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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

HUNG PHUONG NGUYEN,

Plaintiff and Appellant,

v.

LAP TRUNG HUA et al.,

Defendants and Respondents.

G048742

(Super. Ct. No. 30-2011-00501809)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Randell L. Wilkinson, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Hung Phuong Nguyen, in pro. per., for Plaintiff and Appellant

Lap Trung Hua, in pro. per.; Thien Truyen Nguyen Le, in pro. per.; Chanh Minh Nguyen, in pro. per.; Trang Tran Nguyen, in pro. per.; Cu Van Nguyen, in pro. per.; Nhon Ky Phan, in pro. per.; Sinh Tran, in pro. per.; Dung Trung Tran, in pro. per.; Dung Tri Bui, in pro. per.; Nhan Van Bui, in pro. per.; Dat Quang Le, in pro. per.; Long Nguyen, in pro. per.; Nguu Tan Phan, in pro. per.; Ha Son Tran, in pro. per.; Thang Van Tran, in pro. per.; Van Luc Nguyen, in pro. per.; Loi Viet Cao, in pro. per.; Anh Tran

Pham, in pro. per.; Vong Hy Nguyen, in pro. per.; Van Minh Tran, in pro. per.; Lactan Nguyen, in pro. per.; Hien Van Nguyen, in pro. per.; Nghia Xuan Nguyen, in pro. per.; Huu Nhu Phan, in pro. per.; Laura Hien Tran, in pro. per.; Phong Thanh Tran, in pro. per.; Thoi Thanh Vo, in pro. per.; for Defendants and Respondents.

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All parties are in propria persona in this appeal, which purports to be an appeal by plaintiff from an order granting defendants' motion for relief from default pursuant to Code of Civil Procedure section 473.<sup>1</sup> The problem for plaintiff, however, is that it does not appear the default (or defaults) from which relief was sought was ever actually entered, despite the subsequent calendaring of a default prove-up hearing. As defendants point out, the entry of default is not in the record and fails to appear on the docket. Plaintiff did not submit a reply brief that might have cleared up the confusion. It is possible the court granted defendants' motion for relief as a way of cleaning up this mess, but we cannot know that either, because the reporter's transcript was not included in the record. All we can say for certain is that under the relevant standard of review, plaintiff has failed to establish error. We therefore affirm.

## I

### FACTS

We do not know the facts of this case. A complaint was filed in 2011 alleging libel, intentional infliction of emotional distress, and invasion of privacy against 33 separate defendants. The complaint itself is not part of the record. Some of the defendants were apparently dismissed by plaintiff, and several others were dismissed pursuant to motions under section 425.16. The remainder of defendants claimed they were not properly served. Starting in December 2011, plaintiff began filing requests for entry of default. Some of these requests were rejected. Plaintiff claims defaults were

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<sup>1</sup> Subsequent statutory references are to the Code of Civil Procedure.

entered, but the entries of default are not shown on the docket, although some orders vacating default are. There are also entries showing the proposed judgments submitted by plaintiff were rejected in late 2012. We can only guess, because it is not included in the record, that when the court again rejected plaintiff's filings in January 2013, it scheduled the live prove-up hearing to sort matters out. The hearing was continued, and in the interim, on April 12, defendants filed a motion to vacate the default pursuant to section 473.5, subdivision (a). According to defendants, they had never been properly served. This motion was denied. Another motion seeking to vacate, under section 473, subdivision (b), was filed a week later. This motion was granted by the court, and the prove-up hearing was ordered off calendar. We do not know the court's reasons, as no transcript of oral argument was included in the record. Plaintiff now appeals.

## II

### DISCUSSION

Plaintiff argues the section 473, subdivision (b) motion should not have been granted. That section states, in relevant part: "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect."

Plaintiff argues defendants' attorney failed to show grounds for relief. We note another problem, however, which is that defendants may have moved for relief from a default that had not actually been entered at that point. Again, we do not know because the record is inadequate.

"A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' [Citations.]" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Fundamental*

*Investment etc. Realty Fund v. Gradow* (1994) 28 Cal.App.4th 966, 971.) Error must be prejudicial to require reversal. “The burden is on the appellant in every case to show that the claimed error is prejudicial; i.e., that it has resulted in a miscarriage of justice.’ [Citation.]” (*In re Marriage of McLaughlin* (2000) 82 Cal.App.4th 327, 337.)

The record and briefing here are woefully inadequate. We cannot determine what actually happened in the trial court, and therefore we cannot determine if it was error.

Moreover, even if the record was deemed adequate, plaintiff has failed to show reversible error. Despite plaintiff’s argument that the standard of review is de novo, it is not. “A ruling on a motion for discretionary relief under section 473 shall not be disturbed on appeal absent a clear showing of abuse. [Citations.]” (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610.)

Here, the defendants’ attorney submitted a declaration stating he was retained in January 2012 to represent 26 of the defendants. Those defendants told him they were not properly served, and only learned of the defaults requested by plaintiff after plaintiff mailed those requests. They also failed to receive any notice of entry of default. Reviewing the case status, the attorney had not received any notice and therefore advised them they did not have to respond to the default notices.

““[T]he provisions of section 473 of the Code of Civil Procedure are to be liberally construed and sound policy favors the determination of actions on their merits.” [Citation.]’ [Citation.] ‘[B]ecause the law strongly favors trial and disposition on the merits, any doubts in applying section 473 must be resolved in favor of the party seeking relief from default.’ [Citation.]” (*Maynard v. Brandon* (2005) 36 Cal.4th 364, 371-372.) Here, given the confusion, the complexity of the case due to the number of individual defendants, the multiple attempts at entering default, and plaintiffs’ propria persona status, we find any lapse on counsel’s part was indeed excusable, if such a lapse even

occurred in the first place. We remain unconvinced that defaults were ever entered. In any event, plaintiff has simply failed to establish error.

According to the record, matters in this case have been heard by several different judges, which probably did not help clarify the situation. Given that all parties are apparently once again representing themselves, we trust that assignment to a single judge for all purposes will help restore this case to order as it proceeds.

### III

#### DISPOSITION

The order is affirmed. In the interests of justice, each party is to bear its own costs on appeal.

MOORE, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.