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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

NANCY BRYANT,

Plaintiff and Respondent,

v.

CHUN K. KIM et al.,

Defendants and Appellants.

E055829

(Super.Ct.No. INC116045)

OPINION

APPEAL from the Superior Court of Riverside County. Randall Donald White, Judge. Reversed.

Wesierski & Zurek, Thomas G. Wianecki and Ashley A. Reagan for Defendant and Appellant.

Law Offices of Garrotto & Garrotto and Greg W. Garrotto for Plaintiff and Respondent.

On October 7, 2011, the trial court entered the default of Chun K. Kim, D.D.S., and TMJ Head and Neck Pain Center, a business organization, form unknown;¹ default was entered in the sum of \$350,000. On November 29, 2011, defendant's request to set aside the default was denied. On February 17, 2012, an uncontested default hearing was held. After hearing the testimony of Plaintiff and Respondent Nancy Bryant, the court ordered judgment in the amount of \$350,395. Defendant and Appellant Chun K. Kim appeals.

I

PRELIMINARY ISSUE—MOTION TO AUGMENT RECORD

By motion filed June 20, 2012, plaintiff filed a motion to augment the record with documents allegedly lodged with her request for court judgment. On June 29, 2012, we issued an order reserving ruling on the request to augment for consideration with the appeal.

The requested augmentation includes plaintiff's declaration, counsel's declaration, and three medical reports supporting plaintiff's damage claims. Plaintiff states that the 18-page package was lodged with the court on February 10, 2012. According to plaintiff, she was advised that the trial court was unable to locate these documents to include in the court file for this appeal.

¹ Defendant Kim alleges that TMJ Head and Neck Pain Center is a fictitious business name, not a separate entity. Accordingly, we treat both defendants as one.

Defendant filed opposition to the motion to augment on grounds that the documents had not been filed or lodged with the superior court, as required by California Rules of Court, rule 8.155(a)(1)(A).

However, the record shows that a notice of uncontested prove-up hearing filed on February 10, 2012, referred to a “Request for Court Judgment/Supporting Declarations” lodged with the notice. The referenced documents are not attached. While there could be room for doubt as to what documents were attached to the notice, it is clear that the documents, primarily the three medical reports, were before the court and were considered by it at the February 17, 2012, prove-up hearing. In addition, plaintiff testified at the hearing.

We must therefore conclude that the documents were lodged with the court. Accordingly, plaintiff’s motion to augment is granted, and the documents attached to the motion will be considered as part of our appellate record.²

II

STATEMENT OF DAMAGES

In accordance with Code of Civil Procedure section 425.10, subdivision (b),³ the complaint here did not specify damages. Accordingly, defendant had the right to request a statement of damages under section 425.11, subdivision (b). Section 425.11 also

² A separate motion to augment was filed by defendant on May 23, 2012, and granted by this court by order filed June 12, 2012.

³ All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

provides that, if no request is made, “the plaintiff shall serve the statement on the defendant before a default may be taken.” (§ 425.11, subd. (c).) Finally, the section provides: “If a party has not appeared in the action, the statement shall be served in the same manner as a summons.” (§ 425.22, subd. (d)(1).)

Defendant argues that the default judgment is void because plaintiff failed to comply with section 425.11. He cites *Plotitsa v. Superior Court* (1983) 140 Cal.App.3d 755 (*Plotitsa*). In that case, the court voided a default judgment on grounds that a statement of damages had not been personally served on defendant. (*Id.* at pp. 758-759.) The court said: “[I]t must be concluded that a ‘statement of damages’ under section 425.11 is the functional equivalent of an amendment to a complaint that increases the amount of damages sought. Accordingly, the same considerations requiring personal service must apply.” (*Id.* at p. 759.)⁴

The court pointed out that “[t]he legislative purpose of the 1974 amendment of section 425.10 and the addition of section 425.10 . . . was to protect defendants in personal injury and wrongful death actions from adverse publicity resulting from prayers in complaints, particularly malpractice complaints, for greatly inflated damage claims

⁴ According to *Plotitsa*, these considerations include a 30-day waiting period between personal service of the statement of damages and the entry of default. (*Plotitsa, supra*, 140 Cal.App.3d at p. 761.) Since no such period is imposed by section 425.11, some courts have declined to follow it, imposing instead a reasonable notice standard. (*Connelly v. Castro* (1987) 190 Cal.App.3d 1583, 1589-1590, and cases cited.) In this case, the statement of damages was served by mail on August 28, 2011, and entry of default was requested on October 5, 2011.

bearing little relation to reasonable expectations of recovery. (Citation.)” (*Plotitsa, supra*, 140 Cal.App.3d at p. 759.)

To close the gap resulting from the omission of specific damage claims in the complaint, the Legislature provided for the statement of damages “to give defendant one ‘last clear chance’ to respond to the allegations of the complaint” (*Stevenson v. Turner* (1979) 94 Cal.App.3d 315, 320.) It also provided for service of the statement of damages in the same manner as a summons because there had been no prior statement of damages. Accordingly, the Judicial Council has provided a mandatory form No. Civ-050 for this purpose.⁵ Plaintiff did not use the mandatory form.

Instead, plaintiff provided a statement of damages but did not serve it in the same manner as a summons. (§ 411, subd. (d)(1).) Plaintiff merely served it in the manner specified in section 1010. This was not sufficient.

Plaintiff cites *Plotitsa*. She quotes the following: “*Engebretson [& Co. v. Harrison* (1981) 125 Cal.App.3d 436 . . .] determined that service of such amendments upon nonappearing defendants is controlled by those statutes governing service of summons on original complaints (§§ 413.10-417.10), under which personal service is required. This conclusion is enhanced by the pragmatic consideration of ensuring fair and effective notice. Nonappearing and defaulting defendants, having determined to allow default in the amount originally prayed for, are more likely to fail to adequately

⁵ At <http://www.courts.ca.gov/documents/civ050/pdf> (as of May 28, 2013); see generally 6 Witkin, California Procedure (5th ed. 2008), Proceedings Without Trial, § 154, pp. 594-596

examine an amendment to a complaint served by mail, believing it to be merely a procedural step toward obtainment of judgment in the amount originally sought. Employees of such defendants are more likely to fail to recognize the importance of such mail and misplace it. Also, documents sent by mail are more likely to be lost. [Citation.]” (*Plotitsa, supra*, 140 Cal.App.3d at p. 760.)

Plaintiff then argues that the statute is essentially a notice statute and that defendant had actual notice of the claimed damages. She cites *Schwab v. Rondel Homes* (1991) 53 Cal.3d 428. In that case, our Supreme Court concluded by saying, “We cannot allow a default judgment to be entered against defendants without proper notice to them of the amount of damages sought. A defendant is entitled to actual notice of the liability to which he or she may be subjected, a reasonable period of time before default may be entered. The trial court in this case properly vacated the default entered against defendants.” (*Id.* at p. 435.)

It is, of course, true that section 425.11 is essentially a notice statute. But the notice of amount claimed is such an important notice that service by mail under section 1010 is insufficient. Instead, formal notice procedures are prescribed to insure that the requisite notice of the amount claimed is given. The cases cited by plaintiff do not hold otherwise.⁶

⁶ In effect, plaintiff argues that, because there was actual notice at some point, there was no prejudice from the defective service of the statement of damages. But “prejudice is not a factor . . . when a dismissal order is void.” (*Sindler v. Brennan* (2003) 105 Cal.App.4th 1350, 1354.)

“Default judgment is a procedural device designed to clear the court’s calendar and files of cases lacking adversarial quality. Because default judgment ends the controversy, the plaintiff must *precisely* follow certain rules which ensure that a defendant has sufficient knowledge of the pending action to make an informed choice as to whether to defend or ignore plaintiff’s claims. [Citation.]” (*Twine v. Compton Supermarket* (1986) 179 Cal.App.3d 514, 517, italics added.) In that case, the court invalidated a default judgment because the statement of damages was served by mail and default was entered only three days later: “Hence the default judgment exceeded the court’s jurisdiction.” (*Id.* at p. 517.)

Since the statement of damages in this case was not served on defendant in the manner prescribed for service of a summons, the resulting default judgment is void. (*Plotitsa, supra*, 140 Cal.App.3d at p. 759.)

III

DISPOSITION

The judgment is reversed. Appellants are awarded their costs on appeal.

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RICHLI
Acting P. J.

We concur:

KING
J.

CODRINGTON
J.