

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

SHELLY FULLER,

Plaintiff and Respondent,

v.

RONALD R. BROWN, JR.,

Defendant and Appellant.

G045497

(Super. Ct. No. 30-2010-00365690)

O P I N I O N

Appeal from an order of the Superior Court of Orange County,  
Kirk H. Nakamura, Judge. Affirmed.

Morris & Stone and Aaron P. Morris for Defendant and Appellant.

Robert S. Kostrenich for Plaintiff and Respondent.

\* \* \*

## INTRODUCTION

Ronald R. Brown, Jr., appeals from the trial court's order denying his motion made pursuant to Code of Civil Procedure section 473, subdivision (b) (section 473(b))<sup>1</sup> to vacate a judgment entered against him. The judgment, in the total amount of \$164,564.44, had been entered against Brown, following a bench trial at which the court struck his answer after he failed to appear.

Brown contends the trial court abused its discretion by denying the motion to vacate judgment because, he claims, on the morning of trial he had been misinformed by the court clerk about his need to appear or he had misinterpreted the court clerk's message left on his cell phone. He also contends the award of \$100,000 in punitive damages is void because it exceeded the amount alleged in the complaint and the plaintiff, Shelly Fuller, never served a statement of punitive damages under section 425.115, as is required to recover punitive damages in a default judgment.

We conclude the trial court did not abuse its discretion because substantial evidence supported a finding Brown did not act as a reasonably prudent person under the circumstances by ignoring the court clerk's instructions to report to court and to call the clerk immediately. The award of punitive damages is not void because the judgment resulted from an uncontested hearing under section 594, subdivision (a) (section 594(a)) rather than a default prove-up under section 585, subdivision (a). Brown received notice of trial and notice, sufficient to satisfy due process, of the amount of punitive damages to be sought against him at trial. Accordingly, we affirm.

---

<sup>1</sup> Further code references are to the Code of Civil Procedure unless otherwise specified.

## FACTS AND TRIAL COURT PROCEEDINGS

### I.

#### *Trial and Judgment*

In April 2010, Fuller filed a verified complaint (the Complaint) against RUMBI-LCW LLC (Rumbi), Michael Hamilton, and Brown, asserting causes of action for breach of oral contract, open book account, “money lent,” fraud, and “unpaid wages and penalties.” The Complaint alleged Fuller worked as the office manager and bookkeeper for Rumbi from August 2009 to February 2010 and, in December 2009, loaned all defendants \$50,000. The Complaint sought damages in the amount of \$55,000 as repayment of the unpaid loan, \$2,802.44 as reimbursement of expenses advanced by Fuller, unpaid wages in the amount of \$1,242, waiting time penalties in the amount of \$5,520, punitive damages “in an amount to be determined at time of trial within the jurisdictional limits of this court,” attorney fees, and costs.

Brown’s verified answer admitted Rumbi operated as a restaurant under the name, Rumbi Island Grill, Hamilton was Rumbi’s chief executive officer, Brown was Rumbi’s president, and Fuller worked for Rumbi from December 2009 to February 2010. Brown’s answer admitted Brown received a total of \$53,000 from Fuller in 2009.

Brown was represented in the litigation by counsel until September 2010, when the court granted counsel’s motion to be relieved. Thereafter, Brown represented himself.

A bench trial was scheduled for December 6, 2010. Brown appeared for trial that day and for a settlement conference the next day. When the settlement conference was unsuccessful, the court ordered the matter to trail and “[c]ounsel and pro per continue to be on call telephonically within 1 hour notice.”

Brown was not present at trial on December 8, 2010. At the outset of trial, the court stated: “It’s my understanding you have been trailing since Monday on this

matter, that there was a prior [mandatory settlement conference] on this case and it did not settle. [Brown], who is self represented, was advised to be on call—one-hour call—after the settlement conference concluded. [¶] We called him up. My clerk called him up on his cell phone and left a message shortly after 9:00 [a.m.] and told him that if he was not here at 10:00, that we would be proceeding and enter his default and go forward. [¶] It's now 10:23 and he is not here, so we are going to proceed.” The court clerk stated, “[n]o phone calls.” The trial court ordered the answers of Brown and the other two defendants to be stricken and that the matter proceed as a default prove-up.

The judgment recites: “The parties were called at 9:00 a.m. on December 8, 2010, and informed that trial was to commence at 10:00 a.m. in Department C-8. Two messages were left for [Brown] by the Court clerk on the contact number provided. [Brown] did not call back and failed to appear as ordered. The matter was called for trial at approximately 10:30 a.m.” The judgment awarded Fuller \$64,564.44 in compensatory damages and \$100,000 in punitive damages. The judgment was entered on December 10, 2010, and notice of entry was served on December 29.

## II.

### *Motion to Vacate Judgment*

On March 22, 2011, Brown filed a motion to vacate the judgment under section 473, asserting the judgment was entered due to “surprise resulting from an inadvertent error by the Court Clerk in Department C8.” Attached to the motion was a declaration from Brown, who stated that “[o]n December 8, 2010, I received one message from Department C8 that was left for me on my cell[ ]phone voice mail at 9:15 a.m.” According to Brown, the message verbatim from the court clerk was: “Hi, this is Kathy Beltran. I’m in Department C8. Judge Nakamura is here. Today we don’t start trial till 1:30. The clerk said something that you wanted to get a lawyer. The judge wanted to speak to both of you . . . and the attorney. So I need you to come in at 10 o’clock. I need

you to call me back to let me know. I know that you live a bit further away so I need you to call me as soon as possible at [telephone number] so you can discuss what you wanted. If you still want to proceed by trial let me know. I will leave you on the trailing trial [sic]. I took off for now so you could speak to Judge Nakamura. So like I said call me back as soon as possible. Thank you.” Brown declared he heard this message at about 10:30 a.m. on December 8.

Brown also declared: “Hamilton returned my calls at about 10:50 a.m. I told him the Judge wanted to see us about the case that morning. Hamilton told me he had received no notice of trial but he would go to Department C8. I told Hamilton to call the clerk before he went to court. Hamilton called back at 11:15 a.m. and said he had just spoken to Diana in Department C8 who told him that a judgment had already been entered that morning at 10:15 a.m. I immediately called Department C8 and was given the same information by Diana. This was a total surprise to me because of what I had been told in the message from the Clerk. I was not told against whom the judgment was entered. I assumed the judgment had only been entered against Rumbi[] . . . because the suit involved money the plaintiff claimed she loaned to the company while she was working there.”

Brown declared that in late January 2011, he received a letter from Fuller’s attorney, enclosing a copy of the judgment. He claimed that the letter had been sent to the address of his ex-wife “who gave me the letter when I saw her at that time” and also that “[f]or the first time I learned that the judgment was against all three defendants and that punitive damages had been imposed upon me.” On March 14, 2011, Brown was informed by his bank that Fuller had levied a writ of execution on his bank account.

In opposing the motion to vacate the judgment, Fuller submitted her own declaration stating: “I was contacted on December 8, 2010, and told to be in Court by 10:00 a.m. I was present by that time. I heard the court clerk in Department C8 state that she had left two messages for [Brown] to appear by 10:00 a.m. and to call the court. This

court's clerk also stated to the judge and my attorney that [Brown] failed to call back. The trial commenced at about 10:30 a.m. and proceeded to judgment in the absence of [Brown].”

Fuller's trial counsel, Robert S. Kostrenich, also submitted a declaration. He declared that following an unsuccessful settlement conference on December 7, 2010, he and Brown met with the court clerk in Department C8, who informed them the trial was being trailed to December 8, 2010 at 9:00 a.m. and was being placed on “a one hour trailing status.” Brown confirmed his cell phone number and told the clerk, “I always have this phone with me.” The clerk told Brown he needed to appear within one hour of receiving a call to commence trial. Brown stated he understood. While leaving the courtroom, Kostrenich asked Brown to call him that afternoon about settling the case. Brown replied he needed to speak with Hamilton first. Kostrenich said that if he did not hear from Brown, he would proceed to trial against him and seek a large judgment. Kostrenich called and left messages for Brown twice during the afternoon of December 7, but received no return call.

Kostrenich recounted the events of December 8, 2010 as follows: “I received a call from Kathy in C8 at about 9:15 a.m. on December 8, 2010, telling us to report to court at 10:00 a.m. I received this call on my cell phone, which was the contact number I left with the court. I immediately called Ms. Fuller and we each arrived in court before 10:00 a.m. Upon arriving I was informed by Kathy that she had left two messages for [Brown] regarding the requirement that he was to be present in court at 10:00 a.m. that morning and that she had failed to receive any call back.” Trial commenced at about 10:30 a.m. in Brown's absence.

On May 12, 2011, the trial court denied Brown's motion to vacate the judgment and stated in a minute order, “[Brown] was notified that his appearance was necessary on December 8, 2010 and that judgment may be entered against him. [Brown] has failed to demonstrate ‘surprise’ per . . . [section] 473(b).” On July 8, 2011, Brown

filed a notice of appeal from the order denying his motion to vacate the judgment. He never appealed directly from the judgment.

## DISCUSSION

### I.

#### *The Appeal Is Timely.*

Fuller argues Brown's notice of appeal was untimely because it was filed more than 60 days after service of notice of entry of judgment. Brown's motion to vacate the judgment, Fuller argues, did not extend the time to appeal because the motion also was not filed within 60 days of service of notice of entry of judgment. (Cal. Rules of Court, rule 8.108(c).) Brown is appealing from the order denying his motion to vacate the judgment pursuant to section 473, not from the judgment itself. An order denying a motion made under section 473 to vacate or set aside a judgment is directly appealable pursuant to section 904.1, subdivision (a)(2) as an order made after entry of an appealable judgment. (*Burnete v. La Casa Dana Apartments* (2007) 148 Cal.App.4th 1262, 1265-1266; *Generale Bank Nederland v. Eyes of the Beholder Ltd.* (1998) 61 Cal.App.4th 1384, 1394; see also Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2011) ¶ 2:171, pp. 2-94 to 2-95 (rev. # 1, 2010).)

### II.

#### *The Trial Court Did Not Abuse Its Discretion by Denying Brown's Motion to Vacate Judgment.*

Section 473(b) permits the trial court to grant relief from a judgment, order, or other proceeding taken against a party by "mistake, inadvertence, surprise, or excusable neglect." We review an order denying a motion for discretionary relief under section 473 for abuse of discretion. (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 257; *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 980.) In doing so, we

determine whether the court’s factual findings, express or implied, are supported by substantial evidence and independently review its legal conclusions. (*County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1230.)

The term “surprise” under section 473(b) means some condition or situation in which a party is unexpectedly placed to his or her injury, without any default or negligence of his or her own, and which ordinary prudence could not have prevented. (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1206.) Mistake does not justify relief under section 473(b) if the trial court finds the mistake was the result of professional incompetence, ignorance of the law, or unjustifiable negligence in finding the law. (*Hearn v. Howard, supra*, at p. 1206.) Inadvertence or excusable neglect justifying relief is defined as an error that might have been made by a reasonably prudent person under the same or similar circumstances. (*Zamora v. Clayborn Contracting Group, Inc., supra*, 28 Cal.4th at p. 258.)

Brown’s motion to vacate the judgment sought relief only for “surprise resulting from an inadvertent error by the Court Clerk in Department C8.” Because Brown’s motion did not assert inadvertence, mistake, or excusable neglect, Fuller argues Brown has forfeited those grounds for relief and any other arguments not presented to the trial court. We agree. “In order to preserve an issue for appeal, a party ordinarily must raise the objection in the trial court. [Citation.] ‘The rule that contentions not raised in the trial court will not be considered on appeal is founded on considerations of fairness to the court and opposing party, and on the practical need for an orderly and efficient administration of the law.’ [Citations.] Otherwise, opposing parties and trial courts would be deprived of opportunities to correct alleged errors, and parties and appellate courts would be required to deplete costly resources ‘to address purported errors which could have been rectified in the trial court had an objection been made.’ [Citation.]” (*In re S.C.* (2006) 138 Cal.App.4th 396, 406.)

We will presume, nonetheless, the trial court made implied findings that the judgment against Brown did not result from inadvertence, mistake, or excusable neglect. Under any ground for relief under section 473(b), the trial court did not err by denying Brown's motion.

Brown knew the trial was on the trailing calendar and he had to be available by telephone on December 8, 2010. Kostrenich declared that on December 7, 2010, following the unsuccessful settlement conference, the court clerk in Department C8 informed Brown the trial was being trailed to December 8, 2010 at 9:00 a.m. and was being placed on "a one hour trailing status." Brown confirmed his cell phone number and told the clerk, "I always have this phone with me." The clerk told Brown that he needed to appear within one hour of receiving a call to commence trial. He stated he understood. Brown declared he received a voice mail message from the clerk at 9:15 a.m. Although cell phone records show that on December 8, he checked his voice mail at 8:58, 9:26, 9:27, 9:28, and 9:32 a.m., he declared he did not listen to the message from the court clerk until 10:30 a.m. Brown contends the clerk's message informed him the case was being taken off trailing calendar and trial would start at 1:30 p.m. But the message, as transcribed by Brown, states, "I will leave you on the trailing trial" and "I need you to come in at 10 o'clock." In any event, the message clearly instructed Brown to call the court clerk "as soon as possible" and "call me back as soon as possible."

A reasonably prudent person either would have answered the court clerk's call at 9:15 a.m. or would have been continually checking voice mail on the morning of December 8, 2010 to make sure a call had not been missed. Upon listening to the message, a reasonably prudent person would have called the court clerk back *immediately* as directed and would have gone *immediately* to court. Brown did neither. He did not show up in court at 1:30 p.m., the time at which, he claims, he was informed the trial would start. As justification for not calling or appearing, Brown declared that Hamilton told him at about 11:15 a.m., "a judgment had already been entered that morning at

10:15 a.m.” Brown does not explain, however, why he did not call the court earlier, why he did not immediately go to Department C8 to find out what happened, or why he had no contact with the court whatsoever until he brought his motion to vacate the judgment 102 days later.

Brown argues his conduct was excusable because the legal process “can be unfathomable to laypersons.” Yet a litigant appearing in propria persona is held to the same rules as an attorney and is entitled to no greater consideration. (*Rappleyea v. Campbell, supra*, 8 Cal.4th at pp. 984-985.) More importantly, understanding the need to respond to telephone calls from the court and to obey the court’s instructions requires no legal training and is as obvious to laity as it is to attorneys. A reasonably prudent person would not have behaved as Brown did on the morning of December 8, 2010.

Section 473 is to be liberally applied when the party in default moves promptly to seek relief and the party opposing will not suffer prejudice if relief is granted. (*Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233.) In such situations, ““very slight evidence”” is required to obtain relief. (*Ibid.*) Brown did not promptly seek relief under section 473. He waited to bring his motion until 102 days after entry of judgment, 83 days after service of notice of entry of judgment, and at least two months after he claims to have received a copy of the judgment. He is not entitled to liberal construction of section 473.

### III.

#### *The Punitive Damages Award Is Not Void.*

When Brown failed to appear for trial on December 8, 2010, the trial court struck his answer and announced the matter would be treated as a default prove-up. Brown argues the punitive damages award of \$100,000 must be vacated because a default judgment for an amount greater than specifically demanded is void. Although the motion

to vacate the judgment only mentioned the punitive damages award,<sup>2</sup> and did not specifically challenge the punitive damages, Brown argues he may challenge them for the first time on appeal because they are void.

Brown's assertion the punitive damages are void depends on the characterization of the judgment entered against him as a default judgment. Such characterization is essential because the amount awarded in a default judgment may not exceed the amount demanded in the complaint, in the statement required by section 425.11, or in the statement provided by section 425.115. (§§ 580, subd. (a), 585, subd. (a); see also *Greenup v. Rodman* (1986) 42 Cal.3d 822, 826; *Van Sickle v. Gilbert* (2011) 196 Cal.App.4th 1495, 1521.) These restrictions apply both in cases in which the defendant never filed an answer and in cases in which the defendant's answer was stricken as a sanction, resulting in a default judgment. (*Greenup v. Rodman, supra*, at pp. 827-828.) "[A] default judgment greater than the amount specifically demanded is void as beyond the court's jurisdiction." (*Id.* at p. 826.)

A complaint in any action must not allege an amount of punitive damages. (Civ. Code, § 3295, subd. (e).) In an action in which the plaintiff seeks to recover punitive damages, the plaintiff can reserve the right to seek punitive damages on a default judgment by serving a statement of punitive damages on the defendant pursuant to Code of Civil Procedure section 425.115, subdivisions (b) and (f) before the defendant's default is taken. (*Matera v. McLeod* (2006) 145 Cal.App.4th 44, 60.)

While Fuller, appropriately so, did not allege an amount of punitive damages in the Complaint, she also did not serve a statement of punitive damages on Brown, pursuant to section 425.115, subdivisions (b) and (f) and therefore could not

---

<sup>2</sup> The only mention of the punitive damages award in the motion to vacate the judgment was the statement, "[g]iven that the Judgment was essentially entered by default and includes an award of \$100,000.00 punitive damages against Brown, personally, all doubts and inferences should be decided in favor of a trial on the merits and the Judgment should be vacated."

recover punitive damages by default judgment. But was the judgment in this case, labels aside, truly a *default* judgment resulting from a default prove-up? Fuller argues it was not; instead, she argues, the trial was an uncontested hearing under section 594(a) because Brown failed to appear for trial.

Under section 594(a), when an adverse party answers but fails to appear for trial, the trial court “may proceed with the case and take a dismissal of the action, or a verdict, or judgment, as the case may require” provided, if an issue of fact is to be tried, proof is made that the adverse party had 15 days’ notice of the trial (five days’ notice for an unlawful detainer trial). A default may not be entered against an answering defendant who fails to appear for trial. (*Heidary v. Yadollahi* (2002) 99 Cal.App.4th 857, 863, citing *Wilson v. Goldman* (1969) 274 Cal.App.2d 573, 576.) “Where the defendant who has answered fails to appear for trial “the plaintiff’s sole remedy is to move the court to proceed with the trial and introduce whatever testimony there may be to sustain the plaintiff’s cause of action.” [Citation.] In such case a plaintiff is entitled to proceed under the provisions of . . . section 594[(a)], and he may do so in the absence of the defendant provided the defendant has been given at least five days[’] notice of the trial. Section 594 does not authorize the entry of the default in the event the defendant fails to appear, and a hearing held pursuant to that section under such circumstances is uncontested as distinguished from a default hearing. [Citations.] [¶] Where a defendant has filed an answer, neither the clerk nor the court has the power to enter a default based upon the defendant’s failure to appear at trial, and a default entered after the answer has been filed is void [citations] . . . .” (*Heidary v. Yadollahi, supra*, at p. 863, fn. omitted.)

In *Garamendi v. Golden Eagle Ins. Co.* (2004) 116 Cal.App.4th 694, 704-705, the defendant filed an answer and actively defended the lawsuit until the start of trial, at which it “ceased to participate.” The trial court held an evidentiary hearing before entering judgment against the defendant. (*Id.* at p. 705.) A claims administrator argued the judgment was akin to a default judgment and was void because it awarded

damages in an amount greater than sought by the complaint. (*Id.* at p. 704.) The Court of Appeal explained the judgment was not entered by default because the court lacked authority to enter a default judgment. “[The defendant]’s failure to appear for trial after having received proper notice of the trial date authorized the entry of judgment against it under Code of Civil Procedure section 594[(a)], following an ‘uncontested’ evidentiary hearing, but it did not authorize the entry of a default judgment.” (*Garamendi v. Golden Eagle Ins. Co.*, *supra*, at p. 705.)

In this case, the judgment against Brown was not entered by default but resulted from an uncontested hearing under section 594(a). The trial court erred by striking Brown’s answer and mistakenly described the hearing as a default prove-up when it was an uncontested hearing. “Simply stated, the [trial] court had no power to order the entry of [Brown’s] default when [he] failed to appear for trial.” (*Heidary v. Yadollahi*, *supra*, 99 Cal.App.4th at p. 862.) The error was harmless because, as required by section 594(a), Brown received notice of trial and the trial court conducted an evidentiary hearing before rendering judgment against him. As a judgment following an uncontested evidentiary hearing, the judgment against Brown is not void on the ground it awarded damages in excess of those sought by the Complaint.

At oral argument, Brown mentioned, for the first time, that he did not receive notice of trial required by section 594(a) to proceed by uncontested hearing. The superior court’s register of actions reflects that at a hearing on November 5, 2010, the trial court scheduled the trial for December 6, 2010. Brown stated in his declaration that on December 2, 2010, Kostrenich told him the trial was scheduled for December 6. Brown appeared for trial on December 6, attended the settlement conference on December 7, and received notice to be available by cell phone on December 8. Thus, Brown received the requisite notice of trial, or, any lack of notice was harmless. (See *Colony Bancorp of Malibu, Inc. v. Patel* (2012) 204 Cal.App.4th 410, 418 [“Formal

notice of trial is not an issue because [the defendant] appeared through counsel at the commencement of trial”].)

There is, as is usually the case, a wrinkle, yet one that can be ironed out. Due process required that Brown be given notice of the amount of which he might be at risk in the litigation. As stated in *Garamendi v. Golden Eagle Ins. Co.*, *supra*, 116 Cal.App.4th at page 706, “[i]f the eventual judgment exceeded the amount that [the defendant] had been given notice was at risk in the litigation, the constitutional mandate of due process would void the excess, even if . . . section 580 did not.” In the case of a judgment resulting from an uncontested hearing, “[t]he fact that the precise amount of the requested damages was not specified in the complaint does not mean that the resulting judgment necessarily resulted in a deprivation of due process of law.” (*Ibid.*) The question is whether the notice imparted was “‘reasonably calculated, under all the circumstances,’” to apprise the defendant of the pendency of the action and afford the defendant the opportunity and reasonable time to appear and defend. (*Ibid.*, quoting *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314.)

In a declaration submitted in opposition to Brown’s motion to vacate the judgment, Kostrenich stated he sent Brown a letter, dated November 10, 2010, telling him that if he did not appear at trial, a judgment against him would be entered and punitive damages would be sought. The letter informed Brown “[i]f punitive damages are awarded, they can be two to three times the principal amount.” The principal amount specified in the Complaint was \$55,000. Brown later told Kostrenich he had received the November 10 letter and would appear at trial on December 6. Brown contends, as he did in his declaration, he did not receive the November 10 letter until January 2011. The trial court, as the fact finder, impliedly found Kostrenich’s account more credible, and we, as the reviewing court, may not second-guess that determination. The November 10, 2010 letter, together with the Complaint, imparted notice to Brown, sufficient under the

circumstances to satisfy due process, that punitive damages in the sum of \$100,000 might be imposed against him at trial.

The punitive damages award in the judgment therefore is not void. We do not, and cannot, address Brown's argument the punitive damages were in excess of the trial court's jurisdiction or were not supported by the evidence, because Brown did not make those arguments in the motion to vacate the judgment and did not appeal from the judgment. (See *People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 661 ["Errors which are merely in excess of jurisdiction should be challenged directly, for example by motion to vacate the judgment, or on appeal"].)

**DISPOSITION**

The order denying Brown's motion to vacate the judgment is affirmed.  
Respondent shall recover costs incurred on appeal.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.