs' opposition to the motion for relief from default addressed the criteria under Code of Civil Procedure section 473,

subdivision (b), but AFN's motion was based instead on Code of Civil Procedure section 473.5, and extrinsic fraud or mistake. In addition, plaintiffs' opposition had not disputed any of the facts relating to AFN's defense, i.e., that it was not the "Bankers Capital" entity with whom plaintiffs had dealt on their loan, and AFN had not acquired the business name "Bankers Capital" until nearly two years after the transaction that was the subject of the complaint.

At the hearing on AFN's motion, AFN argued its factual defense to the substantive claim, i.e., that it would be unjust to hold it accountable for plaintiffs' damages, when AFN could show that it was not the entity doing business as "Bankers Capital" at the time of plaintiffs' transaction. AFN did not respond to the action because, as the Shermans claimed, they did not receive service of the summons and complaint. Plaintiffs' counsel pointed out that plaintiffs had provided a declaration from the process server himself, who averred that he had personally served a John Sherman at AFN's business address. A business card of "John Sherman" as vice president was attached to the note of instruction to the process server. Plaintiffs had also mailed the request to enter AFN's default to AFN's business address, as well as the default judgment itself. Plaintiffs' counsel stated that, shortly after service of the summons and complaint, "a John Sherman – I don't know which one – called me, said, 'What's this about? I don't think I should be in this.' I said, 'Well, send me documentation.' Then he never did."

The trial court denied the motion to vacate the default and default judgment, on the ground that AFN had in fact received personal service of the summons and complaint, as averred by the process server and shown on the proof of service.

AFN filed a notice of appeal.

ANALYSIS

I. Standard of Review

AFN's motion below was based on both Code of Civil Procedure section 473.5, and the equitable power of the court to set aside a void judgment, or a judgment obtained by extrinsic fraud or mistake.

“Discretionary relief based upon a lack of actual notice under section 473.5 empowers a court to grant relief from a default judgment where a valid service of summons has not resulted in actual notice to a party in time to defend the action. [Citations.] A party seeking relief under section 473.5 must provide an affidavit showing under oath that his or her lack of actual notice in time to defend was not caused by inexcusable neglect or avoidance of service. [Citations.]” (*Anastos v. Lee* (2004) 118 Cal.App.4th 1314, 1319.)

“Extrinsic fraud occurs when a party is deprived of the opportunity to present a claim or defense to the court as a result of being kept in ignorance or in some other manner being fraudulently prevented by the opposing party from fully participating in the proceeding. [Citation.]” (*County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215,

1228-1229.) “[A] false return of summons may constitute both extrinsic fraud and mistake. [Citation.]” (*Id.* at p. 1229.)

As to both of these kinds of rulings, “We review the court’s denial of a motion for equitable relief to vacate a default judgment or order for an abuse of discretion, determining whether that decision exceeded the bounds of reason in light of the circumstances before the court. [Citation.] In doing so, we determine whether the trial court’s factual findings are supported by substantial evidence [citation] and independently review its statutory interpretations and legal conclusions [citations].” (*County of San Diego v. Gorham, supra*, 186 Cal.App.4th 1215, 1230.)

II. The Trial Court Did Not Abuse Its Discretion in Denying AFN’s Motion to Set Aside the Default and Default Judgment

AFN’s claim that the trial court should have set aside the default and default judgment stems from its assertion that it was never served with the summons and complaint. This assertion is a disputed issue of fact, as to which the parties presented competing evidentiary declarations.

AFN urges that “‘Where, as here, the trial court denies the motion for relief from default, the strong policy in favor of trial on the merits conflicts with the general rule of deference to the trial court’s exercise of discretion. [Citation.] Unless inexcusable neglect is clear, the policy favoring trial on the merits prevails. [Citation.] Doubts are resolved in favor of the application for relief from default [citation], and reversal of an order denying relief results [citation].’ [Citation.]” (*Tunis v. Barrow* (1986) 184

Cal.App.3d 1069, 1079.) AFN complains that the trial court did not resolve doubts in the conflicting evidence in its favor, as it should have done under *Tunis v. Barrow*.

We disagree. The trial court did not abuse its discretion in determining that AFN's showing was insufficient to establish its claim that it had not, in fact, been served with the summons and complaint, and that it had no actual notice of the litigation.

The declaration of John Robert Sherman specified that, according to his calendar and e-mail records, he had not yet arrived at the business premises at the time the summons was supposedly served. No details of the records were provided, however, to explain how they showed he could not have been present at the time of service. The declaration of John Brian Sherman was even more vague on the point. His declaration stated only that he had no recollection of being served with the action, and had no documentation to support the service of process.

AFN presented no declaration to deny the averment of plaintiffs' counsel that a John Sherman had telephoned him; the "John Sherman" who called had explained that AFN was not the entity that had done business under the name of "Bankers Capital" at the time of plaintiffs' real estate transaction. This explanation was identical to AFN's actual defense to the merits of the suit, but counsel averred that no one from AFN followed up to present the documentation supporting its claim that it had not been involved. Neither John Robert Sherman nor John Brian Sherman made any declaration specifically addressing the telephone call.

As plaintiffs had pointed out, not only did the proof of service (and the process server's declaration) show that service had been made, but plaintiffs had been required to mail notice of the request to enter default to AFN's mailing address, as well as the judgment itself after it had been entered. John Robert Sherman averred in a conclusional fashion that AFN "has never been served with the complaint or any other documentation related to this case," but did not specifically negate plaintiffs' evidence that the request to enter default and the judgment had been mailed to AFN's address. AFN admitted that the address at which service had been made, and to which other papers were mailed, was in fact its correct business address. John Brian Sherman's declaration is even more vague than that of John Robert Sherman, and did not specifically show that the request for default and the default judgment had not been received. At most, John Brian Sherman stated that he had no memory or documentation regarding service of process, "and just recently learned of a proceeding involving [AFN]" (Cf. *Rodriguez v. Henard* (2009) 174 Cal.App.4th 529, 534 [a trial court ruling on a motion to set aside a default and default judgment under Code Civ. Proc., § 473, did not err in deciding the matter on the credibility of the affidavits: "'credibility' issues were determinative. The trial court found defendants' and [the attorney's] declarations to be lacking in credibility, not only because of the 'artfully drawn' and 'carefully crafted' wording, but also because of what was *not* said therein. In contrast, [the plaintiffs' attorney's] declaration in opposition to the motion plainly specified several conversations he had with defendants and with [their

counsel], which indicated that defendants were aware of what was going on in the case.’’].)

Moreover, AFN’s motion, based as it was on Code of Civil Procedure section 473.5, should have been accompanied by “a copy of the answer, motion, or other pleading proposed to be filed in the action.” (Code Civ. Proc., § 473.5, subd. (b).) So far as the record here shows, AFN’s motion did not include any proposed pleading. The trial court therefore properly denied the motion to the extent it was based on the statutory provision, Code of Civil Procedure section 473.5.

However, “a trial court may . . . vacate a default on equitable grounds even if statutory relief is unavailable. [Citation.]” (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981.)

““To set aside a judgment based upon extrinsic mistake one must satisfy three elements. First, the defaulted party must demonstrate that it has a meritorious case. Second[], the party seeking to set aside the default must articulate a satisfactory excuse for not presenting a defense to the original action. Last[], the moving party must demonstrate diligence in seeking to set aside the default once . . . discovered.” [Citation.]’ [Citation.]” (*Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 503, quoting *Rappleyea v. Campbell, supra*, 8 Cal.4th 975, 982.)

Here, AFN may have shown that it had a meritorious defense to the action (it was not the entity doing business as “Bankers Capital” at the time of plaintiffs’ real estate transaction), but it failed to demonstrate a good excuse for failing to defend the original

action. The trial court found as a factual matter that AFN was actually served with the summons and complaint, as shown on the proof of service and supported by the declaration of the process server. AFN's affidavits in support of its motion were insufficient to negate plaintiffs' evidence of regular service. When "a defendant, . . . [alleges that he or she] has not been served personally, . . . the burden is upon him [or her] to show that he [or she] has not been personally served and that he [or she] has a meritorious defense, but the burden is upon plaintiff to show that it is inequitable to permit defendant to answer." (*Brockman v. Wagenbach* (1957) 152 Cal.App.2d 603, 615.) AFN failed to carry its burden. The issue here was decided upon the declarations. "It is the province of the trial court to determine the credibility of the declarants and to weigh the evidence. [Fn. omitted.] Thus we accept the trial court's finding[] [that the defendant] was served with the original summons and complaint" (*Falahati v. Kondo* (2005) 127 Cal.App.4th 823, 828.)

AFN failed to demonstrate that the trial court abused its discretion in deciding the critical factual issue against it. AFN failed in its burden to show it had not been served with the summons and complaint. It was thus not entitled to have the default and default judgment set aside.

DISPOSITION

The ruling denying AFN's motion to set aside the default and default judgment is affirmed. Costs on appeal are awarded to plaintiffs.

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MCKINSTER
Acting P.J.

We concur:

RICHLI
J.

KING
J.