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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ROBERT B. KORY, as Trustee, etc.,

Plaintiff and Respondent,

v.

KELLEY ANN LYNCH,

Defendant and Appellant.

B267794

(Los Angeles County
Super. Ct. No. BC338322)

APPEAL from an order of the Superior Court of Los Angeles County, Robert L. Hess, Judge. Affirmed in part; reversed in part.

Kelley Ann Lynch, in pro. per., for Defendant and Appellant.

Kory & Rice, Michelle L. Rice; Ferguson Case Orr Paterson and Wendy C. Lascher for Plaintiff and Respondent.

Kelley A. Lynch appeals from an order denying her motion to set aside the renewal of a default judgment in favor of Leonard Norman Cohen.[1] Lynch contends the renewal of the default judgment was void because Cohen never properly served the summons and complaint on her by personal service or substituted service. However, on January 17, 2014 the trial court denied Lynch's motion to vacate the default judgment, finding she had failed to overcome the presumption created by the proof of service that she was properly served and had actual notice of the complaint, and she failed to act diligently to set the judgment aside. Because Lynch failed to appeal the order denying her motion to vacate the judgment, she is now barred by issue preclusion from relitigating whether she was properly served with the complaint.

Lynch also contends Cohen lacked standing to bring the action on behalf of corporations named in the judgment or identified as "any other entity related to Cohen." She asserts the judgment's imposition of a constructive trust over her interests in the corporate entities was improper because the corporations were suspended at the time of the judgment and its renewal, and the trial court lacked jurisdiction over the entities. She also challenges the judgment as void for exceeding Cohen's requested relief. We conclude Lynch is correct as to this final argument in that the default judgment awarded a sum of prejudgment interest exceeding the complaint's request for relief. We reverse, and remand for the trial court to vacate the judgment and modify

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[1] Cohen died on November 7, 2016. After Cohen's death, Robert B. Kory, as trustee of the Leonard Cohen Family Trust, substituted in this appeal as the respondent. For ease of reference, we use the name Cohen to refer to both Cohen individually and Kory as trustee.

it to reflect the correct prejudgment interest. In all other respects we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

We set out the factual and procedural background in detail in our prior opinion in which we dismissed Lynch's appeal from an order denying her motion for terminating and other sanctions, which we concluded was a nonappealable motion for reconsideration of the trial court's order denying her motion to vacate the default judgment. (*Kory v. Lynch* (May 17, 2017, B265753) [nonpub. opn.] (*Kory I*).) We summarize the central facts below.

A. *Factual Background*

Lynch is a former employee of Leonard Cohen, a well-known singer and songwriter. Lynch worked for Cohen as his personal manager for 16 years. Cohen terminated Lynch's employment in October 2004 because she embezzled millions of dollars from him.

B. *The Complaint and the Default Judgment*

On August 15, 2005 Cohen filed a complaint for damages against Lynch alleging causes of action for fraud, conversion, breach of contract, breach of fiduciary duty, negligence, constructive trust, and an accounting. Cohen filed a proof of service prepared by a registered process server, stating the process server served the summons and complaint on Lynch by substituted service by leaving a copy of the papers with "Jane Doe," a woman identified as a "co-occupant," at 2648 Mandeville Canyon Road, Los Angeles, and mailing a copy to Lynch at the

same address. Lynch did not file an answer or otherwise respond to the complaint.

On May 15, 2006 the trial court entered a default judgment awarding Cohen $7,341,345 against Lynch, including $5 million in damages and $2,341,345 in prejudgment interest at the annual rate of 10 percent. As part of the judgment, the trial court imposed a constructive trust on "the money and property that Lynch wrongfully took and/or transferred while acting in her capacity as trustee for the benefit of . . . Cohen . . . ." The court declared "that (1) Lynch is not the rightful owner of any assets in Traditional Holdings, LLC, Blue Mist Touring Company, Inc., or any other entity related to Cohen; (2) that any interest she has in any legal entities set up for the benefit of Cohen she holds as trustee for Cohen's equitable title; (3) that she must return that which she improperly took, including but not limited to 'loans;' and (4) that Cohen has no obligations or responsibilities to her."

C. *Lynch's Motion To Vacate the Default Judgment*

On August 9, 2013 Lynch filed a motion to vacate the default judgment. Lynch argued the judgment was void for lack of personal jurisdiction because Cohen never served her with the summons and complaint. She asserted the process server never effected substituted service because Lynch was "consistently" home when the process server purported to attempt to serve her, and no one resembling the Jane Doe was living at her home at the time. Lynch supported her arguments with her own unsigned declaration and a declaration from her son. She also asserted she was not aware of the lawsuit and default judgment until April 2010.

Lynch argued Cohen's fabrication of service was extrinsic fraud, rendering the default judgment void. She also claimed

Cohen committed tax fraud and sued her in retaliation for her reporting the fraud to federal authorities.

Cohen argued in opposition that Lynch matched the description of the Jane Doe in the proof of service and Lynch had actual notice of the lawsuit based on extensive e-mail communications between Lynch and Cohen's lawyers in 2005 and 2006. Cohen also asserted the motion was untimely.

On January 17, 2014 the trial court denied Lynch's motion to vacate the default judgment. The trial court found the proof of service by the registered process server was presumed valid under Evidence Code section 647, and Lynch had failed to overcome the presumption because she resided at the address at the time of service and fit the description of the Jane Doe. In addition, Lynch had contemporaneous notice of the complaint, request for entry of default judgment, and entry of default judgment, and failed to act diligently to vacate the judgment. Lynch did not appeal from the order denying the motion to vacate.

D. *Lynch's Motion for Terminating Sanctions*

On March 17, 2015 Lynch filed a "Motion for Terminating & Other Sanctions." Lynch again argued she was never served with the summons and complaint, and therefore the trial court lacked jurisdiction to enter the default judgment. Lynch asserted that because of Cohen's extrinsic fraud in obtaining the judgment, the court should dismiss the action with prejudice or allow Lynch to be heard on the merits.

After a hearing on June 23, 2015, the trial court denied Lynch's motion as an untimely motion for reconsideration of Lynch's prior motion to vacate the default judgment. The trial court also noted there was no reason to revisit Lynch's claims.

We dismissed Lynch's appeal from the trial court's order, agreeing the motion was a motion for reconsideration of the trial court's order denying Lynch's motion to vacate the default judgment, which she had not appealed. Thus, we lacked jurisdiction over the appeal. (*Kory I*, *supra*, B265753.)

E. *The Renewal of Judgment*

On July 13, 2015 Cohen filed an application for renewal of the default judgment in the amount of $14,059,183.80, including postjudgment interest, which was entered by the clerk. The next day Cohen served Lynch by mail with notice of the renewal of judgment.

F. *Lynch's Motion To Set Aside the Renewal of Judgment*

On July 28, 2015 Lynch filed a motion to set aside the renewal of judgment pursuant to Code of Civil Procedure section 683.170.[2] Lynch again argued the default judgment was void because Cohen never served her with the summons and complaint and had committed extrinsic fraud in obtaining the default judgment. She asserted Cohen did not serve her as part of his scheme to defraud the tax authorities. Finally, Lynch argued Cohen had no standing to bring the action or obtain a judgment against her on behalf of the corporate entities. She contended the corporations were suspended at the time of the judgment and its renewal, and therefore should have been excluded from the judgment. She also argued the trial court lacked jurisdiction over the entities.

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[2] All further statutory references are to the Code of Civil Procedure.

In his opposition Cohen argued he properly served Lynch by substituted service and the default judgment and renewal of judgment were valid. He also contended Lynch forfeited her right to challenge jurisdiction because she had made a general appearance. Finally, he argued the court should reject Lynch's argument he lacked standing because he properly brought his claims in his individual capacity, not derivatively on behalf of the corporate entities.

At the hearing on October 6, 2015 the trial court referred to Lynch's motion as "an attempt to have a third bite of that same apple." Lynch responded that her motion was not a "third bite" because she "wasn't served [with] this lawsuit." She argued substituted service was improper because there was no female co-occupant at the time of purported service. The trial court responded, "This is exactly the same argument you've made to me twice before." Lynch also raised that the corporations named in the judgment had been suspended. After further argument, the court denied the motion.

Lynch timely appealed.[3]

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[3] An order denying a motion to vacate a renewal of judgment is an appealable order as "'an order made after a judgment made appealable by paragraph (1)' of section 904.1, subdivision (a) . . . ." (*Jonathan Neil & Associates, Inc. v. Jones* (2006) 138 Cal.App.4th 1481, 1487; accord, *Goldman v. Simpson* (2008) 160 Cal.App.4th 255, 262, fn. 4 ["it is the order denying a motion to vacate renewal of a judgment that is appealable, as an order after (the underlying) judgment"].)

DISCUSSION

A. *Section 683.170 Entitles a Party To Challenge the Renewal of a Judgment Based on Lack of Service of the Summons and Complaint*

Cohen contends we should dismiss the appeal because it too is a disguised motion for reconsideration of the trial court's prior order denying Lynch's motion to vacate the default judgment, which she did not appeal. Lynch responds that under section 683.170 she may challenge the renewal of judgment as a void judgment based on the lack of service of the summons and complaint. Lynch is correct.

"Before the 1982 enactment of the Enforcement of Judgments Law (§ 680.010 et seq.), the sole method by which a judgment creditor could extend the enforcement period of a money judgment was by obtaining a new judgment against the judgment debtor in an independent action based on the judgment." (*Goldman v. Simpson* (2008) 160 Cal.App.4th 255, 260 (*Goldman*).) Under the Enforcement of Judgments Law, a money judgment is enforceable for 10 years from the date it is entered. (§ 683.020; *Goldman*, at p. 260.) The law created a summary procedure for renewal of the judgment by the creditor by filing an application for renewal with the clerk of the court before expiration of the 10-year period. (§ 683.130, subd. (a); *Goldman*, at p. 260.) The creditor must serve notice of the renewal on the debtor, and the debtor then has 30 days after service in which to make a motion to vacate the renewal of the judgment. (§ 683.170, subd. (b).)

Significantly, section 683.170, subdivision (a), provides that "[t]he renewal of a judgment pursuant to this article may be vacated on any ground that would be a defense to an action on

the judgment." Thus, "defective service of process is a defense which may be raised on a motion to vacate renewal of a judgment . . . ." (*Fidelity Creditor Service, Inc. v. Browne* (2001) 89 Cal.App.4th 195, 203 (*Fidelity*); accord, *Goldman*, *supra*, 160 Cal.App.4th at p. 262 ["in making a statutory motion under section 683.170, subdivision (a), to vacate a renewal of judgment, the debtor may contend that the court lacked personal jurisdiction *at the time of the initial judgment*"]; see *Hill v. City Cab & Transfer Co.* (1889) 79 Cal. 188, 191 [reversing judgment against debtor in action by creditor to enforce judgment where judgment was void for lack of service of process on defendant].)

In *Fidelity*, the Court of Appeal reversed the trial court's denial of the defendant's motion to vacate renewal of a judgment against him because he was never served with the original complaint, even though the defendant filed the motion almost 10 years after the original judgment was entered. (*Fidelity, supra*, 89 Cal.App.4th at p. 203; cf. *Goldman, supra*, 160 Cal.App.4th at p. 264 [affirming trial court's denial of motion to vacate renewal of default judgment where trial court had jurisdiction over the defendant at the time of filing the complaint, but not at the time of renewal of the judgment].) The reasoning in *Fidelity* is on all fours because Lynch's challenge goes to the jurisdiction of the court at the time of entry of the initial judgment, not at the time of renewal of the judgment.

B. *Standard of Review*

"The judgment debtor bears the burden of proving, by a preponderance of the evidence, that he or she is entitled to relief under section 683.170. [Citations.] On appeal, we examine the evidence in a light most favorable to the order under review and the trial court's ruling for an abuse of discretion." (*Fidelity*,

supra, 89 Cal.App.4th at p. 199; accord, *Iliff v. Dustrud* (2003) 107 Cal.App.4th 1201, 1208.)

"'We review de novo the trial court's determination that a default judgment is or is not void.'" (*Airs Aromatics, LLC v. CBL Data Recovery Technologies, Inc.* (2018) 23 Cal.App.5th 1013, 1018 [vacating default judgment awarding damages in excess of complaint's request for relief]; accord, *Rodriguez v. Cho* (2015) 236 Cal.App.4th 742, 752 [same].)

C. *Lynch's Argument That She Was Never Served with the Summons and Complaint Is Barred by Issue Preclusion*

Cohen contends Lynch's appeal is barred by the doctrine of issue preclusion because the question whether she was properly served with the summons and complaint was adjudicated by the trial court in denying her motion to vacate the default judgment and she failed to appeal the denial. We agree.

"[I]ssue preclusion applies (1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party." (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 825; accord, *Samara v. Matar* (2018) 5 Cal.5th 322, 327.)[4]

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[4] The Supreme Court in *DKN Holdings LLC v. Faerber* clarified that it was using the term "issue preclusion" to refer to collateral estoppel, explaining, "To avoid future confusion, we will follow the example of other courts and use the terms 'claim preclusion' to describe the primary aspect of the res judicata doctrine and 'issue preclusion' to encompass the notion of collateral estoppel." (*DKN Holdings LLC v. Faerber, supra*, 61 Cal.4th at p. 824.)

The question whether Lynch was served with the summons and complaint was adjudicated by the trial court in denying her motion to vacate the default judgment. Lynch had a full opportunity to be heard on the motion. The issue before the trial court was the identical issue raised here and was "actually litigated and necessarily decided." Further, it is undisputed Lynch was a party to the motion.

The trial court's adjudication was a "final adjudication" because Lynch did not appeal from the trial court's order denying her motion to vacate the default judgment. (See *In re Matthew C.* (1993) 6 Cal.4th 386, 393 ["If an order is appealable . . . and no timely appeal is taken therefrom, the issues determined by the order are res judicata."], superseded by statute on another point, as stated in *People v. Mena* (2012) 54 Cal.4th 146, 156; *People v. Mbaabu* (2013) 213 Cal.App.4th 1139, 1147 ["A prior appealable order becomes res judicata in the sense that it becomes binding in the same case if not appealed."].) A postjudgment grant or denial of relief from default and default judgment "is a special order after judgment on a statutory motion to set aside the judgment, and as such is appealable." (*Shapiro v. Clark* (2008) 164 Cal.App.4th 1128, 1137; accord, *Carr v. Kamins* (2007) 151 Cal.App.4th 929, 933 [order denying motion to vacate judgment is appealable as a special order made after entry of judgment under § 904.1, subd. (a)(2)]; see *Moghaddam v. Bone* (2006) 142 Cal.App.4th 283, 287 ["An order vacating default and default judgment pursuant to section 473 'is appealable as an order after final judgment.'"].)

Lynch is therefore barred by issue preclusion from relitigating whether she was served with the summons and complaint.

D. *Lynch's Argument That Cohen Did Not Have Standing To Bring Suit on Behalf of Corporations Named in the Judgment Is Without Merit*

Lynch contends Cohen did not have standing to sue on behalf of Blue Mist Touring Company, Inc. (Blue Mist), Traditional Holdings, LLC (Traditional Holdings), and Old Ideas, LLC because they were suspended, dissolved, or not registered to do business in California. Lynch appropriately moved to vacate the renewed judgment on this ground under section 683.170. (See *Cummings v. Stanley* (2009) 177 Cal.App.4th 493, 501 [""""[C]ontentions based on a lack of standing involve jurisdictional challenges and may be raised at any time in the proceeding."""""].) However, the named plaintiff in the action was Cohen—the default judgment required Lynch to pay Cohen $7,341,345, which was later renewed with interest. The only mention of Traditional Holdings and Blue Mist in the proceedings was in relation to money and property that Cohen alleged Lynch wrongfully took or transferred to herself as the trustee for Cohen. Old Ideas, LLC is not mentioned in the judgment, but arguably falls within the references to "any other entity related to Cohen" or "any interest [Lynch] has in any legal entities set up for the benefit of Cohen."

While Lynch is correct that a suspended corporation cannot prosecute an action (see *Cal-Western Business Services, Inc. v. Corning Capital Group* (2013) 221 Cal.App.4th 304, 310 [assignee of suspended corporation lacked capacity to file and maintain suit to enforce judgment]), it is undisputed that Cohen, not the corporations, was the plaintiff in this action. Although the judgment imposes a constructive trust on the interest Lynch held in these companies, that is no different than if the order required

Lynch to return money she took from a bank account owned by Cohen.

To the extent Lynch contends Cohen had no right to a constructive trust or a declaration that Lynch was not the rightful owner of Traditional Holdings, Blue Mist, "or any other entity related to Cohen" and "that any interest she has in any legal entities set up for the benefit of Cohen she holds as trustee for Cohen's equitable title," we look at the allegations of the complaint to see if they support these remedies.

A defendant may attack a default judgment at any time for granting relief in excess of that alleged in the complaint. (Code Civ. Proc., § 580, subd. (a) ["The relief granted to the plaintiff, if there is no answer, cannot exceed that demanded in the complaint . . . ."]; *Airs Aromatics, LLC v. CBL Data Recovery Technologies, Inc., supra*, 23 Cal.App.5th at p. 1023 ["'[T]he court's jurisdiction to render default judgments can be *exercised only* . . . by keeping the judgment within the bounds of the relief demanded.'"]; *Rodriguez v. Cho, supra*, 236 Cal.App.4th at p. 752 ["'[A] default judgment greater than the amount specifically demanded is void as beyond the court's jurisdiction.'"]; *Simke, Chodos, Silberfeld & Anteau, Inc. v. Athans* (2011) 195 Cal.App.4th 1275, 1286 ["A default judgment that violates section 580 is void; it can be challenged and set aside at any time."].) For purposes of evaluating the validity of the default judgment, we take as true the allegations in Cohen's complaint. (*Grappo v. McMills* (2017) 11 Cal.App.5th 996, 1015 [default judgment reversed where complaint, read liberally, failed to state cognizable claims against defendant]; *Los Defensores, Inc. v. Gomez* (2014) 223 Cal.App.4th 377, 392 ["Generally, a defendant in default 'confesses the material allegations of the complaint.'"].)

Lynch challenges the default judgment's imposition of a constructive trust and declaratory relief with respect to her property interests in the listed corporate entities. "Three conditions must be shown to impose a constructive trust: (1) a specific, identifiable property interest, (2) the plaintiff's right to the property interest, and (3) the defendant's acquisition or detention of the property interest by some wrongful act." (*Higgins v. Higgins* (2017) 11 Cal.App.5th 648, 659; accord, *Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga* (2009) 175 Cal.App.4th 1306, 1332; see Civ. Code, § 2223 ["One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner."].) To qualify for declaratory relief, a plaintiff must show "'(1) a proper subject of declaratory relief, and (2) an actual controversy involving justiciable questions relating to the rights or obligations of a party.'" (*Lee v. Silveira* (2016) 6 Cal.App.5th 527, 546; accord, *Artus v. Gramercy Towers Condominium Assn.* (2018) 19 Cal.App.5th 923, 934 ["""""The fundamental basis of declaratory relief is the existence of an actual, *present* controversy over a proper subject."""""]; see Code Civ. Proc., § 1060 [providing right of action for declaration of rights or duties with respect to property].)

Cohen's complaint alleges he was the rightful owner of assets and interests in Traditional Holdings, Blue Mist, and other entities wrongfully taken by Lynch. And Cohen's complaint sought the imposition of a constructive trust as a remedy for this wrongful taking, as well as a declaration of Cohen's interests in the property. These pleadings, which we take as true, satisfy the conditions for imposition of a constructive trust and establish a controversy appropriately resolved by the declaration of Cohen's property interests in the subject corporate entities. Lynch's argument that the trial court lacked jurisdiction over the

corporate entities misses the mark: The default judgment sets forth Cohen's rights with respect to property interests taken by Lynch, not the rights of the corporate entities. Lynch has shown no basis to disturb the default judgment's creation of a constructive trust or provision of declaratory relief.

E. *The Default Judgment Is Void Because It Exceeds the Monetary Relief Requested in the Complaint*

Lynch also contends the default judgment is void because the amount of damages exceeds that requested by the complaint.[5] We agree. Cohen's complaint sought "general damages in a sum of not less than $5,000,000 or an amount according to proof, together with interest thereon at the legal rate." The default judgment awarded $5 million in damages and $2,341,345 in prejudgment interest, calculated at the annual rate of 10 percent. Thus, the $5 million damage award does not exceed the damages requested in Cohen's pleadings. However, the record shows the calculation of prejudgment interest was in error. The declaration of accounting consultant Kevin Prins, which Cohen submitted in support of entry of the default judgment against Lynch, shows that the $2,341,345 figure was calculated based on a damages award of $7,159,413, an amount in excess both of the amount requested in the complaint and awarded in the judgment. The default judgment is therefore void to the extent the prejudgment interest award is excessive. (See *David S. Karton, A Law Corp. v.*

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[5] Although Lynch did not raise this issue in the trial court, "[b]ecause of its jurisdictional nature, the claim that a judgment exceeds the relief demanded in the complaint can even be raised for the first time on appeal." (*People ex rel. Lockyer v. Brar* (2005) 134 Cal.App.4th 659, 666; accord, *Matera v. McLeod* (2006) 145 Cal.App.4th 44, 59.)

Dougherty (2009) 171 Cal.App.4th 133, 151 [setting aside default judgment as void where prejudgment interest awarded was "mathematically impossible"].) We reverse with instructions for the trial court to modify the judgment to reflect the $5 million in damages and corrected prejudgment interest. (See *Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1748 [affirming trial court's order vacating default judgment awarding damages in excess of demand in complaint, and remanding for trial court to enter judgment reflecting corrected amount of damages].)

DISPOSITION

The order denying Lynch's motion to set aside the renewal of judgment is reversed. On remand, the trial court is directed to vacate its order denying the motion and to enter a new order granting Lynch's motion to set aside the renewal of judgment in part. The trial court should modify the judgment to reflect $5 million in damages plus the corrected prejudgment interest. In all other respects we affirm. The parties shall bear their own costs on appeal.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

SEGAL, J.