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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

ANTONIO OCEGUEDA et al.,

Plaintiffs and Respondents,

v.

AMERICAN BROTHER
CORPORATION INC. et al.,

Defendants and Appellants;

GARY S. BROWN,

Objector and Appellant.

H041380

(Santa Clara County

Super. Ct. No. 111CV202525)

I. INTRODUCTION

Plaintiffs Antonio Ocegueda, Ines Ocegueda, Jorge Orejel, Gricelda Garcia, and Judy Jones filed a class action against defendants American Brother Corporation Inc. (ABC), The Gallant Group Ltd. (Gallant), and Adeel Amin.¹ After ABC and Gallant failed to respond to the first amended complaint, defaults were entered against them. The trial court subsequently denied ABC and Gallant's motion for relief from default (see Code Civ. Proc., §473, subd. (b)),² and a default judgment was entered against them for more than \$1 million.

¹ Amin is not a party to this appeal.

² All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

Meanwhile, Amin and his attorney at the time, objector Gary S. Brown,³ appealed from two orders imposing monetary discovery sanctions. This court dismissed the appeal and awarded sanctions, with the amount to be determined by the trial court. In the trial court, plaintiffs sought attorney's fees of \$31,435.50 in a memorandum of costs on appeal. Amin and Brown filed a motion to tax costs. The trial court denied the motion to tax costs after reviewing time records in camera and holding a further hearing.

On appeal from the judgment, ABC and Gallant seek review of the order denying their motion for relief from default. ABC contends that it was never properly served with the summons and first amended complaint and therefore its default should have been set aside. Gallant also contends that its default should have been set aside because, although it was a suspended corporation and could not defend itself in the action for a period of time, it was diligent and was eventually reinstated on the same day that the default was entered against it.

On appeal from the trial court's order denying his motion to tax costs, Brown contends that he was denied due process because he did not have an opportunity to review or respond to the time records that plaintiffs submitted for in camera review by the court. Brown also contends that the court erred in the amount of fees awarded.

For reasons that we will explain, we will affirm the judgment against ABC and Gallant, and we will affirm the order denying Brown's motion to tax costs.

II. FACTUAL AND PROCEDURAL BACKGROUND

ABC and Gallant did business under the name "RewireMyLoan.com," and Amin was the owner and chief executive officer (CEO) of ABC and Gallant. Plaintiffs were homeowners who: entered into contracts for loan modification services with ABC, Gallant, Amin, and/or other defendants; paid advance fees for those loan modification

³ The record on appeal reflects that Brown is no longer counsel for Amin and that Brown is asserting an appellate claim in his own individual capacity.

services; were not provided with the promised loan modification services; and did not receive promised refunds. Some plaintiffs also negotiated with defendants in a language other than English but did not receive a translation of the written agreements in that same language before executing the agreements.

Plaintiffs filed a class action complaint in June 2011, against defendants Amin, ABC, and others for claims that included breach of contract and unfair competition. In April 2013, plaintiffs filed a first amended class action complaint that added Gallant as a defendant and added a cause of action for fraud, among other changes.

ABC and Gallant failed to respond and defaults were entered. ABC and Gallant filed a motion for relief from default, but the trial court denied the motion and a default judgment was ultimately entered against them. ABC and Gallant were ordered jointly and severally liable with other defendants for various amounts, including \$951,710 in compensatory damages and \$300,000 in punitive damages. The court also granted plaintiffs' motion for class certification.

In the meantime, a discovery dispute arose between plaintiffs and Amin, who had filed an answer and appeared in the action. The trial court granted plaintiffs' discovery motion and ordered \$3,550 in sanctions be paid to plaintiffs' counsel. Neither Amin, nor his attorney Brown, paid the sanctions. After further proceedings, the court ordered Amin and Brown to pay the original sanctions of \$3,550, plus an additional \$2,930.

Amin and Brown appealed the sanctions orders. On motion of the plaintiffs, this court dismissed the appeal and awarded sanctions against Amin and Brown jointly and severally.

Plaintiffs thereafter filed in the trial court a memorandum of costs on appeal, which included a request for attorney's fees of \$31,435.50. Amin and Brown filed a motion to tax costs. After conducting an in camera review of time records submitted by plaintiffs and holding a further hearing, the court determined that the attorney's fees

requested by plaintiffs were reasonably incurred and denied Amin and Brown's motion to tax costs.

III. DISCUSSION

A. ABC's Appeal

1. Parties' contentions

We understand ABC to contend that the trial court erred in denying its motion for relief from default because it was not properly served with the summons and first amended complaint.⁴ Plaintiffs contends that ABC was properly served with the summons, complaint, and first amended complaint.

2. Background

ABC and Gallant failed to respond to the April 2013 first amended complaint, and a default was entered against each of them in October 2013. In December 2013, plaintiffs filed an application for default judgment against ABC and Gallant. The matter was set for a hearing on February 21, 2014.

In the meantime, on January 29, 2014, ABC and Gallant filed a motion for relief from default. Relevant here, ABC contended that it had not been properly served. In particular, it contended that no summons was issued in its name as a Colorado corporation regarding the first amended complaint, and that it had not appointed Lori Gray, who had been served with the summons and first amended complaint, as an agent for service of process. ABC acknowledged that its agent for service of process was CT Corporation.

Plaintiffs filed opposition to the motion for relief from default. Plaintiffs contended that ABC was properly served and that the incorrect reference to ABC as a

⁴ An order denying a motion to vacate a default is not appealable but may be reviewed on appeal from the judgment. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981; *First American Title Co. v. Mirzaian* (2003) 108 Cal.App.4th 956, 961; *Scognamillo v. Herrick* (2003) 106 Cal.App.4th 1139, 1146.)

California corporation, rather than a Colorado corporation, did not render service ineffective. In the absence of mistake, inadvertence, surprise, or excusable neglect, plaintiffs contended that the default of ABC should not be set aside.

ABC and Gallant filed a reply brief in support of their motion for relief from default.

On May 30, 2014, the trial court denied ABC and Gallant's motion for relief from default and granted plaintiffs' motion for default judgment. The court determined that ABC was properly served with the summons, complaint, and amended complaint, and that the "misnomer" in the pleadings regarding ABC being a California corporation did not invalidate proper service.

3. Analysis

a. section 473, subdivision (b) and the standard of review

In the trial court (and on appeal), ABC only generally referred to section 473, without specifying the ground upon which it sought relief from default under that section. The trial court and plaintiffs assumed that ABC was relying on the discretionary relief provision of section 473, subdivision (b). ABC does not contend otherwise on appeal.

The discretionary relief provision of section 473, subdivision (b) provides in 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." The application for relief must be made "within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken." (*Ibid.*)

" 'In order to qualify for [discretionary] relief under section 473, the moving party must act diligently in seeking relief and must submit affidavits or testimony demonstrating a reasonable cause for the default.' [Citation.] In other words, the court's 'discretion may be exercised only after the party seeking relief has shown that there is a proper ground for relief, and that the party has raised that ground in a procedurally proper

manner, within any applicable time limits.’ [Citation.]” (*Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1419 (*Huh*).

“ ‘Section 473 . . . permits relief for “excusable” neglect. The word “excusable” means just that: inexcusable neglect prevents relief.’ [Citation.] [¶] The burden of establishing excusable neglect is upon the party seeking relief who must prove it by a preponderance of the evidence. [Citations.]” (*Iott v. Franklin* (1988) 206 Cal.App.3d 521, 528, fn. omitted.) “ ‘Excusable neglect is that neglect which might have been the act of a reasonably prudent person under the same circumstances.’ [Citations.]” (*Huh, supra*, 158 Cal.App.4th at p. 1419.)

Similarly, “[i]n determining whether the attorney’s mistake or inadvertence was excusable, ‘the court inquires whether “a reasonably prudent person under the same or similar circumstances” might have made the same error.[.]’ [Citation.] In other words, the discretionary relief provision of section 473 only permits relief from attorney error ‘fairly imputable to the client, i.e., mistakes anyone could have made.’ [Citation.] ‘Conduct falling below the professional standard of care, such as failure to timely object or to properly advance an argument, is not therefore excusable. To hold otherwise would be to eliminate the express statutory requirement of excusability and effectively eviscerate the concept of attorney malpractice.’ [Citation.]” (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 258, italics omitted (*Zamora*).

“Where the mistake is excusable and the party seeking relief has been diligent, courts have often granted relief pursuant to the discretionary relief provision of section 473 if no prejudice to the opposing party will ensue. [Citations.]” (*Zamora, supra*, 28 Cal.4th at p. 258.)

“ ‘A ruling on a motion for discretionary relief under section 473 shall not be disturbed on appeal absent a clear showing of abuse.’ [Citation.]” (*Zamora, supra*, 28 Cal.4th at p. 257.) “ ‘ “[T]hose affidavits favoring the contention of the prevailing party establish not only the facts stated therein but also all facts which reasonably may be

inferred therefrom, and where there is a substantial conflict in the facts stated, a determination of the controverted facts by the trial court will not be disturbed.” ’ [Citations.]” (*Id.* at pp. 257-258.) However, any doubts in applying section 473 must be resolved in favor of the party seeking relief, because the policy underlying section 473 favors disposition on the merits. (*Huh, supra*, 158 Cal.App.4th at p. 1419.) An order denying a motion for relief under section 473 is therefore “ ‘scrutinized more carefully than an order permitting trial on the merits.’ [Citation.]” (*Huh, supra*, at p. 1420.)

b. service of process

“A default may be entered only after the defendant has been served with a summons and has failed to answer or file other responsive papers within the time prescribed in the summons” (*Schwab v. Southern California Gas Co.* (2004) 114 Cal.App.4th 1308, 1320, fn. omitted.) “ ‘[C]ompliance with the statutory procedures for service of process is essential to establish personal jurisdiction. [Citation.] Thus, a default judgment entered against a defendant who was not served with a summons in the manner prescribed by statute is void.’ [Citation.]” (*Sakaguchi v. Sakaguchi* (2009) 173 Cal.App.4th 852, 858 (*Sakaguchi*).

“A summons may be served on a corporation by delivering a copy of the summons and the complaint by any of the following methods: [¶] (a) To the person designated as agent for service of process as provided by any provision in [specified sections of the Corporations Code]. [¶] (b) To the president, chief executive officer, or other head of the corporation, a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a controller or chief financial officer, a general manager, or a person authorized by the corporation to receive service of process. [¶] . . . [¶] (d) If authorized by any

provision in [specified sections of the Corporations Code].” (§ 416.10, subds. (a), (b) & (d).)⁵

i. service of the complaint

In 2009, Amin, as owner of ABC, filed a fictitious business name statement in Los Angeles County indicating that “RewireMyLoan.com” is the fictitious business name of ABC.

In plaintiffs’ June 8, 2011 complaint, they identified Amin and “American Brother Corporation, a California Corporation d/b/a rewiremyloan.com” as defendants in the caption of the complaint. (Some capitalization omitted.) The body of the complaint similarly described Amin as the owner of “American Brother Corporation d/b/a RewireMyLoan.com,” a “California corporation.”

The summons, which was dated June 8, 2011, referred to defendants “Adeel Amin and American Brother Corp. (d/b/a ReWireMyLoan.com).”

Amin was personally served as an individual defendant with the summons and complaint on June 8, 2011.

That same day, on June 8, 2011, plaintiffs served an entity named “American Brother Corporation,” which they mistakenly believed was the same entity referred to in the complaint. Plaintiffs eventually “withdr[e]w” the summons and complaint and provided notice that the entity was not obligated to appear in the action.

Apparently after learning of the mistake, plaintiffs proceeded to serve ABC. According to a proof of service, a registered process server personally delivered the summons and complaint to Amin for “American Brother Corp. (dba rewiremyloan.com)” in Los Angeles, California on June 29, 2011.

⁵ ABC is a Colorado corporation. The parties assume that service of process may be effected on either (1) Amin, as owner of ABC, or (2) ABC’s agent for service of process as designated in Colorado. For purposes of this opinion, we will also assume that service may be made on either Amin or ABC’s agent as designated in Colorado.

On July 6, 2011, attorney Brown sent an email to plaintiffs' counsel stating that he had been retained by Amin and "American Brother Corp. d.b.a. ReWireMyLoan.com" and had "just received a copy of the complaint."

In December 2011, Brown signed a stipulated protective order in the action as the attorney for Amin and ABC.

Amin filed an answer to the complaint in March 2012.

In early October 2012, in connection with a discovery dispute, Brown stated in a letter to plaintiffs' counsel that the only defendant he represented was Amin and that he did "not represent American Brother Corporation."

In the trial court, Amin stated in a declaration that he "was never served with a summons and complaint for the American Brother Corporation formed in Colorado" and he was not "served with the initial complaint on behalf of the American Brother Corporation."

Based on the record, we determine that the trial court correctly found that ABC was properly served with the summons and complaint.

First, the proof of service by the registered process server reflects that the summons and complaint were personally delivered to Amin on behalf of ABC. On appeal, ABC implicitly acknowledges that Amin could accept service on its behalf. Further, if the proof of service complies with applicable statutory requirements, "[t]he filing of [the] proof of service creates a rebuttable presumption that the service was proper." (*Floveyor Internat., Ltd. v. Superior Court* (1997) 59 Cal.App.4th 789, 795.) In this case, ABC has not challenged the sufficiency of the proof of service of the summons and original complaint, and the trial court determined, based on the proof of service, that plaintiffs had served ABC by service on Amin. Moreover, a declaration of service by a registered process server, as in this case, creates a presumption of proper service. (*American Express Centurion Bank v. Zara* (2011) 199 Cal.App.4th 383, 390 (*American Express Centurion Bank*); Evid Code, § 647.) Although Amin stated in a

declaration that he had not been served with the complaint, “the trial court was not required to accept this self-serving evidence contradicting the process server’s declaration.” (*American Express Centurion Bank, supra*, at p. 390.) Indeed, to the extent a factual conflict exists as to whether Amin was served with the complaint on behalf of ABC, substantial evidence supports the trial court’s determination that service was properly made, in view of the proof of service by the registered process server. (See *Manson v. Shepherd* (2010) 188 Cal.App.4th 1244, 1258-1259 (*Manson*) [where the standard of review is abuse of discretion, a trial court’s factual findings are reviewed for substantial evidence].)

To the extent ABC contends it was not properly served because the complaint referred to it as a California corporation, rather than a Colorado corporation, the contention is unpersuasive. We find *Thompson v. Southern Pacific Co.* (1919) 180 Cal. 730 (*Thompson*) instructive on this issue.

In *Thompson*, the complaint referred to the defendant as “Southern Pacific Railroad Company,” a California corporation. (*Thompson, supra*, 180 Cal. at p. 731.) The summons and complaint was served on the authorized agent for “Southern Pacific Company,” a Kentucky corporation. (*Id.* at p. 732.) The two entities were separate corporations. (*Id.* at pp. 732-733.) The complaint was later amended to name the latter entity, Southern Pacific Company. (*Id.* at p. 733.) The California Supreme Court rejected Southern Pacific Company’s contention that it had been brought into court without service of process. The court explained: “In this case the real defendant’s agent received the summons and knew the contents of the complaint because the corporation appeared specially in the action. True, there was a misnomer of the party defendant in the pleading, but the court having acquired jurisdiction of the person of the defendant, as well as the subject matter of the suit, possessed the power to correct the misnomer.” (*Id.* at p. 734.) The court relied on the rule that “ ‘a mistake in pleading the corporate name of a party to an action’ ” may be corrected by amendment. (*Ibid.*)

In this case, ABC emphasizes that it was incorrectly identified as a California corporation rather than a Colorado corporation. However, it makes no contention that its corporate name as alleged in the complaint was wrong, which itself would be insufficient to render service of process ineffective. (*Thompson, supra*, 180 Cal. at p. 734.) Moreover, the complaint described the corporate entity as being owned by Amin, and the caption and body of the complaint and the summons included ABC's fictitious business name, RewireMyLoan.com. The allegations that Amin was the owner of ABC and that ABC's fictitious business name was RewireMyLoan.com were consistent with ABC's fictitious business name statement filed in Los Angeles County, in which ABC identified Amin as the owner and RewireMyLoan.com as its fictitious business name. The summons and complaint were personally delivered to Amin on behalf of ABC on June 29, 2011. Thereafter, on July 6, 2011, attorney Brown sent an email to plaintiffs' counsel stating that he had been retained by Amin and "American Brother Corp. d.b.a. ReWireMyLoan.com" and had "just received a copy of the complaint." The trial court found the July 2011 written communication by Brown reflected "that ABC was aware it was the defendant named in the original Complaint." Further, Brown signed a stipulated protective order on behalf of Amin and ABC in December 2011.

Under the circumstances, given that ABC's correct corporate and fictitious business names were included in the caption and body of the complaint and on the summons, that the summons and complaint were personally delivered to the owner, Amin, on behalf of ABC, and that ABC knew it was named in the complaint, we believe the trial court correctly determined that ABC was properly served with the summons and complaint, notwithstanding the incorrect reference in the complaint to its status as a California corporation rather than a Colorado corporation. (*Thompson, supra*, 180 Cal. at pp. 731-734; see also *Sakaguchi, supra*, 173 Cal.App.4th at 857 [" "if the service is otherwise properly made, and the person served is aware that he [or she] is the person named as a defendant in the erroneous manner, jurisdiction is obtained" ' '].)

ii. *service of the first amended complaint*

The first amended complaint, which was filed on April 2, 2013, continued to identify the defendants in the caption as Amin and “American Brother Corporation, a California Corporation d/b/a rewiremyloan.com.” (Some capitalization omitted.) However, the body of the first amended complaint was changed to allege that “American Brother Corporation, Inc.” was a *Colorado* corporation doing business in California under the fictitious business name RewireMyLoan.com. Plaintiffs further alleged that ABC’s principal place of business was a Wilshire Boulevard address in Beverly Hills, which was consistent with the address that ABC had listed in its fictitious business name statement filed in Los Angeles County. Plaintiffs also alleged that Amin was the owner and CEO of American Brother Corporation d/b/a RewireMyLoan.com.

Beginning in June 2009, ABC’s registered agent was National Registered Agents, Inc. (National), at 1535 Grant Street, Suite 140, in Denver, Colorado. Rob Engelberth, who was retained by plaintiffs to serve process on ABC, attempted personal service on National on April 16, 2013, at the Grant Street address, but the address was “incorrect.” Engelberth stated in an April 30, 2013 declaration: “Per Frances Moon, the Process Specialist, National Registered Agents, Inc. are no longer accepting service at this location. Service must go to CT Corporation at 1675 Broadway, Suite 1200 in Denver. CT Corporation verified they were authorized to accept service. Service was completed by personally serving Lori Gray – Authorized Agent.”

According to a similar declaration from Lance Haas, another process server who was retained by plaintiffs to serve process on ABC, Haas attempted to serve National on behalf of ABC at the Grant Street address two weeks after Engelberth but, similar to Engelberth, was told by an “employee” that “National Registered Agents, Inc. no longer accepts service at this location. Service must go to CT Corporation who bought out National Registered Agents, Inc. CT Corporation verified they were authorized to accept service.”

Plaintiffs filed two proofs of service reflecting that the original summons issued June 8, 2011, along with the first amended complaint and other documents, were personally delivered to “Lori Gray – Authorized Agent” at 1675 Broadway, Suite 1200, Denver, Colorado 80203, by Rob Engelberth on April 16, 2013, and by Lance Haas on April 30, 2013. Engelberth and Haas were both from Specialized Legal Services, Inc. in San Francisco, California, and were not registered California process servers.

On June 26, 2013, CT Corporation System, located in New York, filed a statement with the Colorado Secretary of State indicating that National had ceased being ABC’s registered agent as of that day.

In a September 2, 2013 letter, attorney Brown told plaintiffs’ counsel that “no entity named American Brother Corporation that was formed in California was involved in the transactions that are the subject of this lawsuit. I have not seen any other corporation included by the plaintiffs.”

Plaintiffs’ counsel responded in writing to Brown, stating that “the mistake in the caption is immaterial due to Paragraph 26 of the Amended Complaint . . . which properly identifies American Brother Corporation as a Colorado corporation that operated in California with a d/b/a registration in the state.” “Nevertheless, to resolve the issue,” plaintiffs’ counsel stated that plaintiffs were going to file an ex parte application requesting that the caption of the first amended complaint be corrected to state that ABC was a Colorado corporation rather than a California corporation.

On October 1, 2013, the trial court granted plaintiffs’ application to correct the caption of the first amended complaint. The caption was thus corrected by replacing “American Brother Corporation, a California Corporation d/b/a rewiremyloan.com,” with “American Brother Corporation, Inc., a Delinquent Colorado Corporation d/b/a rewiremyloan.com.” (Some capitalization omitted.)

On October 9, 2013, on plaintiffs’ request, a default was entered against ABC on the first amended complaint.

Amin caused a document to be filed with the Colorado Secretary of State on October 10, 2013, indicating that ABC's authorized agent for service of process was CT Corporation, at 1675 Broadway, Suite 1200, Denver, Colorado.

On October 16, 2013, Brown indicated in a letter to the trial court that ABC intended to file an answer to the first amended complaint that day, along with an application for a fee waiver. The answer was rejected by the court because ABC did not pay the requisite fees.

ABC filed a motion for relief from default on January 29, 2014. In support of the motion, Amin stated in a declaration that he was the only person authorized to designate the agent for service of process, and that he never authorized Lori Gray to be the agent for ABC. Amin further stated: "I was never served with a summons and complaint for the American Brother Corporation formed in Colorado. Nor was I served with the initial complaint on behalf of the American Brother Corporation. [¶] . . . I never received in the mail any summons and First Amended Complaint for the American Brother Corporation." In a separate declaration, attorney Brown stated that "Amin never received any copy of the summons or the First Amended Complaint."

We determine that the trial court correctly found that ABC was properly served with the first amended complaint.

First, to the extent ABC contends that it was not correctly named in the first amended complaint based on the caption, which referred to it as a California corporation rather than a Colorado corporation, we find the contention unpersuasive for reasons similar to those we have articulated regarding the original complaint. The summons and first amended complaint sufficiently named ABC, as both documents included ABC's corporate name and its fictitious business name RewireMyLoan.com. Further, the first amended complaint included allegations that ABC was a Colorado corporation, that Amin was the owner, and that ABC had a Wilshire Boulevard address, all of which were consistent with information contained in ABC's fictitious business name statement filed

in Los Angeles County. As we shall next explain, ABC was also properly served with the first amended complaint. Moreover, attorney Brown acknowledged in a letter that “no entity named American Brother Corporation that was formed in California was involved in the transactions that are the subject of this lawsuit.” In other words, ABC could not legitimately express confusion as to which corporation, the California one or the Colorado one, was implicated by plaintiffs’ first amended complaint. Under the circumstances, the trial court correctly determined that ABC was properly served notwithstanding the reference to ABC being a California corporation in the caption of the first amended complaint. (See *Thompson, supra*, 180 Cal. at pp. 731-734; *Sakaguchi, supra*, 173 Cal.App.4th at 857.)

In support of the contention that the name on the summons, complaint, and proof of service must “match exactly,” ABC quotes from an attachment to an August 2013 Judicial Council report, which was created pursuant to former Government Code section 68526.⁶ The attachment quoted by ABC and referring to the need to have the names “match exactly” is actually a checklist from Mendocino County Superior Court regarding its procedure for entry of default. (<http://www.courts.ca.gov/documents/Ir-Default-Prove-Up-Process-in-collection-cases.pdf>, as of March 22, 2016.) The checklist does not include any legal authority to support the contention that the names on the various documents must “match exactly,” nor does it provide persuasive support for

⁶ Former Government Code section 68526 stated in part: “(a) The Judicial Council shall conduct an analysis of the cost incurred by trial courts related to the default prove up process and report on the different methods trial courts use in processing filings related to the default prove up process, as well as the revenue generated by these filings. The Judicial Council shall also compare the processes used by trial courts in filings related to the default prove up process to best practices used in other states, including, but not limited to, the use of electronic filing. [¶] . . . [¶] (c) The Judicial Council shall provide its report to the Assembly Committee on Budget, the Senate Committee on Budget and Fiscal Review, and the Legislative Analyst’s Office” (Stats. 2011, ch. 193, § 1.)

ABC's argument in this case that a mistaken reference to a corporation as a California entity rather than a Colorado entity renders service of the document ineffective.

Second, to the extent ABC contends that it had to be served with a newly-issued or amended summons, rather than the original June 8, 2011 summons that was served with the April 2013 first amended complaint, ABC provides no authority to support this contention. (See *Engbretson & Co. v. Harrison* (1981) 125 Cal.App.3d 436, 441, fn. omitted [stating that it is “undoubtedly true that a defendant need only be served with summons once”]); *Gillette v. Burbank Community Hosp.* (1976) 56 Cal.App.3d 430, 433 [indicating that an amended or new summons must be served with an amended complaint on a new party defendant, but that an amended or new summons need not be served on an existing defendant over which the court has already obtained jurisdiction].)

Third, we find unpersuasive ABC's contention that it was not properly served based on the personal delivery of the summons and amended complaint to Lori Gray.

In this regard, ABC refers to the fact that service of the first amended complaint was done by an “unregistered individual.” Although “a registered process server's declaration of service establishes a presumption affecting the burden of producing evidence of the facts stated in the declaration” (*American Express Centurion Bank, supra*, 199 Cal.App.4th at p. 390; Evid Code, § 647), service by an unregistered individual does not render service ineffective. “There is no requirement that the person serving notices or a summons must be a registered process server A summons may be served by any person who is at least 18 years of age and not a party to the action. [Citation.]” (*City of Riverside v. Horspool* (2014) 223 Cal.App.4th 670, 680.)

ABC also generally refers to statements in the process servers' declarations regarding communications with National and with CT Corporation, which preceded service on Gray, as hearsay. To the extent ABC is contending on appeal that the trial court should not have considered such evidence because it was hearsay, ABC does not provide a record citation indicating that it objected to the declarations on this ground in

the trial court. (See *Duronslet v. Kamps* (2012) 203 Cal.App.4th 717, 725-726 [hearsay objection forfeited on appeal because record did not show that objection was made in the trial court].)

We understand ABC to assert that Gray was not authorized to accept service on ABC's behalf in April 2013, as set forth in the declaration by Amin, and that National was ABC's designated agent for service through June 2013, pursuant to documents filed with the Colorado Secretary of State.

However, according to the declarations from the process servers retained by plaintiffs to serve ABC, National stopped accepting service by April 16, 2013, and CT Corporation was thereafter authorized to accept service. As the trial court observed in its order denying relief from default, "ABC does not dispute that CT Corporation was authorized to accept service on its behalf." Moreover, the reasonable inference from the declarations of plaintiffs' process servers, the proof of service on Lori Gray, and the documents reflecting the address of CT Corporation, is that Gray was an employee or otherwise an agent of CT Corporation at the time she was served with the first amended complaint and other documents. Indeed, in its reply brief on appeal, ABC implicitly acknowledges that Gray was working for CT Corporation. Moreover, to the extent a factual conflict existed as to whether Gray was an employee or agent of CT Corporation, and whether CT Corporation was authorized to accept service on behalf of ABC and in place of National in April 2013, substantial evidence supports the trial court's affirmative determination as to each of these issues. (See *Manson*, 188 Cal.App.4th at p. 1258-1259.) Based on these factual determinations, we find no error in the trial court's conclusion that service was properly made upon ABC.

We further understand ABC to argue that Amin never received the documents that were served on Gray. In support of the motion for relief from default, attorney Brown stated in a declaration that "Adeel Amin never received *any copy* of the summons or the First Amended Complaint." (Italics added.) However, Amin's declaration in support of

the motion did not contain such a broad statement. Amin’s declaration regarding the first amended complaint was limited to a statement that he “never received *in the mail* any summons and First Amended Complaint for the American Brother Corporation.” (Italics added.) The trial court, as factfinder, could reasonably question the declarations of Amin and Brown on the issue of whether Amin received the first amended complaint that had been served on Gray, given that the person presumably most knowledgeable about whether Amin had received the pleading – Amin himself – did not specifically state that he failed to receive the pleading at all or by any means, only that he failed to receive it in the mail.

ABC further argues in a single sentence that because it was a “delinquent” Colorado corporation for a period of time, “the person attempting service should have checked the Colorado law for something similar to Cal. Code Civ. Proc. § 416.20,^[7] applied to suspended corporations.” ABC’s argument is not well-developed and is unpersuasive for that reason. ABC fails to provide legal authority supporting the proposition that personal delivery on a designated agent for service, as occurred here, is ineffective to serve a corporation that is “delinquent” in Colorado.

In sum, ABC contends that it was not properly served with the summons and first amended complaint, and that therefore the trial court erred in denying its motion for relief from default. We determine, however, that ABC was properly served with the summons, complaint, and first amended complaint. We observe that ABC has not argued on appeal or provided legal authority establishing that its legally incorrect position regarding

⁷ Section 416.20 states: “A summons may be served on a corporation that has forfeited its charter or right to do business, or has dissolved, by delivering a copy of the summons and of the complaint: [¶] (a) To a person who is a trustee of the corporation and of its stockholders or members; or [¶] (b) When authorized by any provision in Sections 2011 or 2114 of the Corporations Code (or Sections 3301 to 3303, inclusive, or Sections 6500 to 6504, inclusive, of the Corporations Code as in effect on December 31, 1976, with respect to corporations to which they remain applicable), as provided by such provision.”

whether it was properly served constitutes a mistake, inadvertence, surprise, or excusable neglect within the meaning of section 473. (See *Zamora, supra*, 28 Cal.4th at p. 258 [“the discretionary relief provision of section 473 only permits relief from attorney error ‘fairly imputable to the client, i.e., mistakes anyone could have made’ ”].) Accordingly, we conclude that the trial court did not abuse its discretion in denying ABC relief from the default under section 473, subdivision (b). (*Zamora, supra*, at p. 257; *Huh, supra*, 158 Cal.App.4th at p. 1419.)

B. *Gallant’s Appeal*

1. Parties’ contentions

Gallant acknowledges that it “was delinquent with tax returns” for California, that it had been suspended, and that it needed to work with the Franchise Tax Board to be reinstated, which occurred about the time that plaintiffs obtained a default against it. Gallant contends that the trial court erred in denying relief from the default, as Gallant had worked “diligently” to get reinstated and any delay was caused by the Franchise Tax Board.

Plaintiffs contend that Gallant could have sought to be reinstated much sooner and that it failed to show excusable neglect warranting relief from default.

2. Background

As described above, plaintiffs filed their initial complaint in June 2011 and served Amin the same day. Nearly two years later, on April 2, 2013, plaintiffs filed a first amended complaint which added Gallant as a defendant.

Plaintiffs believed that Gallant’s registered agent at the time was Amin. On July 26, 2013, plaintiffs’ counsel emailed Amin’s attorney Brown, asking whether Brown would accept service on behalf of Amin or, if not, whether Brown would provide Amin’s current address.

On July 27, 2013, Brown responded by email, stating he was “in discussion” and would get back to plaintiffs’ counsel.

On July 29, 2013, three days after the initial request, plaintiffs' counsel again emailed Brown asking whether he would accept service on behalf of Amin or provide Amin's current address for personal service. Brown responded that he was "not authorized" to accept service or to provide Amin's personal address.

That same day, however, on July 29, 2013, Amin filed with the California Secretary of State a form entitled "Statement of Information" on behalf Gallant. In the form, Amin named Brown as the agent for service of process for Gallant. Moreover, in a declaration later filed in support of the motion for relief from default, Amin stated: "About July 27, 2013, I gave my attorney Gary S. Brown permission to accept service upon me for the Gallant Group, Ltd., of which I am the agent for service of process."

Nonetheless, in a letter to plaintiffs' counsel on July 30, 2013, Brown reiterated that he had "not been granted permission" to provide Amin's home address, "[n]or . . . been granted permission" to accept service of process directed to Amin for another entity. Brown also later stated in his declaration in support of the motion for relief from default that he was "not authorized" to accept service on behalf of Amin on July 29, 2013, and that he only "later gained authorization and agreed to accept service upon Mr. Amin for the Gallant Group"

In a letter dated July 30, 2013, to plaintiffs' counsel, Brown expressly stated that he "can now accept service of process for the Gallant Group."

On August 23, 2013, plaintiffs served Brown, as agent for service of process of Gallant, by substituted service.

On September 28, 2013, Brown told plaintiffs' counsel that he was planning to file an answer for Gallant. According to Brown, he believed that Gallant was already revived, given his prior experience that the process normally takes less than four weeks.

On September 30, 2013, Gallant attempted to file an answer but it was rejected for failure to pay a filing fee. Plaintiffs' counsel emailed Brown, stating that filing an answer for a suspended entity may constitute sanctionable conduct against both the attorney and

client. Brown responded that he was informed that Gallant was revived, and that if he was wrong he would withdraw.

On October 1, 2013, Brown and another person from his office emailed plaintiffs' counsel, contending that the law provided for a "reasonable time" to revive. Plaintiffs' counsel was also told that the documents to "enable" a revivor had been filed, and that the Franchise Tax Board had indicated to Brown's office that it was "backed up" and was not "specific as to how long it will take."

In an email on October 2, 2013, plaintiffs' counsel told Brown that he had not provided evidence that Gallant had sought to revive itself despite multiple requests by plaintiffs. Brown responded that the "Franchise Tax Board is behind in its work," and that he was "not sure how one can prove those facts, as calling them leads to long waits and no concrete explanations, in [his] experience." Brown stated that if plaintiffs rushed to take a default, case law allowed Gallant to set it aside.

As of October 8, 2013, Gallant was still a suspended business entity in California. In an email dated October 10, 2013, plaintiffs' counsel asserted that Brown had "failed to provide any documentary evidence that [Brown had] sought revival" despite repeated requests and, accordingly, plaintiffs would be taking Gallant's default.

Brown responded by email on October 11, 2013, indicating that Amin had prepared tax returns for Gallant and submitted them by "ordinary mail" in September 2013, and that Amin "also presented the documents for reviving the corporation." According to Brown, Amin called the Franchise Tax Board, and a person there acknowledged that they had the documents and planned to review them. Brown further stated, "It was explained that they are back logged. There is not any clear date for the review." Brown concluded the email by stating that a default against Gallant was premature and that it would file an answer when the revivor was completed.

That same day, on October 11, 2013, plaintiffs' counsel requested that Brown provide a "postmarked application" regarding the application that was supposedly

submitted in September, as well as a copy of the postmarked application for revival. Plaintiffs' counsel stated that he was giving Brown "many opportunities to provide . . . actual evidence," and that he was not sure why Brown was not "working with [him]." Plaintiff's counsel indicated that Brown was not giving plaintiffs' counsel "many options" given that Gallant was suspended and could not file an answer.

In an October 14, 2013 email, Brown indicated that Amin did not have a postmarked application because the envelope with the application was submitted to the Franchise Tax Board. Brown acknowledged that Gallant was not active at the time and had not filed an answer. He contended that the law allowed for a reasonable time for revivor, and that reviving a corporation used to be faster based on his prior experience.

On October 18, 2013, plaintiffs filed a request for entry of default against Gallant, but it was not entered because of defects in the request.

Plaintiffs subsequently filed another request for entry of default against Gallant. On October 24, 2013, a default was entered as requested.

By Friday, October 25, 2013, Gallant was an active corporation in California. Brown notified plaintiffs' counsel of Gallant's active status by email on Monday, October 28, 2013. In a declaration in support of the motion for relief from default, Brown stated that he had since learned by contacting the California Secretary of State that Gallant was revived on October 24, 2013.

As described above, on December 10, 2013, plaintiffs filed an application for default judgment against Gallant. The matter was initially set for a hearing on February 21, 2014.

In the meantime, on January 29, 2014, ABC and Gallant filed a motion for relief from default. In the motion, Gallant contended that it had "pursued [r]evivor" with the California Franchise Tax Board, that it was entitled to a reasonable time for revivor, but that a default was entered against it on the same date that it was revived. Among other

authorities, Gallant generally referred to section 473 and the policy that there be a trial on the merits wherever possible.

In a supporting declaration, Amin stated that he “commenced the revivor” of Gallant “[a]bout” July 22, 2013, with the “help” from an accounting entity because much of the process involved preparation of tax returns for Gallant, which had been “inactive” for more than four years. Amin stated that he “diligently pursued the revivor of Gallant,” that he “worked with” with accounting entity, and that he “often called” the accounting entity and the Franchise Tax Board “to see what was happening.” Amin stated that he “was often told of delays due to lessening staff due to budget cuts.” Amin “reported the progress, when known to [his] attorney.” Amin stated that when he checked online on October 28, 2013, he “found” that Gallant was active again.

Plaintiffs filed opposition to the motion for relief from default. Plaintiffs contended that Gallant had been suspended in 2010 for failing to pay California taxes. Plaintiffs argued that Gallant’s CEO and president, Amin, knew as early as 2011 that RewireMyLoan.com, and therefore Gallant, was implicated in the lawsuit, and that he knew by April 2013 that Gallant was involved because it was named in the first amended complaint. However, Gallant did not take any steps toward revival until later in 2013. Plaintiffs also argued that Gallant’s delay tactics were reflected by its attorney Brown’s misrepresentations that he was not authorized to accept service. In the absence of mistake, inadvertence, surprise, or excusable neglect, plaintiffs contended that the default of Gallant should not be set aside.

ABC and Gallant filed a reply brief in support of their motion for relief from default.

The trial court ultimately denied Gallant’s motion for relief from default because it failed to demonstrate mistake, inadvertence, surprise, or excusable neglect. The court observed that Gallant did not seek an extension of time to respond to the first amended complaint pending revival, and plaintiffs were not required to refrain from seeking a

default while Gallant was attempting revival. Although Gallant had been inactive for more than four years by the time revivor was commenced in July 2013, and Gallant's CEO Amin was served in April 2013 with the first amended complaint naming Gallant as a defendant, Amin did not commence the revivor process until July. The court believed that the Franchise Tax Board was "not to blame for Gallant's own dilatory conduct, and Gallant should not be rewarded for its longstanding failure to attend to its tax obligations." The court granted plaintiffs' motion for default judgment against Gallant.

3. Analysis

"With exceptions not relevant here, 'the corporate powers, rights and privileges of a domestic taxpayer may be suspended, and the exercise of the corporate powers, rights and privileges of a foreign taxpayer in this state may be forfeited . . . ,' if a corporation fails to pay its taxes. [Citations.]" (*Bourhis v. Lord* (2013) 56 Cal.4th 320, 324 (*Bourhis*)). "A suspended corporation may be sued . . . [Citations.] In addition, a suspended corporation is not protected against a judgment by default upon its failure to answer within the time allowed. [Citation.]" (*Grell v. Laci Le Beau Corp.* (1999) 73 Cal.App.4th 1300, 1306.)

"A corporation whose powers have been suspended may apply with the Franchise Tax Board for reinstatement after satisfying its obligations. [Citation.] If the statutory requirements are met, the Franchise Tax Board issues a 'certificate of revivor.' [Citation.] 'Upon the issuance of the certificate [of revivor] by the Franchise Tax Board the taxpayer therein named shall become reinstated but the reinstatement shall be without prejudice to any action, defense or right which has accrued by reason of the original suspension or forfeiture' ([Rev. & Tax. Code,] § 23305a.)" (*Bourhis, supra*, 56 Cal.4th at p. 324.)

"A claim of lack of corporate capacity to prosecute or defend a civil action because of its suspended status ' "is a plea in abatement which is not favored in law." ' [Citation.] The primary purpose of statutes depriving suspended corporations of

privileges enjoyed by a going concern, including the capacity to sue or defend litigation, is to motivate delinquent corporations to pay back taxes or file missing statements. [Citations.] The suspension statutes are not intended to be punitive. Once the statutory goals underlying suspension are met, no purpose is served by imposing additional penalties. [Citations.]” (*Cadle Co. v. World Wide Hospitality Furniture, Inc.* (2006) 144 Cal.App.4th 504, 512.)

“[I]f the corporation’s status only comes to light during litigation, the normal practice is for the trial court to permit a short continuance to enable the suspended corporation to effect reinstatement (by paying back taxes, interest and penalties) to defend itself in court. [Citation.]” (*Timberline, Inc. v. Jaisinghani* (1997) 54 Cal.App.4th 1361, 1366 (*Timberline*).

For example, in *Schwartz v. Magyar House, Inc.* (1959) 168 Cal.App.2d 182 (*Schwartz*), the plaintiff moved for judgment at the time of trial on July 22, 1957, on the ground that the defendants were barred from defending the lawsuit because they had been suspended for failure to pay state franchise taxes. (*Id.* at p. 184.) The trial was thereafter continued more than once on motion of the defendants. (*Ibid.*) In support of the motions for a continuance, the defendants provided a declaration that explained the circumstances leading to the suspensions, that they did not know about the suspensions, and the steps they had taken recently to be revived. (*Id.* at p. 185.)

The defendants ultimately received a certificate of revivor from the Franchise Tax Board on July 26, 1957, which was two days after they had applied for it. (*Schwartz, supra*, 168 Cal.App.2d at pp. 185, 186.) The matter was tried and judgment was ordered for the defendants. (*Id.* at p. 187.)

The plaintiff appealed from the judgment, contending that the defendants’ powers were suspended for failure to pay taxes, they had no standing to defend the action, and the court thus erred in granting the motions to continue the action, and that the plaintiff’s motion for judgment should have been granted and that a judgment by default be

allowed. (*Schwartz, supra*, 168 Cal.App.2d at p. 187.) The appellate court disagreed. The court determined that a corporate defendant may properly move for a continuance for the limited purpose of paying delinquent taxes, and that the trial court also had the power to grant a continuance on its own motion. (*Id.* at pp. 188, 189.) The appellate court concluded that the trial court was justified in granting a continuance for approximately two weeks to enable the revival proceedings to be consummated and for the defendants to ultimately present a defense in view of the circumstances of the case, including that the trial court was “advised by the affidavit of the facts and circumstances leading up to the suspension of the defendant corporations, the declared purposes and objects of the corporations, and being informed that application had already been made for reinstatement of the corporations’ powers, rights and privileges, and that the state was not being deprived of any franchise tax.” (*Id.* at p. 189.)

In this case, the trial court determined that Gallant was “dilatory” regarding reinstating its corporate powers, and that Gallant had failed to demonstrate mistake, inadvertence, surprise, or excusable neglect under section 473 which would support relief from the default. Gallant fails to establish an abuse of discretion by the trial court.

First, the record supports the trial court’s determination that Gallant was dilatory in seeking reinstatement. Gallant’s suspended status did *not* “only come[] to light during litigation.” (*Timberline, supra*, 54 Cal.App.4th at p. 1366; see *Schwartz, supra*, 168 Cal.App.2d at p. 185.) Further, Gallant did not apply for a certificate of revivor within days of learning that its corporate powers had been suspended. (See *Schwartz, supra*, at pp. 184, 186.) Rather, Amin, who was the CEO of Gallant according to evidence provided by plaintiffs, admitted in a declaration that Gallant had been inactive for more than four years. Amin did not “commence[] the revivor” until “[a]bout July 22, 2013,” which was several months after Gallant was added to the action by way of the first amended complaint and Amin was served with the pleading in April 2013.

Second, for the same reasons, the record supports the trial court's determination that Gallant's default was not the result of mistake, inadvertence, surprise, or excusable neglect under section 473. Despite Amin knowing that Gallant had been named in the first amended pleading in April 2013, he delayed until July 2013 to begin the reinstatement process. Further, in contrast to the defendants in *Schwartz*, who sought a continuance from the court as soon as they learned of their suspended status and of the plaintiff's motion to enter judgment on that ground (*Schwartz, supra*, 168 Cal.App.2d at p. 184), Gallant in this case took no action to obtain a continuance from the court or an extension of time to respond to the first amended complaint pending reinstatement. Moreover, although Gallant knew plaintiffs were seeking an entry of default in October 2013, Gallant did not actually file a motion for relief from default until January 29, 2014, which was more than three months after Gallant had been reinstated and a default had been entered on October 24, 2013, and more than one month after plaintiffs actually filed an application for default judgment on December 10, 2013.

We are not persuaded by Gallant's attempt to cast the default as a circumstance out of its control and based wholly on the staffing of the Franchise Tax Board. A corporation's suspension "is . . . almost entirely within the control of the corporation. If it neglects to attend to its tax obligations and corporate formalities, or chooses to ignore them, an opposing litigant should not be penalized and the corporation should not be rewarded—or be allowed to engage in procedural gamesmanship—on that basis." (*Gibble v. Car-Lene Research, Inc.* (1998) 67 Cal.App.4th 295, 311.) In this case, Gallant fails to establish that the trial court abused its discretion in determining that the default was not the result of a "mistake, inadvertence, surprise, or excusable neglect" on the part of Gallant or its attorney. (§ 473, subd. (b).)

C. Brown's Appeal

1. Parties' contentions

We understand attorney Brown to be challenging the trial court's denial of his motion to tax costs and the court's finding that the \$31,435.50 plaintiffs sought in attorney's fees in their memorandum of costs on appeal was "reasonably incurred." Brown first contends that he was denied due process because he did not have an opportunity to review or respond to certain time records that plaintiffs submitted for in camera review by the court. Second, Brown contends that the requirements for attorney's fees under section 1021.5 have not been met in this case. Third, Brown contends that the amount of attorney's fees awarded was not reasonable.

Plaintiffs contend that the trial court used the proper method in calculating attorney's fees, the amount awarded was reasonable, and that Brown forfeited his due process claim and his due process right was not violated.

2. Background

In 2012, plaintiffs filed a discovery motion against Amin and ABC and ultimately sought more than \$12,000 in sanctions against Amin and his attorney Brown. The trial court granted the discovery motion and granted in part the request for monetary sanctions, ordering that \$3,550 be paid to plaintiffs' counsel within 30 days.

Amin did not comply with the discovery order, and neither Amin nor Brown paid the sanctions. Following an ex parte application by plaintiffs, the trial court issued an order to show cause why Amin and Brown should not be held in contempt.

In January 2013, after a hearing, the trial court determined that Amin and Brown failed to comply with the prior discovery and sanction order, but declined to find them in contempt. The court ordered further discovery responses. Regarding sanctions, the court stated that "Amin and Brown are once again jointly ordered to pay monetary sanctions to Plaintiffs' counsel in the amount of \$3,550.00" and "jointly to pay additional monetary

sanctions to Plaintiffs' counsel in the amount of \$2,930.00." (Bold and underlining omitted.)

Amin and Brown filed a notice of appeal regarding the September 2012 and January 2013 sanction orders. Plaintiffs filed a motion to dismiss the appeal on the ground that each of the sanction orders was less than \$5,000 and therefore the orders were not appealable. Plaintiffs further argued that Amin and Brown should be sanctioned for filing a frivolous appeal pursuant to section 907 and California Rules of Court, rule 8.276(a),⁸ in an amount to be determined in the trial court.

Amin and Brown filed opposition to the motion to dismiss. They argued, among other contentions, that the September 2012 order imposing \$3,550 in sanctions did not specify who was required to pay the sanction, and that the January 2013 sanction order, which included the original \$3,550 plus an additional \$2,930, was the first order specifying who was to pay the sanction. Because the latter order totaled more than \$5,000, the order was appealable according to Amin and Brown.

This court granted the motion to dismiss and awarded sanctions against Amin and Brown jointly and severally, leaving the amount to be determined by the trial court.

Plaintiffs thereafter filed in the trial court in September 2013 a memorandum of costs on appeal, which included a request for attorney's fees of \$31,435.50. In a supporting memorandum of points and authorities, plaintiffs cited this court's order granting sanctions, section 907, and rules 8.276(a) and 8.278, as a basis for the request for attorney's fees. Plaintiffs also filed a declaration from counsel to support the lodestar figure of \$31,435.50. According to counsel's declaration, the individuals that worked on the case included three attorneys from Law Foundation of Silicon Valley whose hourly rates ranged from \$450 to \$695, three attorneys from Orrick, Herrington & Sutcliffe LLP whose hourly rates ranged from \$450 to \$795, and one attorney from Lawyers Committee

⁸ All further rule references are to the California Rules of Court.

for Civil Rights under Law whose hourly rate was \$795. Plaintiffs sought reimbursement for some, but not all, of the attorneys' time expended in connection with the appeal, and those reduced hours were between three and 17 hours for each attorney. In the declaration, counsel also provided evidence of the rates charged by other firms of comparable size in the same region for attorneys with similar qualifications and experiences.

Amin and Brown filed a motion to tax costs. They argued that the attorney's fees sought by plaintiffs were excessive in view of the length and lack of complexity of plaintiffs' motion to dismiss the appeal. Amin and Brown further argued that plaintiffs' memorandum of costs was not supported by competent evidence, and that plaintiffs otherwise failed to provide sufficient information upon which the court could assess plaintiffs' attorneys' work on the appeal and their billing rate.

Plaintiffs filed opposition to the motion to tax costs. They argued that their memorandum of costs was prima facie evidence that their expenses were necessarily incurred, and that Amin and Brown failed to establish that the costs were not reasonable or necessary. They also sought an additional \$12,683.25 in attorney's fees for work spent on the "instant filing." Plaintiffs filed declarations from counsel that provided more detail regarding the nature of the work conducted by the attorneys, and more detail about the background and experience of certain attorneys.

In reply, Amin and Brown continued to argue that the requested costs, including attorney's fees, were not supported with competent evidence and were not reasonable or necessary.

The trial court issued a tentative ruling regarding Amin and Brown's motion to tax costs on May 22, 2014, the day before the hearing on the motion. In the tentative ruling, the trial court stated that plaintiffs were seeking \$31,435.50 in attorney's fees under rule 8.278(d)(2). The court indicated that the lodestar method would be used to calculate attorney's fees. The court explained that plaintiffs had provided evidence supporting

their memorandum of costs regarding the time spent and the billing rates for the attorneys working on the appeal, that they sought compensation for time spent on the motion to dismiss, that their rates were comparable to those charged by attorneys with similar qualifications and experience, and that in opposition to the motion to tax they submitted further evidence regarding the work performed by certain attorneys. The court determined, however, that “Amin and Brown’s point is well taken that the amount of fees requested for a single motion to dismiss in the Court of Appeal appears excessive. Plaintiffs did not submit detailed time sheets.” The court observed that although it could assess the value of professional services rendered in its court, and that detailed time sheets are not required, “[h]ere, because the instant motion seeks fees in connection with services rendered in another court, this Court is not in the same position to assess the value of the services provided from these papers alone.” In its tentative ruling, the court indicated that plaintiffs’ attorneys’ had 10 days to “submit their time records for in camera review so that the Court may better assess the reasonableness of the fee request.”

The hearing on Amin and Brown’s motion to tax costs was held the next day, on May 23, 2014. On appeal, there is no reporter’s transcript or settled statement reflecting the oral proceedings. The minutes of the hearing indicate that Brown appeared by telephone. In a subsequent written order, the trial court adopted the May 22, 2014 tentative ruling as the order of the court.

Pursuant to the trial court’s order, plaintiffs apparently submitted time records for the court’s in camera review.

On June 4, 2014, Brown substituted out as Amin’s attorney, and Amin began representing himself.

It appears from the record that the trial court issued another tentative ruling regarding several motions, including Amin and Brown’s motion to tax costs, in connection with a hearing on July 25, 2014. It does not appear that Brown contested the tentative ruling. On appeal, there is no reporter’s transcript or settled statement reflecting

the oral proceedings of July 25, 2014. The trial court filed an “order after hearing” in which it adopted its tentative ruling on Amin and Brown’s motion to tax costs as its order. According to the written order, the court “reviewed and considered the written submission of all parties” and “heard and considered the oral argument of counsel.” The court indicated that it had previously continued the motion to tax costs on appeal pending an in camera review of plaintiffs’ billing records. The court further stated that it had “conducted an in camera review of the time records of Plaintiffs’ counsel for work performed in response to Amin and Brown’s appeal.” The court noted that plaintiffs did not include in their fee request more than 48 percent of the hours incurred in working on the appeal. The court found that the amount of fees requested in plaintiffs’ September 2013 memorandum of costs on appeal was “reasonably incurred,” and it consequently denied Amin and Brown’s motion to tax costs.

3. Analysis

We understand Brown to be appealing the trial court’s July 25, 2014 order, in which the trial court denied his motion to tax costs⁹ and found that the fees requested in plaintiffs’ September 2013 memorandum of costs on appeal was “reasonably incurred.” Plaintiffs had sought, among other amounts, \$31,435.50 in attorney’s fees in their memorandum of costs on appeal.

a. due process

First, Brown contends on appeal that he was denied due process because he did not have an opportunity to review the records submitted by plaintiffs to the trial court for in camera review, and he was not given an opportunity to present arguments regarding

⁹ An order denying a motion to tax costs on appeal is appealable under the collateral order doctrine. (*Krikorian Premiere Theatres, LLC v. Westminster Central, LLC* (2011) 193 Cal.App.4th 1075, 1083-1085; but see *Barnes v. Litton Systems, Inc.* (1994) 28 Cal.App.4th 681, 685, fn. 4.)

that evidence. In making this argument, Brown relies on *Concepcion v. Amscan Holdings, Inc.* (2014) 223 Cal.App.4th 1309 (*Concepcion*).

Plaintiffs contend that Brown waived this argument because he did raise the due process argument below or otherwise object to the trial court's in camera review of the time records. Plaintiffs further argue that Brown "was given ample opportunity to argue the fee requests after the in camera review of the timesheets but did not appear to contest the ruling or argue that the in camera procedure violated his due process." (Italics omitted.)

In *Concepcion*, the plaintiffs filed a motion for attorney's fees and costs. (*Concepcion, supra*, 223 Cal.App.4th at p. 1314.) The defendants opposed the motion on the grounds that the amounts sought were excessive and the time expended was duplicative. (*Id.* at p. 1316.) In reply, the plaintiffs' attorneys offered to submit detailed billing records for in camera review. (*Ibid.*) The trial court issued a tentative ruling stating that the plaintiffs' attorneys should provide time records for in camera review and justify why the time expended by the attorneys was not duplicative. (*Id.* at pp. 1316-1317.) The hearing on the matter was not reported. (*Id.* at p. 1316.) The plaintiffs' attorneys thereafter filed additional declarations and provided time and cost records for in camera review by the court. (*Id.* at pp. 1317-1318.) At the continued hearing on the matter, the trial court granted the motion for attorney's fees and costs. (*Id.* at pp. 1318-1319.)

On appeal, the defendants argued that they were denied due process by the trial court's in camera review of the attorneys' billing records to support the fee award. (*Concepcion, supra*, 223 Cal.App.4th at p. 1312.) The plaintiffs contended that the defendants forfeited any objection to the trial court's in camera review of billing records because the defendants "remained silent" when the court issued its final ruling. (*Id.* at p. 1323.)

The appellate court found the forfeiture argument “unpersuasive.” (*Concepcion, supra*, 223 Cal.App.4th at p. 1323.) The appellate court noted that the plaintiffs were not contending that the defendants forfeited their objection at the unreported hearing when the trial court issued its tentative ruling and first invited in camera review of billing records. (*Id.* at p. 1323, fn. 8.) Regarding the subsequent hearing in which the trial court made its ruling, the appellate court determined that the trial court “invited no argument or discussion regarding its rulings.” (*Id.* at p. 1324.) The appellate court concluded that, “[u]nder these circumstances silence by [defendants’] counsel did not forfeit [their] right to challenge the trial court’s use of undisclosed billing records as a basis for its fee award.” (*Ibid.*) The appellate court further determined that it would exercise its discretion to consider the forfeiture issue for the first time on appeal because it involved an issue of law not dependent on the production of additional evidence, and the parties had been afforded a reasonable opportunity to address the issue. (*Ibid.*)

The appellate court ultimately determined that, although the trial court had the discretion to request additional information to determine the reasonable number of hours expended by counsel, it “was not permissible . . . for the court to invite an in camera review of timesheets and billing records not also made available to [the defendants] and then to award fees without providing an opportunity for further argument based on the supplemental evidence presented.” (*Concepcion, supra*, 223 Cal.App.4th at p. 1325.) The appellate court explained that, “[u]nder our adversarial system of justice, once [plaintiffs’] counsel presented evidence to support their fee request, [the defendants were] entitled to see and respond to it and to present [their] own arguments as to why it failed to justify the fees requested.” (*Ibid.*) The appellate court consequently reversed the attorney’s fee order and remanded the matter for further proceedings. (*Id.* at p. 1328.)

In contrast to *Concepcion* where the trial court “invited no argument or discussion regarding its rulings” (*Concepcion, supra*, 223 Cal.App.4th at p. 1324), the trial court in this case twice issued tentative rulings regarding its proposed, and thereafter actual, in

camera review of documents submitted by plaintiffs. Nothing in the record reflects, however, that Brown objected to the in camera review or otherwise attempted to address the court's tentative rulings. Plaintiffs contend that Brown did not object below to having the time records reviewed in camera and did not raise a due process claim. Brown does not dispute these contentions by plaintiffs in his reply brief on appeal. Having failed to raise the issue in the trial court, we determine that Brown forfeited his claim on appeal. (*Santantonio v. Westinghouse Broadcasting Co.* (1994) 25 Cal.App.4th 102, 113.)

Even if Brown did not forfeit the issue, we determine that he has failed to provide an adequate record establishing that the trial court did not provide him with the opportunity to see or respond to the records submitted for in camera review. There is no reporter's transcript or settled statement for the two hearings at which the trial court addressed the issue of an in camera review of plaintiffs' attorneys' time records. In May 2014, the trial court issued a tentative ruling stating that plaintiffs' attorneys' had 10 days to "submit their time records for in camera review so that the Court may better assess the reasonableness of the fee request." On appeal, there is no reporter's transcript or settled statement reflecting the oral proceedings that took place the following day regarding the court's tentative ruling. Likewise, there is no reporter's transcript or settled statement reflecting the oral proceedings that took place in July 2014 regarding the continued hearing on the motion to tax costs. According to the trial court's written order after the hearing, the court considered the written submissions of the parties and the oral argument of counsel. The substance of those written submissions and oral argument is not clear from the court's order.

On appeal, Brown contends that he did not have an opportunity to review the records that were submitted for in camera review, and he did not have an opportunity to present any argument regarding the records. Plaintiffs contend that Brown did not make any objection to this procedure in the trial court and that he was given an opportunity to

argue about the fee requests after the in camera review but he did not appear to contest the ruling.

Brown fails to provide an adequate record establishing that the trial court did not give him an opportunity to review the records, or did not provide an opportunity for him to make an argument based on those records. In conducting our appellate review, we presume that a judgment or order of a lower court is correct. “ ‘All intendments and presumptions are indulged to support [the judgment] on matters as to which the record is silent, and error must be affirmatively shown.’ ” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 (*Denham*); *Conservatorship of Rand* (1996) 49 Cal.App.4th 835, 841.) Therefore, the appellant “has the burden of showing reversible error by an adequate record.” (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574 (*Ballard*)). “ ‘A necessary corollary to this rule is that if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed.’ [Citations.]” (*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416 (*Gee*); see also *Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 187 (*Foust*)). Thus, where the appellant fails to provide an adequate record as to any issue the appellant has raised on appeal, the issue must be resolved against the appellant. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296 (*Maria P.*)). Here, in the absence of an adequate record establishing that the trial court did not give Brown an opportunity to view and respond to the records submitted by plaintiffs, Brown fails to demonstrate error in this regard.

b. section 1021.5

Second, Brown contends on appeal that “[t]he basis for enhanced attorney fees rests upon a finding of public benefit served,” citing section 1021.5 and a California Supreme Court case applying that section. Brown contends that “no public benefit has been achieved” in this case because there has not been any hearing on the merits yet. Brown does not, however, point to anything in the record indicating that section 1021.5

was a basis for plaintiffs' request for attorney's fees, or that the trial court relied on that section in denying Brown's motion to tax costs and awarding attorney's fees to plaintiffs.

c. reasonable amount of attorney's fees

Third, Brown contends that the more than \$30,000 awarded for attorney's fees on appeal was not reasonable based on the short and noncomplex motion by plaintiffs to dismiss the prior appeal. Brown also questions whether the trial court properly determined the fair market value of the services performed by plaintiffs' attorneys and whether a multiplier to the lodestar figure was warranted (although plaintiffs never requested a multiplier and the record does not indicate that the trial court applied a multiplier).

“[T]he fee setting inquiry in California ordinarily begins with the ‘lodestar,’ i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate. ‘California courts have consistently held that a computation of time spent on a case and the reasonable value of that time is fundamental to a determination of an appropriate attorneys’ fee award.’ [Citation.] The reasonable hourly rate is that prevailing in the community for similar work. [Citations.] The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided. [Citation.] Such an approach anchors the trial court’s analysis to an objective determination of the value of the attorney’s services, ensuring that the amount awarded is not arbitrary. [Citation.]” (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) A trial court’s determination of a reasonable amount of attorney’s fees is reviewed for an abuse of discretion. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 255.)

Brown fails to provide an adequate record establishing that the trial court abused its discretion in its determination of the reasonable amount of attorney’s fees. In determining the amount, the trial court relied on time records submitted by plaintiffs for in camera review. Brown did not seek to include those documents in the record on

appeal. The record is inadequate without them because we are unable to assess whether the amount of attorney's fees awarded by the trial court was reasonable or whether the award amounted to an abuse of discretion. As a result, the issue of the reasonableness of the fees awarded and whether the trial court abused its discretion must be resolved against Brown. (See *Denham, supra*, 2 Cal.3d at p. 564; *Ballard, supra*, 41 Cal.3d at p. 574; *Gee, supra*, 99 Cal.App.4th at p. 1416; *Foust, supra*, 198 Cal.App.4th at p. 187; *Maria P., supra*, 43 Cal.3d at pp. 1295-1296.)

Further, to the extent Brown contends that the trial court was required to provide a more detailed explanation for its award of attorney's fees, we reject that contention. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140 [trial court not required to issue statement of decision regarding attorney's fee award]; *In re Tobacco Cases I* (2013) 216 Cal.App.4th 570, 589 [court not required to explain its reason for a fee award absent a request for a statement of decision]; *Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 67 [finding "no California case law analogue to section 632 requiring trial courts to explain their decisions on all motions for attorney fees and costs, or even requiring an express acknowledgment of the lodestar amount"].)

In sum, Brown fails to demonstrate that the trial court erred in denying his motion to tax costs and determining that the fees requested in plaintiffs' memorandum of costs on appeal were reasonably incurred.

IV. DISPOSITION

The judgment against defendant American Brother Corporation Inc. and defendant The Gallant Group Ltd., and the July 25, 2014 order denying objector Gary S. Brown's motion to tax costs, are affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MIHARA, J.

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