Premier Capital

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This is the second appeal in the present case. In the underlying action, the predecessor in interest of plaintiff Premier Capital, LLC (Premier Capital) obtained a default and default judgment against defendants Gary North, Kerrie North, and North Aircraft Services, Inc. (the corporation).[1] After Premier Capital, the judgment creditors assignee, sought to enforce the judgment, Gary moved to vacate the default and default judgment and to quash service of process, alleging that defendants had not been validly served with the complaint. The trial court granted the motions as to all defendants.

In an unpublished opinion, a panel of this court affirmed as to Gary, but reversed as to Kerrie and the corporation. It held that the trial court lacked jurisdiction over Kerrie because she was not a party to Garys motion: Garys attorney represented only Gary; and Kerrie, though represented by separate counsel, had not filed any motions of her own. (Premier Capital LLC v. North Aircraft Services, Inc., et al. (May 21, 2007, C053396) [nonpub. opn.] (Premier Capital I).)[2]

After the remittitur issued, Kerrie filed motions to vacate the default and default judgment and to quash service of process on the same grounds as Gary. The trial court granted Kerries motions. Premier Capital appeals. Kerrie has not filed a respondents brief. (Cf. Cal. Rules of Court, rule 8.220(a)(2).)

We shall conclude Kerries motion to vacate the default and default judgment was untimely under Code of Civil Procedure section 473.5,[3] in that she failed to file it within 180 days after she was served with written notice that the judgment had been entered. Her 180 days had expired before she -- or Gary -- filed their motions. Accordingly, we shall reverse the orders granting relief from default and default judgment and quashing service of summons.

FACTUAL AND PROCEDURAL BACKGROUND

Under section 473, subdivision (d), a default judgment void on its face may be attacked at any time by a motion to vacate the judgment. However, if a default judgment is alleged to be void not on its face but for lack of valid service, section 473.5, subdivision (a) (§ 473.5(a)), prescribes time limits for filing a

motion to vacate. As we shall explain, section 473.5(a) controls here.

Since the substance of the underlying litigation is immaterial to our decision, we set out only the relevant procedural facts.

The default judgment was entered against all defendants on September 1, 2004. (Premier Capital I, supra, C053396.) Premier Capital filed notice of assignment (stating the date of entry of judgment) and a copy of the default judgment on August 19, 2005, and had served the same on Gary and Kerrie on August 17, 2005.[4] Gary moved to vacate the default and default judgment and to quash service of process on March 6, 2006. After the trial court entered its orders in favor of all defendants, Premier Capital appealed, asserting among other things that Garys motion was untimely.

Premier Capital I

The court found that the default and default judgment were void as to Gary because of defective service. It then discussed what time limits generally apply to motions to vacate default judgments on this ground:

"There is no time limit to attack a judgment void on its face. (Rochin v. Pat Johnson Mfg. Co. (1998) 67 Cal.App.4th 1228, 1239 [a collateral attack may be brought at any time]; Plotitsa v. Superior Court (1983) 140 Cal.App.3d 755, 761 [no time limit for relief under section 473 where judgment is void on its face]; Weil & Brown[, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2006) par.] 5:490, p. 5--115.) However, a judgment is void on its face only when the record of the judgment itself affirmatively shows the court was without jurisdiction to render the judgment. (Canadian & American Mortgage & Trust Co. v. Clarita Land & Invest. Co. (1903) 140 Cal. 672, 674; see People v. Greene (1887) 74 Cal. 400, 406.)

"Here, the defect of service under section 415.20 did not appear on the face of the record of the judgment, but required evidence extrinsic to the record to show the alleged substituted service was not at the usual mailing address for defendants as required for valid service under section 415.20, subdivision (b). "A motion for relief pursuant to section 473, subdivision (d), from a judgment valid on its face but void for lack of valid service of process must be brought within a reasonable time, which has been determined to be, by analogy, within the time provided for a motion under section 473.5, relating to relief for lack of actual notice of a pending action despite proper service of process. (Rogers v. Silverman (1989) 216 Cal.App.3d 1114, 1121-1124; Weil & Brown, supra, [par.] 5:491, p. 5--115.) Under section 473.5, relief must be sought "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. (§ 473.5, subd. (a); see also Gibble v. Car-Lene Research, Inc. [(1998)] 67 Cal.App.4th 295, 301, fn. 3.)" (Premier Capital I, supra, C053396.)

Thus, a party who moves to vacate a facially valid default judgment for lack of valid service must comply with section 473.5(a).[5]

The court also rejected Garys contention, for which he cited Thompson v. Cook (1942) 20 Cal.2d 564 (Thompson) and Dill v. Berquist Construction Co. (1994) 24 Cal.App.4th 1426 (Dill) in support, that the trial court could grant relief to Kerrie, even though she was not before the court, because the judgment was "void." It stated:

"To the extent Thompson, supra, 20 Cal.2d 564 and Dill, supra, 24 Cal.App.4th 1426, provide authority for a courts duty to declare a judgment void, they are limited to a judgment void on its face (Dill, supra, at pp. 1[4]41, 1444) or where "the party in favor of whom the judgment or order runs admits facts showing its invalidity, or, without objection on his part, evidence is admitted which clearly shows the existence of such facts, so that the invalidity is shown as a matter of law. (Thompson, supra, at pp. 569-570.) These cases are not authority for, and we are unaware of any other authority, allowing a court to declare a judgment void as to parties not before it where the validity (invalidity) of the judgment depends on resolution of disputed factual questions from extrinsic evidence. Such was the case here.

"Premier Capital strenuously contested Gary Norths declarations regarding the service of process at Mail Boxes, Etc. and it submitted evidence attempting to show the address was still being used by the defendants as their usual mailing address. While Premier Capitals evidence was largely inadmissible due to foundational and hearsay problems, we cannot say Premier Capital either admitted the facts showing the invalidity of the judgment or failed to object to and contest such facts. We cannot say as a matter of law the judgment as to all defendants is void for lack of proper service. Under these circumstances, it was not appropriate for the trial court to extend its ruling to parties not before it." (Premier Capital I, supra, C053396.)

The remittitur in Premier Capital I issued on July 23, 2007. The decision is law of the case in this appeal.

Kerrie's Motions

On or around August 15, 2007, Kerrie filed motions to vacate the default and default judgment and to quash service of process, alleging that the default and default judgment were void because the complaint had not been validly served on her. To support this premise, she cited the account of the facts in Premier Capital I, a declaration submitted by Gary on his motion, and her own declaration, closely modeled on Garys declaration.[6] She claimed Gary closed their mailbox at Palmer Drive in Cameron Park before the summons and complaint were served, and she never received a notice of entry of judgment.

She claimed that her motion to vacate was timely under section 473.5(a) because: (1) "the original

motion" (i.e., Garys) was filed less than two years from the date of entry of judgment; and (2) Kerrie "did attempt to have the judgment set aside as to her" (apparently by means of Garys motion) and had not thought she needed to file her own motion until after the remittitur issued in Premier Capital I. She also argued a "void" judgment under section 473, subdivision (d),[7] may be attacked at any time.

In opposition, Premier Capital asserted among other things that a judgment may be attacked at any time only if it is void on its face, which this judgment is not. Premier Capital argued Kerries motion for relief from default was untimely under section 473.5(a) (fn. 3, ante), because it was not filed within 180 days after she was served with "written notice that the default or default judgment has been entered." Thus, the default judgment was entered (filed) on September 1, 2004. On August 17, 2005, Premier served on Kerrie -- at a Spinel Circle address she does not dispute -- a copy of the file-stamped judgment, attached to and incorporated by reference in a "NOTICE OF ASSIGNMENT OF JUDGMENT AND LIENS FROM NC VENTURE I, L.P. to PREMIER CAPITAL, LLC." The proof of service says that, on August 17, 2005, "NOTICE OF ASSIGNMENT OF JUDGMENT AND LIENS FROM NC VENTURE, L.P. TO PREMIER CAPITAL, LLC," was served by mail, addressed to Kerrie North at 3867 Spinel Circle, Rescue, California. Thus, argued Premier Capital, the 180 days for relief from default judgment began to run on August 17, 2005, and expired on February 13, 2006 (or at the latest February 18, 2006, if five days were added for service by mail). Accordingly, Kerries time to seek relief expired even before Gary filed his motion on March 6, 2006. Thus, applying tolling for Kerrie during Garys motion would not save Kerries motion from being untimely. Kerries motion, filed in August 2007, was untimely under the 180-day period of section 473.5.

Premier Capital also argued Kerrie missed the alternative two-year deadline and was estopped to seek relief because she had acquiesced in the judgment by referring Premier Capital to her divorce lawyer, which resulted in Premier Capital collecting approximately $106,000 on the judgment.

Kerries reply brief made no mention or argument concerning the 180-day limitations period or the fact that in August 2005 she was served with written notice that the judgment had been entered. Her reply brief argued the time limits did not apply because Premier Capital admitted, or it was undisputed, that service of summons and complaint was defective. Alternatively, she argued the two-year period should be tolled because she was not served with the remittitur after the first appeal, and service on her attorney should not count. As to estoppel, Kerrie argued she did not acquiesce in the judgment by referring Premier Capital to her lawyer, and Premier Capitals lawyer unethically continued to engage in conversations with Kerrie despite her being represented by counsel.

Despite Kerries failure to address the 180-day deadline, the trial court nonetheless ruled in her favor. After finding that Kerrie had established invalid service of summons and complaint, the trial court ruled: "The court, not having obtained jurisdiction over defendant Kerrie North by valid service of process [sic], finds that the default and default judgment entered against defendant Kerrie North is void and subject to attack at any time. The court rejects the plaintiffs arguments that the motion is untimely. The motion is granted." Relying on the same evidence, the court then granted Kerries

motion to quash service of process. The court ordered plaintiff to return to Kerrie any money it had already collected on the judgment.

Plaintiff appeals from the minute order which stated, "Text of tentative ruling BECOMES THE ORDER." An order vacating default and default judgment is appealable as an order after final judgment. (Moghaddam v. Bone (2006) 142 Cal.App.4th 283, 287.) A minute order may suffice as an appealable order if nothing further need be done by the court. (In re Marriage of Dupre (2005) 127 Cal.App.4th 1517, 1523.) Here, however, Kerries motion failed to include a proposed answer, as required by section 473.5, subdivision (b), and therefore (even assuming such defect was not fatal), the trial court should have given her leave to file an answer to the complaint by a specified date. Moreover, where, as here, the trial court orders a party to pay money, we would expect an order stating the amount, which the minute order and tentative ruling did not do. Nevertheless, despite these problems, and in the interest of judicial economy, we shall treat the minute order as appealable.

DISCUSSION

Premier Capital contends in part that Kerries motion to vacate the default judgment was untimely under the 180-day period of section 473.5(a). We agree and, since this issue is dispositive, we need not address Premier Capitals other contentions.

As stated in the first appeal of this case, there is no time limit to attack a judgment void on its face, but a judgment is void on its face only when the record affirmatively shows the court was without jurisdiction to render the judgment. (Canadian & American Mortgage & Trust Co. v. Clarita Land & Invest. Co. (1903) 140 Cal. 672, 674; Rochin v. Pat Johnson Mfg. Co. (1998) 67 Cal.App.4th 1228, 1239.)

Here, the alleged defect of service did not appear on the face of the record of the judgment. Thus, section 473(d), which applies to default judgments void on their face, does not apply, and the time limits of section 473.5(a) apply.

This means that any motion to vacate the default and default judgment in this case had to be made within the earlier of (1) two years after entry of judgment, or (2) 180 days after service on defendant of "written notice that the default or default judgment has been entered." (§ 473.5, subd. (a).) A judgment is "entered" when the court clerk (1) enters it in a judgment book or (2) stamps it as filed and places it in the case file while also recording it on microfilm, in a register of actions, or in an electronic data-processing system. (§§ 668-668.5; see also, Cal. Rules of Court, rule 8.104(a)(2) [for purposes of time to appeal, entry of judgment means the date entered in a judgment book or the date it is stamped as filed under section 668.5].)

On September 1, 2004, the court clerk filed the default judgment. Kerrie has not disputed that the judgment was entered on that date, as stated in the opinion in the first appeal. (Premier Capital I, supra, C053396.)

On August 17, 2005, Premier Capital served on Kerrie -- at an address she does not dispute -- written notice that the judgment had been entered. Thus, Premier Capital served on Kerrie a copy of the file-stamped judgment, attached to and incorporated by reference in a "NOTICE OF ASSIGNMENT OF JUDGMENT AND LIENS FROM NC VENTURE I, L.P. to PREMIER CAPITAL, LLC." The proof of service says that, on August 17, 2005, "NOTICE OF ASSIGNMENT OF JUDGMENT AND LIENS FROM NC VENTURE, L.P. TO PREMIER CAPITAL, LLC," was served by mail, addressed to Kerrie North at 3867 Spinel Circle, Rescue, California. Kerrie challenges only service of summons and complaint on a Palmer Drive address. She does not claim Spinel Circle is an incorrect address. Her reply papers in the trial court did not reply to this evidence or the 180-day limitations period; she merely asserted the two-year limitations period did not expire because she herself was not served with a copy of the remittitur following the first appeal.

However, the remittitur is a nonissue. The 180 days for relief from default judgment began to run on August 17, 2005, and expired on February 13, 2006 (or at the latest February 18, 2006, if five days were added for service by mail). Accordingly, Kerries time to seek relief expired even before Gary filed his motion on March 6, 2006. Thus, even applying tolling for Kerrie during Garys motion would not save Kerries motion (filed in August 2007) from being untimely. Kerries motion was untimely under the 180-day period of section 473.5.

Kerrie may not rely on Thompson, supra, 20 Cal.2d 564, and Dill, supra, 24 Cal.App.4th 1426, so far as those decisions allow a court to find a facially valid default judgment void when the plaintiff has admitted or not disputed facts which render the judgment void as a matter of law. In the first round of litigation, Premier Capital vigorously disputed Garys factual showing for his claim of invalid service (which appears on this record to have been essentially the same showing as Kerries), and the court did not apply the Thompson-Dill rule even as to Gary. (Premier Capital I, supra, C053396.)[8] If a party could sit silently by while the time limits of section 473.5(a) expire, then long afterward file a motion to vacate a default judgment in reliance on the outcome of a co-defendants prior motion, the purpose of section 437.5(a) would be defeated.

For the above reasons, Kerries motion to vacate should have been denied.

As to Kerries motion to quash service of process, the court stated in its previous opinion: "[T]he issue of valid service of process was integral to both [of Garys] motions and it was necessary for the default judgment to be set aside before the trial court could consider the motion to quash[.]" (Premier Capital I, supra, C053396.) Because the trial court should not have set aside the default judgment as to Kerrie, it follows that the court also should not have reached Kerries motion to quash service of process and erred by granting that motion.

DISPOSITION

The judgment (orders granting the motions to vacate default and default judgment and to quash

service of process) is reversed. The matter is remanded to the trial court with directions to vacate its orders and to enter new and different orders in accordance with this opinion. Because Kerrie has filed no respondents brief in this court, the parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

We concur: SCOTLAND, P. J., BUTZ, J.

1. For clarity and intending no disrespect, we hereafter refer to the individual defendants by their first names.

2. Although our previous opinion is unpublished, we may cite and rely on it because it is the same case as the present case and it states the law of the case. (Cal. Rules of Court, rule 8.1115(b)(1).)

3. Undesignated statutory references are to the Code of Civil Procedure. Section 473.5, subdivision (a), states, "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 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."

4. Premier Capital served Gary and Kerrie at 3867 Spinel Circle, Rescue, California. Gary subsequently filed a claim of exemption in the trial court, listing that address as his residence. Kerrie has not denied that she lived at that address as of August 17, 2005.

5. This court did not decide whether Garys motions were filed within those time limits, however, because Premier Capital had not raised timeliness in the trial court as to Gary (though it did argue Garys motion was filed more than 180 days after Kerrie was served with notice of the default judgment). It also rejected as improperly raised first on appeal Premier Capitals claim that defendants conduct after receiving actual notice of the judgment gave rise to an estoppel. (Premier Capital I, supra, C053396.) Here, Premier Capital raised both issues in the trial court. However, because we reverse on timeliness, we again do not reach the estoppel issue.

6. Indeed, at one point Kerries declaration states: "At no time on or about November 2002 did North Aircraft Services, GARY NORTH or my wife [sic], personally receive mail at 3450 Palmer Drive, Cameron Park, California."

7. Section 473, subdivision (d), states, "The court may... on motion of either party after notice to the other party, set aside any void judgment or order."

8. In any event, Thompson, supra, 20 Cal.2d 564, and Dill, supra, 24 Cal.App.4th 1426, are distinguishable. In 1942, when Thompson was decided, section 473.5 had not been enacted, and section 473 as it then read did not contain any specific time limits for challenging default judgments on the ground of invalid service; thus Thompson does not support the proposition that a party claiming invalid service may move to vacate a default judgment at any time without regard to section 473.5(a). (Cf. Thompson, supra, 20 Cal.2d at pp. 565-566.) In Dill, the default judgment was void on its face because

its invalidity was apparent from inspection of the judgment roll, which proved that the plaintiffs had not obtained personal jurisdiction over the defendants before taking their default. (Dill, supra, 24 Cal.App.4th at p. 1441.)