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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RUTAN & TUCKER,

Plaintiff and Respondent.

v.

LAURENCE L. GRABOWSKI,

Defendant and Appellant,

G044964

(Super. Ct. No. 05CC03732)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County,
Steven L. Perk, Judge. Affirmed.

Larry R. Marshall (Pro Hac Vice); Thomas Whitelaw & Tyler, Michael I.
Katz and Carolyn N. Ko for Defendant and Appellant.

Rutan & Tucker, Stephen A. Ellis and Hanni Pichel for Plaintiff and
Respondent.

Laurence L. Grabowski (Grabowski) owes the law firm Rutan & Tucker (Rutan) legal fees for litigation involving a family trust dispute. After Grabowski failed to make payments or honor his promissory note, Rutan filed a lawsuit against Grabowski and obtained a default judgment. Approximately five years later, Rutan learned Grabowski was going to receive a large monetary settlement arising out of litigation involving a family business dispute (hereafter Orange County Litigation). Rutan filed a notice of lien in the pending action. After the court ordered the parties to prepare a final judgment, Rutan filed a motion for order regarding satisfaction of the lien. The court granted the motion. A few months later, Grabowski filed a motion to set aside the default and default judgment claiming it was void because he was not properly served with the summons and complaint. The court denied Grabowski's motion and deemed the lien, based on the default judgment, to be valid. This appeal challenges the order denying Grabowski's motion to set aside the default and default judgment as void. Finding no error, we affirm the order.¹

I

Grabowski is a former resident of California but has lived in Missouri for over 10 years. In 2004, Grabowski owed Rutan legal fees, and he executed an interest bearing promissory note in favor of Rutan for \$167,237.16. The note came due in December 2004, and when Grabowski failed to make any payments, Rutan filed a lawsuit for breach of the promissory note. The summons was filed with the court on March 3, 2005.

¹ In a separate appeal, Grabowski sought to set aside the court's order regarding satisfaction of the judgment lien. (*Grabowski v. Rutan & Tucker* (February 24, 2012) G044438 [nonpub. opn.].) Grabowski again argued the default judgment was void, and we ruled he was wrong for the same reasons as stated in this opinion. Nevertheless, we reversed the court order on the technical grounds the parties failed to comply with the court's order to actually prepare a final judgment to which the lien could attach.

On March 14, 2005, Rutan served the summons and complaint by sending copies by mail to Grabowski. Rutan regularly communicated with Grabowski in the family trust litigation using his Missouri post office box mailing address (hereafter referred to as the Missouri Address). Rutan sent one copy of the summons and complaint by regular first class mail and another copy by certified mail with a return receipt requested to the same Missouri Address.

Rutan never received a signed return receipt from Grabowski. However, the mail was not sent back or returned to Rutan. It did not receive a return receipt marked “unclaimed.”

Grabowski failed to file a response in the action. Rutan sought entry of a default judgment. The court initially rejected the request because Rutan had not submitted with its proof of service the ““original [g]reen “return receipt” mailed card.”” In response, Rutan submitted Stephen A. Ellis’s declaration to support the request for a default judgment. In his declaration, Ellis provided evidence proving Grabowski had actually received the service of the summons and complaint.

Specifically, Ellis explained that when Grabowski executed the note he was being represented by Gary E. Shoffner in his family’s Orange County Litigation. The note was executed in February 2004 and was due and payable in December 2004 because Grabowski and Rutan believed the Orange County Litigation would be quickly resolved in Grabowski’s favor and he would be able to pay off the note. However, the lawsuit was delayed after it was sent to arbitration.

Ellis stated that during Rutan’s representation of Grabowski in the trust litigation, the law firm regularly communicated with Grabowski at his Missouri Address. He attested, “[Rutan] had numerous conversations with . . . Grabowski regarding the documents that were sent to the Missouri Address. These included conversations about bills, pleadings and letters.” He explained Rutan served the summons and complaint in

the collection action by sending copies to the same Missouri Address. One set was sent via first class mail, and one set was sent via certified mail with a return receipt requested.

Ellis declared Rutan did not receive a signed return receipt card from Grabowski, however Ellis explained he had been “in periodic contact with Mr. Shoffner regarding not only the Orange County Litigation, but also regarding this matter. For example, on July 6, 2005, I sent an e-mail to Mr. Shoffner in an attempt to resolve this matter, and informing Mr. Shoffner that [Rutan] would have to seek entry of . . . Grabowski’s default if progress in this matter was not made by the July 25, 2005 [c]ase [m]anagement [c]onference. Acknowledging that [Rutan] had filed suit against . . . Grabowski on the promissory note, Mr. Shoffner replied, ‘I will try to get back to you no later than Monday.’ On July 12, 2005, Mr. Shoffner again replied to my July 6, 2005 e-mail and said, ‘call me to discuss how the [Rutan] lawsuit can be resolved.’”² Ellis attached copies of the e-mails to his declaration.

After considering Ellis’s declaration, the court found there was sufficient evidence Grabowski had actually been served and it granted Rutan’s application for a default judgment. Rutan served and then filed the notice of entry of the default judgment with the court at the end of February 2006.

In July 2006, Rutan filed a “notice of filing of foreign judgment” in the Missouri state court to register its judgment. Grabowski appeared and contested enforcement of the foreign judgment. The Missouri court refused to register the default judgment.

² In addition, Shoffner included information in the July 21 e-mail about the progress being made in the Orange County Litigation. Shoffner offered information about Grabowski’s interest in several properties involved in that litigation. Shoffner sent Rutan a proposed order he expected would soon resolve the lawsuit, after which Rutan would be paid from the proceeds. Shoffner stated the parties were motivated to resolve the case this year. It can be inferred from Shoffner’s e-mail that he believed Grabowski could soon have the means to pay the Rutan bill and there was no need to enter Grabowski’s default.

When Rutan learned the Orange County Litigation had settled, and Grabowski was to receive payments totaling over \$2 million, it filed a notice of lien and a motion for an order for satisfaction of the lien. On September 7, 2010, the court granted the motion. Grabowski filed an appeal.

Five months later, on February 1, 2011, Grabowski filed a motion to set aside the default and default judgment due to improper service. The court denied the motion. In its minute order the court ruled, “[T]he ‘other evidence’ before the court at the [time] the default judgment entered was sufficient to show actual delivery to [Grabowski.] [(Code Civ. Proc., § 417.20, subd. (a).)³] Since the motion is brought more [than two] year[s] after entry the moving party must show that the judgment is void on its face. [Grabowski] has not done that.”

II

“Generally, a party who has not actually been served with summons has three avenues of relief from a default judgment. [¶] First, . . . section 473.5, subdivision (a) provides: ‘When service of a summons has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered against him or her in the action, he or she may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the action. [¶] . . . [S]uch motion must be made no later than two years after entry of judgment, and the party must act with diligence upon learning of the judgment. (§ 473.5 . . .) [Citations.]’” (*Trackman v. Kenney* (2010) 187 Cal.App.4th 175, 180 (*Trackman*)). Because Grabowski’s motion was filed over two years after the entry of judgment, section 473.5 does not offer him an avenue for relief.

Section 473, subdivision (d), also does not assist Grabowski. It provides in pertinent part: “The court may, . . . on motion of either party after notice to the other

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

party, set aside any void judgment or order.” It is well settled, “Where a party moves under section 473, subdivision (d) to set aside ‘a judgment that, though valid on its face, is void for lack of proper service, the courts have adopted by analogy the statutory period for relief from a default judgment’ provided by section 473.5, that is, the two-year outer limit. [Citations.]” (*Trackman, supra*, 187 Cal.App.4th at p. 180.)

Second, a “party can show that extrinsic fraud or mistake exists, such as a falsified proof of service, and such a motion may be made at any time, provided the party acts with diligence upon learning of the relevant facts. [Citations.]” (*Trackman, supra*, 187 Cal.App.4th at p. 181.) Grabowski does not allege extrinsic fraud or mistake occurred in this case. Moreover, this equitable relief would not be available because the record shows Grabowski did not act with diligence. Grabowski certainly knew about the default judgment by 2006 when he contested Rutan’s attempts to enforce the foreign judgment in Missouri. Waiting approximately five years (until February 2011), before moving to set aside the default was not acting diligently.

“The third avenue of relief is a motion to set aside the default judgment on the ground that it is facially *void*. (§ 473, subd. (d) [‘The court may . . . set aside any void judgment’]; [citation].) ‘A judgment or order that is invalid on the face of the record is subject to collateral attack. [Citation.] It follows that it may be set aside on motion, with no limit on the time within which the motion must be made.’ [Citation.] This does not hinge on evidence: A void judgment’s invalidity appears on the *face of the record*, including the proof of service. [Citations.]” (*Trackman, supra*, 187 Cal.App.4th at p. 181.)

Specifically, “‘A judgment . . . is . . . void on its face when the invalidity is apparent upon an inspection of the judgment-roll. [Citation.]’” (*Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1441 (*Dill*)). The judgment roll for a default judgment is statutorily defined as “the summons, with the affidavit or proof of service; the complaint; the request for entry of default . . . and a copy of the judgment[.]”

(§ 670, subd. (a).) The question of whether a judgment is void on its face is a question of law that we review de novo. (See *Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 496.)

Grabowski alleges the default and default judgment are void on their face because: (1) he was never personally served with the summons and complaint; (2) he never appeared in the case; (3) he never entered his appearance in the case; (4) his attorney never entered an appearance; (5) the acknowledgement of receipt of summons was not returned or filed by Rutan; (6) no signed return receipt was filed; and (7) Rutan's other evidence (i.e., Ellis's declaration) failed to establish actual service of the summons and complaint.

The first contention can be dealt with quickly. Personal service was not required. Section 415.40 provides, "A summons may be served on a person outside this state in any manner provided by this article or by sending a copy of the summons and of the complaint to the person to be served by first-class mail, postage prepaid, requiring a return receipt. Service of a summons by this form of mail is deemed complete on the 10th day after such mailing." Thus, service by mail outside the state is expressly authorized by statute.

The rest of Grabowski's contentions all relate to the *sufficiency* of Rutan's proof of service. "It has been held that the filing of a proof of service creates a rebuttable presumption that the service was proper. [Citations.] However, that presumption arises only if the proof of service complies with the statutory requirements regarding such proofs."⁴ (*Dill, supra*, 24 Cal.App.4th at pp. 1441-1442.) Section 417.20 requires that "if service is made by mail pursuant to [s]ection 415.40, proof of service shall include evidence satisfactory to the court establishing actual delivery to the person to be served, by signed return receipt or other evidence." (§ 417.20, subd. (a).)

⁴ We note there was no dispute Rutan's proof of service met the basic requirements of identifying the correct name and address of the person to be served.

There is no dispute Rutan did not possess a signed return receipt to establish actual delivery to Grabowski. “Effective service on a defendant within California requires a signed receipt of the summons and complaint. (§ 415.30, subd. (c).) By contrast, with service by mail on a defendant outside the state, no executed acknowledgment of receipt is required. [Citations.]” (*Bolkiah v. Superior Court* (1999) 74 Cal.App.4th 984, 1000.) However, evidence mail was refused or returned to the sender “unclaimed” without a signed receipt is not sufficient to establish service under section 415.40. (See *Stamps v. Superior Court* (1971) 14 Cal.App.3d 108, 110 [return receipt marked “unclaimed” will not suffice as a valid proof of service].)

The court properly relied on Rutan’s “other evidence” (§ 417.20, subd. (a)) establishing actual delivery. The sufficiency of “other evidence” under section 417.20 was considered in the case *In re Marriage of Tusinger* (1985) 170 Cal.App.3d 80, 82 (*Tusinger*). In that case, Gary Tusinger, residing in the state of Arkansas, was sued for divorce by his former wife residing in California. The summons and complaint were mailed pursuant to section 415.40, but received and signed for by Tusinger’s mother. The appellate court took judicial notice of a letter from Tusinger’s attorney that stated, “I am writing with reference to the divorce petition which Gary Tusinger received a few days ago and which was initiated by his wife.” (*Tusinger, supra*, 170 Cal.App.3d at pp. 82-83.) The court concluded Tusinger never contradicted the inference he took the summons and petition to his attorney. This ““other evidence,”” the court concluded, clearly established receipt sufficient to enable Tusinger to answer and defend the suit. (*Ibid.*)

““Other evidence”” of receipt has also been found where plaintiff served nonresident defendants at addresses the parties previously used in their dealings. (*Bolkiah v. Superior Court* (1999) 74 Cal.App.4th 984, 1001 (*Bolkiah*).) The court in *Bolkiah* explained plaintiff served defendants at the address at which they previously sent

correspondence. Moreover, defendants had directed plaintiff to use the address to ensure that mail and merchandise would reach them. (*Ibid.*)

In light of the above authority, we conclude Ellis's declaration provided sufficient "other evidence" establishing receipt. As in the *Bolkiah* case, Ellis attested the summons and complaint were sent to the same address the parties previously used in their dealings. When Rutan was actively representing Grabowski in the trust case, Grabowski received correspondence, bills and pleadings at this address and discussed their contents with his counsel at Rutan. In addition, Ellis's conversations with Shoffner about the Rutan lawsuit further established receipt of the summons. Although Shoffner was hired to represent Grabowski in the Orange County Litigation, his discussion of the Rutan lawsuit in e-mails to Ellis was highly probative because the two actions were interrelated. Indeed, Grabowski promised to pay Rutan's promissory note once he prevailed in the Orange County Litigation. In his e-mail to Rutan, Shoffner stated he was optimistic the litigation would be resolved soon and he sent Rutan a copy of the proposed settlement giving Grabowski the funds he needed to pay Rutan's legal bills. Shoffner specifically stated he wished to discuss how "the Rutan lawsuit" could be "resolved," clearly indicating an awareness of it.

Finally, Ellis's declaration stated Rutan had not received a returned envelope, or anything returned "unclaimed" to suggest Grabowski was not still receiving mail at the Missouri Address. Grabowski's declaration stating the post office box was shared with other people and he never received the summons is irrelevant because the only avenue of relief open to him five years after the judgment was to show the proof of service was void on its face. (*Dill, supra*, 24 Cal.App.4th at p. 1441 [“A judgment . . . is . . . void on its face when the invalidity is apparent upon an inspection of the judgment-roll.”].) We conclude Rutan's "other evidence" of receipt was sufficient and the resulting default judgment was valid.

III

The order is affirmed. Respondent shall recover its costs on appeal.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

ARONSON, J.