Not Reported in Cal.Rptr.3d, 2004 WL 2181477 (Cal.App. 2 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2004 WL 2181477 (Cal.App. 2 Dist.))

Court of Appeal, Second District, Division 1, California.
Vicki HUFNAGEL, Plaintiff and Respondent,
v.
Jonathan LEHRER-GRAIWER, Defendant and Appellant.

No. B171572.
(Los Angeles County Super. Ct. No. EC032807).
Sept. 29, 2004.

APPEAL from a judgment and orders of the Superior Court of Los Angeles County, Michael S. Mink, Judge. Reversed in part; dismissed in part.
Dunn **Koes**, Pamela E. Dunn and Daniel J. **Koes** for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

SPENCER, P.J.

INTRODUCTION

***1** Defendant Jonathan Lehrer-Graiwer appeals from (1) the July 11, 2003 default judgment entered in favor of plaintiff Vicki Hufnagel, (2) the July 11, 2003 order denying defendant's motion to quash service of process, set aside default and default judgment, if entered, and to determine that the court does not have jurisdiction over defendant,[FN1] (3) the September 5, 2003 order denying defendant's motion for reconsideration,[FN2] and (4) the November 7, 2003 order denying defendant's motion to set aside the default judgment pursuant to Code of Civil Procedure section 473, subdivision (d),[FN3] and imposing sanctions in the amount of $2,000.

FN1. Defendant's notice of appeal references the August 14, 2003 written order memorializing the trial court's July 11 ruling.

FN2. Defendant also purports to appeal from the September 5, 2003 order directing him to pay sanctions in the amount of $1,275. No such *order* appears in the record on appeal.

FN3. All statutory references hereinafter are to the Code of Civil Procedure.

The order denying defendant's motion to quash service of process, set aside default and default judgment, if entered, and to determine that the court does not have jurisdiction over defendant, which motion defendant characterized below as a "motion to quash, [and] nothing more," is not appealable. (§ 904.1, subd. (a)(3); *Milstein v. Ogden* (1948) 84 Cal.App.2d 229, 235.) The propriety of such an order is subject to review only by way of a writ of mandate. (§ 418.10, subd. (c).)

The order denying defendant's motion for reconsideration is not appealable. (*Reese v. Wal-Mart Stores* (1999) 73 Cal.App.4th 1225, 1242.) The order awarding sanctions in an amount less than $5,000 is not appealable, although the propriety of the sanction order may be reviewed on appeal from the final judgment. (§ 904.1, subds.(11), (12).) Although a post-judgment order denying a motion to set aside a judgment pursuant to section 473 is an appealable order (§ 904.1, subd. (a)(2); *Generale Bank Nederland v. Eyes of the Beholder Ltd.* (1998) 61 Cal.App.4th 1384, 1394), defendant's section 473 motion in reality was a second motion for reconsideration. The order denying the motion, therefore, is not appealable. The appeal from the default judgment, however, has merit and the judgment is reversed with directions.

BACKGROUND

In September 1999, plaintiff rented a home in

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Studio City from defendant, an attorney. Problems subsequently arose, and, in June 2001, defendant served plaintiff with a three-day notice to pay rent or quit. Defendant thereafter filed an unlawful detainer action against plaintiff. In August, a stipulation for judgment was entered in favor of defendant for $11,600. The following month, defendant sent plaintiff a security deposit accounting that listed $10,446.90 as amounts owed for rent and damage to the property.

Two days later, on September 28, 2001, plaintiff, in pro. per., filed the instant action for personal injury against defendant, alleging causes of action for negligence and premises liability.

On September 4, 2002, plaintiff filed a proof of service for the summons. The proof of service, which was dated August 5, 2002, specified that the summons had been served by (1) personal service, (2) substituted service, (3) mail and acknowledgement service, (4) certified registered mail service and (5) facsimile service.

***2** On February 11, 2003, plaintiff filed a second proof of service for the summons. This proof, which was signed on February 10, 2003, stated that defendant had been served with the summons and complaint by mail on June 19, 2002, some eight months earlier.

Also on February 11, 2003, no answer having been filed by defendant, plaintiff filed a request for entry of default against defendant. Default was entered as requested that same day. Although the request for entry of default was executed on January 17, 2003, the proof of service stated that the document was mailed and hand delivered on June 19, 2002, six months before it was created.[FN4]

> FN4. In a declaration, plaintiff later explained that she actually mailed the request for entry of default on January 17, 2003, the same day the document was executed. She had entered the date of June 19, 2002 erroneously believing that she was required "to put in the date of service of the original Summons and Complaint in this matter."

On May 23, 2003, at his previous address, defendant received in the mail a substitution of attorney, request for court judgment and statement of damages filed by plaintiff. Defendant telephoned the file clerk, who informed him that the file contained two proofs of service of the summons and complaint filed on September 5, 2002 and February 11, 2003.

Defendant then called plaintiff's newly retained counsel, Ronald Talkov, and followed up with a letter confirming their conversation in which defendant apprised counsel that he "had never been served with the summons in this action, that the complaint had not been properly served and that I had never received any notice of the request for entry of default." Defendant further wrote that the only pleading he received was the complaint via mail and fax. He elaborated that "[n]o summons was attached to the complaint and I never received the summons in this action. I also never received any notice regarding the entry of a default. Consequently, I told you that in view of the proofs of service that the court clerk told me had been filed on the summons and complaint on September 5, 2002 and on the request for entry of default on February 11, 2003, it appeared that the proofs of service might be perjured." Defendant requested that counsel provide him with copies of the proofs of services. Defendant received no response.

On June 19, 2003, defendant, acting in pro. per., filed a motion to quash service of process, set aside default and default judgment, if entered, and to determine that the court does not have jurisdiction over him. The hearing on the motion was noticed for July 11. The motion was made on the ground that the trial court "does not have jurisdiction over [him] because the summons has not been served or has not been properly served, because the complaint has not been properly served, because the proof of service of the summons and complaint

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are facially defective and because the Request for Entry of Default was not properly served."

In his supporting declaration, defendant stated that he was never served with and did not otherwise receive the summons in this action. He further acknowledged that he received two copies of the complaint via telecopier transmission and certified mail on June 14 and June 20, 2002, respectively. Defendant further declared that he "never received by mail, personal service or substitute service, the Request for Entry of Default, which was filed February 11, 2003, in this action." He first saw the request for entry of default on June 5, when he reviewed the superior court file. To the extent proof of services contained in the superior court file indicated otherwise, defendant challenged their veracity.

***3** On July 11, 2003, plaintiff filed a statement of damages and request for court judgment in the amount of $54,235. Under penalty of perjury, it was declared that both documents were mailed to defendant on May 13, 2003.

On the same day, July 11, defendant failed to attend the hearing on his motion to quash service of summons. The court stated that it was "surprised" that defendant had failed to appear. The court observed that "[plaintiff] may have messed up to some degree of service, and [defendant] acknowledged in his papers that he was served but he says improperly, but he had this on notice, and that's what I was going to hear argument about, particularly since there is a question of credibility as to whether or not he received the summons, and I was going to tell him that I wanted to discuss the issue of filing an answer to move this case towards trial." Ultimately, the trial court denied the motion. A subsequent written order, filed on August 14, specified that "upon presentation of evidence, and the matter being heard," the court denied defendant's motion to quash service of process, set aside default and default judgment, if entered, and to determine that the court does not have jurisdiction over defendant.

Also on July 11, 2003, the court signed a default judgment against defendant and in favor of plaintiff. That judgment states that "[d]efendant was properly served with a copy of the summons and complaint," that "[d]efendant failed to answer the complaint or appear and defend the action within the time allowed by law," and that "[d]efendant's default was entered by the clerk upon plaintiff's application." The court ordered defendant to pay plaintiff $54,000 in damages and $235 in costs, the precise amounts listed in plaintiff's statement of damages.

When defendant realized that he had failed to appear for the hearing, he called the court clerk to explain his inadvertence. The court clerk apprised defendant that the court had denied his motion because he failed to appear. Defendant reserved September 5 for a hearing on a motion for reconsideration.

On July 28, 2003, defendant filed a motion for reconsideration pursuant to section 1008, subdivision (a). Defendant apologized to the court and stated that this was the first time in more than 30 years of practice that he had missed a hearing. Defendant explained that his failure to appear "was completely inadvertent and the result of an unfortunate confluence of events which distracted [him] and made [him] forget about the scheduled hearing." Defendant asked the court to entertain his motion to quash on the merits.

On August 18, 2003, defendant filed a revised motion for reconsideration, emphasizing that he had never received the summons, that the original summons had never been returned to the court, and the four declarations in opposition to his motion to dismiss, which were filed the day of the hearing, were not properly before the court. Defendant further attacked the proofs of service filed by plaintiff, as well as the declaration of service contained in the request for entry of default.

***4** On September 5, 2003, the trial court denied defendant's motion and amended motion for recon-

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sideration. The court determined that inasmuch as judgment had been entered prior to the filing of the reconsideration motion, it lost jurisdiction to reconsider defendant's motion to quash service of summons. [FN5] The court further noted that even if it were able to reach the merits of the reconsideration motion, it would deny the motion, in that it fails to follow mandatory requirements enumerated in section 1008 and fails to show any new or different facts warranting a different ruling or diligence in ascertaining such facts.

> FN5. In its minute order, the trial court cited *ARPI Ins. Co. v. Superior Court* (1999) 76 Cal.App.4th 176 in which the appellate court observed that " '[a] court may reconsider its order granting or denying a motion and may even reconsider or alter its judgment so long as judgment has not yet been entered. Once judgment has been entered, however, the court may not reconsider it and loses its unrestricted power to change the judgment. It may correct judicial error only through certain limited procedures such as motions for new trial and motions to vacate the judgment. [Citations.]' [Citation.]" (At p. 181.)

Thereafter, defendant received a letter demanding payment of the default judgment. Defendant retained counsel and filed an ex parte application to stay enforcement of the judgment to allow him to obtain relief from the default judgment. The trial court ordered defendant to post a bond in the amount of $81,352.50 and stayed enforcement of the judgment while he sought relief.

On October 17, 2003, defendant filed a motion to set aside the default judgment pursuant to section 473, subdivision (d).[FN6] The motion was made on the grounds "that the complaint and summons in this matter were neither personally nor substitute served on Defendant in accordance with either ... §§ 415.10 or 415.20. Due to this lack of service, this court never acquired jurisdiction over Defendant and, as a result, was not empowered to enter judgment against Defendant." Once again, defendant explained that his failure to attend the hearing on his motion to quash service of summons had resulted from excusable inadvertence.

> FN6. Section 473, subdivision (d) provides that "[t]he court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order."

On November 7, 2003, the trial court denied defendant's section 473, subdivision (d), motion. The court observed that defendant's "motion seeks the same remedy and is based on the same grounds as the prior motion that was denied July 11, 2003[.][T]his motion is an attempted reconsideration of that July 11, 2003, ruling. This motion is an improper second attempt at reconsideration." The court further noted that "defendant provides no legal authority in support of this second attempt [at] reconsideration. Under ... section 1008(e), no application to reconsider any order whether renewal of a previous motion may be considered by any judge or court unless made according to the provisions of ... section 1008. The defendant's motion is untimely under ... section 1008(a) because it was filed October 17, 2003, which is not with ten days of the prior ruling, July 11, 2003. In addition, ... section 1008 includes no provision permitting the party to request a second reconsideration." The court then denied defendant's motion, concluding that it was "an improper attempt to gain reconsideration of this request to set aside the default based on the argument he was not properly served."

Pursuant to section 1008, subdivision (d), the trial court further granted plaintiff's request for monetary sanctions. The court concluded that defendant violated section 1008 "in three manners: one, by seeking to obtain the same remedy he

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sought July 11, 2003, by not identifying the motion as a motion for reconsideration; two, by filing the motion more than ten days after the prior ruling; and three, by filing a second motion seeking to change the July 11, 2003, ruling." The court ordered defendant to pay plaintiff $2,000 in sanctions.

CONTENTIONS

***5** Defendant contends (1) the trial court abused its discretion, in that it never determined whether it had personal jurisdiction over him, (2) the trial court abused its discretion, in that he set forth evidence establishing that he was never served with the summons and that the default and default judgment were obtained through extrinsic fraud and mistake, (3) he was entitled to relief under section 473, subdivision (d), (4) the trial court abused its discretion and the default and default judgment are void because plaintiff failed to serve him with a statement of damages before default was entered, (5) the evidence was insufficient to establish that he was served with the summons, and (6) the sanction order should be reversed.

To the extent that defendant's contentions challenge the trial court's nonappealable orders denying his motion to quash service of process and his motions for reconsideration and the nonappealable orders awarding sanctions, they are not properly before us. For the reasons that follow, we reject those issues that warrant our consideration with the exception of defendant's assertion that plaintiff's failure to serve him properly with a statement of damages *before* default was entered requires reversal of the judgment. We find that assertion to be meritorious.

DISCUSSION

Resolution of Issue of Personal Jurisdiction

We reject defendant's assertion that the trial court failed to resolve the question of whether it had personal jurisdiction over him. The court resolved that question against defendant when on July 11, 2003 it denied his motion to quash service of process. The subsequent written order memorializing the court's ruling states that "upon presentation of evidence, and the matter being heard," the court denied defendant's motion. In addition, the default judgment states, among other things, that "[d]efendant was properly served with a copy of the summons and complaint" and "[d]efendant failed to answer the complaint or appear and defend the action within the time allowed by law." Thus, the court rejected defendant's personal jurisdiction challenge when ruling on defendant's motion to quash. Inasmuch as an order denying a motion to quash service of process is not appealable (§ 904.1, subd. (a)(3); § 418.10, subd. (c); *Milstein v. Ogden, supra,* 84 Cal.App.2d at p. 235), the issue of whether the trial court properly denied the motion is not before us.

To the extent defendant claimed his failure to appear at the hearing on his motion to quash was the result of inadvertence, defendant should have filed a motion to set aside that order and the default judgment pursuant to section 473, subdivision (b). That statutory provision authorizes the trial court "upon any terms as may be just, [to] relieve a party ... from a judgment [or] ... order ... taken against him ... through his ... mistake, inadvertence, surprise, or excusable neglect." Defendant did not seek this statutory relief, however. Rather, he moved the court for reconsideration of its ruling. By that time, however, the judgment already had been entered and the order could not be reconsidered. (*ARPI Ins. Co. v. Superior Court, supra,* 76 Cal.App.4th at p. 181.)

Motion to Set Aside Default Judgment

***6** As previously noted, the trial court characterized and treated defendant's motion to set aside the default judgment pursuant to section 473, subdivision (d), as one for reconsideration under section 1008. In fact, in denying defendant's motion and granting plaintiff's request for sanctions, the trial court relied solely on section 1008. Since an order denying a motion for reconsideration is not appealable (*Reese v. Wal-Mart Stores, supra,* 73 Cal.App.4th at p. 1242), and defendant does not on

appeal challenge the trial court's characterization of his section 473 motion (which sought the same relief for the same reasons asserted in defendant's motion to quash service of summons and his motion for reconsideration) or its sole reliance on section 1008 in ruling on the motion, we need not reach the merits of defendant's assertions that he was entitled to relief under section 473, subdivision (d).

Equitable Relief

For the first time on appeal, defendant argues that in addition to section 473, the trial court had inherent equitable power to grant relief from a default judgment obtained through extrinsic fraud or mistake. Inasmuch as defendant did not assert this theory of relief below, he may not do so on appeal. (*Bardis v. Oates* (2004) 119 Cal.App.4th 1, 13-14, fn. 6.)

Sanctions Order

Although the November 7, 2003 sanctions order in the amount of $2,000 is not appealable independently, the propriety of that order "may be reviewed on an appeal by that party after entry of final judgment in the main action." (§ 904.1, subd. (b).) Defendant argues that the order is void because the trial court did not have personal jurisdiction over him. The trial court found to the contrary, however, and this determination is not subject to review on appeal. We therefore reject defendant's argument.

Statement of Damages

Defendant asserts that the default and default judgment are void because plaintiff failed to serve him with a statement of damages before his default was entered. Default was entered against defendant on February 11, 2003. Defendant learned about the default on May 23 when he received in the mail, among other things, a request for court judgment and statement of damages. The proof of service for these documents reflect that they were served on defendant by mail on May 13, after entry of default. The documents themselves were not filed with the court until July 11.

As observed in *Schwab v. Southern California Gas Co.* (2004) 114 Cal.App.4th 1308, "[a] complaint must state the amount of money damages or other relief it seeks. (§ 425.10.) An exception applies where a complaint seeks damages for personal injury or wrongful death. (§ 425.11.) In these cases, the nature and amount of money damages must not be stated in the complaint, but must be stated in a separate statement described in section 425.11. (*Id.*; § 425.10 .) The statement must be served in the same manner as a summons, *before a default may be entered* on the underlying complaint. (§ 425.11, subd. (d)(1).) [¶] Together, the statutes require that before a default may be entered, the defendant must be served, in the same manner as a summons, with notice of the amount of money damages or other relief sought. (§§ 425.10, 425.11 & 585.)" (*Schwab, supra,* at p. 1320.) The requirement of proper notice of the damages sought is rooted firmly in fundamental notions of due process. (*Id.* at p. 1321.)

*7 When section 425.11 applies, "the statement of damages must separately state the amounts of special and general damages sought. 'Section 425.11 has been construed to require "a statement of both special and general damages sought [because] ... such information aids a defendant in evaluating the validity of plaintiff's damage claims with regard to their provability." ' [Citation.]" (*Schwab v. Southern California Gas Co., supra,* 114 Cal.App.4th at p. 1322.) Stated otherwise, the requirement " 'aim[s] to ensure that a defendant who declines to contest an action does not thereby subject himself to open-ended liability.' " (*Schwab v. Rondel Homes, Inc.* (1991) 53 Cal.3d 428, 435.)

As to the amount of notice that need be given before a defendant's default may be taken, a case-by-case approach "satisfies the applicable statutes and the requirements of due process." (*Schwab v. Southern California Gas Co., supra,* 114 Cal.App.4th at p. 1322; *California Novelties, Inc. v. Sokoloff* (1992) 6 Cal.App.4th 936, 945.)

In a personal injury action, the plaintiff's service on defendant of a statement of damages after

entry of default but prior to entry of the default judgment is not sufficient to comport with section 425.11. (*Hamm v. Elkin* (1987) 196 Cal.App.3d 1343, 1345-1346.) As observed in *Hamm,* "[t]his interpretation is appropriate for a number of reasons. It furthers the strong policy of the law in favor of adjudication on the merits. It recognizes that knowledge of the alleged amount of damages may be crucial to a defendant's decision whether to permit a clerk's default. [Citation.] It reflects the common understanding that a clerk's default is 'taken' by counsel while the default judgment is 'entered' by the court. Finally, one purpose of section 425.11 is to give the defendant a final chance to respond to the allegations of the complaint [citation], and this purpose would be frustrated if the plaintiff could wait until after the clerk's default before serving the statement, when the defendant could respond only on the issue of damages." (*Id.* at p. 1346.)

In this case, plaintiff served defendant with the statement of damages delineating the general and special damages she sought to recover but did so after defendant's default had been entered. Inasmuch as she failed to comply with section 425.11, the default judgment must be reversed and the default vacated.

DISPOSITION

The July 11, 2003 default judgment is reversed. The matter is remanded to the trial court with directions to vacate the default entered on February 11, 2003 and to give defendant 30 days within which to file a responsive pleading. If defendant fails to do so, plaintiff may once again seek entry of default. Defendant's appeals from the July 11, 2003 order denying his motion to quash service of summons, the September 5, 2003 order denying his motion for reconsideration, the purported September 5, 2003 order awarding sanctions, the November 7, 2003 order denying his second motion for reconsideration, which had been designated as a section 473, subdivision (d), motion, and the November 7, 2003 order awarding sanctions are dismissed. Defendant is awarded his costs on appeal.

We concur: ORTEGA and MALLANO, JJ.

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