4th Civil No. G011755

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ROBERT ROGALSKI,

Plaintiff and Respondent,

vs.

NABERS CADILLAC, INC. and
RICHARD NABERS,

Defendants and Appellants.

Appeal from the Superior Court of Orange County
The Honorable David C. Velasquez, Judge Presiding

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Plaintiff lists twelve "noteworthy facts" in the Introduction to his Respondent's Brief (RB 1-2), but most are noteworthy only for their utter irrelevance to the issues on this appeal. In particular, this Court should not be led

astray by plaintiff's repeated assurances of the strength of his wrongful termination claim. Defendants have never had their day in court on that claim. Indeed, the core issue on appeal is whether defendants should have the opportunity to prove their side of the case.

In this Reply Brief, defendants will refocus this Court's attention on the real issues, refute plaintiff's legal arguments, and reiterate why defendants' defaults and the resulting default judgment should be set aside.

LEGAL DISCUSSION

1.

THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO SET ASIDE DEFENDANTS' DEFAULTS AND THE DEFAULT JUDGMENT.

a. The Real Issue On Appeal Is Not "Sufficiency Of The Evidence" But "Abuse Of Discretion."

Plaintiff asserts the "sufficiency of the evidence" standard of appellate review, summarizes the evidence he presented without opposition at his default prove-up hearing, and concludes that the default judgment should therefore be affirmed. (RB 3-8.) In a similar vein, plaintiff asks this Court to affirm the order

denying relief from default because the order purportedly did not "result in a 'miscarriage of justice,' especially given the obvious merit of Mr. Rogalski's claims . . ." (RB 16-17.)[1/]

Although defendants disagree with plaintiff's self-serving assessment of his claim, neither the merit of plaintiff's claim nor the merit of defendants' defense is properly before this Court. (Price v. Price (1956) 140 Cal.App.2d 816, 817; First Small Business Inv. Co. v. Systim, Inc. (1970) 12 Cal.App.3d 645, 650 ["[a] hearing on a motion to relieve a defendant from default is not the place or time to ascertain whether defendant really has a defense."].) No affidavit of merits is required on a motion for relief from default under Code of Civil Procedure section 473.[2/] As explained by Justice Kaus in Uva v. Evans (1978) 83 Cal.App.3d 356:

> "While the existence of an arguably meritorious defense may reasonably lend support to a trial court's determination that a default should be vacated, it does so only because it aids the policy that 'appellate courts are more disposed to affirm an order where the result compels a trial on the merits . . . .' [Citation.] Section 473 requires that a proposed answer be filed with the motion to set aside the default. The existence of a defense is irrelevant to the critical question of

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1/ While sufficiency of the evidence might be a relevant standard of appellate review where there is a factual dispute as to how the defaults occurred, there is no such dispute here. The facts are clear -- it is the legal import of those facts which this Court must decide.

2/ Defendants nevertheless demonstrated that they have meritorious defenses to plaintiff's claims. Defendants' affidavits filed with their motion for relief from default show that there was good cause for plaintiff's termination, that they had no intent to discriminate against him on the basis of age, and that, in any event, plaintiff's damage claims were excessive. (CT 106, 110-111, 113.)

whether the moving party showed that his failure to act was caused by 'mistake, inadvertence, surprise or excusable neglect.'" (Id. at p. 362, emphasis added.)

The merits of the underlying controversy are not in issue because the erroneous denial of the opportunity for a party to present evidence and argue his cause is the denial of a substantial right. (Spector v. Superior Court (1961) 55 Cal.2d 839, 844.) It is not a "mere error of procedure" and cannot be excused under the "no miscarriage of justice" standard of California Constitution, Article VI, section 13, or Code of Civil Procedure section 475. (Callahan v. Chatsworth Park, Inc. (1962) 204 Cal.App.2d 597, 610 [on review of summary judgment]; Bush v. Bastian (1931) 112 Cal.App. 644, 647-648 [on review of default judgment].)

Therefore, the real issue on this appeal is whether the trial court abused its discretion in refusing to set aside defendants' defaults and the default judgment. For the following reasons, defendants respectfully submit that the trial court did abuse its discretion in the circumstances of this case.

b. Defendants Reasonably Relied On Their Insurer To Defend As Promised And Were Taken By Surprise When The Insurer Failed To Defend.

Plaintiff asserts that defendants' insurance broker "told them that the claim was probably covered." (RB 8.) In fact, there was no "probably." Stanley Mashita, who was responsible for defendants' legal matters, states unequivocally:

> "Mr. Cressman [defendants' insurance broker] told me that the lawsuit would be a 'covered loss' under Nabers Cadillac's, Inc.'s insurance policy issued by Golden Eagle Insurance Company, and that Golden Eagle would handle the defense of the lawsuit." (CT 104:17-19, emphasis added.)

Plaintiff notes that at one point before the defaults were entered, Golden Eagle advised defendants that it was questioning whether coverage could be afforded under the policy. (RB 8.) In fact, however, Golden Eagle's duty to defend was separate from the issue of coverage. "As long as the potentiality of coverage exists, the duty to defend also exists." (Jaffe v. Cranford Ins. Co. (1985) 168 Cal.App.3d 930, 934.) The evidence is undisputed that Golden Eagle "did not state, or in any way imply, that Golden Eagle was not handling the defense of this lawsuit." (CT 105:11-12.) Golden Eagle had notified defendants in a letter addressed "Dear Insured," that the matter had been received "for coverage pursuant

to the provisions of your Golden Eagle insurance policy," that a claim file had been established, and that Golden Eagle had commenced its investigation. (CT 122.) Defendants therefore reasonably "understood that Golden Eagle would handle the litigation, including, but not limited to, the appointment of defense counsel and the timely filing of a response on behalf of all defendants." (CT 104:27-28:3.)

Plaintiff chastises defendants for not closely monitoring the litigation themselves (RB 8-9), but in fact defendants did everything within reason to assure themselves their insurer was providing a defense. As soon as defendants learned that an answer to plaintiff's complaint was overdue, they conferred in person with the insurance broker. The broker assured defendants that "the lawsuit is, in fact, covered . . . and that he would make certain that Golden Eagle handles the matter in timely fashion." (CT 105:17-19.) The next thing defendants heard, just a week later, was that Golden Eagle had not and would not provide them a defense. (CT 105:22-25.) That same day defendants retained their own counsel and have since done everything possible to defend this action.

Finally, plaintiff claims that defendants "did not diligently pursue coverage and defense with their carrier, again choosing to rely on a casual offer by their broker to follow up on it." (RB 16, original emphasis.) In fact, it was not a "casual offer" at all. The broker told defendants, without qualification, that "he would make certain that Golden Eagle handles the matter in timely fashion." (CT 105:18-19.)

To defendants' complete surprise, and despite repeated assurances that it would provide a defense, Golden Eagle failed to do so. In these circumstances, the trial court abused its discretion in refusing to set aside defendants' defaults and the default judgment.

c. The Surprise Failure Of Defendants' Insurer To Provide A Defense Is A Proper Basis For Setting Aside Defendants' Default.

Where, as here, a defendant has reasonably relied on a third party to provide a defense, and the third party fails to provide that defense, the defendant is entitled to relief from default. (Weitz v. Yankosky (1966) 63 Cal.2d 849, 855-856; Crane v. Kampe (1964) 225 Cal.App.2d 200, 205-206; Pelegrinelli v. McCloud River, etc. Co. (1905) 1 Cal.App. 593, 596-597.)

Realizing he cannot seriously contend that defendants themselves acted unreasonably[3/], plaintiff resorts to Don v. Cruz (1982) 131 Cal.App.3d 695, for the proposition that when the third party on whom the defendant reasonably relies happens to be his insurer, relief from default may be granted only when the insured proves additionally that the insurer's conduct also is excusable.

3/ Plaintiff candidly concedes that his allegations against Golden Eagle are "more compelling" than those against defendants. (RB 16.) As plaintiff puts it: "The carrier knew about the lawsuit, knew that defendants had tendered defense of same to it, knew when a response was due, and yet failed either to respond to it or inform defendants that it was not going to respond in time for defendants to defend the case themselves." (RB 16.)

Defendants have already shown that Don is inapplicable to this case. (AOB 21-26.) Among other things, Don involved an action addressed to the trial court's extra statutory powers in equity, not, as here, a motion for relief from default under the more generous provisions of Code of Civil Procedure section 473. Moreover, Don predated the 1988 amendment to Section 473. That amendment specifies that relief from default must be granted where a default results from the neglect of the defendant's attorney, whether or not the attorney's neglect was excusable. If, as Don assumes, a defendant's reliance on his insurer is legally equivalent to reliance on an attorney (131 Cal.App.3d at pp. 701-702), then establishing the reasonableness of the insurer's conduct should not now be a prerequisite to relief, either.

Plaintiff does not address these problems with Don. Instead, he moves on to cite several out-of-state cases in support of his proposition that to justify relief from default a defendant must show not only that he reasonably relied on his insurer to defend, but also that the insurer's failure to defend was excusable. (RB 20-23.) For every case cited by plaintiff, however, there is an equal and opposite out-of-state case which supports the proposition that a defendant is entitled to relief where he reasonably relies on his insurer, whether or not the insurer's conduct is shown to be excusable. An insured should not be left to the whim of his insurer in these circumstances. For example, in Ackerman v. Burgard (S.D. 1961) 109 N.W.2d 10, the defendant promptly delivered a summons to his insurance agent and the agent forwarded it to the insurer. Then:

"For some unexplained reason the insurer failed to answer, appear, or defend the action against defendant as it was obligated to do by contract. Defendant made numerous inquiries of the [agent] and was assured repeatedly his insurer was taking care of the matter and his interests would be protected. When defendant learned of the judgment he moved to be relieved of default without delay. Under the circumstances defendant was justified in relying on his insurer to answer or appear for him . . . ." (Id. at p. 13.)

Similarly, in White v. Holm (1968) 73 Wash.2d 348, 438 P.2d 581, the court states:

"We need not now decide whether or not there was in fact any culpable neglect on the part of the insurer or its agents, for we are satisfied that in any event the instant circumstances do not warrant an imputation of any such fault to defendants, who were otherwise found to be blameless. . . . Under these circumstances, we would be most reluctant to hold that Mr. Holm tendered the defense of the action to the insurer at his peril." (Id. at p. 585.)

See also, Weisberg v. Garcia (1965) 75 N.M. 367, 404 P.2d 565 [rejecting argument that insured's remedy is against his insurer, who for unexplained reasons failed to defend the insured]; Hobbs v. Martin Marietta Company (1964) 257 Iowa 124, 132, 131 N.W.2d 772, 777 [holding it unjust to require insured to keep constant check until appearance made by insurer]; Sears, Roebuck & Co. v. Ramey

(1984) 170 Ga.App. 873, 318 S.E.2d 740, 741-742 [reversing denial of relief from default where defendant reasonably believed insurer was providing defense]; Sterling Myers Ford Sales, Inc. v. Brown (1975) 33 Ill.App. 619, 621-622, 338 N.E.2d 149, 151-152; Eby v. Misar (S.D. 1984) 345 N.W.2d 381, 382-383.[4/]

These cases, not Don, are consistent with California's public policy favoring trial on the merits. Unless inexcusable neglect is clear, this policy prevails over the usual deference to the trial court's exercise of discretion. (Elston v. City of Turlock (1985) 38 Cal.3d 227, 235.)

If defendants were neglectful at all (plaintiff has not shown that they were), that neglect was excusable in the circumstances of this case. Defendants' insurer's failure to act to protect their interests should not be imputed to them. Defendants' default and the default judgment should therefore be set aside.

d. The Curious Circumstances Of Plaintiff's Filing Of Default Papers.

Contrary to plaintiff's assertion (RB 10-11), defendants' appellate counsel had no knowledge that plaintiff filed two sets of the same default papers on different dates. Court records give no such indication. They show only one set of default papers, all file-stamped July 3, 1991. (CT 26-35.) Appellate counsel also had no

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4/ Defendants' potential remedy against their insurer is not a sufficient reason to permit an erroneous default judgment (and windfall to plaintiff) to stand. While the insurer might be able to satisfy the monetary aspects of the default judgment, defendants forever will be saddled with the stigma of an age discrimination judgment against them.

knowledge of plaintiff's July 5, 1991, letter to defendant's trial counsel, not part of the record, advising that a second set of default papers would be filed. (RB 10-11.)

By their arguments on appeal, defendants do not intend to suggest any dishonesty on the part of plaintiff's counsel. Defendants do suggest that even with plaintiff's explanation for the present state of the record, the circumstances are extraordinary. According to plaintiff, the original set of default papers filed with the Court on July 3, 1991, was withdrawn from the court file. Another set of default papers was filed on July 5, 1991, and backdated to July 3, 1991. The proofs of service on the second set were also backdated by the clerk from July 5 to July 3, 1991, thus leaving the erroneous impression that service of that set was made on defendants' counsel on July 3, 1991, when in fact counsel was not served until July 5, 1991. (RB 10-11.)

Plaintiff contends these anomalous facts surrounding his service and filing of default papers are raised by defendants only to "muddy the waters." (RB 10.) Not so. First, because "default judgment ends the controversy, the rules leading to it are precise and should be followed to the letter. Where a plaintiff fails to adhere to those rules, a defendant need not suffer the consequences a default judgment brings." (Jones v. Interstate Recovery Service (1984) 160 Cal.App.3d 925, 928.) Defendants therefore properly question the unusual circumstances surrounding the entry of defendants' default. Second, the exact timing of filing of the default papers is important to show the absence of prejudice to plaintiff if relief were granted. Through no fault of their own, defendants missed, literally by just minutes, the

opportunity to file their answer before their defaults were taken. If plaintiff had given Golden Eagle even one more day to respond, as plaintiff could have done under local rules, defendants would have avoided default. If defendants' prompt motion for relief from default had been granted, this case would now be well on its way to final adjudication on its merits rather than bogged down in a dispute over the propriety of defendants' default.

Furthermore, plaintiff is hardly above efforts to "muddy the waters." Plaintiff's brief makes much of the fact that he believes defendant Richard Nabers was untruthful in testifying at a deposition that he and defendant Nabers Cadillac had been involved in just a few prior lawsuits. (RB 14.) Plaintiff also dwells on a motion made by Golden Eagle to block the deposition of one of its adjusters, characterizing the motion as "misleading" and "frivolous." According to plaintiff, defendant is dishonest and Golden Eagle is devious. (RB 12-14.)

Again, of course, plaintiff's characterization of the facts is all his own. No court has made such findings. More importantly, plaintiff is distracting this Court's attention with matters which occurred after the defaults were taken. They have nothing to do with whether the defaults were properly taken in the first place, whether relief from default should have been granted, and whether the amount of the default judgment exceeds the amount of plaintiff's prayer.

e. Plaintiff Would Suffer No Undue Prejudice From A Trial On The Merits.

Defendants anticipated and refuted most of plaintiff's arguments why he would supposedly suffer undue prejudice if the default judgment were set aside. (AOB 26-29.) Plaintiff, of course, has been put through some additional proceedings (and so have defendants), but that is true for virtually every plaintiff who erroneously obtains a default judgment which must be set aside. If inconvenience to the plaintiff were alone sufficient cause to deny relief from default, such relief would never be available under Code of Civil Procedure section 473. As the court states in Palmer v. Moore (1968) 266 Cal.App.2d 134:

> "We may assume that it was disappointing to the plaintiff to have his judgment for $17,500 and costs set aside, but there was no showing that a delay of the trial of the case on the merits would be prejudicial to him." (Id. at p. 141.)

Plaintiff does not complain that evidence has been lost or that witnesses have disappeared. Plaintiff has already taken the depositions of all the pertinent parties and has even had the opportunity to examine the defendants' insurance adjuster and the claim file. Plaintiff does complain that he has "revealed his case" at the default prove-up hearing. But plaintiff would have had to do that anyway when defendants are finally permitted to engage in their own discovery. And, while plaintiff

complains that he dismissed all fictitiously-named defendants at the default prove-up proceeding, he was not required to do so. (Code Civ. Proc., § 579.) There is no danger whatsoever that plaintiff will be without a solvent defendant in the unlikely event he can obtain a judgment after a contested trial on the merits.[5/]

Finally, as defendants have already shown, plaintiff's argument that there is no defense to his claims is just an argument. He assumes the validity of the very matters which defendants have not been permitted to contest. A full trial could and would lead to an entirely different conclusion.

In short, plaintiff would suffer no undue prejudice if defendants were permitted to defend plaintiff's action. There was no legitimate basis for the trial court to exercise its discretion so as to deny defendants a trial on the merits in this case.

5/ Plaintiff has yet to explain how the Trust which owns the land which the defendant car dealership occupies could possibly be liable for his alleged wrongful termination by the dealership.

2.

THE DEFAULT JUDGMENT IS VOID BECAUSE PLAINTIFF FAILED TO GIVE DEFENDANTS ADEQUATE NOTICE OF THE TYPE AND AMOUNT OF DAMAGES CLAIMED.

a. Plaintiff Failed To Serve A Statement Of Special And General Damages As Required By Code Of Civil Procedure Section 425.11.

Since plaintiff's complaint basically asserted a claim for personal injury, his failure to serve a statement of special and general damages under Code of Civil Procedure section 425.11 invalidates defendants' defaults and the resulting default judgment. (Hamm v. Elkin (1987) 196 Cal.App.3d 1342, 1346.)

Plaintiff argues his case should not be treated as a personal injury case because the damages awarded for emotional distress were eliminated when the court reduced the amount of the default judgment. (RB 33-34.) The flaw in this argument is that the trial court did not eliminate any particular item of damages when it reduced the amount of the default judgment; the court simply reduced the overall amount. (CT 392, 453-456; RT 3, 17.) Presumably the reduction applied proportionately to the various parts which made up the whole.

Moreover, unlike Barragan v. Banco BCH (1986) 188 Cal.App.3d 283, relied on by plaintiff (RB 33), the personal aspect of plaintiff's claim cannot be divided from the economic aspect. Plaintiff's claim arises out of one incident. In Barragan, the complaint sought damages for a variety of separate acts of wrongdoing, including conversion, fraud, breach of contract, and false imprisonment.

While plaintiff would prefer to ignore cases interpreting tax statutes, they offer useful guidance in understanding the term "personal injury" as used in Section 425.11, which itself offers no definition of the term. The same term ordinarily should be given the same meaning wherever it appears in the law. "Harmony and consistency are positive values in a legal system because they serve the interests of impartiality and minimize arbitrariness. Construing statutes by reference to others advances those values. In fact, courts have been said to be under a duty to construe statutes harmoniously where that can reasonably be done." (2B Sutherland Statutory Construction (1992) § 53.01, pp. 229-230.)

The most recent and helpful tax case in interpreting the term "personal injury" is United States v. Burke (May 26, 1992) ___ U.S. ___, 60 U.S. Law Week 4404. In Burke, the United States Supreme Court considered whether a settlement of a back pay claim under Title VII of the Civil Rights Act of 1964 is excludable from gross income under Section 104(a)(2) of the Internal Revenue Code as "damages received . . . on account of personal injuries." The Court concluded the settlement was not excludable, since the sole remedial focus of Section 104(a)(2) is the award of back wages. The statute therefore does not redress a tort-like personal

injury within the meaning of section 104(a)(2). The Court carefully distinguished other statutes which create a cause of action of a more tort-like conception:

> "No doubt discrimination could constitute a 'personal injury' for purposes of § 104(a)(2) if the relevant cause of action evidenced a tort-like conception of injury and remedy. [Citation.] Indeed, the circumscribed remedies available under Title VII stand in marked contrast not only to those available under traditional tort law, but under other federal antidiscrimination statutes, as well. [Footnote omitted.] For example, 42 U.S.C. § 1981 permits victims of race-based employment discrimination to obtain a jury trial at which 'both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages may be awarded.' [Citation.] The Court similarly has observed that Title VIII of the Civil Rights Act of 1968, whose fair housing provisions allow for jury trials and for awards of compensatory and punitive damages, 'sounds basically in tort' and 'contrasts sharply' with the relief available under Title VII. [Citation.]" (Id. at p. 4407.)

In this case, plaintiff's claim for wrongful termination based on age discrimination is akin to those "tort-like" claims which the Supreme Court in Burke states would constitute claims for "personal injury." Plaintiff is not limited to the sole remedy of back pay. He can and has claimed not only economic damages for

past and future lost earnings but also damages for emotional distress and attorney's fees under the age discrimination statute.

Plaintiff's age discrimination claim cannot be meaningfully distinguished from the housing discrimination claim which was held to be a claim for "personal injury" in Schwab v. Rondel Homes, Inc. (1991) 53 Cal.3d 428, 432. Plaintiff's damages might be measured in part by past and future economic losses, but the heart of his discrimination case is a wrong committed at a personal level, and he seeks to vindicate a highly personal right. Plaintiff's discrimination case is quintessentially an action for "personal injury."

b. Plaintiff's Complaint Did Not Give Adequate Notice Of The Nature And Amount Of Damages Claimed.

Plaintiff's complaint prayed for $500,000 damages for each of four causes of action for age discrimination, breach of contract, breach of covenant of good faith and fair dealing, and wrongful termination. (CT 9-10.)[6/] But this was not, as plaintiff argues, an adequate substitute for the specification of damages required by Code of Civil Procedure section 425.11. His complaint did not break down the $500,000 amount into general and special or any other category of damages.

6/ To be precise, plaintiff has only one cause of action. The four counts of his complaint simply state different theories of relief based on an alleged violation of one primary right. (City of Los Angeles v. Superior Court (1978) 85 Cal.App.3d 143, 152.)

In Uva v. Evans, supra, 83 Cal.App.3d 356, relied on by plaintiff, the complaint specified its prayer for $30,000 in general damages, so the defendant had adequate notice for a judgment awarding $30,000 in general damages. In this case, on the other hand, the complaint prays for $500,000 in damages, period. There is no specification of special and general damages of any kind.

Plaintiff cites Shook v. Pearson (1950) 99 Cal.App.2d 348 for the proposition that if a prayer for damages does not specify it is for special damages, then it is presumed to be for general damages. (RB 38.) All Shook really says is that special damages must be specifically pleaded.[7/] In any event, the requirements of section 425.11, enacted long after Shook was decided, would be negated if a plaintiff could, as plaintiff did here, simply specify a total amount of damages, letting the defendant guess whether it is all general damages or otherwise. As the Supreme Court held in Schwab v. Rondel Homes, Inc., supra, 53 Cal.3d 428, a default judgment may not be entered in the absence of notice, either in the complaint or in a statement of damages, of the special and general damages sought. (Id. at pp. 434-435.)

If this case were not subject to section 425.11, plaintiff's prayer might be adequate to support a default judgment for $500,000. This case is subject to section 425.11, however, and plaintiff's failure to comply either directly or indirectly with the provisions of that statute invalidates defendants' defaults and the subsequent default judgment.

7/ Shook explains: "A defendant cannot be presumed to be aware of the special damage resulting from his act, and therefore, in order to prevent a surprise on him, this sort of damages must be specially set forth in the complaint, or the plaintiff will not be permitted to give evidence of it." (99 Cal.App.2d at p. 351.)

3.

THE TRIAL COURT HAD NO JURISDICTION TO AWARD ATTORNEY'S FEES AND COSTS IN ANY AMOUNT, MUCH LESS IN AN AMOUNT WHICH BROUGHT THE TOTAL DEFAULT JUDGMENT OVER $500,000, THE MAXIMUM AMOUNT MENTIONED IN THE COMPLAINT.

Plaintiff's complaint sought attorney's fees and costs, but specified no maximum amount to be claimed. (CT 9-10.) No amount having been alleged, the trial court had no jurisdiction to award any amount in a default proceeding. (See this Court's recent decision in California Novelties, Inc. v. Sokoloff (No. G011260, May 8, 1992) 92 Daily Journal D.A.R. 6265, 6267; mod. (June 3, 1992) 92 Daily Journal D.A.R. 7474 ["No amount having been alleged here, the award of compensatory damages clearly exceeded the demand."].)

In any event, the addition of attorney's fees and costs brings the total default judgment in favor of plaintiff to more than the largest amount specified anywhere in any of plaintiff's pleadings. This is flatly contrary to Code of Civil Procedure section 580, which provides that "relief granted to plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint. . . ." This means both the type and the amount of relief sought. (Becker v. S.P.V. Construction Co. (1980) 27 Cal.3d 489, 493-494.)

To avoid Section 580, plaintiff relies on Richee v. Gillette Realty Co. (1929) 97 Cal.App. 365. (RB 41-43.) Richee, however, was narrowly construed (not wholeheartedly approved, as plaintiff suggests) by the Supreme Court in Becker v. S.P.V. Construction Co., supra, 27 Cal.3d at p. 494, fn. 2. The Supreme Court emphasized that Richee involved a promissory note under which the defendant expressly agreed to pay such attorney's fees as the court found to be reasonable. This is a limited exception to the general rule that the plaintiff must give clear prior notice of the amount of a judgment the defendant might suffer if he were to default. Absent an express agreement to abide by the court's discretion, a defendant is, as a matter of due process, entitled to notice of the amount of attorney's fees and costs claimed before his default may be taken. (Hartke v. Abbott (1931) 119 Cal.App. 439, 442.) Defendants here did not expressly agree to have the court determine the award of attorney's fees against them. Plaintiff's application of the special exception in Richee to this case would allow the exception to swallow the rule.

Requiring a plaintiff to notify the defendant of the maximum amount of fees and costs he will claim before he takes the defendant's default no more interferes with the determination of fees in default cases than requiring a plaintiff to specify general and special damages interferes with the determination of damages in default cases. A plaintiff has an obligation to notify the defendant of the type and amount of relief he seeks. If he fails to do so, as plaintiff failed here, he is not entitled to a default judgment including that relief.

CONCLUSION

For each of the reasons stated here and in defendants' Opening Brief, the order denying defendants' motion for relief from default and the resulting default judgment should be reversed.

Respectfully submitted,

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