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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

UNG TIONG UNG et al., Plaintiffs and Respondents, v. JONATHAN J. HEADMAN, JR., Defendant and Appellant.	H042617 (Santa Clara County Super. Ct. No. 1-03-CV817891)

In 2003, appellant Jonathan J. Headman, Jr., was named as a defendant in a wrongful death lawsuit after his brother, Timothy Headman, struck and killed two pedestrians while driving a pickup truck.[1] The lawsuit, filed by respondents Ung Tiong Ung, Ai Lang Yong, Margaret Shin Ung, Shin Yu Yung, Anabel Shung We Ong, Abigail Shung Qi Ong, and San San Seah, the survivors of the two pedestrians, alleged that Timothy was employed by appellant and was acting within the scope of his employment at the time of the accident. Respondents attempted to personally serve appellant several times with the summons and the complaint but were unable to complete service. Thereafter, the trial court granted their application to serve appellant by publication. In 2004, the San Jose Post Record published notice of the summons four times. Appellant failed to appear in the action, and the trial court entered a default judgment against him in 2005.

[1] We refer to Timothy by his first name for clarity.

In 2015, respondents applied to renew the default judgment. Shortly thereafter, appellant moved to vacate the default judgment, or, in the alternative, vacate the renewal of the default judgment. Appellant argued he never received actual or constructive notice of the lawsuit. He alleged he was abroad when the summons was published. He claimed he did not discover the default judgment was entered against him until respondents applied to renew the default judgment in 2015. After hearing argument from the parties, the trial court denied appellant's motion to vacate the default judgment and the renewal of the default judgment. Appellant appealed. For the reasons set forth below, we affirm the judgment.

BACKGROUND

1. *The Complaint and Default Judgment*

On July 3, 2002, Shin Chi Ung and Nelson Sze Sheng Ong, both citizens and residents of Malaysia, were visiting California for a training seminar. While walking outside their company's plant in Santa Clara, they were struck by a pickup truck driven by appellant's brother, Timothy. Ong was pronounced dead at the scene, and Ung died the following day. Ong was survived by his widow and his two young daughters. Ung was survived by her parents and two adult siblings.[2]

On June 16, 2003, Ung and Ong's survivors (respondents) filed a complaint against Timothy and "John Headman" based on the names listed on the accident report prepared by the California Highway Patrol. On July 21, 2003, respondents filed a first amended complaint for wrongful death. The complaint alleged that Timothy and John Headman were the owners and operators of the pickup truck, and Timothy had been under the influence of alcohol when the accident occurred.

Respondents attempted to serve appellant multiple times. On August 19, 2003, respondents' counsel received a phone call from a man who identified himself as

[2] Ung's father and mother passed away in late 2004 and in February 2005.

appellant's father, John J. Headman, Sr. Appellant's father informed counsel that he had been served with process, but he was not the person who owned the vehicle involved in the accident. He clarified that his two sons, appellant and Timothy, were the ones involved in the crash. He also told counsel that he had not been in contact with his sons for the past several years, but he believed appellant last lived somewhere in Santa Clara. On September 9, 2003, respondents filed an amendment to the first amended complaint that named appellant as a defendant.

Respondents successfully served Timothy with the first amended complaint, but he failed to appear. Subsequently, the trial court entered a default judgment against him on January 20, 2004.

Respondents, however, were unable to complete personal service on appellant. Thus, on January 26, 2004, respondents applied for an order to serve appellant by publication in the San Jose Post Record. Accompanying the application was a declaration prepared by respondents' counsel detailing his attempts at finding a viable address for appellant.

The declaration asserted that on August 11, 2003, a process server attempted to serve appellant at the address listed in the police report, 917 Warburton, Santa Clara, California. The process server discovered the address was a vacant business lot. Subsequently, the process server again attempted to serve appellant at 4305 Crescendo Avenue, San Jose, California, an address obtained through an online database search. Substituted service was made on a man named John Headman, a co-tenant of the residence and appellant's father. After service was made, appellant's father called counsel and informed him that he had been served with process, but he was not the owner or driver of the vehicle. Appellant's father told counsel that he had not spoken to appellant for several years, but he believed appellant lived somewhere in Santa Clara.

Between September 22, 2003, and October 7, 2003, the process server unsuccessfully attempted to serve appellant at 908 Reeve Street, Santa Clara, California, another address obtained through a database search. Counsel ultimately attempted to obtain a forwarding address for appellant from the United States Postal Service. The United States Postal Service informed counsel that appellant did not have a change of address order on file. Subsequently, counsel contacted the California Department of Motor Vehicles Financial Responsibility Department to ascertain whether there were any other listed addresses for appellant. Counsel was still awaiting a response from the department at the time he applied for service by publication. In January 2004, counsel asked the Los Angeles Daily Journal to conduct a records search for appellant in Santa Clara County. The search divulged only two recent addresses, on Reeve Street and Warburton Avenue.

Before the trial court ruled on the application for service by publication, respondent's counsel deposed Timothy on February 3, 2004. Timothy said he had worked for appellant's hauling company for approximately eight months to a year prior to the accident. He had permission to drive the pickup truck involved in the crash. To his knowledge, the pickup truck was not insured.

Timothy did not know where appellant lived. Timothy explained that he had spoken with appellant the week before the deposition. Appellant had told Timothy he intended to take a four-month trip to Taiwan. Timothy did not know why his brother was going to Taiwan, but he believed his brother may be going overseas to meet people he had met online. Timothy was unsure of how his brother was able to afford the trip.

On February 16, 2004, the trial court granted respondents' application for service by publication. The San Jose Post Record published the summons four times between April 2004 and May 2004. Appellant failed to appear in the action. On April 15, 2005,

the trial court entered a default judgment against him. In June 2005, abstracts of judgments were issued in Santa Clara County.

2. *Motion to Set Aside the Default Judgment*

On April 10, 2015, respondents filed an application to renew the default judgments against both appellant and Timothy. Notice of the applications were served on appellant and Timothy by first class mail.

On April 12, 2015, Timothy called appellant and told him he had received notice of respondents' application to renew the default judgments. Appellant claimed this was the first time he realized that the judgment had been personally entered against him. Several days later, appellant retained counsel to seek legal advice. At that time, the amount of the default judgment was $2,036,328.20. On May 5, 2015, appellant filed a motion to vacate default judgment or, in the alternative, vacate the renewal of default judgment, arguing the default judgment should be set aside for lack of actual notice under Code of Civil Procedure section 473, subdivision (d).[3] Alternatively, appellant argued the trial court should exercise its inherent equitable power to set aside the default judgment on the grounds of extrinsic fraud or mistake. Lastly, appellant insisted that even if he was not entitled to relief from the default judgment, the trial court should grant his motion to vacate the renewal of the default judgment under section 683.170.

Appellant submitted a declaration with his motion to vacate the default judgment or vacate the renewal of the default judgment. According to the declaration, appellant was aware that Timothy had killed two people in an auto accident while driving under the influence in 2002. At the time, appellant owned three dump trucks for his hauling company. Timothy was driving appellant's personal pickup truck the day of the accident, which was not insured. Appellant knew Timothy had been incarcerated after the accident, but he did not know he was personally named as a defendant in the subsequent

[3] Unspecified statutory references are to the Code of Civil Procedure.

lawsuit. He had not spoken with his parents for approximately three years before the accident.

Appellant declared his hauling business was located at 917 Warburton Avenue, Santa Clara, California. The business shut down in February 2003 after a fire. From mid-2003 until February 2004, he resided at 917 Warburton Avenue in a camper parked in the back of the building. A welding business began using the 917 Warburton address in mid-2003, but appellant continued to reside in the camper parked on the property. Appellant never encountered any process servers while living at 917 Warburton, nor did he receive notice of the case while he was living there.

Appellant explained that he decided to move to Taiwan in February 2004. He did not know about the lawsuit at the time. While in Taiwan, he met his wife, whom he married in October 2005. In November 2006, appellant and his wife permanently moved back to the United States. Appellant did not have contact with his parents after he returned. He had sporadic contact with Timothy, but Timothy never mentioned the lawsuit. Respondents had not attempted to collect the judgment against him, so he remained completely unaware of its existence.

In February 2015, appellant and his wife purchased a house. At that time, appellant became aware that an abstract of judgment had been recorded against both him and his brother and a default judgment had been entered against him. Appellant did not believe the default judgment applied to him, because he was not involved in the accident, the case was almost 10 years old, and nobody had ever attempted to collect the judgment against him. Appellant only realized the judgment was against him when Timothy called him several months later in April 2015, informing him about respondents' application to renew the default judgments.

Appellant also submitted a declaration prepared by his attorney, which attested that a process server had attempted to serve appellant at the 917 Warburton address, but

found the address was a "bad address" because it was a vacant business lot. Attached to his motion to vacate, appellant submitted a proposed verified answer to respondents' first amended complaint, which he claimed demonstrated he had a meritorious defense. In his answer, appellant denied giving Timothy permission to drive the pickup truck that day.

Respondents opposed appellant's motion to vacate, arguing the motion was untimely, and it was unlikely that both Timothy and appellant's father failed to mention the lawsuit to appellant, even if they had a strained relationship. Respondents noted that Timothy had spoken to appellant a week before he was deposed by respondent's counsel.

Appellant submitted a second declaration in support of his reply to respondent's opposition to his motion to vacate. In this declaration, appellant again asserted that none of his family members had informed him of the lawsuit. He explained that while in Taiwan, he taught English, was paid $18 an hour, and was not required to pay rent. He denied having knowledge of the lawsuit before he went to Taiwan.

After considering the parties' arguments, the trial court denied appellant's motion to vacate the default judgment and to vacate the renewal of the default judgment. Appellant filed a timely notice of appeal.

DISCUSSION

Appellant argues the trial court erred when it denied his motion to vacate the default judgment. He argues the trial court should have granted mandatory relief under section 473, subdivision (d). Alternatively, he claims the court should have exercised its equitable powers and granted discretionary relief due to extrinsic fraud or mistake. Lastly, he argues the court erred in denying his motion to vacate the renewal of the default judgment under section 683.170.

1. *Mandatory Relief under Section 473, subdivision* (*d*)

First, we find the trial court did not err when it denied appellant mandatory relief from the default judgment pursuant to section 473, subdivision (d). Appellant filed his

motion approximately a decade after entry of the default judgment, rendering the motion untimely.

Under section 473, subdivision (d), the court "may, . . . on motion of either party after notice to the other party, set aside any void judgment or order." "Where a party moves under section 473, subdivision (d) to set aside 'a judgment that, though valid on its face, is void for lack of proper service, the courts have adopted by analogy the statutory period of relief from a default judgment' provided by section 473.5, that is, [a] two-year outer limit." (*Trackman v. Kenney* (2010) 187 Cal.App.4th 175, 180 (*Trackman*).) Section 473.5, subdivision (a) provides: "When a service of a summons has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered against him or her in the action, he or she may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the action. The notice of motion shall be served and filed within a reasonable time, but in no event exceeding the earlier of: (i) two years after entry of a default judgment against him or her; or (ii) 180 days after service on him or her of a written notice that the default or default judgment has been entered."

In contrast to the two-year statute of limitations imposed on motions to vacate default judgments that are void for lack of proper service, default judgments that are void on their face may be vacated at any time under section 473, subdivision (d). " 'A judgment or order that is invalid on the face of the record is subject to collateral attack. [Citation.] It follows that it may be set aside on motion, with no limit on the time within which the motion must be made.' " (*Trackman, supra,* 187 Cal.App.4th at p. 181.) " 'A judgment is . . . void on its face when the invalidity is apparent upon an inspection of the judgment-roll.' " (*Dill v. Berquist Construction Co*. (1994) 24 Cal.App.4th 1426, 1441.) When a default judgment has been entered, the judgment roll consists of "the summons, with the affidavit or proof of service; the complaint; the request for entry of

default . . . , and a copy of the judgment." (§ 670, subd. (a).) Whether a judgment is void "does not hinge on evidence: A void judgment's invalidity appears on the *face of the record*, including the proof of service." (*Trackman, supra,* at p. 181.)

Here, appellant does not attack the default judgment as facially void. Rather, he argues the default judgment is void due to lack of proper service. This argument is not based on invalidities apparent on the face of the record but on extrinsic evidence: Timothy's deposition statements informing respondents' counsel of appellant's travel plans and appellant's declarations explaining how he failed to receive actual notice of the lawsuit.

Thus, the two-year limitations period set forth under section 473.5 applies, and section 473, subdivision (d) cannot offer appellant any relief. A motion to vacate a default and a default judgment under section 473 is reviewed for an abuse of discretion. (*Parage v. Couedel* (1997) 60 Cal.App.4th 1037, 1041.) Since appellant's motion under section 473 was untimely, the trial court did not abuse its discretion in denying it on this ground.

2. *Equitable Relief on the Ground of Extrinsic Fraud or Mistake*

Next, appellant argues the trial court should have granted his motion to vacate the default judgment on the grounds of either extrinsic fraud or mistake.

A court has the inherent authority to set aside a default judgment based on nonstatutory, equitable grounds "if it has been established that extrinsic factors have prevented one party . . . from presenting his or her case." (*In re Marriage of Park* (1980) 27 Cal.3d 337, 342.) If a "party can show that extrinsic fraud or mistake exists, such as a falsified proof of service . . . a motion may be made at any time, provided the party acts with diligence upon learning of the relevant facts." (*Trackman, supra,* 187 Cal.App.4th at p. 181.)

"Extrinsic fraud usually arises when a party is denied a fair adversary hearing because he has been 'deliberately kept in ignorance of the action or proceeding, or in some other way fraudulently prevented from presenting his claim or defense.' " (*Kulchar v. Kulchar* (1969) 1 Cal.3d 467, 471.) The term "extrinsic mistake" has been broadly applied to encompass "circumstances extrinsic to the litigation [that has] unfairly cost a party a hearing on the merits." (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981 (*Rappleyea*).) "In contrast with extrinsic fraud, extrinsic mistake exists when the ground of relief is not so much the fraud or other misconduct of one of the parties as it is the excusable neglect of the defaulting party to appear and present his claim or defense. If that neglect results in an unjust judgment, without a fair adversary hearing, the basis for equitable relief on the ground of extrinsic mistake is present. [Citation.] Relief will be denied, however, if the complaining party's negligence permitted the fraud to be practiced or the mistake to occur." (*Manson, Iver & York v. Black* (2009) 176 Cal.App.4th 36, 47.)

"When a default *judgment* has been obtained, equitable relief may be given only in exceptional circumstances. '[W]hen relief under section 473 is available, there is a strong public policy in favor of granting relief and allowing the requesting party his or her day in court. Beyond this period there is a strong public policy in favor of the finality of judgments and only in exceptional circumstances should relief be warranted.' " (*Rappleyea*, *supra*, 8 Cal.4th at pp. 981-982.) Thus, a stringent test applies to determine if a party qualifies for equitable relief from a default judgment on the basis of extrinsic mistake: " 'First, the defaulted party must demonstrate that it has a meritorious case. Second[], the party seeking to set aside the default must articulate a satisfactory excuse for not presenting a defense to the original action. Last[], the moving party must demonstrate diligence in seeking to set aside the default once . . . discovered.' " (*Id.* at p. 982.)

We review the trial court's denial of appellant's motion for equitable relief to vacate the default judgment for an abuse of discretion. (*County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1229.) On review we may not substitute our judgment for that of the trial court and must defer to the trial court's express or implied findings if they are supported by substantial evidence. (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1143.)

Here, the trial court did not make specific factual findings when it denied appellant's motion to vacate the default judgment. Nonetheless, from its denial of appellant's motion we may infer it found that appellant failed to demonstrate one or more of the required elements set forth in *Rappleyea, supra,* 8 Cal.4th at page 982. And we must uphold the trial court's discretionary ruling, " 'if . . . correct on any basis, regardless of whether such basis was actually invoked.' " (*Bae v. T.D. Service Co. of Arizona* (2016) 245 Cal.App.4th 89, 98.)

Even if appellant satisfied his burden to show he had a meritorious defense and there was a lack of prejudice due to his delay in moving to vacate the default, to warrant discretionary relief appellant must have also demonstrated a satisfactory excuse for not timely responding to the complaint. Courts have defined an extrinsic mistake broadly; it encompasses "almost any set of extrinsic circumstances" depriving "a party of a fair adversary hearing." (*Aldrich v. San Fernando Valley Lumber Co.* (1985) 170 Cal.App.3d 725, 738.) Extrinsic mistake often involves a party's excusable neglect. (*Kulchar v. Kulchar, supra,* 1 Cal.3d at p. 471.) " 'Excusable neglect is that neglect which might have been the act of a reasonably prudent person under the same circumstances.' " (*Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1419.)

Appellant's claim that he had a satisfactory excuse for failing to timely respond to the complaint rests entirely on the contents of his declarations. In his declaration, appellant asserted he was residing at the business address located at 917 Warburton

Avenue in Santa Clara when respondents attempted personal service. The process server who visited the address determined it was a vacant lot, and appellant never encountered him. Appellant declared he did not receive notice of the case during the time he resided there. He also declared that by the time the San Jose Post Record published the summons, he was traveling abroad in Taiwan. Appellant asserted that none of his family members, including Timothy, informed him he was involved in the lawsuit until Timothy told him in April 2015 that respondents were renewing the default judgment.

If found credible, appellant's declaration may have been sufficient to show he failed to respond to the summons due to excusable neglect, because he lacked actual or constructive notice of the lawsuit. The trial court, however, could have reasonably found appellant's declaration not to be credible, even in the absence of evidence contradicting it. (*Warner Bros. Records, Inc. v. Golden West Music Sales* (1974) 36 Cal.App.3d 1012, 1017, fn. 7; *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890; *Sprague v. Equifax, Inc*. (1985) 166 Cal.App.3d 1012, 1028.) "A trier of fact is free to disbelieve a witness, even one uncontradicted, if there is any rational ground for doing so." (*In re Jessica C.* (2001) 93 Cal.App.4th 1027, 1043.) Rational grounds for disbelieving a witness include the factors listed in Evidence Code section 780, which include the witness's interest in the matter being litigated. (Evid. Code, § 780, subd. (f); see *Pierce v. Wright* (1953) 117 Cal.App.2d 718, 723 [court is not bound to believe interested witness].)

Again, the only evidence that supported appellant's motion to vacate was his own declarations. Appellant did not submit any other declarations aside from the declaration of his attorney, who he retained to file the motion to vacate the default judgment and the renewal of the default judgment. Appellant's attorney lacked personal knowledge of the circumstances leading to the default judgment, and his declaration offers no support for

appellant's explanation of his whereabouts during the periods of time in question or his assertion that none of his family members told him about the lawsuit.

Thus, the trial court could have reasonably credited respondents' suggestion that appellant's declaration was not credible. Appellant asserted he lacked actual or constructive notice of the lawsuit. Yet, as respondents argued in their opposition to appellant's motion to vacate the default, two members of his immediate family—his father and his brother, Timothy—had knowledge of the lawsuit. And a week before appellant departed on his trip to Taiwan, Timothy spoke with appellant on the phone. Respondents argued it was unlikely that Timothy would fail to mention the lawsuit to appellant during this conversation, despite their strained relationship.

Appellant also argues that respondents' counsel failed to notify the court that appellant was going to be out of the country during the period when publication of the summons would occur. He further claims that counsel waited to run the publication in the newspaper until he *knew* appellant would be out of the country. Publication of the summons at a locale where a plaintiff *knows* a defendant is not present does not satisfy the requirements of service by publication under section 415.50, subdivision (b). (*Olvera v. Olvera* (1991) 232 Cal.App.3d 32, 42-43.)

However, aside from Timothy's vague deposition testimony about appellant's planned trip, there was no evidence that respondents' counsel knew that appellant had actually left for Taiwan when the notice of summons was published. As argued by respondents below, Timothy's statements to respondents' counsel about appellant's travel plans were vague. Timothy told counsel that appellant had informed him he was heading to Taiwan for four months, but Timothy was unsure of appellant's plans in Taiwan and his reasons for going abroad. Timothy also opined he did not know how appellant was able to afford a trip, because he believed appellant had no money. Ultimately, the

summons was published in a newspaper that circulated locally to appellant's last known address.

In his reply brief, appellant argues that respondents misused the process of service by publication and acted with disregard to his right to receive actual notice of the lawsuit. Service by publication, however, is a proper means to effectuate service, although it has been deemed a "last resort" that is to be exercised only after reasonable diligence to locate a person has been undertaken. (*Donel, Inc. v. Badalian* (1978) 87 Cal.App.3d 327, 332; *Kott v. Superior Court* (1996) 45 Cal.App.4th 1126, 1135.) Thus, service by publication under section 415.50 may be ordered by the trial court only "if upon application it appears to the satisfaction of the court the party to be served cannot with reasonable diligence be served in another manner." (*Kott v. Superior Court, supra,* at p. 1135.) Reasonable diligence must consist of a " ' "systematic investigation and inquiry conducted in good faith . . . ." ' " (*In re Christiano S.* (1997) 58 Cal.App.4th 1424, 1428, fn. 3.)

The declaration attached to respondents' application for service by publication detailed respondents' numerous attempts to personally serve appellant. Respondents performed several database searches and online inquiries in an attempt to discover alternative addresses for appellant. They asked Timothy and appellant's father about appellant's whereabouts. They attempted to find appellant's forwarding address through the United States Postal Service and conducted a records search in Santa Clara County. None of these actions produced a viable address. The trial court could have reasonably concluded that respondents were diligent in their efforts to locate appellant.

"A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) As the reviewing court, we do not reweigh or evaluate the credibility of witnesses or the evidence presented, and we must defer to

the trier of fact's express or implied findings. (*Escamilia v. Department of Corrections & Rehabilitation* (2006) 141 Cal.App.4th 498, 514.) Thus, we find the court did not abuse its discretion when it denied appellant's motion to vacate.

3. Motion to Vacate Renewal of Default Judgment under Section 683.170

Lastly, appellant argues the trial court erred when it denied his motion to vacate renewal of the default judgment under section 683.170.

A money judgment is enforceable for 10 years from the date of its entry. (§§ 683.020, 683.030.) After 10 years, a judgment creditor may renew a judgment for another 10 years. (§ 683.110 et seq.) Renewal of a default judgment is a ministerial act performed by the court clerk upon receipt of an application for renewal. (§§ 683.120, subd. (b), 683.150, subd. (a).) Section 683.170, subdivision (a) permits a judgment debtor to move to vacate the renewal of the judgment pursuant to "any ground that would be a defense to an action on the judgment."

"The judgment debtor bears the burden of proving, by a preponderance of the evidence, that he or she is entitled to relief under section 683.170." (*Fidelity Creditor Service, Inc. v. Browne* (2001) 89 Cal.App.4th 195, 199.) We review the trial court's order denying a motion under section 683.170 for an abuse of discretion. (*Fidelity Creditor Service, Inc. v. Browne*, *supra*, at p. 199.)

Here, appellant bases his argument that the trial court abused its discretion in denying his motion under section 683.170 on the same theories he advanced when arguing the court should have set aside the default judgment. He argues he is entitled to mandatory relief from default under section 473, subdivision (d), because the judgment is void as a matter of law for lack of actual or constructive notice of the proceedings. He also argues that he is entitled to equitable relief because the default judgment was entered as a result of extrinsic mistake or fraud.

As explained above, however, the trial court could have reasonably found appellant's declaration asserting lack of actual notice not to be credible. Accordingly, we also cannot find the trial court abused its discretion when it denied appellant's motion to vacate the renewal of the default judgment.

DISPOSITION

The order denying appellant's motion to vacate the default and/or vacate the renewal of the default judgment is affirmed. Respondents are entitled to their costs on appeal.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.