Not Reported in Cal.Rptr.3d, 2008 WL 1932967 (Cal.App. 2 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2008 WL 1932967 (Cal.App. 2 Dist.))

Court of Appeal, Second District, Division 3, California.
IN AE KWON, etc., Plaintiff and Appellant,
v.
JO SIG HONG etc., et al., Defendants and Respondents.

No. B200428.
(Los Angeles County Super. Ct. No. GC033911).
May 5, 2008.

APPEAL from an order of the Superior Court of Los Angeles County, C. Edward Simpson, Judge. Reversed.
Law Offices of Mark C. Kim and Mark C. Kim; Quade & Associates, Michael W. Quade and Amy E. Allemann; Dunn **Koes** and Pamela E. Dunn and Daniel J. **Koes** for Plaintiff and Appellant.

No appearance for Defendants and Respondents.

ALDRICH, J.

INTRODUCTION

***1** Seventeen months after plaintiff In Ae Kwon obtained a judgment against defendant Jo Sig Hong, doing business as Magic Touch Interiors, Hong moved to set aside the judgment on the grounds of extrinsic mistake and fraud and because the judgment was void. The trial court granted Hong's motion and Kwon appeals. We conclude that the trial court erred as a matter of law under both subdivisions (b) and (d) of the Code of Civil Procedure section 473. Accordingly, the order is reversed.

FACTUAL AND PROCEDURAL BACKGROUND

Kwon owned a house in Alhambra, California. She entered into a contract with Hong, a cabinet maker, to remodel the kitchen and bathroom for the sum of $32,392.55. During construction, Hong burst a pipe, causing water to intrude into the house's framing and then abandoned the project.

Kwon filed her complaint against Hong [FN1] for damages for breach of contract, fraud, money had and received, and intentional and negligent infliction of emotional distress. Kwon alleged that Hong fraudulently induced her to enter into the contract and then breached it. Hong's conduct, Kwon alleged, rendered her property uninhabitable. As damages, the complaint prayed for the $26,000 that Kwon paid defendants, plus money she spent for other contractors to redo and complete the construction that Hong had abandoned. Additionally, Kwon's complaint sought compensation for her physical and psychological injuries and pain and suffering, including hospital and medical expenses, all according to proof.

FN1. Plaintiff also named Il Song Yoo, doing business as A-1 Painting & Maintenance, as a defendant. Yoo did not move to set aside the judgment.

Hong retained counsel and filed an answer.

On June 20, 2005, when the trial court called him, Hong did not respond. Anticipating that Hong would not appear, Kwon presented a "prove up package" to the court. Noting that Hong had not appeared for the previous four hearings, the court decided to enter judgment supported by the declaration, and entered judgment in Kwon's favor in the amount of $678,568.40.

The judgment, entered June 20, 2005, states that the case came on regularly "for a prove-up hearing.... After considering the papers filed in support of default judgment and the argument of coun-

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sel, the court held that Defendants [ ] Hong and [ ] Lee have had default entered against them by order of court." An abstract of judgment issued on July 5, 2005. Notice of entry of judgment was filed on October 20, 2005, and so the judgment became final in December 2005. (Cal. Rules of Court, rule 8.104.)

Rather than to file an appeal, in October 2005, Hong filed for bankruptcy court protection under Chapter 7 (Case No. 05-20806-ER). In Schedule F., Hong identified Kwon as the holder of an unsecured, nonpriority claim in the amount of $650,000.

Kwon filed a complaint in Hong's bankruptcy case seeking to have Hong's discharge denied on the grounds: (1) Hong had sold real property he owned in Los Angeles in a fraudulent transfer (11 U.S.C. § 727(a)(2)(A)),[FN2] and (2) he had willfully and maliciously injured Kwon's property (11 U.S.C. § 523). Hong did not respond to Kwon's complaint and on May 8, 2006, the Bankruptcy Court entered judgment in Kwon's favor and against Hong, denying or revoking Hong's discharge under title 11 United States Code section 727(a)(2)(A).[FN3]

> FN2. Title 11 United States Code section 727 reads in relevant part, "(a) The court shall grant the debtor a discharge, unless-[¶] ... [¶] (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed-[¶] (A) property of the debtor, within one year before the date of the filing of the petition...."

> FN3. Kwon then filed an action in the Los Angeles County Superior Court against Hong under the California Uniform Fraudulent Transfer Act to avoid the fraudulent transfer of his Los Angeles property. Hong filed an answer, and that action is pending.

***2** Seven months later, and *17 months* after the judgment in Kwon's breach of contract action had been entered, in December 2006, Hong moved the trial court to set aside Kwon's judgment. Hong contended that Kwon "failed to provide the trial date and time *and* [*to*] *inform the court of* [*Hong's*] *appearance at trial.* " Hong further asserted that Kwon (1) failed to give formal notice of the damages sought (Code Civ. Proc., § 580); (2) failed to file or serve a statement of damages (Code Civ. Proc., §§ 425.11 & 425.115); (3) only served her statement of damages four days before taking her default judgment (Code Civ. Proc., § 1013); and (4) the award far exceeded the damages sought in the complaint.

Hong's attached declaration averred that he "was never served with any written notice of the trial date or time...." Nonetheless, he declared, on June 25, 2006, "I drove to the courthouse" and "found my way into Department 'R,' about shortly after 9:00 a.m. and saw [Kwon's] counsel, Mark C. Kim, Esq. and [Kwon] in the courtroom. Mr. Kim saw me enter the courtroom and we had eye contact briefly, but he said nothing. I sat in the courtroom across from Mr. Kim expecting either Mr. Kim or the courtroom clerk to call my name. During the following thirty minutes I and Mr. Kim sat in the courtroom, Mr. Kim never said anything to me about the trial. When my name was not called, I approached the courtroom staff and asked what happened to my case. I was told to go home because the hearing had been over. I left the courtroom and found [Kwon] in the hallway just outside the courtroom and tried to speak with her, but Mr. Kim told me in Korean not to speak with [Kwon] and said, 'what are you doing? It's done.' I then left the courtroom building." Hong also stated that "Although I did receive a copy of Notice of Entry of Judgment, at no time did I receive a judgment from either [Kwon] or this court." Hong also asserted he had no reason to believe the damages would exceed $26,000.

Kwon opposed the motion by pointing up

Hong's lack of diligence and denying that she committed fraud.

"Address[ing] the equities," the trial court granted Hong's motion "on the basis that the judgment is void for failure to serve notice of trial and service of the statement of damages was not adequate." The court pointed out deficiencies in Kwon's mailing of certain notices, including the absence of a notice of trial in the court file. Finally, the court ruled that the statement of damages was void because it was served by mail, four days before trial, which means it was not served until after the default prove-up.

Kwon filed a motion for reconsideration (Code Civ. Proc., § 1008). Therein, she explained that the breach of contract judgment taken on June 20, 2005, was taken after an uncontested trial and was not a default because Hong's answer was never stricken. Kwon's attorney, Daniel Park, testified in his attached declaration that "After the Court concluded with trial in this matter, Plaintiff and I walked out of Department 'R' while Mr. Kim stayed behind to wait [and received] a conformed copy of the signed judgment from the clerk. [¶] Once Plaintiff and I stepped out of the courtroom ... I observed Hong approaching Department 'R' with another Korean male, who later turned out to be [Yoo, the other defendant in this case]. [¶] ... Upon seeking plaintiff, Hong approach[ed] and began asking questions about what happened with the trial. I told Hong to stop talking to the plaintiff and to step away from her. I then told Hong that [the] trial was over and that he was too late. Hong and Yoo both knew the case was set for trial because they asked questions about what happened at trial before anything was said to them about a trial. [¶] ... As we were leaving, I witnessed Hong and defendant Yoo enter Department 'R.' " The court denied the motion for reconsideration, and Kwon filed her appeal. Hong has not filed a respondent's brief in this appeal.

CONTENTIONS

*3 Kwon contends the trial court erred in (1) granting Hong's motion to set aside the judgment, and (2) denying her motion for reconsideration.

DISCUSSION

1. *The motion for reconsideration is not reviewable on appeal.*

There is a split of authority over whether orders denying reconsideration (Code Civ. Proc., § 1008) are appealable. (*In re Marriage of Burgard* (1999) 72 Cal.App.4th 74, 80-81.) Some courts have held that motions for reconsideration are appealable only if the underlying orders are appealable and if the reconsideration motions are based on new or different facts. (*Id.* at p. 81; *Freeman v. State Farm Mut. Auto. Ins. Co.* (1975) 14 Cal.3d 473, 477, fn. 2.) The trial court's order denying Kwon's reconsideration motion is not appealable for the simple reason that the motion was not based on new facts. The motion was brought on the ground that the judgment was not a default judgment but taken after an uncontested trial. Counsel made that same argument based on the same facts to the trial court at the hearing on Hong's motion to set aside the judgment. However, while we may not review the court's ruling denying Kwon's motion for reconsideration under Code of Civil Procedure section 1008, we may nonetheless review the underlying order setting aside the judgment. (*Romadka v. Hoge* (1991) 232 Cal.App.3d 1231, 1237.)

2. *The trial court abused its discretion in granting Hong's motion to set aside the judgment.*

a. *The trial court had no authority to set aside the judgment under Code of Civil Procedure section 473, subdivision (b).*

"[T]he discretionary relief provision of [Code of Civil Procedure] section 473, subdivision (b) provides that: 'The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect.' " (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 254.) Thus, one

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ground for relief under the trial court's discretionary power to set aside a judgment under section 473, subdivision (b) is extrinsic mistake. Extrinsic mistake is "a term broadly applied when circumstances extrinsic to the litigation have unfairly cost a party a hearing on the merits. [Citations.] 'Extrinsic mistake is found when [among other things] ... a mistake led a court to do what it never intended....' [Citations.]" (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981-982.)

" 'The lower court has discretionary power to decide the issue growing out of a motion for relief under the remedial provisions of section 473, Code of Civil Procedure, and its exercise thereof will not be disturbed by an appellate tribunal unless there is a clear showing of abuse [citations].' [Citation.]" (*Ludka v. Memory Magnetics International* (1972) 25 Cal.App.3d 316, 321; accord, *Zamora v. Clayborn Contracting Group, Inc., supra,* 28 Cal.4th at p. 257.)

***4** However, in addition to demonstrating extrinsic mistake or fraud, "[t]he party seeking relief under [Code of Civil Procedure] section 473 must also be diligent. [Citation.]" (*Zamora v. Clayborn Contracting Group, Inc., supra,* 28 Cal.4th at p. 258, citing Code Civ. Proc., § 473, subd. (b).) " '[T]o qualify for [discretionary] relief under section 473, the moving party must act diligently in seeking relief and must submit affidavits or testimony demonstrating a reasonable cause for the default.' [Citation.]" (*Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1419, quoting from *Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 495.) This is, in effect, a *separate,* discretionary time limitation on granting relief. (Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2007) ¶ 5:374, p. 5-97.) "[A]n application for relief must be made 'within a reasonable time, *in no case exceeding six months,* after the judgment, dismissal, order, or proceeding was taken.' " (*Zamora v. Clayborn Contracting Group, Inc., supra,* at p. 258, citing Code Civ. Proc., § 473, subd. (b); *Rappleyea v. Campbell, supra,* 8 Cal.4th at p. 982.) Indeed, an unexplained three-month delay between knowledge of entry of default and application for relief is not diligence. (*Ludka v. Memory Magnetics International, supra,* 25 Cal.App.3d at pp. 321-322.)

Here, Hong waited *17 months* from the time the judgment was entered in July 2005, until he moved for relief from default in December 2006. Hong made no showing in his motion, or by affidavit or declaration, of reasonable cause for his delay. The record clearly shows he was aware of the judgment in July 2005. Even assuming some sort of equitable tolling because Hong chose to pursue an alternative remedy through the bankruptcy court, he still waited *seven* months *after the bankruptcy court entered judgment revoking his discharge to return to the trial court to move to set aside Kwon's judgment.*[FN4] Hong gave absolutely no justification for either his seven or his 17-month foot-dragging. The trial court took note of that fact during the hearing on the motion to set aside the judgment, stating, "On the other hand, Mr. Hong [has] got to bear some responsibility for coming in here a year and a half later asking to be relieved from this default." Hong was not diligent as a matter of law, and so on this record, the trial court abused its discretion in granting Hong's motion.

> FN4. Hong's conduct in the bankruptcy court of not responding to Kwon's complaint, along with his failure to appear for his deposition in the underlying action, and failure to appear at hearings on certain motions, shows his pattern of flouting the legal process.

b. *The trial court had no authority to set aside Kwon's judgment under Code of Civil Procedure section 473, subdivision (d).*

Notwithstanding Hong was not entitled to the discretionary relief under subdivision (b) of the Code of Civil Procedure section 473, he also relies on subdivision (d) of that section, which enables the trial court to set aside a judgment that is void. (*Cruz v. Fagor America, Inc., supra,* 146 Cal.App.4th at p. 496.) Section 473, subdivision (d)

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[FN5] authorizes the trial court, once six months have elapsed from the entry of a judgment, to set aside that judgment as void, but *only* if the judgment is void on its face. (*Cruz, supra,* at pp. 495-496.) "We review de novo a trial court's determination that a judgment is void." (*Id.* at p. 496 .)

> FN5. Code of Civil Procedure section 473, subdivision (d) reads, "The 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 order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order."

*5 " 'A judgment or order is said to be void on its face when the invalidity is apparent upon an inspection of the judgment-roll.' [Citation.]" (*Cruz v. Fagor America, Inc., supra,* 146 Cal.App.4th at p. 496.) Thus, judgments are considered to be void as a matter of law when the rendering court lacked subject matter or personal jurisdiction, or exceeded its jurisdiction by granting relief it had no authority to grant. (*Rochin v. Pat Johnson Manufacturing Co.* (1998) 67 Cal.App.4th 1228, 1239.)

Hong contends there are two reasons why the judgment was void on its face. In our view, neither ground is applicable.

(1) *Code of Civil Procedure section 594 does not apply because Hong appeared.*

Hong first argued, and the court agreed, that the judgment was void ab initio because Hong was not served with notice of trial.

Kwon argues she gave proper notice of trial. She cites her attorney's declaration establishing that although there was no actual copy of the notice in the file, counsel was able to resurrect a copy of the notice in his computer and a computer-generated version of the proof of serve prepared and served well in advance of trial, along with a cost statement reflecting that Kwon was billed for mailing the notice to Hong. Kwon also notes that she served Hong with discovery responses, notices and motions to compel discovery, and an order granting Kwon monetary sanctions for Hong's failure to appear for deposition and respond to discovery. Each of these notices listed the trial date. Therefore, Kwon contends, she gave ample notice in advance of trial.

Code of Civil Procedure section 594, subdivision (a) requires a plaintiff wishing to bring a case to trial in the absence of the defendant to satisfy the trial court that the nonappearing party had 15 days' notice of trial. Hong argued that he never received notice of the trial date. The court agreed, [FN6] noting that there was no copy of a notice of trial in the case file.

> FN6. The court also appeared to be bothered by the proof of service on the notice of entry of judgment. However, that notice does not affect the validity of the judgment itself.

However, "if a party has notice by other means, *or actually appears at trial,* section 594 does not apply. [Citations.]" (*Au-Yang v. Barton* (1999) 21 Cal.4th 958, 968-969, citing 7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 87, pp. 106-107, italics added.) "Actual notice, however acquired, is sufficient. [Citation.]" (*Parker v. Dingman* (1975) 48 Cal.App.3d 1011, 1016.)

Here, Hong admitted in his declaration, filed under penalty of perjury, that he was present in the court on June 20, 2005, the day of trial. He is thus presumed to have received the notice. Any defect of notice was overcome by Hong's actual presence.

(2) *Code of Civil Procedure sections 425.11, 425.115, and 580 do not apply because the judgment was not a default judgment.*

Hong next argued that he was never served with a statement of damages pursuant to Code of Civil Procedure sections 425.11, 425.115, and 580, with the result that the *default* judgment was im-

properly entered and is thus void on its face. Insisting that she did serve Hong with her statement of damages, Kwon does concede that it may not have been served sufficiently in advance of trial. (§ 1013 .) "[A] default entered without any such statement [of damages] being served on the defendant is void on the face of the record and may be successfully challenged beyond the six-month limitation period specified in section 473. [Citation.]" (*Plotitsa v. Superior Court* (1983) 140 Cal.App.3d 755, 760.)

***6** However, Kwon's judgment against Hong *was not a default judgment* and so the judgment was not void on its face for failure to provide a statement of damages according to the above-cited statutes. Hong filed an answer, which was never struck. Hong was never defaulted. And, as explained, he was present in the court on the day of trial. While the trial court's minute order from the day of trial, along with the judgment, identified it as a "default judgment," in actuality, the judgment was one taken after *an uncontested trial.*

In *Merrifield v. Edmonds* (1983) 146 Cal.App.3d 336, the appellate court rejected the characterization that the judgment was a "default judgment," holding it was "one entered pursuant to Code of Civil Procedure section 594. That section provides in pertinent part that where a defendant who has answered the complaint receives proper notice of trial but does not appear, the plaintiff may proceed with his case and take judgment. This is what occurred in the case at bench. The hearing was one which was 'uncontested'; it was not a default hearing [citation], and the judgment was not a default judgment." (*Id.* at p. 341, citing *Wilson v. Goldman* (1969) 274 Cal.App.2d 573, 576-577 [default judgment not authorized where answer is on file regardless of whether defendants appeared at trial and if defendant appeared, plaintiff must proceed under Code Civ. Proc., § 594]; but see *In re Marriage of Hock & Gordon-Hock* (2000) 80 Cal.App.4th 1438, 1445-1446 [distinguishing *Merrifield* on grounds it did not involve scope of mandatory relief available under section 473, subdivision (b) for attorney abandonment].) The same result obtains here as in *Merrifield.* The judgment was taken after an uncontested trial under section 594, subdivision (a) because Hong's answer was on file and he was present at trial. Therefore, it was not a default judgment, no matter what its characterization in the judgment.

Turning to the other notices that Hong contended were deficient, Code of Civil Procedure sections 425.11 and 425.115 require statements of damages to be served on a defendant before a plaintiff may seek damages and punitive damages *on a default judgment.*[FN7] Likewise, " Code of Civil Procedure section 580 places a limit on the amount of recovery only in the event that 'there is no answer' and *a default judgment* is entered against the defendant." (*Garamendi v. Golden Eagle Ins. Co.* (2004) 116 Cal.App.4th 694, 705, italics added.) [FN8] "As long as [the defendant's] answer remained on file, the court lacked the authority to enter its default." (*Ibid.*)

FN7. Code of Civil Procedure section 425.11, subdivision (c) reads, "If no request is made for the statement [of damages] referred to in subdivision (b), the plaintiff shall serve the statement on the defendant *before a default may be taken.* " (Italics added.)

Section 425.115 of the Code of Civil Procedure reads, "(b) The plaintiff preserves the right to seek punitive damages pursuant to Section 3294 of the Civil Code *on a default judgment* by serving upon the defendant the following statement, or its substantial equivalent .... [¶] (c) If the plaintiff seeks punitive damages pursuant to Section 3294 of the Civil Code, and if the defendant appears in the action, the plaintiff shall not be limited to the amount set forth in the statement served on the defendant pursuant to this section .... [¶] ... (f) The plaintiff shall serve the statement upon

> the defendant pursuant to this section *before a default may be taken,* if the motion for default judgment includes a request for punitive damages." (Italics added.)
>
> FN8. Code of Civil Procedure section 580, subdivision (a) reads, "The relief granted to the plaintiff, *if there is no answer,* cannot exceed that demanded in the complaint, in the statement required by Section 425.11, or in the statement provided for by Section 425.115; but in any other case, the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issue. The court may impose liability, regardless of whether the theory upon which liability is sought to be imposed involves legal or equitable principles." (Italics added .)

Here, because the judgment was not a default judgment, it was not void for Kwon's failure to provide Hong with statements of damages under these statutes. Because Hong's answer was on file, the damages were properly entered upon Kwon's proof and were not limited to that demanded in the complaint. (Code Civ. Proc., § 580.) In any event, Hong was aware of the damages Kwon was seeking. During mediation, he was specifically told about the amount of potential damages he was facing, to which he responded by threatening Kwon that he would "go after" her "for the rest of his life." And, the court had found that Kwon proved her damages when it entered judgment in her favor.

***7** To summarize, although Kwon's notices may appear to be vulnerable to attack, Hong appeared at trial and had notice of the damages he was facing. Consequently, the judgment was not void on its face and so the trial court had no authority to set it aside under Code of Civil Procedure section 473, subdivision (d). Where Hong's motion to set aside the judgment was patently late, as a matter of law, the trial court had no authority to exercise its discretionary power to grant the motion under section 473, subdivision (b) and so should have denied it.

DISPOSITION

The order setting aside the judgment is reversed with directions to deny the motion and to reinstate the judgment in favor of plaintiff. Appellant shall recover her costs on appeal.

We concur: KLEIN, P.J., and KTCHING, J.

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