Harbor v. Tong

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OPINION

Plaintiff Madison Harbor ALC (Madison Harbor) appeals from an order granting defendant Tu My Tong's motion to vacate a default and default judgment against her under Code of Civil Procedure section 473, subdivision (d) (§ 473(d)) on the ground the judgment was void.[1] Madison Harbor contends it substantially complied with the statutory substituted service requirements and in any event, Tong had made a general appearance. We disagree and affirm.

FACTS

Madison Harbor filed a complaint against Tong in 2006, alleging that Tong failed to pay approximately $30,000 for legal services. Tong filed no responsive pleading and the court entered a default judgment against her.

Tong moved to set aside the default judgment pursuant to section 473, subdivision (b), which the court denied as untimely because the motion was filed more than six months after entry of default judgment. This court affirmed that order. (Madison Harbor v. Tong (May 18, 2009, G039798) [nonpub. opn.].) Both this court and the court below observed, Tong "'probably [has] another remedy . . . .'" (Id. at p. 4.)

After remand, Tong filed another motion to set aside the default judgment, this time pursuant to section 473(d) ("The court may . . . set aside any void judgment or order") and section 473.5, subdivision (a) ("When 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"). Tong supported her motion with the following evidence. A registered process server purportedly served Tong by substituted service. According to the proof of service filed in 2006, the server left the summons and complaint with "JOHN DOE CAUCASIAN MALE AGE: 40/45" at "504 WEST 41ST DRIVE # 306A" and mailed a copy of both documents to the "place where the copies were left." The

unit number (306A) was handwritten over a typed number on the document. A copy of the document filed with the court in 2007 did not contain the handwritten "306A," but instead contained the typed "101." The process server's declaration of due diligence states that efforts to effect personal service were also made at unit number 101, and, inconsistently with the proof of service, states that the summons and complaint were mailed to unit 101, not unit 306A. Tong's evidence and declarations show her actual unit number is 306, and not 306A or 101. Tong also provided declarations that most tenants in the building are students in their 20's, and that two Vietnamese men lived in unit 101 at the time of service. Finally, Tong's declaration and exhibits established without contradiction that she was in Viet Nam at the time of the purported service on October 12, 2006, and, in fact, was on an airplane in transit between Ho Chi Minh City and Da Nang at that time, and that no one was living in her apartment while she was in Viet Nam.

The court set aside the judgment. It found "the default and default judgment are void. Plaintiff failed to properly serve Defendant Tong with summons of the action." The court further found "Tong has not made a general appearance in this action."

DISCUSSION

"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 for relief from a default judgment' provided by section 473.5, that is, the two-year outer limit" after entry of the judgment. (Trackman v. Kenney (2010) 187 Cal.App.4th 175, 180.) Relief on this basis "hinge[s] on evidence about the method of purported service." (Id. at p. 181.) On the other hand, "'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.' [Citation.] This does not hinge on evidence: A void judgment's invalidity appears on the face of the record, including the proof of service." (Ibid.)

Here, the default judgment was entered on June 27, 2007, and the section 473(d) motion to set it aside was filed within two years, on June 18, 2009. Although the record contains proof of mailing of a request to enter default,[2] there is no record of any notice of entry of either the default or the default judgment. Had such notice been given, and again by analogy to section 473.5, the outer time limit for filing the motion may have been shortened to 180 days.

Thus, the court was entitled to base its decision on both the face of the record, including the proof of service, and on other evidence submitted in support of and in opposition to the motion. "We review de novo a trial court's determination that a judgment is void." (Cruz v. Fagor America, Inc. (2007) 146 Cal.App.4th 488, 496.) "[S]ince the basis of [Tong's] motion is that [Madison Harbor] had failed to effect valid service, the evidentiary burden rested on [Madison Harbor] to establish that [Tong] had been validly served." (Dill v. Berquist Construction Co. (1994) 24 Cal.App.4th 1426, 1441.)

The Court Did Not Err By Vacating the Default Judgment as Void

Compliance with the statutes governing service of process is essential to establish personal jurisdiction. "Thus, a default judgment entered against a defendant who was not served with a summons in the manner prescribed by statute is void." (Dill v. Berquist Construction Co., supra, 24 Cal.App.4th at p. 1444.) Where improper service renders a judgment void, the court may set aside the judgment pursuant to section 473(d). (Ellard v. Conway (2001) 94 Cal.App.4th 540, 544.) When a defendant has actual notice of the action, the statute is to be "liberally construed to effectuate service and uphold jurisdiction . . . ." (Bein v. Brechtel-Jochim Group, Inc. (1992) 6 Cal.App.4th 1387, 1392.) Substantial compliance with the service statutes is sufficient. (Summers v. McClanahan (2006) 140 Cal.App.4th 403, 411-412 (Summers).) Still, "no California appellate court has gone so far as to uphold a service of process solely on the ground the defendant received actual notice when there has been a complete failure to comply with the statutory requirements for service." (Id. at p. 414.) Here, the parties disagree as to whether Tong had actual notice of the action against her.[3] The court made no finding regarding actual notice.

Madison Harbor purported to effect substituted service of process. Section 415.20, subdivision (b) (§ 415.20(b)) applies when a plaintiff has made reasonably diligent but unsuccessful efforts to obtain personal service on a defendant. The statute requires a plaintiff to leave a copy of the summons and complaint at a defendant's dwelling house, usual place of business, or usual mailing address. (Ibid.) The copy must be left with "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." (Ibid.) Finally, a plaintiff must mail a copy of the summons and the complaint to the place where the copy was left. (Ibid.) In Summers, supra, 140 Cal.App.4th 403, plaintiff served defendant's personal manager, who was purportedly his "authorized agent" under section 416.90. (Summers, at p. 405.) The court held the manager had not been authorized to accept service on behalf of defendant, and as a result plaintiff had not substantially complied with the statute. (Id. at p. 413.) The plaintiff had served the wrong person.

Here, Madison Harbor failed to comply with even a liberal interpretation of section 415.20(b). The proof of service states that "John Doe" was served at unit number 306A and that the summons and complaint was subsequently mailed to Tong "at the place where copies were left." But Tong's evidence persuasively establishes that she lives alone at unit 306, that she was in Viet Nam at the time of purported service, and that nobody was living at that address in her absence. Moreover, the inconsistencies in the remaining documents weigh heavily against a finding of proper service. The process server's declaration of due diligence recites four attempts to serve Tong at her "residence address," listed as unit number 101, that "John Doe" was served at unit 101, and that the copies were mailed to unit number 101, not Tong's actual address, unit number 306.

Importantly, the person served, who must be "a competent member of the household" or "apparently in charge" (§ 415.20(b)), was an unidentified white male. Madison Harbor does not assert this "John

Doe" had any relationship with Tong, let alone a "'relationship with the person to be served [that] makes it more likely than not that they will deliver process to the named party.'" (Bein v. Brechtel-Jochim Group, Inc., supra, 6 Cal.App.4th at p. 1393.) For that matter, evidence suggested the John Doe was not even a resident of the unit number allegedly served. As noted above, it was Madison Harbor's burden to establish proper service. It failed to do so. The evidence sufficiently shows a complete failure to effect substituted service with an appropriate person and at the correct address.

Like the plaintiff in Summers, Madison Harbor served the wrong person. Thus, the evidence supports a finding of Madison Harbor's failure to comply substantially with section 415.20(b), even construing the statute liberally. Actual notice, if any, is no substitute for a failure to comply with service of process. (Summers, supra, 140 Cal.App.4th at p. 414.) Given Madison Harbor's failure to properly serve Tong, the court properly held the judgment void and permissibly set it aside under section 473(d).

Tong Did Not Make a General Appearance

Madison Harbor argues Tong made a general appearance when she arrived at a scheduled case management conference in December 2006, and is thus subject to the court's jurisdiction. We are not persuaded.

A defendant makes a general appearance if he or she participates in the action in some way recognizing the court's authority to proceed. (Mansour v. Superior Court (1995) 38 Cal.App.4th 1750, 1756 (Mansour).) If a defendant raises any substantive issue other than personal jurisdiction, or requests relief that can only be granted on the premise that the court has personal jurisdiction, he has appeared generally. (Ibid.) In Mansour, this court held an appearance at a case management conference can be a general appearance. There, defendant's counsel prepared a case management statement, read the statement, and actively participated in the conference, discussing the need for discovery. (Id. at p. 1757.) Because defendant prepared for and participated actively in a process premised on the court's authority, the appearance was general. (Ibid.)

Here, unlike Mansour, the facts alleged by Madison Harbor's attorney show Tong did nothing to recognize the court's authority over her. Tong did not appear before the court, or even participate in the case management conference, which was, in fact, not held. At most, Madison Harbor's evidence suggests Tong spoke with the clerk, who rescheduled the conference precisely because there was no proof of service on file. Tong did nothing to recognize the authority of the court.

Madison Harbor weakly asserts issue preclusion barred the court from finding Tong made no general appearance. It notes, the court stated at the hearing on Tong's first (denied) set-aside motion that Tong "made an appearance" and was "present in this department" in December 2006. The court also noted Tong "knew about it, because [she] appeared here."

There is no issue preclusion. It is not clear whether the issue of Tong's general appearance was "actually litigated" at the first hearing -- the court may have been using the term "appearance" in the ordinary sense of the word. (Lucido v. Superior Court (1990) 51 Cal.3d 335, 341 [elements of issue preclusion].) And it is clear the issue of a general appearance was not "necessarily decided" at the first hearing. (Ibid.) The court found Tong's motion was untimely. A finding that Tong made a general appearance was not necessary to its ruling.[4]

DISPOSITION

The order setting aside the default and default judgment is affirmed. Tong shall recover her costs on appeal.

WE CONCUR: RYLAARSDAM, ACTING P. J., O'LEARY, J.

1. All statutory references are to the Code of Civil Procedure.

2. As discussed below, the evidence establishes without contradiction that the request for entry of default was mailed to an incorrect address.

3. Madison Harbor asserts Tong had actual notice, and thus the court should not have set aside the default judgment pursuant to section 473.5. That statute allows a default judgment to be set aside when a defendant is properly served, but still lacks actual notice. (Weil and Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2008) ¶ 5:420.) Because we hold service was improper, we need not reach whether section 473.5 would have provided additional grounds for vacating the default judgment against Tong.

4. The parties also discuss whether the amount of the default judgment was proper. Although we noted when this matter was last on appeal that the judgment amount was likely improper (Madison Harbor v. Tong, supra, G039798), we need not resolve the issue here because the default is set aside.