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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

MARGARET C. HUGHES, Plaintiff and Respondent, v. DAVID ASHTON, Defendant and Appellant.	A129354 (San Mateo County Super. Ct. No. CIV 433159)

Appellant David Ashton appeals the order denying his motion to vacate a default and default judgment, on contentions that (1) the trial court lacked jurisdiction over him while he was a resident of the Republic of Chile; and (2) the relief granted exceeded the amount demanded in the complaint. We affirm the order denying the motion but because the judgment exceeds the amount asserted in the complaint, we order the judgment modified to a decreased amount of $31,442.

I. BACKGROUND

In 1989, the parties jointly purchased 225 Hillside Drive, Pacifica, with respondent Margaret Hughes receiving a one-fourth interest and Ashton receiving a three-fourths interest. According to the complaint Ashton elected to refinance in 1993 and asked Hughes to remove her name from title until the refinancing was accomplished, promising to restore her name upon completion. Hughes conveyed her interest to Ashton but he did not keep his promise. Thereafter, Ashton "purported to 'buy out' " Hughes' interest for the sum of $50,762, but the fair market value of the property placed her interest at $82,204 or greater.

In 2003, Hughes contacted counsel, Patrick Hall, regarding her dispute with Ashton. He wrote to Ashton at his address in Chile and received a hostile response from attorney Frances Diaz. After several "fruitless" exchanges between counsel, Hall filed the underlying lawsuit in August, 2003; a first amendment to complaint followed in January, 2004 alleging causes of action for partition, accounting, and constructive trust. Hall declared that he served the summons and complaint on Ashton at his address in Chile. A signed receipt for mail indicates documents were sent to David Ashton at Rosa de los Vientos 640, Algarrobo, Chile on January 27, 2004. Hughes filed her request for entry of default and default judgment on May 10, 2004, and mailed it to Ashton at the same address in Chile. Following the prove-up hearing, the court entered default judgment in favor of Hughes on September 27, 2004 in the amount of $77,438. Notice of entry of judgment was served on Ashton at the same address on November 1, 2004.

On October 31, 2005, Ashton executed a declaration in support of motion to set aside default and default judgment while he was in Pacifica, California, declaring therein that his mailing address was Rosa de los Vientos 540 (not 640), Algarrobo, Chile. Attorney Diaz sent the declaration to Hughes' attorney and indicated she would file the motion if Hughes would not agree to set aside the default judgment. Hughes refused and no further action was taken at the time.

Then in January, 2010, Ashton moved, pursuant to Code of Civil Procedure[1] section 473, subdivision (d) to set aside default and default judgment, with an accompanying declaration. Ashton stated he now resided in Arizona. In connection with the motion, Diaz filed several declarations of a specialist in international service of process and two Chilean attorneys who declared that service on Ashton by registered mail was defective and not permitted under Chilean law.

The trial court found that Ashton was in personal receipt of the summons and complaint, as evidenced by his signature on the certified mail receipt, and the signature matched examples submitted to the court. The court concluded service by certified mail

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

on persons outside this state is permitted by section 415.40, and therefore the judgment was not void. Further, Ashton had not provided any authority showing that compliance with the requirements for service of lawsuits under the Inter-American Convention on Letters Rogatory (Inter-American Convention) was the exclusive means for effectuating service of process in Chile. This appeal followed.

II. DISCUSSION

A. *Service of Summons*

Ashton first claims that the default judgment is void because Hughes failed to serve him in a manner permitted by the Republic of Chile, namely by informal service by a process server who resides in Chile, or as prescribed by the Inter-American Convention. As support for this proposition he refers us to the declarations submitted on his behalf.

Our Code of Civil Procedure provides that defendants living in another country may be served with summons "as provided in this chapter or as directed by the court in which the action is pending, or, if the court before or after service finds that the service is reasonably calculated to give actual notice, as prescribed by the law of the place where the person is served or as directed by the foreign authority in response to a letter rogatory." (*Id.*, § 413.10, subd. (c).) This provision authorizes any method (1) approved for service within California; (2) directed by the court where the matter is pending; (3) prescribed by the law of the foreign country in which service is made, provided due process requirements are met; and (4) in response to a letter rogatory. Thus, a non-resident defendant may be served anywhere in the world by mailing him or her a copy of the summons and complaint "by first class-mail, postage prepaid, requiring a return receipt. . . ." (§ 415.40)

The Judicial Council Comment to section 413.10 is instructive: "By authorizing a series of alternative methods of service, Section 413.10 permits accommodation to the policies and procedures of sister states and foreign countries. Careful study of foreign law may show that service would less likely be objected to, or could be more easily made, if effected in a manner prescribed by foreign law or by a foreign authority, in response to a letter rogatory. . . . [¶] Since a number of foreign countries recognize

foreign judgments only if they are based upon service made in accordance with their laws, the flexible provisions of Section 413.10 would permit service to be effected in accordance with such laws." (Judicial Council Comment, West's Ann. Code Civ. Proc., § 413.10 (2004 ed.) p. 32.)

The rules for serving summons on persons outside the United States are expressly subject to the Hague Service Convention. (§ 413.10, subd. (c).) Any method of service which requires transmission of documents abroad is preempted by the Hague Service Convention as to defendants in signatory countries. (*Kott v. Superior Court (Beachport Entertainment Corporation*) (1996) 45 Cal.App.4th 1126, 1136.) However, Chile is not a signatory to the Hague Service Convention.

The United States has also ratified the Inter-American Convention, as has Chile. (Reprinted following 28 U.S.C. § 1781; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2010) [¶] 4:334, p. 4-57.) A letter rogatory (or letter of request) is by definition "merely one of many procedural mechanisms by which a court in one country may request authorities in another country to assist the initiating court in its administration of justice," and may be used to seek assistance in deposing or serving a foreign resident. (*Kreimerman v. Casa Veerkamp, S.A. de C.V.* (5th Cir. 1994) 22 F.3d 634, 640, fn. 27.) The Inter-American Convention solely governs delivery of letters rogatory among signatory states and, unlike the Hague Service Convention, does not prohibit other methods of service on a defendant residing in a signatory country. (*Ibid*.; *Laino v. Cuprum S.A. de C.V.* (1997) 235 A.D.2d 25, 29-30.)

Notwithstanding Ashton's declarations, the face of the record shows that he was served in accordance with procedures authorized by California law. Service by certified mail with return receipt is authorized for persons residing outside the United States. (§ 415.40.) Hughes submitted the certified mail receipt with Ashton's signature. Although years later Ashton indicated that his mailing address was Rosa de los Vientos 540 [not 640 as indicated on Hughes' papers], clearly substantial evidence supports the trial court's finding that he was in receipt of the summons and complaint, as evidenced by the signed return receipt. Thus, he had actual notice of the lawsuit.

While it may be that Chile would not recognize the California judgment because Ashton purportedly was not served in a manner authorized under Chilean law, that does not mean that service was improper under California law and that the California judgment is void in this state. It is not. (§§ 413.10, subd. (c); 415.40.)

Ashton refers us to the federal decision in *Tucker v. Interarms* (N.D. Ohio 1999) 186 F.R.D. 450, 452 (*Tucker*) in which the federal district court stated that "even if other means of obtaining service of process are technically allowed, principles of comity encourage the Court to insist that Tucker follow Brazilian law and obtain letters rogatory to ensure service of process upon [defendant]," noting also that such a course of action protected Tucker's interests because "use of the 'safe harbor' of letters rogatory makes it far more likely that he will later be able to enforce any judgment abroad." (*Id.* at pp. 542-543.) Defendant had made a special appearance asking the court to dismiss Tucker's claim for insufficient service. The court denied the motion, but gave Tucker time to obtain service by means of letters rogatory. In such a case, there was time and a reason to invoke principles of comity. Here, we are not talking about a motion to dismiss or quash service of summons. Rather, this is an attack on a default judgment launched *over five years* after judgment was entered and after Ashton indisputably had notice of the action. The *Tucker* facts simply do not pertain in the present situation.

In any event, the motion to set aside was filed too late. "Where a party moves under section 473, subdivision (d) to set aside 'a judgment that, though valid on its face, is void for lack of proper service, the courts have adopted by analogy the statutory period for relief from a default judgment' provided by section 473.5, that is, the two-year outer limit." (*Trackman v. Kenney* (2010) 187 Cal.App.4th 175, 180.) The validity of a judgment on its face may only be determined by considering matters constituting the judgment roll. (*Johnson v. Hayes Cal. Builders, Inc.* (1963) 60 Cal.2d 572, 576.) The judgment roll for a default judgment is defined as "the summons, with the affidavit or proof of service; the complaint; the request for entry of default with a memorandum indorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment." (§ 670, subd. (a).) The judgment here was valid on its face.

Ashton cannot now assert that the facially valid judgment is void for lack of service under section 473, subdivision (d).

B. *Excessive Relief*

Ashton also contends that the default judgment is void because it granted relief exceeding that sought in the complaint. Section 580, subdivision (a) provides that the relief granted to plaintiff, where there is no answer, "cannot exceed that demanded in the complaint."

Here the amended complaint asserted causes of action for partition, accounting, and constructive trust. The prayer for relief asked for compensatory damages according to proof. The body of the complaint alleged that Ashton recently purported to buy out Hughes' one-fourth interest for the sum of $50,762, but that the fair market value of her quarter interest was actually $82,204 or greater.

Allegations in the complaint may cure a defective prayer for damages. (*Greenup v. Rodman* (1986) 42 Cal.3d 822, 829.) Ashton was on notice that Hughes was claiming an interest in property with a value of at least $82,204, not $50,762, and was seeking compensatory damages according to proof. Although the complaint was inartfully crafted, it did alert Ashton of the nature of Hughes' demand, that is, the value of her interest in the property.

The trial court entered judgment in the amount of $77,438. At the prove-up hearing, attorney Hall stated that Ashton paid Hughes $50,762 of the $82,204 equity, leaving a balance owed as of 2003 in the amount of $31,442. However, rather than entering judgment for that amount, the court allowed Hughes to testify as to the *current* fair market value as of the time of the hearing, which resulted in an increased net equity to her of $128,000. Subtracting from that amount the amount already paid, Hughes indicated judgment should be entered for $77,238. Judgment was entered for $77,438 representing the $77,238 plus $200 costs.

Therein lies the problem. The judgment exceeds the amount specified in the complaint and is void as to the excess. The complaint alerted Ashton that Hughes was

seeking the value of her interest, namely $82,204 minus $50,762, or $31,442. The judgment must be reduced to that amount.

III. DISPOSITION

We affirm the order denying Ashton's motion to vacate default and default judgment. However, because the judgment exceeds the damages asserted in the complaint, we reverse the default judgment with directions that the trial court modify the judgment downward to $31,442. In all other respects we affirm the default judgment. Costs to Ashton on appeal.

_____
Reardon, J.

We concur:

_____
Ruvolo, P.J.

_____
Sepulveda, J.