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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

CITY OF FONTANA,

Plaintiff and Respondent,

v.

BANI, LLC et al.,

Defendants and Appellants.

E062018, E063549

(Super.Ct.No. CIVDS1312579)

OPINION

APPEAL from the Superior Court of San Bernardino County. Brian S.

McCarville and Barry L. Plotkin (retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.), Judges.<sup>1</sup> Affirmed as modified.

Law Office of Gerald Philip Peters and Gerald P. Peters for Defendants and Appellants.

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<sup>1</sup> Judge McCarville presided over the matter up until the entry of a default judgment against all defendants. Judge Plotkin entered a postjudgment order appointing a receiver.

Silver & Wright, Curtis R. Wright, and Ruthann M. Elder for Plaintiff and Respondent.

This is a nuisance abatement action by the City of Fontana (City). All of the defendants' defaults were entered. However, two of the defendants — Avtar Singh Bhangu (Bhangu) and Bani, LLC (Bani) (collectively appellants) — filed a series of motions to set aside their defaults; they filed the first such motion through an attorney who, at the time, was suspended from the practice of law. The trial court denied all of these motions. Ultimately, it entered a default judgment, including monetary relief as well as injunctions essentially commanding appellants to abate the nuisance. When appellants failed to abate the nuisance, the trial court held them in contempt and appointed a receiver to enforce the judgment.

In this appeal, appellants contend that:

1. The default judgment is void because, when the underlying defaults were entered, appellants' attorney was suspended.
2. In light of their attorney's suspension, appellants are entitled to relief from the default judgment based on extrinsic fraud or mistake.
3. Appellants are entitled to relief from the default judgment because the City's attorney knew that their attorney had been suspended, yet failed to disclose this to the trial court.
4. The City reopened the defaults by introducing evidence in its prove-up package that went beyond the allegations of the complaint.

5. The trial court erred by awarding the City attorney fees because the City had not requested attorney fees in its request for entry of default.

6. The trial court erred by awarding the City attorney fees and administrative costs because the City had not specified these amounts in its complaint.

7. The trial court improperly awarded the City certain items of attorney fees and costs.

8. The default judgment against Bani is void because Bani was never properly served.

9. The trial court erred by appointing a receiver because there was no evidence that less drastic remedies would be inadequate.

We agree that the trial court erred by awarding administrative costs and by awarding the City's attorneys' printing and copying costs. Otherwise, we find no prejudicial error. Accordingly, we will modify the judgment.

## I

### FACTUAL BACKGROUND

The following facts are taken from the prove-up package that the City submitted in support of its request for a default judgment. Accordingly, while these facts have been shown by sworn testimony, they do not necessarily include appellants' side of the story.

The defendants "own[] or control[]" a piece of property on Washington Street in Fontana. In December 2007, the City received a "citizen complaint" that there were illegal businesses operating at the property. Upon inspection, it found several businesses

at the property, including a truck driving school, a truck repair business, a pallet manufacturing business, a storage business, and an insurance company — all operating without conditional use permits and without business licenses, in violation of the municipal code. It also found “substandard and unpermitted structures . . . , substandard and unpermitted electrical and plumbing modifications, improper storage of oil and other flammable materials, and . . . improper storage of commercial vehicles and . . . debris.”

In 2009, the defendants applied to the City for a conditional use permit (CUP). On December 7, 2010, the City issued a CUP, solely for the operation of a trucking school, subject to conditions of approval. The City’s approval would become null and void unless the defendants complied with the conditions of approval within one year, i.e., by December 8, 2012.

The defendants failed to comply with the conditions of approval by December 8, 2012, or ever. Instead, inspectors found new municipal code violations, including the operation of an unpermitted trucking business, the installation of an unpermitted guard shack, and contaminated water runoff into storm drains. In June 2013, the City formally revoked the CUP.

An inspection in September 2013 found myriad municipal code violations, some of which presented an immediate risk of injury to occupants, neighbors, and passersby.

## II

### PROCEDURAL BACKGROUND

In October 2013, the City filed this action against Bani, Bhangu, and four other defendants. In its complaint, it asserted causes of action for public nuisance.

Between November 19 and December 2, 2013, the City obtained the entry of the other defendants' defaults. On December 5, 2013, the City obtained the entry of appellants' defaults.

On January 21, 2014, through Attorney Dennis M. Assuras, appellants filed a motion to set aside their defaults. It argued that appellants' failure to respond to the complaint was due to excusable neglect, in that the address on file with the Secretary of State for service on them was actually the address of Bhangu's mother.

On February 26, 2014, the trial court held a hearing on the motion. Assuras did not appear. The trial court denied the motion. On March 5, 2014, it entered a formal written order denying the motion.

On March 6, 2014, this time through Attorney Yolanda Flores-Burt, appellants filed a motion for reconsideration. It argued that appellants' failure to respond to the complaint was due to inadvertence, mistake, and excusable neglect, in that appellants had been under the mistaken belief that they "had to be personally served and at [their] place of business and that service at any other location or [in any other] manner was not effective." Appellants conceded that they had, in fact, been served, and they claimed that they had attached their proposed answer to the motion (although actually they had not).

On April 28, 2014, the trial court held a hearing on the motion. After hearing argument, it denied the motion. On May 14, 2014, it entered a formal written order denying the motion for reconsideration.

On May 29, 2014, again through Attorney Flores-Burt, appellants filed a second motion to set aside their defaults. It asserted that appellants failed to respond to the complaint due to excusable neglect, in that Banghu's mother was the owner and principal of all of the corporate defendants, and she had been out of the country when the summons and complaint were served. If she had been aware of the summons and complaint, she would have made sure that appellants responded in a timely manner.<sup>2</sup> Specifically, Banghu's mother stated, "I am not arguing that [the City] didn't properly serve the Complaints, I am saying that due to my excusable neglect, I didn't answer the Complaints."

On August 13, 2014, the trial court held a hearing on the motion. After hearing argument, it denied the motion, finding that appellants had not shown excusable neglect. On August 25, 2014, it entered a formal written order denying the motion.

On August 29, 2014, after a prove-up hearing, the trial court entered a default judgment against all defendants. The default judgment included some 22 separate prohibitory injunctions. Among other things, it enjoined all defendants from:

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<sup>2</sup> This conflicted with appellants' claim in their previous motion for reconsideration, also filed by Attorney Flores-Burt, that the reason why they failed to respond was that they mistakenly believed the service was ineffective.

“Operating any business without a business license on the Subject Property.”

“Maintaining any use of the Subject Property without the appropriate approvals from the [C]ity, including but not limited to conditional use permits.”

“Maintaining any use of the Subject Property which violates the Fontana Zoning Code.”

The default judgment also awarded the City \$80,087.90 in attorney fees and \$4,189.68 in administrative costs.

On March 18, 2015, the City filed an order to show cause, seeking to have all defendants held in contempt and to have a receiver appointed on the ground that defendants were continuing to operate (1) a trucking business, which was a permitted use, without the requisite conditional use permit, and (2) a trucking school, which was not a permitted use.

After an evidentiary hearing, the trial court held appellants in contempt and appointed a receiver. It directed the receiver, among other things, to “take all steps necessary to discontinue any illegal business operations on the Subject Property . . . .”

### III

#### ISSUES ARISING OUT OF THE SUSPENSION OF APPELLANTS’ ATTORNEY

Appellants raise several issues arising out of the fact that their quondam attorney, Dennis M. Assuras, was suspended.

A. *Additional Factual and Procedural Background.*

Appellants have requested judicial notice of court records that show the following. The City has not opposed the request, which is hereby granted. (Evid. Code, §§ 452, subd. (d), 459, subd. (a).)

In July 2012, the State Bar and Assuras stipulated to discipline, as follows. Assuras was to be suspended from the practice of law for one year. However, aside from an actual suspension of 30 days, the suspension was stayed and Assuras was placed on probation for three years. One of the conditions of his probation was that he had to provide proof that he had passed the Multistate Professional Responsibility Examination (MPRE) within one year. The stipulation provided: “*Failure to pass the MPRE results in actual suspension without a further hearing until passage.*” (Italics added.)

On August 10, 2012, the State Bar Court approved the stipulation and recommended the stipulated discipline to the Supreme Court.

On December 3, 2012, the Supreme Court imposed discipline on Assuras. By and large, its order tracked the stipulation. In fact, the court summarized its own order as, “Recommended discipline imposed.” However, with regard to taking the MPRE, the terms of the order arguably differed from the terms of the stipulation. Specifically, the Supreme Court’s order stated: “. . . Assuras must also take and pass the [MPRE] within one year after the effective date of this order and provide satisfactory proof of such passage . . . within the same period. *Failure to do so may result in suspension.*” (Italics added.)

On January 27, 2014, the State Bar Court ordered Assuras suspended, “effective February 18, 2014,” due to his failure to pass the MPRE in a timely manner.

B. *Discussion.*

Appellants contend that the default judgment is “void” because, when their defaults were entered, their then-attorney, Assuras, was suspended from the practice of law.

It is arguable that appellants forfeited this contention by failing to raise it below. Indeed, the City has affirmatively asserted forfeiture. Appellants, however, argue that the default judgment is void and that voidness cannot be waived. Thus, in order to decide the preliminary issue of forfeiture, as well as to decide the merits, we must address whether the default judgment is void. We turn to that question.

The parties focus on the date when Assuras was suspended. According to appellants, he was suspended automatically on December 3, 2013, when he failed to take the MPRE within one year after the Supreme Court’s order. This would mean that he was already suspended on December 5, 2013, when defendant’s defaults were entered. It would also mean that he was still suspended on January 26, 2014, when he filed the first motion to set aside their defaults. According to the City, however, Assuras was not suspended until February 18, 2014, the effective date of the State Bar Court’s order suspending him.

In our view, however, there are other significant factual questions. For example, was Assuras already representing appellants on December 5, 2013, when their defaults were entered? Or did they retain him only after their defaults had already been entered?

On this record, we cannot say for sure. Appellants repeatedly state that Assuras was already representing them when their defaults were entered. However, they do not cite any support in the record for this statement. (See Cal. Rules of Court, rule 8.204(a)(1)(C).) In their second motion to set aside the defaults, they claimed that their defaults were entered as a result of excusable neglect, in that Banghu's mother, supposedly the principal of Bani, was out of the country and unaware of either the complaint or the defaults. If that is true, then it would appear that they did *not* retain Assuras until after their defaults were entered.

But if appellants did not retain Assuras until after their defaults were entered, then the fact that he was suspended (if it was a fact) would not make their defaults either void or voidable. Admittedly, he may also have been suspended when he filed the motion to set aside the defaults. However, that would not entitle appellants to have the motion set aside granted automatically, regardless of whether it was meritorious. At most, it might entitle them to file a second motion to set aside — which they did file, and which was denied on the merits.

Appellants cite *Lovato v. Santa Fe Internat. Corp.* (1984) 151 Cal.App.3d 549, which held that a default judgment, entered as a discovery sanction, was void because the underlying interrogatories were served on a suspended attorney and therefore did not

provide notice to the client. (*Id.* at pp. 553-555.) We fail to see how *Lovato* is relevant. Here, we repeat, there is no evidence that Assuras was representing appellants when their defaults were entered. Because appellants had no attorney of record, the City served the request for entry of default on them personally, by mail, as it was statutorily required to do. (Code Civ. Proc., § 587.)

There is an additional factual question as to whether appellants knew that Assuras had been suspended. In *Russell v. Dopp* (1995) 36 Cal.App.4th 765, we held that a judgment taken against clients represented by a nonattorney may be void, but only if the clients were not “coparticipants in the fraud.” (*Id.* at p. 774.) “[I]f the [clients] were aware of the fraud, the policy of protection of the public from unlicensed persons is inapplicable. . . . [I]f the [clients] knew they were being represented by an unlicensed person and intended to save the issue for appeal in the event they lost in the trial court . . . , they participated in the fraud, and the judgment should stand.” (*Ibid.*) Here, again, the record sheds no light on appellants’ knowledge.

There are “ . . . three fundamental principles of appellate review: (1) a judgment is presumed correct; (2) all intendments and presumptions are indulged in favor of correctness; and (3) the appellant bears the burden of providing an adequate record affirmatively proving error.” [Citation.]” (*Acquire II, Ltd. v. Colton Real Estate Group* (2013) 213 Cal.App.4th 959, 970.) Here, given the state of the record, appellants cannot show that Assuras was representing them when their defaults were entered; appellants

also cannot show that they did not know that Assuras had been suspended. Thus, they have not shown that the default judgment is void.

C. *Extrinsic Fraud or Mistake.*

Appellants also contend that, in light of Assuras's suspension, they are entitled to relief based on extrinsic fraud or mistake.

Appellants "ha[ve] raised the issue of extrinsic fraud for the first time before this court, and for this reason we decline consideration of that issue. [Citation.]" (*Factor v. Superior Court* (1970) 9 Cal.App.3d 345, 354; accord, *Morgan v. Clapp* (1929) 207 Cal. 221, 226-227.) Separately and alternatively, we also reject this contention because the record fails to establish that Assuras was representing appellants when their defaults were entered and fails to establish that they did not know that he had been suspended. (See part III.B, *ante*.)

D. *The City's Attorney's Failure to Disclose Assuras's Suspension.*

Appellants contend that they are entitled to relief from the default judgment because the City's attorney knew that Assuras had been suspended, yet failed to disclose this to the trial court.

Once again, appellants never raised this contention below. It is based on time records of the City's attorneys, which the City introduced in support of its request for attorney fees as part of the default judgment. These records show that one of the City's attorneys did the following:

February 25, 2014: “Print court docket case report and Assuras suspension profile.” (Capitalization altered.)

February 26, 2014: “Attend court motion to set aside default hearing; meeting with atty Assuras re suspension; court appearance on motion to obtain order denying motion to set aside the defaults . . . .” (Capitalization altered.)

Precisely because appellants did not raise this issue below, the City has never had the opportunity to introduce evidence that would place its attorney’s acts and omissions in a different light. For example, for all we know, he did advise the trial court, albeit off the record, that Assuras had been suspended.

We therefore decline to reach this contention for the first time on appeal. “[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court.’ Thus, ‘we ignore arguments, authority, and facts not presented and litigated in the trial court. Generally, issues raised for the first time on appeal which were not litigated in the trial court are waived. [Citations.]’” (*Newton v. Clemons* (2003) 110 Cal.App.4th 1, 11, fn. omitted.)

We also note that appellants have not shown prejudice. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475.) Let us imagine for a moment that the City’s attorney *did* advise the trial court that Assuras had been suspended. The best that appellants could hope for was that the trial court would take the motion to set aside the defaults filed by Assuras off calendar and would give appellants time to retain new counsel, who would file a new

motion to set aside the defaults. In the end, however, that is exactly what happened — Attorney Yolanda Flores-Burt filed a second motion to set aside the defaults, and the trial court denied that second motion on the merits.

#### IV

#### INTRODUCING EVIDENCE BEYOND THE ALLEGATIONS OF THE COMPLAINT

Appellants contend that the City reopened the default by introducing evidence in its prove-up package that went beyond the allegations of the complaint.

Appellants rely on *Jackson v. Bank of America* (1986) 188 Cal.App.3d 375. There, we held that the complaint failed to allege that the defendant's conduct caused the plaintiff's damages (*id.* at p. 388); hence, when the plaintiff introduced evidence of causation at the default prove-up hearing, there was a de facto amendment of the complaint, which reopened the default. (*Id.* at pp. 389-390.)

Here, by contrast, appellants do not claim that the complaint was missing any allegations essential to the City's nuisance causes of action. As we will discuss in more detail below, they simply claim that the evidence at the prove-up hearing was more specific regarding the nature of the existing violations than was the complaint. The introduction of such evidence, however, would not constitute a de facto amendment; it would be, at most, an immaterial variance. (Code Civ. Proc., § 470; *Pack v. Vartanian* (1965) 232 Cal.App.2d 466, 474.) Thus, there would be no reason why it should reopen the default.

Separately and alternatively, we find no discrepancies between the allegations of the complaint and the evidence introduced at the prove-up hearing. Appellants claim there were four discrepancies, as follows.

First, they claim that the complaint did not allege, and yet the City introduced evidence, that the violations created an attractive nuisance to children. The complaint, however, alleged: “Defendants’ maintenance of the Subject Property in violation of numerous laws . . . pose[s] a[n] . . . attractive nuisance . . . .”

Second, they claim that the complaint did not allege, and yet the City introduced evidence, that the property had serious latent defects. The complaint, however, alleged “fire hazards” as well as a “threat[.]” to “[s]torm water drainage” as a result of “pollutants on the Subject Property.”

Third, they claim that the complaint did not allege, and yet the City introduced evidence, that pollutants had contaminated the soil and were threatening a storm water drain. The complaint, however, alleged “soil pollution.” Also, as just mentioned, it alleged that “pollutants” were “threaten[ing]” “[s]torm water drainage.”

Fourth and finally, they claim that the complaint did not allege, and yet the City introduced evidence, that there were several illegal occupancies. The complaint, however, alleged “[i]llegal . . . occupation of two large commercial metal structures” as well as “[f]ailure to obtain a valid Certificate of Occupancy for the occupancies at the Subject Property.”

We therefore conclude that the default was not reopened as a result of any discrepancy between the allegations of the complaint and the evidence in the prove-up package.

## V

### ISSUES ARISING OUT OF THE TRIAL COURT'S AWARD OF ATTORNEY FEES AND ADMINISTRATIVE COSTS

Appellants raise several issues arising out of the fact that the trial court awarded the City attorney fees and administrative costs.

#### A. *Additional Factual and Procedural Background.*

In its complaint, the City prayed for (1) “nuisance abatement costs, including staff and administrative costs,” as well as (2) “attorneys’ fees to the extent allowed by law . . . .” However, it did not specify any dollar amounts for either of these items.

The City requested entry of default using Judicial Council Form CIV-100. This form has spaces that can be used to specify the amounts sought for (among other things) attorney fees. The City left all of these blank.

The City then requested entry of a default judgment, once again using Judicial Council Form CIV-100. This time, it specified that it was seeking \$80,087.90 in attorney fees.

The default judgment awarded the City \$80,087.90 in attorney fees and \$4,189.68 in administrative costs.

B. *Failure to Request Attorney Fees in the Request for Entry of Default.*

Appellants contend the trial court erred by awarding the City attorney fees because the City did not request attorney fees in its request for entry of default.

Appellants rely on *Garcia v. Politis* (2011) 192 Cal.App.4th 1474. There, the plaintiff obtained a default judgment that did not award attorney fees. Two months later, he filed a motion for attorney fees. (*Id.* at p. 1477.) The court held that the postjudgment motion was improper: “A plaintiff electing to proceed by way of a default judgment may recover statutory attorney fees only if a request for those fees is included in the request for default judgment.” (*Id.* at pp. 1476-1477.)

It explained: “Subdivision (a) of section 585 sets forth the procedure for entry of a default judgment in an action ‘arising upon contract or judgment for the recovery of money or damages only.’ It provides that, upon written application by the plaintiff, the clerk must enter the default of the defendant and immediately ‘enter judgment for the principal amount demanded in the complaint, . . . together with interest allowed by law or in accordance with the terms of the contract, and the costs against the defendant.’

[Citation.] The clerk may include attorney fees in the judgment if a schedule of attorney fees has been adopted by rule of court and the contract provides for attorney fees or the action is one in which the plaintiff is entitled by statute to recover attorney fees. If the plaintiff is entitled to recover attorney fees but no schedule of attorney fees has been adopted by rule of court, the plaintiff is required to ‘file a written request at the time of application for entry of the default of the defendant or defendants, to have attorneys’ fees

fixed by the court,’ and the court will then hear the application and render judgment.

[Citation.]

“Actions that do not arise upon contract or judgment for the recovery of money or damages only are governed by subdivision (b) of section 585. That subdivision provides that the clerk must enter the default of the defendant upon written application of the plaintiff, and that ‘[t]he plaintiff thereafter may apply to the court *for the relief demanded in the complaint*. The court shall hear the evidence offered by the plaintiff, and shall render judgment in the plaintiff’s favor for that relief.’ [Citation.]

“What these two subdivisions make clear is that a party seeking entry of a default judgment must apply for *all* of the relief sought — including attorney fees — when application is made for entry of default.” (*Garcia v. Politis, supra*, 192 Cal.App.4th at pp. 1478-1479.)

The court also noted that, under California Rules of Court, rule 3.1800(a)(9), a party seeking entry of a default judgment on declarations must include “[a] request for attorney fees if allowed by statute or by the agreement of the parties.” (*Garcia v. Politis, supra*, 192 Cal.App.4th at p. 1479.)

We gather, from the *Garcia* court’s statement of its own holding, that the request for attorney fees need only be included in the request for entry of a default *judgment*. This is also apparent from its reliance on California Rules of Court, rule 3.1800(a)(9), which applies only to a request for entry of a default *judgment*.

Admittedly, there is some room for confusion. In an action governed by Code of Civil Procedure section 585, subdivision (a), the plaintiff must apply for both the entry of default and a default judgment, including attorney fees, at the same time. By contrast, in an action governed by Code of Civil Procedure section 585, subdivision (b), the plaintiff must apply for the entry of default first and only thereafter for a default judgment, including attorney fees. Thus, at one point, *Garcia* stated that “a party seeking entry of a default judgment must apply for *all* of the relief sought — including attorney fees — when application is made for *entry of default*.” (*Garcia v. Politis, supra*, 192 Cal.App.4th at p. 1479.) Nevertheless, in context, it is clear that this is a shorthand reference to a request for entry of a default *judgment*.

Here, the City’s request for entry of default did not include a request for attorney fees. However, its request for entry of a default *judgment did* include a request for attorney fees. Under *Garcia*, this was all that was required.

C. *Award in Excess of the Prayer of the Complaint.*

Appellants contend the trial court erred by awarding attorney fees and administrative costs because the City did not specify these amounts in its complaint.

Code of Civil Procedure section 580, subdivision (a), as relevant here, provides: “The relief granted to the plaintiff, if there is no answer, cannot exceed that demanded in the complaint . . . .”

““[T]he primary purpose of the section is to guarantee defaulting parties adequate notice of the maximum judgment that may be assessed against them.” [Citations.]’

[Citation.] ‘[D]ue process requires notice to defendants . . . of the potential consequences of a refusal to pursue their defense. Such notice enables a defendant to exercise his right to choose . . . 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.’ [Citation.]

“‘[A] default judgment greater than the amount specifically demanded is void as beyond the trial court’s jurisdiction.’ [Citation.]” (*In re Marriage of Kahn* (2013) 215 Cal.App.4th 1113, 1116-1117.)

It has been held, however, that a default judgment can properly include attorney fees recoverable as costs, even if the complaint did not specify a dollar amount for them. (*Simke, Chodos, Silberfeld & Anteau, Inc. v. Athans* (2011) 195 Cal.App.4th 1275, 1285, 1290-1291, 1293.) We recognize that in *Simke*, the defendant’s default was entered as a discovery sanction (*id.* at p. 1283), and the appellate court limited its holding to that situation. (*Id.* at p. 1278.) Nevertheless, the court’s reasoning swept more broadly. For example, it explained that such fees do not constitute “relief” within the meaning of Code of Civil Procedure section 580, subdivision (a). (*Id.* at pp. 1285, 1290-1291, 1293.) It also explained that, when the complaint was filed and “prior to the prove-up hearing, [the plaintiff] could not have known or accurately predicted the total amount of attorney fees the firm would incur in the litigation and could not have included that amount in the complaint. ‘The law[, including due process,] never requires impossibilities.’ [Citations.]” (*Id.* at p. 1294, italics omitted.)

*Horton v. Horton* (1941) 18 Cal.2d 579 is even more closely on point. There, the wife filed a complaint for separate maintenance (*id.* at pp. 580-581), in which she requested “a reasonable sum” for attorney fees. (*Id.* at p. 581.) After the husband failed to respond, the trial court entered his default, followed by a default judgment awarding the wife, among other things, \$400 in attorney fees. (*Ibid.*) On appeal, the husband argued that “the judgment . . . [wa]s void for the reason that the relief therein granted was in excess of that demanded in the complaint,” specifically including the \$400 in attorney fees. (*Id.* at p. 582.) The Supreme Court held: “[T]he judgment awarding to the wife . . . \$400 for attorney fees[] was directly responsive to the wife’s prayer for reasonable sums for . . . attorney fees and costs, and as so framed this judgment cannot be said to transgress the limitation of section 580 of the Code of Civil Procedure.” (*Id.* at p. 583.)

Under the authority of *Simke* and *Horton*, we conclude that here, the trial court could properly award attorney fees.

In contrast to attorney fees and costs of suit, however, the City’s administrative costs are not a mere incident of the judgment. (See *Berti v. Santa Barbara Beach Properties* (2006) 145 Cal.App.4th 70, 75 [costs and attorney fees are an incident of the judgment].) They are an item of damages, proximately caused by the nuisance. Because the complaint did not state any amount for these costs, the trial court erred by awarding them.

D. *Particular Items of Attorney Fees and Costs.*

Appellants contend that the trial court erred by awarding the City certain items of attorney fees and costs that were not properly recoverable.<sup>3</sup>

“[A]ttorney fees are permitted in a civil action when authorized by statute, contract, or law. [Citation.] A municipal ordinance is a law within the meaning of this provision. [Citations.]” (*City of Monte Sereno v. Padgett* (2007) 149 Cal.App.4th 1530, 1535.)

Section 1-13 of the Fontana Municipal Code provides that: “The prevailing party in any judicial action and/or administrative proceeding to abate a nuisance and/or to enforce any provision of this Municipal Code may elect to recover the incurred attorneys’ fees. In no judicial action or administrative proceeding shall an award of attorneys’ fees to a prevailing party exceed the amount of reasonable attorneys’ fees incurred by the city in the judicial action or administrative proceeding.”

In addition, section 18-19(a) of the Fontana Municipal Code allows the City to collect “[t]he costs of abating [a] nuisance and the related administrative expenses . . . .”

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<sup>3</sup> Appellants also contend that the trial court erred by awarding the City certain items of administrative costs. In part V.C, *ante*, however, we held that the trial court erred by awarding any administrative costs at all. Accordingly, appellants’ challenge to particular items of administrative costs is moot.

“Expenses” is defined as including “legal fees” as well as “other related costs.” (Fontana Muni. Code, § 18-17(d).)<sup>4</sup>

“We review an award of fees . . . by the trial court for abuse of discretion. [Citation.] However, de novo review of an award is appropriate where the determination of whether the criteria for an award of attorney fees . . . have been satisfied amounts to statutory construction and a question of law. [Citations.]” (*Law Offices of Marc Grossman v. Victor Elementary School District* (2015) 238 Cal.App.4th 1010, 1013-1014.)

Appellants object to the following items of attorney fees and costs.

1. *Fees incurred in revoking the CUP.*

Some of the City’s claimed attorney fees related to the administrative proceeding in which the City revoked the CUP for the property.

These attorney fees were not recoverable under Section 1-13 of the Fontana Municipal Code. That section specifically provides that “[i]n no judicial action or

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<sup>4</sup> It could be argued that the City was not entitled to collect abatement costs because it had not served an order on the property owner fixing the amount of costs. (See Fontana Muni. Code, §§ 18-17(a)-(c), 18-18, 18-21(b).)

It could also be argued that the City was not entitled to collect abatement costs by means of a civil action; rather, it had to proceed by recording and then foreclosing a lien on the property. (See Fontana Muni. Code, §§ 18-11, 18-17, 18-19; see also Gov. Code, §§ 38773.5, subd. (a), 54988, subd. (a).)

Appellants, however, did not raise these arguments in their opening brief — or even in their reply brief — and thus they have forfeited them. (*In re Marriage of LaMoure* (2011) 198 Cal.App.4th 807, 817.)

administrative proceeding shall an award of attorneys' fees to a prevailing party exceed the amount of reasonable attorneys' fees incurred by the city *in the judicial action or administrative proceeding.*" (Italics added.) In other words, in this judicial action, the City can recover the fees that it incurred in this judicial action, but not the fees that it incurred in the earlier administrative proceeding.

However, these fees were recoverable under section 18-19(a) of the Fontana Municipal Code. That section allows the recovery of "expenses" "related" to "abating the nuisance." As noted, "expenses" includes legal fees. (Fontana Muni. Code, § 18-17(d).) Revoking the CUP was reasonably calculated to prevent appellants from operating their business(es) on the property and thus from committing further violations.

In part V.C, *ante*, we held that the City cannot recover administrative expenses, because the complaint did not state an amount of administrative expenses; however, it can recover attorney fees, even though the complaint did not specify an amount of attorney fees. Appellants argue that, if these particular fees were recoverable under section 18-19(a) of the Fontana Municipal Code, then they necessarily constitute administrative expenses that had to be stated in the complaint.

We disagree. As Gertrude Stein might have said, attorney fees are attorney fees are attorney fees. These particular fees are attorney fees available by statute — namely, sections 18-17(d) and 18-19(a) of the Fontana Municipal Code. Under Code of Civil Procedure section 1033.5, subdivision (a)(10)(B), attorney fees are recoverable as costs whenever they are authorized by statute. Accordingly, we conclude that these fees are

recoverable as an incident of the judgment, and not as damages, for purposes of *Simke* and *Horton*. (See part V.C, *ante*.)

2. *Fees incurred in preparing a motion for a preliminary injunction.*

Some of the City’s claimed fees relate to drafting a motion for a preliminary injunction. However, the City never actually filed such a motion. Appellants conclude that “[t]he City should not have been awarded these fees.”

“Generally speaking, hours are reasonable if they were ‘reasonably expended in pursuit of the ultimate result achieved in the same manner that an attorney traditionally is compensated by a fee-paying client for all time reasonably expended on a matter.’ [Citations.]” (2 Pearl, Cal. Attorney Fee Awards (Cont.Ed.Bar 3d ed. 2016) § 9.4, p. 3/16.) A reasonable attorney will sometimes find it necessary to prepare a motion for a preliminary injunction, just in case, even though ultimately it is never filed. Thus, the trial court could find that fees here were “incurred by the [C]ity in the judicial action” within the meaning of section 1-13 of the Fontana Municipal Code.

3. *Fees incurred in opposing a motion to set aside the defaults.*

Some of the City’s claimed fees relate to appellants’ second motion to set aside their defaults.<sup>5</sup> Appellants argue that, when that motion was litigated, the City sought an award of fees, which the trial court denied. They conclude that “the fees should not have been awarded.”

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<sup>5</sup> Appellants refer to “[m]otions,” plural. However, they cite only one order denying attorney fees — the order on their second motion to set aside the default. Accordingly, we consider only that motion.

We cannot discern the legal theory behind this contention. Certainly it is not the Fontana Municipal Code. Appellants have forfeited the contention by failing to support it with citation of authority and reasoned argument. (*Carr v. Rosien* (2015) 238 Cal.App.4th 845, 856, fn. 6.)

We also note that the City's request for fees at the time of the motion was based on Code of Civil Procedure section 128.5. Thus, the trial court was not called on to determine, and it did not determine, whether the City was entitled to the same attorney fees on any other ground. Moreover, we know of no legal principle that would preclude the City from seeking the same fees later on different grounds.

4. *Printing and copying costs.*

The City sought and was awarded its attorneys' printing and copying costs, totaling \$268.64.

Printing and copying costs are not recoverable as costs of suit. (Code Civ. Proc., § 1033.5, subds. (a), (b)(3).) Moreover, as we already held in part V.C, *ante*, the City could not recover administrative costs as damages because the complaint did not state any amount for these costs. Thus, the trial court erred by awarding printing and copying costs.

VI

THE VALIDITY OF THE SERVICE ON BANI

Defendants contend — for the first time on appeal — that the default judgment against Bani is void because Bani was not properly served.

A. *Additional Factual and Procedural Background.*

The City served Bani by substituted service: (1) by leaving a copy of the summons and complaint at the address listed for Bhangu, as Bani's agent for service of process, with an adult member of the household, and (2) by mailing a copy of the summons and complaint addressed to Bani at the same address.

The City also served Bhangu, as an individual defendant, by substituted service: (1) by leaving a copy of the summons and complaint at the same address, with an adult member of the household, and (2) by mailing a copy of the summons and complaint addressed to Bhangu at the same address.<sup>6</sup>

B. *Discussion.*

A corporation — including a limited liability corporation — may be served by effecting service on its agent for service of process. (Code Civ. Proc., § 416.10, subd. (a); see also Corp. Code, § 17701.16, subd. (a) [allowing service on limited liability corporations under Code Civ. Proc., § 413.10 et seq.].)<sup>7</sup>

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<sup>6</sup> The City also submitted proof that it had been unable to personally serve Bhangu despite reasonable diligence, as necessary for substituted service on an individual (Code Civ. Proc., § 415.20, subd. (b)) but not for substituted service on a corporation (Code Civ. Proc., § 415.20, subd. (a)).

<sup>7</sup> For some reason, throughout their argument, defendants cite Code of Civil Procedure section 416.40, dealing with service on an unincorporated association. Bani holds itself out as a limited liability corporation; there is no evidence that it is an unincorporated association.

One of the ways a limited liability corporation can be served is by substituted service. (1 Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2015) ¶ 4:172, p. 4-26.) This requires that a copy of the summons and complaint be left at the office of the person to be served (or, in some cases, at the mailing address of the person to be served), in the presence of a person who is apparently in charge, “and by thereafter mailing a copy of the summons and complaint by first-class mail, postage prepaid to the person to be served at the place where a copy of the summons and complaint were left.” (Code Civ. Proc., § 415.20, subd. (a).)

Appellants argue that the City violated these procedures by addressing Bani’s copy of the summons and complaint to Bani, rather than to Bhangu, as its agent for service of process. We may assume, without deciding, that appellants are correct. Even if so, however, strict compliance with the mailing requirement is not required; substantial compliance is sufficient. (*Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1436.) In this case, it would constitute substantial compliance if, despite the City’s failure to address the summons and complaint to Bhangu, Bhangu actually received them. (See *id.* at pp. 1436-1437.)

Bhangu submitted a declaration in support of appellants’ motion for reconsideration (filed by Attorney Flores-Burt). In it, he stated that appellants had failed to file a responsive pleading due to a “misunderstanding of the laws and how they apply.” He added, “Unfortunately, I was operating under the mistaken belief that we (as Defendants) had to be personally served and at our place of business and that service at

any other location or manner was not effective. We realize now that said belief was mistaken . . . . Had I known then what I know now, the responsive pleadings would have been filed.” This boils down to an admission that he did actually receive a copy of the summons and complaint. Thus, it shows substantial compliance.

Separately and alternatively, the record shows that appellants are judicially estopped to challenge the service on Bani.

“““Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. [Citations.] The doctrine’s dual goals are to maintain the integrity of the judicial system and to protect parties from opponents’ unfair strategies. [Citation.] Application of the doctrine is discretionary.” [Citation.] The doctrine applies when “(1) the same party has taken two positions; (2) the positions were taken in judicial . . . proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.” [Citations.]’ [Citations.]” (*People v. Castillo* (2010) 49 Cal.4th 145, 155.)

By bringing a series of motions claiming that their failure to respond to the complaint was due to excusable mistake,<sup>8</sup> appellants essentially conceded that they had

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<sup>8</sup> The City argues that by filing the various motions, appellants made a general appearance and thereby forfeited any objection to service. Because we are resolving the issue on other grounds, we express no opinion on this point.

been properly served. The passage from Bhangu’s declaration, stating that he was “mistaken” about whether appellants had been properly served, and concluding “Had I known then what I know now, the responsive pleadings would have been filed,” constituted a representation that the service was proper. Appellants’ offer to file an answer was a similar concession.

In addition, in appellants’ second motion to set aside the defaults, Bhangu’s mother — identified as the principal of Bani — specifically stated, “I am not arguing that [the City] didn’t properly serve the Complaints, I am saying that due to my excusable neglect, I didn’t answer the Complaints.” Again, this was a representation that the service was proper.

The trial court accepted appellants’ position by denying their motions. Had it believed that appellants had not been properly served, it would have had to grant the motions; obviously, it concluded that it had personal jurisdiction.

Finally, the record shows no grounds for a claim of ignorance, fraud, or mistake. Appellants were in a position to know the facts as to how they were served, and they had Attorney Flores-Burt — an attorney who had not been suspended — to advise them on the legal consequences of those facts.

We therefore conclude that appellants are judicially estopped to contend, at this late date, that Bani was not properly served.

## VII

### THE APPOINTMENT OF A RECEIVER

Defendants contend that the trial court erred by appointing a receiver because there was no evidence that less drastic remedies would be inadequate.

A receiver may be appointed “[a]fter judgment, to carry the judgment into effect.” (Code Civ. Proc., § 564, subd. (b)(3).) This includes the judgment in a nuisance abatement proceeding. (*City and County of San Francisco v. Daley* (1993) 16 Cal.App.4th 734, 744.)

“California rigidly adheres to the principle that the power to appoint a receiver is a delicate one which is to be exercised sparingly and with caution. It is said by the state's courts that the appointment of a receiver is ‘an extraordinary and harsh,’ and ‘delicate,’ and ‘drastic,’ remedy to be used ‘cautiously and only where less onerous remedies would be inadequate or unavailable. . . .’ [Citations.] And a party to an action should not be ‘subjected to the onerous expense of a receiver, unless . . . his appointment is obviously necessary to the protection of the opposite party . . . .’ [Citation.]” (*Morand v. Superior Court* (1974) 38 Cal.App.3d 347, 351.)

However, “[t]he availability of other remedies does not, in and of itself, preclude the use of a receivership. [Citation.] Rather, a trial court must consider the availability and efficacy of other remedies in determining whether to employ the extraordinary remedy of a receivership. [Citation.]’ [Citation.]” (*Gold v. Gold Realty Co.* (2003) 114 Cal.App.4th 791, 807.)

“We review a trial court’s decision to appoint a receiver to carry a judgment into effect for an abuse of discretion.” (*City and County of San Francisco v. Daley, supra*, 16 Cal.App.4th at p. 744.)

Defendants argue that the trial court could have obtained compliance “through mandatory and prohibitory injunctions.” Pardon our French, but *c’est á rire*. The default judgment already included injunctions. Among other things, it enjoined defendants from operating any business on the property without a business license, from maintaining any use of the property without the appropriate conditional use permit, and from maintaining any use of the property that violated the zoning code. The trial court found that defendants had violated some 15 of the 22 injunctions in the default judgment. It added: “Their lack of compliance borders on being flagrant. They simply ignored the order . . . treating it as if it didn’t exist . . . .” In sum, then, the trial court properly found that injunctive relief was inadequate.

Defendants also argue that there was evidence that they had applied for a CUP. In their view, this shows “that they were willing to comply with the default judgment” and “had begun the process of remediating the property . . . .” The evidence, however, merely showed that they had applied for a CUP in the past, not that they were still pursuing one in the present. A City official was asked whether defendants had “*ever . . . started the conditional use permit process*”; he answered, “Yes.” (*Italics added.*) Presumably this referred to the fact that they had applied for — and, had in fact, obtained — a CUP in 2009. That CUP, however, had been revoked in 2013. The evidence before

the trial court showed that, as of the time when the City was seeking the appointment of a receiver, “there [were] no records to indicate that [defendants] ha[d] begun the process to obtain a Conditional Use Permit . . . .”

In any event, even assuming that defendants had applied for a new CUP, that would be beside the point. Their violations of the default judgment were so numerous and so flagrant that the trial court could reasonably find that any application for a CUP that they made was for purposes of delay and not in good faith.

Defendants complain that the trial court did not make an express finding that less drastic remedies would be inadequate and did not expressly consider this issue on the record. However, they cite no authority requiring an express finding. “[W]here no express finding is required a reviewing court must ‘presume that the trial court made all factual findings necessary to support the judgment for which substantial evidence exists in the record.’ [Citations.]” (*Cypress Semiconductor Corporation v. Maxim Integrated Products, Inc.* (2015) 236 Cal.App.4th 243, 266.) As discussed, there was substantial evidence that lesser remedies would be inadequate.

Finally, defendants argue that the receiver was essentially directed to shut down the existing business operations at the property. In their reply brief, they accuse the City of failing to respond to this argument. As far as we can tell, however, it does not raise any points separate and apart from their argument that the trial court should have considered less drastic remedies. Accordingly, we do not discuss it further.

We conclude that defendants have not shown that the trial court erred in any way in appointing a receiver.

## VIII

### FRIVOLOUS APPEAL SANCTIONS

Finally, the City requests sanctions, on the ground that defendants' appeal is frivolous.

Under California Rules of Court, rule 8.276, there is a clearly prescribed procedure for obtaining frivolous appeal sanctions; it requires a timely motion, as well as a declaration supporting the amount of sanctions sought. Even before the adoption of this rule, we stated: “[We] would prefer that requests for sanctions for an allegedly frivolous appeal be contained in a separate motion, filed after the appellant’s reply brief. Such a motion should be supported by points and authorities concerning the frivolousness of the appeal and the amount of the sanctions to be awarded, and by a declaration concerning the expenses incurred by the moving party as a result of the appeal.” (*Summers v. City of Cathedral City* (1990) 225 Cal.App.3d 1047, 1074, fn. 22.)

The City has disregarded this prescribed procedure without any apparent good cause. Indeed, it is hard to see how good cause could possibly exist; the City itself cited *Summers* in its brief. We therefore deny the City’s request.

IX

DISPOSITION

The judgment is modified, as follows: (1) the award of \$4,189.68 in administrative costs is stricken; and (2) \$268.64 of the award of \$80,087.90 in attorney fees is stricken as copying costs, leaving an award of \$79,819.26 in attorney fees. The judgment as thus modified is affirmed. The City is awarded costs on appeal against appellants. We leave it up to the trial court on remand to determine in the first instance whether costs on appeal should include attorney fees.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ  
P. J.

We concur:

McKINSTER  
J.

CODRINGTON  
J.