

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ACQUICOR MANAGEMENT, LLC,

Plaintiff, Cross-complainant and
Appellant,

v.

STEWART INVESTMENTS, LLC, et al.,

Defendants, Cross-defendants and
Respondents.

G045368

(Super. Ct. No. 30-2008-00113229)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Tam
Nomoto Schumann, Judge. Reversed in part and affirmed in part.

Law Offices of George S. Burns, George S. Burns and John C. Ashby for
Plaintiff, Cross-complainant and Appellant.

No appearance for Defendants, Cross-defendants and Respondents.

* * *

Plaintiff, cross-complainant, and appellant Acquicor Management, LLC (Acquicor) appeals from an order vacating the defaults and default judgments entered against defendants, cross-defendants, and respondents Brandon Stewart and Stewart Investments, LLC (collectively, Stewart Defendants) on both the complaint and fourth amended cross-complaint in this action. The trial court found the default and default judgment on the complaint were void because Stewart denied Acquicor ever served him with the summons and complaint. The trial court found the default and default judgment on the fourth amended cross-complaint were void because Acquicor failed to personally serve that pleading on the Stewart Defendants. The trial court held that Acquicor had to personally serve the fourth amended cross-complaint because that pleading made substantive changes to the claims against the Stewart Defendants by adding a fraud claim the third amended cross-complaint did not allege.

We reverse in part and affirm in part. We reverse the portion of the trial court's order vacating the default and default judgment on the complaint because the trial court erroneously relied on Stewart's initial declaration denying he was served despite Stewart's subsequent reply declaration withdrawing his earlier denial. We affirm the portion of the trial court's order vacating the default and default judgment on the fourth amended cross-complaint because we agree that pleading made substantive changes to the claims against the Stewart Defendants and Acquicor failed to personally serve the pleading.

I

FACTS AND PROCEDURAL HISTORY

Acquicor borrowed over \$6 million dollars from Context Advantage Master Fund, LP and Context Opportunistic Master Fund, LP (collectively, Context) to purchase stock in Jazz Technologies, Inc. (Jazz). Acquicor pledged as collateral the Jazz stock it purchased with the loan. In early 2008, Context declared Acquicor in default on the loan

because the Jazz stock's value dropped below the minimum amount specified in the loan agreement. Acquicor disputed Context's valuation of the Jazz stock and that any default had occurred, but Context nonetheless notified Acquicor it intended to sell the stock based on the default. To prevent Context from doing so, Acquicor filed for bankruptcy protection.

Acquicor approached the Stewart Defendants, offering them an equity interest in Acquicor if they would provide sufficient funds to pay off the Context loan and prevent Context from selling the Jazz stock. The Stewart Defendants agreed to purchase an equity interest in Acquicor for \$3.2 million and allow Acquicor to use that investment to pay off the Context loan. Acquicor then negotiated a separate settlement agreement with Context to pay off the loan with the Stewart Defendants' investment and thereby retain the Jazz stock.

The bankruptcy court approved these transactions in May 2008, but the Stewart Defendants failed to provide the investment they promised and thereby prevented Acquicor from performing under its settlement agreement with Context. Over the ensuing months, the Stewart Defendants repeatedly promised to provide Acquicor with the necessary funding, but never did.

In October 2008, Acquicor filed this action to prevent Context from selling the Jazz stock and to recover damages from the Stewart Defendants for their failure to provide the promised funds. Context filed a cross-complaint against Acquicor, Gilbert Amelio (Acquicor's managing member), and the Stewart Defendants. The cross-complaint alleged a breach of contract claim and three fraud claims against the Stewart Defendants.

On February 20, 2009, Amelio scheduled a meeting with Stewart to discuss his repeated promises to provide the funds necessary to pay off the Context loan. After arranging the meeting, Amelio informed Acquicor's lawyers he would be meeting Stewart that afternoon in the bar at the Newport Beach Island Hotel and they should send

a process server to serve the Stewart Defendants. Coincidentally, Context used the same process serving company as Acquicor and therefore the company sent a process server to serve both the complaint and cross-complaint on the Stewart Defendants. While Amelio sat with Stewart at the bar in the Island Hotel, a process server approached the two men, asked Stewart, “[A]re you Brandon Stewart?” and, when Stewart responded affirmatively, served him with the summons, complaint, and cross-complaint.

Both Acquicor and Context filed proofs of service signed by the process server stating he served the Stewart Defendants on February 20, 2009, at 5:43 p.m., at 690 Newport Center Drive, Newport Beach, California (the address for the Island Hotel). The Stewart Defendants failed to respond to either the complaint or the cross-complaint, and Acquicor and Context entered their defaults in March and April 2009.

In response to a series of challenges by Acquicor and Amelio, Context amended its cross-complaint three times. In May 2009, Context filed its first amended cross-complaint, in August 2009, Context filed its second amended cross-complaint, and, in December 2009, Context filed its third amended cross-complaint. The second and third amended cross-complaints alleged only a single breach of contract claim against Stewart Investments and no claim against Stewart. Nothing in the record shows these amended cross-complaints were served on the Stewart Defendants.

In December 2009, the trial court entered a default judgment against the Stewart Defendants for nearly \$3.7 million based on Acquicor’s complaint. Shortly thereafter, Acquicor and Context reached a settlement regarding all claims between them. As part of that settlement, Context assigned its claims against the Stewart Defendants to Acquicor. Acquicor then substituted itself for Context as the cross-complainant on the third amended cross-complaint.

In June 2010, the trial court granted Acquicor’s motion for leave to file a fourth amended cross-complaint in its capacity as Context’s assignee. The fourth amended cross-complaint reinstated the previously alleged fraud claim against both

Stewart Defendants and added Stewart as a cross-defendant on the existing breach of contract claim.

Acquicor entered the Stewart Defendants' defaults on the fourth amended cross-complaint after they failed to timely respond to that pleading. In August 2010, the trial court entered a separate default judgment against the Stewart Defendants for nearly \$3.9 million based on the fraud claim alleged in the fourth amended cross-complaint.

In April 2011, the trial court granted the Stewart Defendants' motion to vacate the defaults and default judgments entered against them on both the complaint and fourth amended cross-complaint. The court found the default and default judgment on the complaint were void because Acquicor failed to serve the Stewart Defendants with the summons and complaint. The court sustained numerous objections to Acquicor's evidence regarding service on the Stewart Defendants. The trial court concluded "the evidence appears to be slim supporting service of the Summons and Complaint on February 20, 2009" based on Stewart's declaration denying he was served with the summons and complaint at the Island Hotel on that date. The trial court also found the default and default judgment on the fourth amended cross-complaint were void because Acquicor failed to personally serve that pleading on the Stewart Defendants. According to the trial court, the fourth amended cross-complaint "'open[ed]'" the Stewart Defendants' default because it added a fraud claim the third amended cross-complaint did not allege, and therefore Acquicor had to personally serve the fourth amended cross-complaint on the Stewart Defendants.

Acquicor timely appealed the trial court's ruling.

II

DISCUSSION

Acquicor challenges both grounds on which the trial court relied to find the defaults and default judgments against the Stewart Defendants were void. First, Acquicor

contends the trial court erred in finding the Stewart Defendants presented sufficient evidence to show they were not served with the summons and complaint as the process server described in his proof of service. Second, Acquicor argues the trial court erred in finding the fourth amended cross-complaint made substantive changes to the claims alleged in earlier cross-complaints and therefore Acquicor had to personally serve that pleading on the Stewart Defendants.

A. *Governing Legal Principles on Void Judgments and the Standard of Review*

““[A] default judgment entered against a defendant who was not served with a summons in the manner prescribed by statute is void. [Citation.]” [Citation.] . . .” (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1200 (*Hearn*); see also *County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1225-1227 (*Gorham*).) Similarly, a default judgment is void when based on a claim or damages not alleged in the last complaint properly served on the defendant. (*David S. Karton, A Law Corp. v. Dougherty* (2009) 171 Cal.App.4th 133, 150 (*Karton*).)

Under Code of Civil Procedure section 473, subdivision (d),¹ “[t]he court may, . . . on motion of either party after notice to the other party, set aside any void judgment or order.” (See also *Hearn, supra*, 177 Cal.App.4th at p. 1200; *Karton, supra*, 171 Cal.App.4th at p. 148.) There is no time limit on a motion to vacate a void judgment. (*Manson, Iver & York v. Black* (2009) 176 Cal.App.4th 36, 43; *Gorham, supra*, 186 Cal.App.4th at p. 1225.)

We review a trial court’s determination a judgment is void under the de novo standard of review because the court “has no statutory power under section 473,

¹ All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

subdivision (d) to set aside a judgment that is not void[.]”² (*Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 495-496; *Talley v. Valuation Counselors Group, Inc.* (2010) 191 Cal.App.4th 132, 146.) We review the factual findings underlying the trial court’s determination a judgment is void under the substantial evidence standard of review. (*SFPP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 461 [“Generally, appellate courts independently review questions of law and apply the substantial evidence standard to a superior court’s findings of fact”].)

Because the Stewart Defendants failed to file a respondent’s brief, we decide this appeal based on the record and Acquicor’s opening brief (Cal. Rules of Court, rule 8.220(a)(2)), “examining the record and reversing only if prejudicial error is shown” (*Nakamura v. Parker* (2007) 156 Cal.App.4th 327, 334).

B. *The Trial Court Erred in Finding the Default and Default Judgment on the Complaint Void for Lack of Personal Service*

Evidence Code section 647 provides a registered process server’s return “establishes a presumption, affecting the burden of producing evidence, of the facts stated in the return.” “The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption.” (Evid. Code, § 604.) In other words, it is presumed the process server served the defendant as described in his or her proof of service unless the defendant presents evidence sufficient to support a finding

² In contrast, a motion to vacate a default judgment under section 473, subdivision (b), on the grounds of mistake, inadvertence, surprise, or excusable neglect ““is addressed to the sound discretion of the trial court, and in the absence of a clear showing of abuse . . . the exercise of that discretion will not be disturbed on appeal.” [Citations.] . . . [Citation.]” (*Hearn, supra*, 177 Cal.App.4th at p. 1200; see also *Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 257.)

service did not occur as described in the proof of service. If the defendant produces sufficient evidence, then the trier of fact determines whether service occurred based on the plaintiff's and defendant's competing evidence. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1428 (*Palm Property*).)

Here, Acquicor filed a proof of service from a registered process server stating he served the Stewart Defendants at the Island Hotel in Newport Beach, California on Friday, February 20, 2009, at 5:43 p.m. The Stewart Defendants initially rebutted the presumption the proof of service established by filing a declaration from Stewart denying he was served as described in the proof: "I did not receive a copy of the Summons[,] Complaint[, and Cross-Complaint] in this action on February 20, 2009 at 690 Newport Center Drive, Newport Beach, California 92660 or anywhere else. In other words, no process server provided those documents to me on that date at that location either to me personally or as a representative of Stewart Investments, LLC."

Acquicor responded to Stewart's denial by filing two declarations more specifically describing the circumstances surrounding service on the Stewart Defendants. The process server provided a declaration stating (1) on February 20, 2009, his employer sent him to the bar at the Island Hotel to serve the Stewart Defendants; (2) he walked up to a man in the bar he identified as Stewart and asked, "[A]re you Brandon Stewart?"; (3) Stewart responded, "[Y]es"; (4) he handed Stewart the summons, complaint, and cross-complaint; (5) the person in the picture attached to the declaration is the person he served; and (6) he clearly remembered serving the Stewart Defendants because it was the only time he served someone in the bar at the Island Hotel. Amelio provided a declaration stating (1) he met Stewart in the bar at the Island Hotel on February 20, 2009; (2) while he sat at the bar with Stewart, a man approached them and asked Stewart if he was Brandon Stewart; (3) Stewart responded, "[Y]es"; (4) the man handed Stewart papers Amelio recognized as documents from this action; (5) he paid the bar tab on his American Express card and attached a copy of his bill showing the charges at the

Island Hotel on February 20, 2009, to his declaration; and (6) identified Stewart as the person depicted in the picture attached to the process server's declaration.

Faced with these detailed declarations challenging his denial he was served, Stewart filed a reply declaration essentially withdrawing his denial. In his reply declaration, Stewart conceded he met Amelio "at the Island Hotel in Newport Beach approximately 10 to 20 times [between 2008 and 2010]." Stewart further stated, "After reviewing [the] testimony of both [the process server] and Mr. Amelio and wrestling with that testimony, I have tried to recall every time that I met Mr. Amelio at the Island Hotel. However, *I do not recall* ever receiving these documents at the Island Hotel from [the process server] or any other process server on February 20, 2009 or at any other time." (Italics added.)

When read together, Stewart's two declarations do not rebut the presumption established by the process server's proof of service. To rebut the presumption they were served as described in the proof of service, the Stewart Defendants were required to introduce evidence that would support a finding they were not served as described in the proof. (Evid. Code, § 604; *Palm Property, supra*, 194 Cal.App.4th at p. 1428.) Stewart's statement he does not recall being served is insufficient to support a finding he was not served as described in the proof of service and it negates his initial declaration denying he was served. (*Louis & Diederich, Inc. v. Cambridge European Imports, Inc.* (1987) 189 Cal.App.3d 1574, 1591-1592 ["I don't recall"] is not substantial evidence sufficient to support a finding the event the declarant cannot recall either occurred or did not occur[.]

The trial court found the Stewart Defendants were not served because (1) it sustained evidentiary objections to portions of the process server's and Amelio's declarations and (2) Stewart denied he was served as described in the proof of service. These reasons fail to support the trial court's finding the Stewart Defendants were not served.

Although the trial court sustained a number of objections to the process server's and Amelio's declarations, it did not sustain any objections to the critical statements described above regarding service on the Stewart Defendants. Indeed, a careful review of the trial court's specific rulings on the evidentiary objections reveals it did not sustain any objections to the process server's statements he went to the Island Hotel bar to serve the Stewart Defendants, Stewart gave his name before the process server served him, the photo attached to his declaration shows the person he served, and the process server clearly remembered serving the Stewart Defendants because it was the only time he served someone in the Island Hotel bar. Similarly, a careful review of the court's evidentiary rulings reveals it did not sustain any objections to Amelio's statements he sat at the bar in the Island Hotel with Stewart, he witnessed the process server serve Stewart, and the photo attached to the process server's declaration is a picture of Stewart.

At the hearing on the Stewart Defendants' motion, the court stated it struck from the process server's declaration the entire paragraph that included the process server's statement he clearly remembered serving the Stewart Defendants. The court's specific rulings on the evidentiary rulings, however, show the court overruled the Stewart Defendants' objection to this statement by the process server and did not sustain any objections to the paragraph containing that statement. We agree the Stewart Defendants failed to state any valid objection to this statement.

The trial court's reliance on Stewart's declaration denying he was served also is misplaced for the reasons described above. The court's ruling fails to acknowledge Stewart's reply declaration that effectively withdrew the denial on which the court based its ruling. Accordingly, we conclude the trial court erred in vacating the default and default judgment on the complaint for lack of personal service.

C. *The Trial Court Properly Found the Fourth Amended Cross-Complaint's Substantive Changes Required Personal Service*

When an amended complaint makes substantive changes to the allegations against a defaulted defendant, the amended complaint ““opens”” the defendant’s default and provides him or her with a new opportunity to participate in the litigation. (*Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1743.) An amended pleading making substantive changes must be personally served before the plaintiff may seek a default or default judgment based on that pleading. (*Crestmar Owners Assn. v. Stapakis* (2007) 157 Cal.App.4th 1223, 1230-1231; *Ostling*, at p. 1743; *Beeman v. Burling* (1990) 216 Cal.App.3d 1586, 1593; *Engbretson & Co. v. Harrison* (1981) 125 Cal.App.3d 436, 442-443.) An amended complaint makes substantive changes when it increases the damages sought or adds a new cause of action based on a different legal theory. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2012) ¶ 6:699, p. 6-176 (rev. # 1, 2008) (hereinafter, Weil & Brown), citing *Leo v. Dunlap* (1968) 260 Cal.App.2d 24, 27 and *Ford v. Superior Court* (1973) 34 Cal.App.3d 338, 343.)

Here, Acquicor’s fourth amended cross-complaint made substantive changes because it added a new cause of action and named a new cross-defendant. Context’s third amended cross-complaint alleged a single cause of action for breach of contract against Stewart Investments; it did not allege a claim against Stewart. After Context assigned its claims against the Stewart Defendants to Acquicor, Acquicor filed the fourth amended cross-complaint to add a fraud cause of action against both Stewart Defendants and to add Stewart as a cross-defendant on the existing breach of contract claim.

Acquicor contends the fourth amended cross-complaint did not make substantive changes because Context’s original cross-complaint alleged the same fraud cause of action Acquicor alleged in the fourth amended cross-complaint and the original

cross-complaint named Stewart as a cross-defendant. According to Acquicor, the original cross-complaint therefore put the Stewart Defendants on notice Context sought fraud damages from them, including punitive damages. This argument fails because it ignores the legal effect of the changes in Context's pleading between the original cross-complaint and the fourth amended cross-complaint.

Although both the original and first amended cross-complaints alleged a claim for fraud and included Stewart as a cross-defendant, the second and third amended cross-complaints omitted the fraud claim and all claims against Stewart. By doing so, the second and third amended cross-complaints dismissed both the fraud claim and Stewart. (See *Fireman's Fund Ins. Co. v. Sparks Construction, Inc.* (2004) 114 Cal.App.4th 1135, 1142 (*Fireman's Fund*) ["It has long been the rule that an amended complaint that omits defendants named in the original complaint operates as a dismissal as to them"].) That dismissal did not prevent Acquicor from later amending the cross-complaint to reallege the fraud cause of action or rename Stewart as a cross-defendant because the dismissal that occurs when an amended complaint omits a claim or a party is without prejudice. (*Id.* at p. 1143; Weil & Brown, *supra*, ¶ 6:714, p. 6-180.) Nonetheless, the dismissal made any change in a later cross-complaint realleging the fraud claim or renaming Stewart a substantive change because it exposed the Stewart Defendants to a new claim and new damages.

While the third amended cross-complaint was the operative pleading, Acquicor could obtain a default judgment only against Stewart Investments and only on the breach of contract claim because that was the only claim alleged in the third amended cross-complaint. (*Electronic Funds Solutions, LLC v. Murphy* (2005) 134 Cal.App.4th 1161, 1182 ["The court cannot allow a plaintiff to prove different claims or different damages at a default hearing than those pled in the complaint"].) Acquicor could not obtain a default judgment on the fraud claim alleged in the original and first amended cross-complaints because those pleadings were superseded by the second and third

amended cross-complaints and therefore could not provide the basis for a default judgment. (*Fireman's Fund, supra*, 114 Cal.App.4th at p. 1144 [““It is well established that an amendatory pleading supersedes the original one, which ceases to perform any function as a pleading””].)

Consequently, we agree with the trial court's conclusion the fourth amended cross-complaint made substantive changes and Acquicor had to personally serve that pleading on the Stewart Defendants. We also agree with the trial court's conclusion Acquicor failed to personally serve the fourth amended cross-complaint on the Stewart Defendants.

The proof of service attached to the copy of the fourth amended cross-complaint in the record relates to service of Acquicor's motion for leave to file the fourth amended cross-complaint. The proof shows Acquicor served the motion to amend by mailing it to the Stewart Defendants at the Island Hotel's address, not at a residential, business, or mailing address for the Stewart Defendants. The trial court's order granting Acquicor leave to file the fourth amended cross-complaint stated the pleading was deemed served on the Stewart Defendants as of the date the trial court granted leave, but the court's deemed served order is not a substitute for personal service. The order merely sought to start the time for the Stewart Defendants to respond to the fourth amended cross-complaint; it did not eliminate the need for Acquicor to personally serve that pleading. The trial court therefore properly vacated the default and default judgment on the fourth amended cross-complaint.

III

DISPOSITION

We reverse the portion of the trial court's order vacating the default and default judgment against the Stewart Defendants based on the complaint. We affirm the portion of the trial court's order vacating the default and default judgment against the Stewart Defendants based on the fourth amended cross-complaint. Acquicor shall recover its costs on appeal.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.