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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

EFTEHEA LEONTARITIS, Plaintiff and Respondent, v. MOHTARAM L. KOURSARIS, Defendant and Appellant.	B219095 (Los Angeles County Super. Ct. No. BC383073)

APPEAL from orders of the Superior Court of Los Angeles County, Ronald M. Sohigian, Judge. Reversed in part and dismissed in part.

Law Offices of Ziad Elrawashdeh Rawa, Ziad Elrawashdeh Rawa; Greines, Martin, Stein & Richland, Irving H. Greines and Feris M. Greenberger for Defendant and Appellant.

Law Offices of Santiago Rodnunsky & Jones, David G. Jones and Tamara S. Fong for Plaintiff and Appellant.

INTRODUCTION

Defendant Mohtaram L. Koursaris ("Liza")[1] appeals from an order denying her motion to quash service of summons and complaint and to vacate a default and default judgment in favor of plaintiff Eftehea Leontaritis. She also appeals from an order denying her motion for reconsideration. We reverse the order denying the motion to vacate and dismiss as moot the appeal from the order denying reconsideration.

FACTUAL AND PROCEDURAL BACKGROUND

On January 13, 2004, plaintiff filed a complaint against Liza's husband, Tony Koursaris (Tony), and his restaurant, Taverna Tony, seeking damages based on sexual harassment. (*Leontaritis v. Koursaris* (Super. Ct. L.A. County, 2006, No. BC309027).) Following a jury trial, judgment was entered in favor of plaintiff in the amount of $4,757,117.08 on November 20, 2006. Tony and Taverna Tony appealed the judgment.

Pursuant to court order, plaintiff conducted a judgment debtor examination on September 17 and October 5, 2007. During the examination, Tony acknowledged that he transferred to Liza his interest in their house without consideration in November 2006. She transferred to him her shares in Taverna's, Inc., the corporate owner of Taverna Tony. Additionally, as of the time of the judgment debtor examination, Liza was employed by Taverna Tony.

On December 31, 2007, plaintiff filed the instant action against Tony and Liza to set aside a fraudulent conveyance. She alleged that Tony and Liza as husband and wife owned real property at 4440 Encinal Canyon Road in Malibu. On June 23, 2004, Tony transferred the property to Liza by interspousal grant deed for no consideration. The

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[1] To avoid confusion, we refer to defendant Mohtaram L. "Liza" Koursaris and Tony Koursaris by their first names. (Cf. *In re Marriage of Corona* (2009) 172 Cal.App.4th 1205, 1209, fn. 1.)

grant deed was not recorded until March 21, 2005. The property was worth at least $10 million. The purpose of the transfer was to defraud Tony's creditors, especially plaintiff, by concealing his ownership interest in the property.

Unknown to plaintiff at the time she filed the instant action, on November 14, 2006, Liza entered into a trust agreement whereby she transferred the Encinal Canyon property to Anastassia Korakianitis as trustee to secure a debt in the amount of $2.5 million. The deed of trust was not notarized until March 16, 2007. However, on November 21, 2006, Liza transferred the Encinal Canyon property to Anastassia Korakianitis as trustee of the Koursaris Family Trust of September 11, 2006. Both the deed of trust and the deed for the transfer were recorded on March 27, 2007.

On January 2, 2008, plaintiff served notice of lis pendens and notice of pendency of action by certified mail, return receipt requested, on Tony at his attorney's address and on Liza at the Encinal Canyon address. Plaintiff received return receipts. Plaintiff recorded the lis pendens on January 8.

Plaintiff served Liza with the summons and complaint by substituted service on January 25, 2008. According to the proof of service, the process server contacted Tony at Taverna Tony on January 14. Tony said that Liza would be out of the country for at least the next six months. After several more attempts, the process server made substituted service on Tony on January 25, despite his refusal to accept service due to Liza being out of the country. After substituted service was made, a copy of the summons and complaint was also mailed to Liza at Taverna Tony on January 28.

Neither Tony nor Liza filed an answer. On June 16, 2008, plaintiff filed a request for entry of default against the two, and a default was entered by the clerk as requested.

On September 23, 2008, we issued our decision in the sexual harassment case, affirming the judgment. (*Leontaritis v. Koursaris* (Sep. 23, 2008, B196816) [nonpub. opn.].)

The default prove-up was held on December 5, 2008 and January 23, 2009. The trial court found that the transfer of the Encinal Canyon property from Tony to Liza was fraudulent, performed to prevent plaintiff from collecting on her judgment in the sexual

harassment case. The court therefore set aside the transfer. The default judgment was filed on January 23.

On March 24, 2009, Liza filed a motion to quash service of the summons and complaint. In support of the motion, she submitted a declaration stating that she filed for dissolution of her marriage to Tony on January 19, 2007; the dissolution of marriage was final on October 17, 2007. In November 2007, she moved from the Encinal Canyon property to a home in Woodland Hills.

According to Liza, she worked full time at Taverna Tony until January 2007, when she filed for dissolution of marriage. She continued to work there part time until September 2007, when her employment there was terminated. She did not work there in January 2008, when substitute service was made on her there. Since that time, she had not returned to the restaurant. Additionally, once she moved from the Encinal Canyon property, she had no further contact with Tony. He never advised her that he had received documents connected with this lawsuit. She knew nothing about the lawsuit until February 2009, when she heard about it from Faye Mirsalimi, her sister, who learned about it from Tony's lawyer.[2]

The trial court denied the motion on procedural grounds. It explained that once Liza's default was entered, her options were to move to set aside the default or appeal the subsequent default judgment. In addition, it was too late for her to move to set aside the default under Code of Civil Procedure section 473.

On June 18, 2009, Liza filed a motion to vacate the default and default judgment on the grounds they were void due to invalid service and she was entitled to relief under Code of Civil Procedure section 473.5 because she lacked actual notice of the lawsuit. The motion was supported by the same evidence Liza relied upon in support of her motion to quash. She filed a motion to quash service of summons and complaint concurrently with the motion to vacate.

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[2] Mirsalimi worked part time at Taverna Tony and spoke to Tony's lawyer when he came into the restaurant to eat. Mirsalimi knew him from the sexual harassment lawsuit.

In opposition to the motions, plaintiff submitted the declaration of her attorney, Timothy Mitchell. According to Mr. Mitchell, he had called Liza's attorney and offered to stipulate to setting aside the default and allowing Liza to file an answer. He received no response. He checked public records and identified the last transfer instrument of the Encinal Canyon property as the 2005 quitclaim deed.

The trial court denied the motions. The court found the motions were untimely under Code of Civil Procedure sections 473 and 473.5. In addition, the court found that Liza "did have actual notice of the pendency of this action and she does not even state that she did not receive notice of the lis pendens."

On July 31, 2009, Liza filed a motion for reconsideration. In support of her motion, she submitted documents showing the recordation of the deeds for the transfer of the Encinal Canyon property. According to the declaration of her attorney, he spoke to post office representatives who indicated that the certified letters sent to Liza were returned unclaimed.

Liza submitted a declaration by Tony stating that Liza had not been in Taverna Tony since October 2007. In early 2008, "[s]omeone left an envelope of documents on one of the tables at the restaurant," and he threw them away. Since he already had a judgment against him, he did not care about additional documents.

Liza stated in her declaration that she did not own or reside at the Encinal Canyon property in 2008 and was never served with the lis pendens. She did not know anything about the lis pendens or the lawsuit until February 2009, when her sister told her about it.

Liza also submitted declarations of employees of Taverna Tony. They stated that Liza stopped working at the restaurant in late 2007 and they had not seen her there since then.

Plaintiff opposed the motion on the ground none of the evidence submitted constituted newly discovered evidence. She also objected to much of the evidence on hearsay and other grounds.

At the hearing on the motion, the trial court addressed each of the objections to Liza's evidence. It then denied the motion, explaining that Liza failed to make a

satisfactory showing that the purportedly new evidence could not have been discovered and produced at an earlier time.

DISCUSSION

A. *Timeliness of Challenge to Default and Default Judgment*

Code of Civil Procedure section 473.5, subdivision (a),[3] provides: "When service of a summons and complaint 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."

The default judgment was entered on January 23, 2009. Liza filed her motion to vacate the judgment on June 18, 2009. This was well within the two years allowed by section 473.5, subdivision (a)(i).

However, subdivision (b) of section 473.5 requires that the motion "be accompanied by an affidavit showing under oath that the party's lack of actual notice in time to defend the action was not caused by his or her avoidance of service or inexcusable neglect. The party shall serve and file with the notice a copy of the answer, motion, or other pleading proposed to be filed in the action." Assuming arguendo Liza's declaration was sufficient to meet the requirements of section 473.5, subdivision (b), she still failed to comply with this section because her motion was not accompanied by a copy of her answer or other proposed pleading.

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3 All further section references are to the Code of Civil Procedure.

Section 473, subdivision (d), provides: "The court may, . . . on motion of either party after notice to the other party, set aside any void judgment or order." This provision applies to a default judgment that is valid on its face but void due to improper service. (*Strathvale Holdings v. E.B.H* (2005) 126 Cal.App.4th 1241, 1249; *Gibble v. Car-Lene Research, Inc.* (1998) 67 Cal.App.4th 295, 301, fn. 3.) The two-year limitation period of section 473.5 applies to such a motion. (*Gibble, supra*, at p. 301, fn. 3.) It commences upon entry of the default judgment. (*Rogers v. Silverman* (1989) 216 Cal.App.3d 1114, 1126.) Liza's motion to vacate the default and default judgment therefore was timely under section 473, subdivision (d).

B. *Validity of Service*

When a defendant claims a default and default judgment are void for lack of personal jurisdiction due to invalid service of process, the burden is on the plaintiff to prove the service of process was valid. (*Summers v. McClanahan* (2006) 140 Cal.App.4th 403, 413.) We review de novo the question whether service of process was valid. (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1200.)

Substituted service is governed by section 415.20, subdivision (b), which provides that "[i]f a copy of the summons and complaint cannot with reasonable diligence be personally delivered to the person to be served, . . . a summons may be served by leaving a copy of the summons and complaint at the person's dwelling house, usual place of abode, usual place of business, or usual mailing address . . . , in the presence of a competent member of the household or a person apparently in charge of his or her office, place of business, or usual mailing address . . . , at least 18 years of age, who shall be informed of the contents thereof, and by thereafter mailing a copy of the summons and of the complaint by first-class mail, postage prepaid to the person to be served at the place where a copy of the summons and complaint were left. Service of a summons in this manner is deemed complete on the 10th day after the mailing."

"To be constitutionally sound the form of substituted service must be 'reasonably calculated to give an interested party actual notice of the proceedings and an opportunity

to be heard . . . [in order that] the traditional notions of fair play and substantial justice implicit in due process are satisfied.' [Citations.]" (*Zirbes v. Stratton* (1986) 187 Cal.App.3d 1407, 1416.) Substituted service "'must be made upon a person whose "relationship with the person to be served makes it more likely than not that they will deliver process to the named party." [Citations.]'" (*Hearn v. Howard*, *supra*, 177 Cal.App.4th at p. 1203.)

Here, at the time of the judgment debtor hearings on September 17 and October 5, 2007, Tony stated that he and Liza shared a house, and Liza worked at Taverna Tony. Plaintiff filed this action on December 31, 2007. The lis pendens was mailed to the house; the person who signed for it has not been identified. The process server attempted to serve Liza with the summons and complaint at Taverna Tony beginning on January 14, 2008; Tony refused to accept service on the ground Liza was out of the country for at least the next six months.

According to Liza, she filed for dissolution of her marriage to Tony in January 2007. At that point, she stopped working full time at Taverna Tony and began working there part time. Her employment was terminated in September 2007. The dissolution of marriage was final on October 17, 2007. In November 2007, she moved from the home she previously had shared with Tony.

While there is some dispute as to the facts, i.e., when Liza stopped working at Taverna Tony, Liza presented evidence that at the time the lis pendens was mailed to the house, she did not live there, and at the time the summons and complaint was served at the restaurant, she did not work there and was no longer married to Tony.

Plaintiff presented no evidence that contradicted the foregoing, and it was her burden to establish that the service of process was valid. (*Summers v. McClanahan*, *supra*, 140 Cal.App.4th at p. 413.) Service on Liza at the restaurant where she no longer worked by leaving the summons and complaint with her former husband does not meet the requirement that it be "'reasonably calculated to give [Liza] actual notice of the proceedings.'" (*Zirbes v. Stratton*, *supra*, 187 Cal.App.3d at p. 1416.)

We need not address the question whether Liza had actual notice of the proceedings. While that is relevant to a motion under section 473.5, it is irrelevant to a motion under section 473, subdivision (d), which focuses only on whether there has been valid service of process, conferring personal jurisdiction over the defendant.[4]

DISPOSITION

The order denying motion to quash service of summons and complaint and to vacate a default and default judgment is reversed, and the trial court is directed to enter a new and different order granting the motion. The appeal is dismissed as to the order denying reconsideration. Defendant is to recover her costs on appeal.

JACKSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.

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[4] Although unnecessary to the resolution of this appeal, we note that the trial court did not abuse its discretion in denying Liza's motion for reconsideration. Reconsideration is not properly granted where a party could have produced the evidence on the original motion but did not think it necessary to do so. (*New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 213.)