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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RICHARD B. HOLT,

Plaintiff and Appellant,

v.

KORMANN ROCKSTER RECYCLER
GMBH,

Defendant and Respondent.

G045086

(Super. Ct. No. 30-2009-00323416)

O P I N I O N

Appeal from an order of the Superior Court of Orange County,
Robert J. Moss and David T. McEachen, Judges. Affirmed.

Fasel & Fasel, Thomas A. Fasel and Frank R. Fasel for Plaintiff and
Appellant.

Law Offices of John R. Walton, John R. Walton and Nikki Ma for
Defendant and Respondent.

* * *

INTRODUCTION

Richard B. Holt sued Kormann Rockster Recycler GmbH (Kormann), Rockster North America (RNA), and Stephane Guerchon for various causes of action arising out of an agreement to buy a rock-crushing machine. Holt attempted service of process on all three defendants under the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, article 10 (Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638) (the Hague Service Convention), by having Guerchon served at his home in Montreal, Quebec, Canada, even though Kormann is an Austrian company and Austria is not a signatory to the Hague Service Convention. Guerchon and his family own RNA, which is a Canadian corporation, and he is not an officer, director, agent, or employee of Kormann. The summons served on Guerchon did not provide the statutorily required notice that he was being served on behalf of Kormann under Code of Civil Procedure section 416.10.¹

Holt obtained a default judgment against Kormann after it failed to respond to the complaint. More than six months after entry of judgment, the trial court granted Kormann's motion to vacate the default judgment and quash service of summons. Holt appeals from the trial court's order granting Kormann's motion. (§ 904.1, subd. (a)(3) [order quashing service of summons is appealable].)

We affirm. The default judgment was void on its face because the summons did not comply with section 412.30, which requires in an action against a corporation that the summons notify the person being served that he or she is being served on behalf of the identified corporation. The summons in this case did not provide that information and did not impart actual notice to Guerchon that he was being served on

¹ Further code references are to the Code of Civil Procedure unless otherwise indicated.

behalf of Kormann. We reject Holt's argument that Kormann was required to register with the California Secretary of State.

FACTS

Holt, a California resident, is a licensed California grading and demolition contractor. Kormann is an Austrian corporation that manufactures rock-crushing machines. Its principal place of business is Ennsdorf, Austria. Kormann is not registered or qualified to do business in California and does not maintain a registered agent for service of process in the state.

RNA is a Canadian corporation with its principal place of business in Montreal, Quebec, Canada. Guerchon is a resident of Montreal and is RNA's chief executive officer. He and his family own 100 percent of RNA, which is not a subsidiary of Kormann. RNA has the exclusive right to sell, distribute, and service Kormann products in North America. Upon making a sale of equipment, RNA orders the equipment from Kormann, which manufactures the item and sells it to RNA, which distributes the equipment to the buyer.

Holt became interested in purchasing a Kormann rock crusher when he saw an advertisement in a trade magazine. In August 2009, he contacted Guerchon at RNA to ask about purchasing a rock crusher. Ultimately, Holt and RNA entered into a written purchase order agreement by which Holt agreed to purchase a Rockster R1100 "demo unit" from RNA for 352,378 euros. Holt paid the 10 percent deposit by making a wire transfer of \$52,200 to RNA's bank account at Bank TD Canada Trust.

Several weeks later, Holt notified RNA that he wanted to cancel the purchase agreement and requested the return of his deposit. The reason for the request and whether it was justified are disputed issues in the lawsuit.

Guerchon contacted Kormann to request cancellation of Holt's order. Wolfgang Kormann of Kormann informed Guerchon the deposit could not be refunded

and the order could not be cancelled unless RNA paid a fee. When Guerchon related this information to Holt, he replied: “The ball is in your court as President of [RNA]. I dealt with you, not [Kormann] in Austria.”

PROCEDURAL HISTORY

In November 2009, Holt filed a complaint against RNA, Guerchon, and Kormann, seeking recovery of the deposit, damages for lost profits and emotional distress, attorney fees, and punitive damages under eight causes of action.

Holt’s attorneys initiated service of process on all three defendants through the Hague Service Convention. The United States and Canada are signatories to the Hague Service Convention; Austria is not. Pursuant to the Hague Service Convention, Attorney Frank R. Fasel provided the Ministry of Justice of the Province of Quebec with a request for service on Guerchon, RNA, and Kormann. The Ministry of Justice dispatched a process server to Guerchon’s home in January 2010. The process server encountered Sandrine Guerchon, Guerchon’s wife, and served the papers on her.

Several days later, Fasel filed, in the Orange County Superior Court, a declaration of service on Guerchon. In February 2010, Holt attempted to file a request for entry of default against all three defendants, but the court rejected the document because a proof of service on RNA and Kormann had not been filed. A few days later, Fasel filed a declaration of service on RNA, Guerchon, and Kormann, claiming they had been personally served on “January 11, 2009” (the correct year is 2010). Accompanying the declaration of service was a certificate of service signed by the Canadian process server, who stated he served Sandrine Guerchon on January 11, 2010.

On the day the second declaration of service was filed, Fasel also filed a second request for entry of default against all three defendants. The trial court ordered entry of default only against Kormann because RNA and Guerchon had appeared and

filed a motion to quash. According to Holt's opening brief, RNA and Guerchon ultimately answered the complaint.

In July 2010, Holt filed a request for a default judgment against Kormann in the amount of \$168,204.48. Holt filed a declaration of mailing signed by his counsel, Thomas A. Fasel, stating the request for entry of default judgment was served on Kormann by mail to Guerchon's home address in Montreal, Quebec, Canada. A default judgment against Kormann in the amount of \$175,029.68 was signed by the court and entered on July 16, 2010.

In February 2011, Kormann filed a motion to quash and set aside default judgment (Motion to Quash) asserting insufficiency of service of process and lack of personal jurisdiction. Holt opposed the Motion to Quash. Judge Robert J. Moss orally granted the Motion to Quash on the ground Kormann had not been served properly with the summons and complaint. Judge David T. McEachen signed the formal order granting the Motion to Quash, quashing service of the summons and complaint on Kormann, and vacating the default judgment against it as void *ab initio*. Holt timely appealed.

OVERVIEW AND STANDARD OF REVIEW

“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.” (§ 473.5, subd. (a).) A motion to quash service of summons may be made concurrently with the motion to set aside the default or default judgment. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2011) ¶ 3:398, pp. 3-93 to 3: 94 (rev. #1, 2010).)

A default judgment entered against a defendant who was not served with a summons in the manner prescribed by law is void. (*Hearn v. Howard* (2009) 177

Cal.App.4th 1193, 1200.) Under section 473, subdivision (d), the trial court may set aside a default judgment that is void as a matter of law, due to improper service of process. (*Hearn v. Howard, supra*, at p. 1200.) Once six months have elapsed from entry of judgment, a trial court may set aside the judgment as void only if it is void on its face. (*Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 496.) A judgment is void on its face when the invalidity appears on the judgment roll, which includes the proof of service of summons. (*Ibid.*) We review de novo the trial court’s determination the judgment is void. (*Ibid.*)

DISCUSSION

I.

The Hague Service Convention Does Not Apply.

Holt argues Kormann was properly served with the summons and complaint pursuant to the Hague Service Convention. Kormann is an Austrian corporation, and Austria is not a signatory to the Hague Service Convention. (See *State of California v. Western Natural Rubber, Inc.* (1991) 235 Cal.App.3d 1495, 1499 [“As Austria is not a signatory to the Hague Convention, the State had to arrange for service through the United States Embassy in Austria”]; *Prewitt Enterprises, Inc. v. Organization of Petroleum Exporting Countries* (2003) 353 F.3d 916, 922-923, fn. 10 [“while the United States is party to the Hague Service Convention, Austria is not”].)

Holt argues service on Kormann pursuant to the Hague Service Convention was proper because RNA is a subsidiary or distributor of Kormann, RNA is a Canadian corporation, and Canada is a signatory to the Hague Service Convention. The evidence showed that Guerchon and his family own RNA, which is not a subsidiary of Kormann. Guerchon is the chief executive officer of RNA, and he is not an officer or manager of Kormann. Wolfgang Kormann stated in his declaration that Kormann never designated Guerchon as its agent for service of process and never took any action or made any

statements that would confer authority on RNA or any person at RNA to accept service on Kormann's behalf. Thus, Holt could not effect service on Kormann by serving Guerchon or RNA pursuant to the Hague Service Convention.

II.

The Summons Did Not Comply with Section 412.30.

The summons served on Guerchon, California Judicial Council form SUM-100 (rev. July 1, 2009), did not have any boxes checked indicating whether Guerchon was being served as an individual defendant or on behalf of another person or entity and did not state the name of any corporation on behalf of which he was being served. Holt argues the summons nonetheless complied substantially with the requirements of section 412.30. We conclude the summons was defective and failed to impart notice that Guerchon was being served on behalf of Kormann.²

Section 412.30 states: "In an action against a corporation or an unincorporated association (including a partnership), the copy of the summons that is served shall contain a notice stating in substance: 'To the person served: You are hereby served in the within action (or special proceeding) on behalf of (here state the name of the corporation or the unincorporated association) as a person upon whom a copy of the summons and of the complaint may be delivered to effect service on said party under the provisions of (here state appropriate provisions of Chapter 4 (commencing with Section 413.10) of the Code of Civil Procedure).' If service is also made on such person as an individual, the notice shall also indicate that service is being made on such person as an individual as well as on behalf of the corporation or the unincorporated association. [¶] If such notice does not appear on the copy of the summons served, no default may be

² Because the summons did not comply on its face with section 412.30, we do not and need not reach the issue whether Guerchon was authorized by statute to receive service on behalf of Kormann.

taken against such corporation or unincorporated association or against such person individually, as the case may be.”

Judicial Council form SUM-100 makes compliance with section 412.30 a matter of checking boxes and providing a name. “The form of summons used in this state is intended to facilitate compliance with the foregoing requirement by providing a checkbox whereby the serving party can indicate that the recipient is being served as a person sued under a fictitious name, with the name to be written on the form at that point.” (*Carol Gilbert, Inc. v. Haller* (2009) 179 Cal.App.4th 852, 858 (*Carol*)). Near the bottom of the form appears a notice to the person being served that he or she is being served as an individual, as a fictitious defendant, or on behalf of a corporation, partnership, or another person. The party preparing the summons need only check the correct box or boxes to indicate the capacity in which the person is being served. The notation that the person is being served on behalf of another is considered “paramount.” (*Id.* at p. 862.)

For Holt to have indicated he was serving Guerchon on behalf of Kormann, he need only have checked the box next to number 3 (“on behalf of”), typed or written Kormann’s name next to that box, and, beneath that, checked the box next to “CCP 416.10 (corporation).” Holt failed to do so. *No* boxes are checked. Kormann’s name does not appear next to number 3. The summons does not state or suggest the recipient was being served on behalf of Kormann, a corporation, under section 416.10.

Holt argues substantial compliance is good enough and he substantially complied with section 412.30. Case law does acknowledge substantial compliance with section 412.30 might be sufficient (*Mannesman DeMag, Ltd. v. Superior Court* (1985) 172 Cal.App.3d 1118, 1123; *MJS Enterprises, Inc. v. Superior Court* (1984) 153 Cal.App.3d 555, 558); however, these cases “hold in essence that a summons *completely lacking the required notice* cannot be found to substantially comply” (*Carol, supra*, 179 Cal.App.4th at p. 862).

In *Carol*, the defendant was named as a Doe defendant and was personally served at his home with copies of the summons, the complaint, and the Doe amendment. (*Carol, supra*, 179 Cal.App.4th at p. 856.) The copy of the summons, received by the defendant and filed with the trial court, was left blank in the space designated to notify him that he was sued as a fictitiously named defendant. (*Id.* at pp. 856-857.) The trial court, concluding the summons substantially complied with statutory requirements, denied the defendant’s motion to vacate a default judgment entered against the defendant. (*Id.* at p. 858.) The Court of Appeal reversed, concluding, “such a complete failure precludes reliance on the doctrine of substantial compliance.” (*Id.* at p. 862.) The Court of Appeal identified three preconditions to a finding of substantial compliance: (1) “there must have been *some* degree of *compliance* with the offended statutory requirements”; (2) it must have been highly probable in light of the objective nature and circumstances of the attempted service that it would impart the same notice as full compliance; and (3) service “must in fact have imparted such notice, or at least sufficient notice to put the defendant on his defense.” (*Id.* at p. 865-866.) “In this regard, it is not enough that the process inform the defendant of the fact of a lawsuit, or even of a lawsuit in which his name appears.” (*Id.* at p. 866.)

Holt’s complete failure to comply with section 412.30 precludes reliance on the doctrine of substantial compliance. Nothing about the objective nature and circumstances of the service would impart notice that Guerchon was being served on behalf of Kormann. The “Summary of the Document to Be Served,” made pursuant to the Hague Service Convention, provides the identity and address of the addressee, as follows: “Stephane Guerchon (Rockster North America, Kormann Rockster Recycler GmbH) [¶] 5512 Hudson Ave. [¶] Montreal, Qc. H4W2K1 [¶] Canada.” Holt argues the Summary of the Document to Be Served and the summons, by naming all three defendants (Guerchon, RNA, and Kormann), imparted notice that Guerchon was being served on behalf of Kormann. The contrary is true: By naming all three defendants,

without stating Guerchon was being served on behalf of Kormann, the Summary of the Document to Be Served and the summons imparted notice only that Guerchon was being served in his individual capacity.

Holt argues his case is “synonymous to” *Cory v. Crocker National Bank* (1981) 123 Cal.App.3d 665 (*Cory*), in which the court concluded a defective summons substantially complied with statutory requirements. In *Cory*, a summons and complaint against a bank were served on the bank by delivery to one of its officers. (*Id.* at p. 667.) An “X” had been placed next to the notation, “CCP 416.10 (Corporation).” (*Id.* at pp. 667, 668.) But, apparently due to an oversight, neither the original summons nor the copy left with the bank officer showed the bank’s name on the designated place of the form, and the box specifying the officer received service on behalf of the bank was not checked. (*Ibid.*) Upon delivery to the bank officer, the summons was stamped by bank personnel to show it had been received by the officer on the bank’s behalf on a specific date and at a specific time. (*Ibid.*)

Reversing an order quashing service of summons, the Court of Appeal concluded the summons substantially complied with section 412.30 for three reasons. (*Cory, supra*, 123 Cal.App.3d at p. 670.) First, “it was made clear” to the bank officer that he was not being served as an individual or fictitious Doe defendant. (*Ibid.*) Second, the summons revealed on its face that service was being made under section 416.10, thereby “rul[ing] out any potential misunderstanding that [the bank officer] was sued in a capacity other than a corporate representative.” (*Cory, supra*, at p. 670.) Third, because the bank was the only corporation named in the summons and complaint, the bank officer could not have been misled or confused as to the capacity in which he was being served. (*Ibid.*) The stamp made on the summons upon its receipt showed the bank officer received the summons in his representative capacity on behalf of the bank. (*Ibid.*)

The reasons set forth in *Cory* for finding substantial compliance do not apply to this case. Here, the circumstances of service would not have made it clear to

Guerchon that he was being served on behalf of Kormann. Unlike the summons in *Cory*, the summons received by Guerchon did not have a checkmark in the box next to “CCP 416.10 (corporation).” Kormann was not the only defendant named in the summons and complaint—RNA and Guerchon individually were also named—so that Guerchon might have been misled or confused about the capacity in which he was being served. As Guerchon was not an officer or director of Kormann, and Kormann had no ownership interest in RNA, he reasonably could have believed he was being served only in his individual capacity or on behalf of RNA.

As *Carol*, *supra*, 179 Cal.App.4th at page 862, points out, *Cory* is the only published case in which the doctrine of substantial compliance was used to save a defective summons. That doctrine does not save the defective summons here. Because the summons did not provide the notice required by section 412.30, no default could be taken against Kormann.

III.

Kormann Was Not Required to Register with the California Secretary of State.

Holt argues Kormann failed to register with the California Secretary of State and appoint an agent for service of process in California as Corporations Code section 2105 requires. Corporations Code section 2015, subdivision (a) provides that “[a] foreign corporation shall not transact intrastate business without having first obtained from the Secretary of State a certificate of qualification.” To obtain a certificate of qualification, a corporation must file a statement containing information about the corporation and designating an agent for service of process in the state. (*Id.*, § 2105, subd. (a)(1)-(4).)

Corporations Code section 191, subdivision (a) defines intrastate business to mean “entering into repeated and successive transactions of its business in this state, other than interstate or foreign commerce.” The only evidence of Kormann’s business

ties to California produced by Holt was RNA's sale to him of the rock crusher. Wolfgang Kormann explained in his declaration that Kormann had only one other business connection to California: "The only instance in which K[ormann] has sold equipment directly to a California resident customer was in 2007, when that customer visited K[ormann] at a trade fair in Munich, Germany. That customer ordered a K[ormann] machine at the trade fair in Munich and requested that it be delivered to California." This one sale was not repeated or successive, and constituted foreign commerce, not intrastate commerce, as RNA is in Canada and Kormann is in Germany. The sale of the rock crusher to Holt was "an isolated transaction completed within a period of 180 days and not in the course of a number of repeated transactions of like nature," which, under Corporations Code section 191, subdivision (c)(8), alone does not constitute transacting intrastate business in California.

In addition, under Corporations Code section 191, subdivision (b), a foreign corporation is not considered to be transacting intrastate business in California "merely because its subsidiary transacts intrastate business." Thus, Kormann would not be considered to be transacting intrastate business in California based on RNA's activities even if RNA were Kormann's subsidiary. Corporations Code section 191, subdivision (c) provides a foreign corporation is not considered to be transacting intrastate business in California merely by "[e]ffecting sales through independent contractors" (*id.*, § 191, subd. (c)(5)) or by "[s]oliciting or procuring orders, whether by mail or through employees or agents or otherwise, where those orders require acceptance outside this state before becoming binding contracts" (*id.*, § 191, subd. (c)(6)). Under those standards, the sale of the rock crusher to Holt would not constitute intrastate business in California by Kormann even if RNA were Kormann's agent.

DISPOSITION

The order vacating the default judgment and quashing service of summons on Kormann is affirmed. Respondent shall recover costs incurred on appeal.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.