David Fink v. Classic Tile & Stone

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Fink v. Classic Tile & Stone

CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

OPINION

Affirmed.

I. INTRODUCTION

David Fink appeals from the trial court's order granting the motion of Tagui Indzheyan (Tagui)[1] to set aside and vacate a default judgment entered against her. The court granted the motion in exercise of its inherent power to vacate a default judgment for lack of due process, extrinsic fraud, or mistake, finding Tagui had never been served with the summons and complaint. We conclude the trial court did not abuse its discretion, and therefore affirm.

II. FACTS AND PROCEDURAL HISTORY

A. The Complaint and Proof of Service of Summons

In November 2007, Fink filed a complaint against Classic Tile & Stone, Inc. (Classic Tile), and others, including Tagui, asserting causes of action for breach of contract, fraud, and fraudulent transfer. The only allegation against Tagui was "Tagui Aghekyan-Indzheyan was married to defendant Akop Indzheyan at the time the debt in this action was incurred (2006), and is liable under Family Code § 910. She is being sued in her individual capacity."

On February 21, 2008, Fink filed a proof of service of summons on "Tagui Indzheyan-Aghekyan." According to the proof of service, Tagui was served at 5:05 p.m. on December 27, 2007 at 12953 Sherman Way, North Hollywood, California, by substituted service on "Akop

Indzheyan-Moskovian-competent husband and co-defendant." The proof of service was signed under penalty of perjury by Shawn O'Malley of Caveman Process Serving.

Accompanying the proof of service was a declaration of diligent search signed by O'Malley that related the following chronology. On December 13, 2007 at 5:30 p.m., O'Malley attempted service at a home located at 13624 Hartland, Van Nuys. The house was vacant and neighbors said the tenants had moved several weeks earlier. On December 14, 2007 at 9:15 a.m., O'Malley attempted service at 12953 Sherman Way, North Hollywood, "a new business address given by the last rental agent of Classic Tile & Stone." O'Malley stated, "[t]his seemed to be the new address for the business but no one was there at [t]his time." He attempted service at the same address at 2:10 p.m. on December 23 but there was "[n]o answer at door of business," and again at 1:00 p.m. on December 24 but an employee claimed, "the owners and managers were gone." On December 27 at 5:05 p.m., O'Malley returned to 12953 Sherman Way. O'Malley stated: "Akop and Hovik/Oganes were there, an employee pointed them out with their specific names, both were present and accepted the papers for all other defendants." On December 28, O'Malley mailed the papers "for the business Classic Tile & Stone, Inc. Greta and Tagui, who are the wives of Hovik/Oganes and Akop."

In July 2008, a default judgment was entered against all defendants, including Tagui, in the amount of $85,676.36.

B. Tagui's Motion to Set Aside and Vacate Default Judgment

In February 2011, Tagui filed a motion to set aside and vacate the default judgment on the ground she had never been served with the summons and complaint. The motion was accompanied by declarations from Tagui, Oganes Indzheyan (Oganes), and Akop Indzheyan (Akop).

Tagui declared she had never been an officer, director, or shareholder of Classic Tile and had never participated in its management. She sometimes worked for Classic Tile part time "performing ministerial functions." Her name is Tagui Indzheyan and did not include the name "Aghekyan" as reflected on the proof of service. She declared that Akop is her brother, not her husband, as alleged in the complaint, and Oganes is her father.

Tagui declared she had never been served with the summons and complaint. She understood the business address for Classic Tile was 12732 Sherman Way, North Hollywood, not 12953 Sherman Way, the address at which service was supposedly made. A copy of the articles of incorporation for Classic Tile listed its address as 12732 Sherman Way, North Hollywood, and Fink had sent a letter to Classic Tile at the same address. Tagui declared she had lived with her family at 13624 Hartland, Van Nuys, until December 15, 2007, two days after the attempted service at that address.

Tagui declared: "The first time I became aware of the lawsuit, and that there was a judgment against me, was in late 2009, when my bank account was levied and my wages garnished from my employer.

Upon becoming aware of this situation, I prepared and sent the plaintiff a letter dated January 18, 2010 [attached as exhibit 9]. In this letter I made it clear to the plaintiff that I had nothing to do with the management of the business or the corporation, and that I had never been served with any summons and complaint. As a result of the bank levies and garnishment, the plaintiff has wrongfully taken approximately $7,000."

Oganes declared he was an officer, director, shareholder, and employee of Classic Tile until 2006, when it was sold to Artur Khalatyan. Oganes is the father of Tagui and Akop. When Oganes was involved with Classic Tile, its address was 12732 Sherman Way, North Hollywood, and never had an address of 12953 Sherman Way. Oganes declared he was not served with the summons and complaint on December 27, 2007, had never been served, and first became aware of the lawsuit in late 2009, when Tagui told him her bank account had been levied.

Akop declared he was the incorporator of Classic Tile and was an employee of the company until 2006, when it was "transferred" to Khalatyan. He is the brother of Tagui and lived with her and their parents at 13624 Hartland Street, Van Nuys, until December 15, 2007. His declaration stated Classic Tile never conducted business or had offices at 12953 Sherman Way and its business address had always been 12732 Sherman Way. He declared he was not served with the summons and complaint on December 27, 2007, had never been served, and first became aware of the lawsuit in late 2009, when Tagui told him her bank account had been levied.

C. Fink's Opposition to the Motion

In opposition to Tagui's motion to set aside and vacate the default judgment, Fink contended the proof of service was "clearly valid" and, "[t]herefore, there is no need for the registered process server to come into Court and identify the defendants he served." He submitted his own declaration claiming, "[t]he defendant/debtors are a family of Armenian gypsies, who have operated the same tile and stone business located at the same location for the past five years; but have changed the name on the building at least seven (7) times during these past last five (5) years." (Original italics.) Attached to the declaration as an exhibit was what Fink claimed to be a commercial lease, dated in July 2005, for 12953 Sherman Way, North Hollywood. The lease named Oganes as the tenant.

According to Fink's declaration, four bank levies were made against Tagui's bank account between September and November 2008, and the garnishee's memorandum stated the account had no available funds. In June and July 2009, a total of $1,189.80 was garnished from Tagui's bank account. Fink stated that after those levies, Tagui called him and claimed she had not been served properly. Her attorney also contacted Fink and told him the same thing. On July 29, 2009, Tagui's attorney sent Fink an e-mail demanding he return the sums garnished from Tagui's bank account and dismiss her with prejudice from the lawsuit. The e-mail also informed Fink: "[P]lease find attached as a PDF file the birth records (with translations) for both Tagui Indzheyan and Akop Indzheyan. They are brother and sister."

Fink declared that in January 2010, a wage garnishment was served on Tagui's employer, an employer's return was filed a week later, and Tagui never filed an exemption or otherwise challenged the garnishment.

Attached to Fink's declaration, as exhibits, were copies of the proof of service of summons and the declaration of diligent search, both signed under penalty of perjury by O'Malley, the process server. Also attached as an exhibit to Fink's declaration was an order, filed on October 25, 2010, from this court dismissing Tagui's appeal from the default judgment on the ground the notice of appeal was filed late. The order states: "The notice of appeal was filed on August 16, 2010, from a judgment entered on July 24, 2008."

D. The Trial Court's Order

On the day of the hearing on the motion to set aside and vacate the default judgment, after the trial court had posted its tentative ruling to grant the motion, Fink filed a declaration from O'Malley, the process server. The trial court declined to accept this declaration, which was nearly the same as the declaration of diligent search prepared in December 2007.

The trial court granted Tagui's motion to set aside and vacate the default judgment, and adopted the tentative ruling as the final ruling. In the tentative ruling, the court quoted County of San Diego v. Gorham (2010) 186 Cal.App.4th 1215 (Gorham) and stated: "The moving defendant has submitted evidence that the actual address for defendant Classic Tile . . . was 12732 Sherman Way, not 12953 Sherman Way as stated in the Declaration of Diligent Search. See Motion, Exhibit 5 Articles of Incorporation for Classic Tile & Stone; Exhibit 6 - Statement of Information for Classic Tile and Stone; and Declarations of Akop and Oganes, paragraph 8. Further, . . . Fink knew that the correct address for Classic Tile . . . was not 12953 Sherman Way, but was 12732 Sherman Way. See Motion, Exhibit 4 - Letter from David Fink to Classic Tile, Akop and Artur dated September 12, 2007. However, . . . Fink has shown that Oganes Indzheyan did in fact lease 12953 Sherman Way (Declaration of David Fink, Exhibit 3 - Lease). Therefore it is possible that he could have been served at that location and that substitute service on the moving defendant via personal service on Oganes was therefore valid. [¶] On the other hand, the moving defendant contends that she was never served with a copy of the summons and complaint. Declaration of Tagui Indzheyan, paragraph 6. Also, both Akop and Oganes have submitted declarations that they were never served on December 27, 2007, at 12953 Sherman Way and, in fact, have never been served with the summons and complaint. Declaration of Oganes Indzheyan, paragraphs 5 & 6; Declaration of Akop Indzheyan, paragraphs 5 & 6. [¶] The declarations are sufficient to shift the burden of proof onto plaintiff to show that the moving defendant was properly served. . . . Fink has not met his burden. . . . Fink has not submitted a declaration by the process server (Shawn O'Malley) or asked for an evidentiary hearing to have the process server testify. Mr. Fink simply declares that the proof of service is clearly valid and that there is no need for the process server to come into court and identify the defendants he served. Opposition, page 5, lines 18 -19. This conclusory statement is not evidence. Thus Mr. Fink has not

met his burden. In contrast as set forth above moving defendant has shown that she was not served. Therefore, the judgment is void based on the lack of due process. Notwithstanding it also is apparent that the judgment is void on the alternative ground that she has a meritorious defense to this action. [Citation.] Here, the allegations against her are that she was married to Akop Indzheyan, but Akop is her brother, not her husband. Declaration of Tagui Indzheyan, paragraphs 3 and 5. Also, she states that she has never been an officer, director or shareholder of defendant Classic Tile . . . , or participated in the management of the business. Declaration of Tagui Indzheyan, paragraph 2. Oganes and Akop also state that the moving defendant has never been involved in the ownership or management of Classic [Tile]. Declaration of Oganes Indzheyan, paragraph 3; Declaration of Akop Indzheyan, paragraph 3."

At the time she filed her motion to set aside and vacate the default judgment, Tagui submitted a proposed answer to Fink's complaint. After the trial court granted the motion, the answer was filed.

III. DISCUSSION

A. Standard of Review

We review the trial court's order granting Tagui's motion to set aside and vacate the default judgment for abuse of discretion. (Rappleyea v. Campbell (1994) 8 Cal.4th 975, 981 [order denying motion to vacate default judgment]; Gorham, supra, 186 Cal.App.4th at p. 1230 [same].) In doing so, we determine whether the court's factual findings are supported by substantial evidence and independently review its legal conclusions. (Gorham, supra, at p. 1230.)

B. The Trial Court's Inherent Power to Vacate a Default Judgment for Fraud or Mistake

Under Code of Civil Procedure section 473.5, subdivision (a), when service of a summons did not result in actual notice in time to defend the action, a party against whom a default judgment is entered may serve and file a motion to set aside the default judgment. The motion must be filed and served no later than the earlier of (1) two years of entry of the default judgment, or (2) 180 days after service of written notice of entry of the default judgment. (Ibid.) The default judgment against Tagui was entered in July 2008, and she filed her motion to set aside and vacate the default judgment in February 2011.

When statutory relief is no longer available, a trial court retains inherent power to vacate a default judgment on equitable grounds if the party seeking relief establishes the judgment is void for lack of due process or resulted from extrinsic fraud or mistake. (Gorham, supra, 186 Cal.App.4th at p. 1228.) "Extrinsic fraud occurs when a party is deprived of the opportunity to present a claim or defense to the court as a result of being kept in ignorance or in some other manner being fraudulently prevented by the opposing party from fully participating in the proceeding." (Id. at pp. 1228-1229.)

A false return of summons may constitute extrinsic fraud and mistake. (Gorham, supra, 186 Cal.App.4th at p. 1229.) "When a judgment or order is obtained based on a false return of service, the court has the inherent power to set it aside [citation], and a motion brought to do so may be made on such ground even though the statutory period has run [citation]." (Ibid.) A judgment resulting from a complete failure of service of process is void, and the statute of limitations or laches may not be invoked as a defense to a proceeding to vacate the judgment. (Ibid.)

C. The Trial Court Did Not Abuse Its Discretion by Granting Tagui's Motion to Set Aside and Vacate Default Judgment.

The trial court did not abuse its discretion in granting Tagui's motion to set aside and vacate the default judgment. The court found the declarations submitted by Tagui in support of her motion were sufficient to show she had not been served and to shift the burden to Fink to prove she had been served. Substantial evidence supported that finding. In her declaration, Tagui stated she had never been served with summons and first became aware of the lawsuit and default judgment in late 2009. Her brother Akop and father Oganes each declared he had not been served with summons on December 27, 2007 and had never been served. Those declarations countered the veracity of the proof of service of summons and declaration of diligent search and supported a finding the proof of service was based on perjury.

In addition, Tagui's declaration established she was the sister of Akop, not his wife, and was not an owner or manager of Classic Tile. As liability against Tagui was based entirely on the allegation she was married to Akop, her declaration established she had a meritorious defense, which is necessary to obtain relief from a judgment on the ground of extrinsic fraud. (Kimball Avenue v. Franco (2008) 162 Cal.App.4th 1224, 1229.)

It behooved Fink to present evidence to show the facts stated in the proof of service of summons and declaration of diligent search were true. He did not do so. He did not timely submit a declaration from the process server or ask for an evidentiary hearing to have the process server testify. In his opposition to the motion to set aside and vacate the default judgment, Fink chose to stand by the proof of service of summons and declaration of diligent search, contending they were "clearly valid." Fink argued the declaration of Oganes was perjured, but the trial court, the ultimate judge of credibility, disagreed.

Fink argues he met his burden of proving Tagui was properly served because the proof of service of summons and the declaration of diligent search themselves, both submitted in opposition to the motion to set aside and vacate the default judgment, were signed under penalty of perjury. He contends the trial court's statement that he did not submit a declaration from the process server demonstrates the court failed to consider the proof of service of summons and declaration of diligent search. We interpret the trial court's statement as meaning Fink did not submit a declaration of the process server separate and apart from the proof of service of summons and declaration of diligent

search to prove the veracity of the statements made under penalty of perjury in those documents. By stating the declarations submitted by Tagui proved she had not been served, the trial court expressed its determination the proof of service of summons and declaration of diligent search were presumptively false and Fink had the burden of producing extrinsic evidence they were true. He could not meet his burden by relying on the very documents the trial court initially determined to be false.

Claiming he "has never heard of a Court who blocked the testimony of the process server," Fink argues the trial court erred by not allowing him to have the process server testify at the hearing on the motion to set aside and vacate the default judgment. But Fink stated in his opposition to the motion that the proof of service of summons was "clearly valid" and there was "no need for the registered process server to come into Court and identify the defendants he served." Rule 3.1306(a) of the California Rules of Court restricts evidence received at law and motion hearings to declarations and requests for judicial notice unless the trial court orders otherwise for good cause shown. Under rule 3.1306(b), a party seeking permission to introduce oral testimony at a law and motion hearing must file, no later than three court days before the hearing, a written statement stating the nature and extent of the evidence proposed to be introduced and a time estimate for the hearing. Fink did not file a statement under rule 3.1306(b).

Fink's other arguments in support of reversal do not have merit. Fink argues Tagui knew of the default judgment by mid-2009 and unreasonably delayed bringing her motion to set aside and vacate it. However, "where it is shown that there has been a complete failure of service of process upon a defendant, [s]he generally has no duty to take affirmative action to preserve [her] right to challenge the judgment or order even if [s]he later obtains actual knowledge of it because '[w]hat is initially void is ever void and life may not be breathed into it by lapse of time.'" (Gorham, supra, 186 Cal.App.4th at p. 1229.)

Fink argues he justifiably relied on the default judgment in that it was over two and a half years old and Tagui had been making payments on it for 21 months when she filed her motion. In Gorham, supra, 186 Cal.App.4th at page 1229, the court acknowledged: "[A] court sitting in equity in such situation may 'refuse to exercise its jurisdiction in a proper case by declining to grant affirmative relief' [citation], such as where '(1) The party seeking relief, after having had actual notice of the judgment, manifested an intention to treat the judgment as valid; and [¶] (2) Granting the relief would impair another person's substantial interest of reliance on the judgment.' [Citation.]" The evidence did not support the first prong: Tagui did nothing after learning of the default judgment to manifest an intention to treat it as valid. She did not voluntarily make payments on the judgment but stated in her declaration that she had learned of it in "late 2009, when my bank account was levied and my wages garnished from my employer." In January 2010, she sent a letter to Fink telling him she had not been served with summons and complaint.

Fink also argues Tagui was collaterally estopped from bringing her motion to set aside and vacate

the default judgment because an earlier motion to vacate judgment had been denied. In the clerk's transcript appears a document called a motion and declaration to vacate judgment that was signed by Tagui in propria persona on August 5, 2010. The motion does not bear a file stamp and there is no order on it. There is no evidence the motion and declaration were ever presented to and ruled on by the trial court. Tagui earlier appealed directly from the default judgment, but we dismissed the appeal as untimely, not on the merits.

IV.

DISPOSITION

The order granting the motion to set aside and vacate the default judgment is affirmed. Respondent to recover costs incurred on appeal.

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

1. To avoid confusion, we refer to Tagui Indzheyan and other members of her family by their first names.