Filed 10/23/17

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

INFOSPAN, INC. et al., Plaintiffs and Appellants, v. ENSIGN COMMUNIQUE (PVT.) LTD. et al., Defendants and Respondents.	B265490 (Los Angeles County Super. Ct. No. BC499795)

APPEAL from orders of the Superior Court of Los Angeles County, Maureen Duffy-Lewis, Judge. Affirmed.

Lindborg & Mazor, Peter F. Lindborg, Irina J. Mazor; Boies Schiller & Flexner and William A. Isaacson for Plaintiffs and Appellants.

Law Offices of Thomas F. Nowland, Thomas F. Nowland, Daniel A. Brodnax, Sean B. Janzen and Sarah K. Huntley for Defendants and Respondents.

Plaintiffs Infospan, Inc. and Infospan (Pvt.) Ltd. appeal from an order quashing the service of summons on two foreign defendants, Ensign Communique (Pvt.) Ltd. and Shaheen Foundation PAF (collectively defendants), and vacating a $17 million default judgment and the defaults entered against defendants. The trial court found that the determination in a prior action that defendants were not subject to personal jurisdiction in this state was binding and conclusive in this action. The court therefore granted defendants' motion to quash the service of summons and set aside the defaults and default judgment under Code of Civil Procedure section 473, subdivision (d).[1] We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Plaintiffs' Complaint and the Default Judgment*

On January 23, 2013, plaintiffs filed their complaint in the present action against defendants and an individual who is not a party to this appeal. Plaintiffs alleged that they had entered into contracts with True Imaging Medical Group (True Imaging), a California corporation, to perform collection services and call center services relating to workers' compensation claims of California residents. Plaintiffs alleged that True Imaging's president later informed plaintiffs that True Imaging was considering filing for bankruptcy protection and requested the return of the workers' compensation claim files. According to plaintiffs, they returned the files to True Imaging, which then

---

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

sold them to defendants. Plaintiffs alleged 10 causes of action, including intentional interference with contractual relations and both intentional and negligent interference with prospective economic advantage.

On February 14, 2014, the clerk of the court entered defendants' defaults after they failed to respond to the complaint. Plaintiffs then moved for entry of a default judgment. On July 23, 2014, the trial court granted the motion and entered a $17 million default judgment against defendants.

B. *Defendants' Motion to Quash Service of Summons and for Relief from the Default Judgment*

On October 17, 2014, defendants filed a notice of motion and motion to quash the service of summons and to set aside the default judgment under section 473, subdivision (d). (The notice of motion and motion were served one day earlier.) Defendants argued that the default judgment was void because defendants were not subject to personal jurisdiction in California and because they were not properly served.

According to defendants, on September 28, 2011, plaintiffs filed suit against defendants in the Los Angeles County Superior Court concerning the same conduct at issue in the present complaint. Defendants moved to quash service of summons in that action on the ground that they were not subject to personal jurisdiction in California. The court granted the motion, and plaintiffs unsuccessfully moved for leave to amend and for reconsideration and did not appeal.

In support of their motion to quash in the present action, defendants argued that the determination in the prior action that they were not subject to personal jurisdiction was binding under

the doctrine of res judicata, and, in any event, they did not have sufficient contacts with the State of California to be subject to personal jurisdiction in this state. Defendants also argued that plaintiffs did not comply with the requirements for service of process abroad.

The court heard the motion on May 12, 2015, took it under submission, and on June 16, 2015, entered a minute order granting it. The court stated that the doctrine of issue preclusion applied to the prior determination that defendants were not subject to personal jurisdiction, so the default judgment and the defaults were void. The court dismissed defendants from the action. On July 6, 2015, the court signed an order quashing the service of summons and vacating and declaring void the defaults and default judgment. Plaintiffs timely appealed. (See § 904.1, subds. (a)(2), (a)(3).)

DISCUSSION

A. *The Trial Court Properly Considered Extrinsic Evidence*

Plaintiffs argue that a motion to vacate under section 473, subdivision (d), is a collateral attack on the judgment and that such a motion consequently can only be granted if the judgment is void on its face. On that basis, plaintiffs argue that the trial court erred by considering extrinsic evidence in ruling on defendants' motion to vacate. The argument lacks merit.

A timely motion under section 473, subdivision (d), to set aside a void judgment is a direct attack, and a court hearing such a motion may accordingly consider extrinsic evidence (i.e., evidence outside the judgment roll). (*County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1228; *Strathvale Holdings*

v. E.B.H. (2005) 126 Cal.App.4th 1241, 1249 (*Strathvale*); see generally 8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, §§ 1, 2, 5, 208, 209, pp. 583-585, 589-590, 813-816 [collecting numerous cases].) Defendants filed their notice of motion and motion under section 473, subdivision (d), on October 17, 2014, and served it one day earlier, which was less than three months after the default judgment was entered on July 23, 2014. The motion was therefore timely, and the court properly considered extrinsic evidence when ruling on it.

Plaintiffs argue that *Phelan v. Superior Court* (1950) 35 Cal.2d 363 "specifically held" that a motion under section 473, subdivision (d), is a collateral attack, not a direct attack, and that the court ruling on such a motion therefore cannot consider extrinsic evidence. *Phelan* does not so hold. In *Phelan*, the petitioner did not move for relief under section 473 at all, did not appeal, and filed a petition for writ of mandate after the time to appeal had expired. (*Phelan*, at pp. 365, 372.) *Phelan* says nothing about subdivision (d) of section 473. The statute was not divided into subdivisions until 1996, though the statute did already contain the provision now contained in subdivision (d). (See *Airlines Reporting Corp. v. Renda* (2009) 177 Cal.App.4th 14, 21.) But *Phelan* says nothing about that provision or about the general principle on which we rely, namely, that a timely motion under section 473, subdivision (d), to set aside a void judgment is a direct attack, and a court hearing such a motion may accordingly consider extrinsic evidence. Plaintiffs' argument therefore fails.

Plaintiffs also argue that because defendants' motion to set aside the default judgment was made more than six months after entry of judgment, the trial court could grant the motion "*only* if

the judgment is void on its face," so the court erred by considering extrinsic evidence. The argument fails because, as already noted, the motion was timey filed on October 17, 2014, and served one day earlier, which was less than three months after the default judgment was entered on July 23, 2014.[2] Plaintiffs' argument to the contrary is based on the statement in the respondents' brief that the motion was made on "May 12, 2015," but that was the hearing date. A motion is made when the notice of motion is served and filed. (§ 1005.5.)

Plaintiffs also argue that *Strathvale*, on which we rely and the trial court relied, "should not be stretched to encompass the case at bar," particularly in light of *Phelan*. The argument fails because *Strathvale* is squarely on point and hence need not be "stretched" to apply. In *Strathvale*, defaults were entered against two defendants in February, the defendants moved to quash service of summons in March, and in April the defendants moved

---

[2] The time limits in section 473.5, subdivision (a), apply to motions for relief under section 473, subdivision (d). (*Rogers v. Silverman* (1989) 216 Cal.App.3d 1114, 1121-1124.) Accordingly, a direct attack under section 473, subdivision (d), must be served and filed within two years of entry of the default judgment or 180 days of service of notice of entry of the default or default judgment, whichever comes first. (§ 473.5, subd. (a).) Defendants' default was entered on February 14, 2014, but the record on appeal contains no notice of entry of default. The default judgment was entered on July 23, 2014. Defendants served their motion for relief on October 16, 2014, and filed it the next day. Defendants thus served and filed their motion less than three months after entry of the default judgment, and the record on appeal contains no evidence that they served and filed the motion more than six months after notice of entry of the default (or that any such notice was ever given).

under section 473, subdivision (d), to vacate the defaults for lack of personal jurisdiction. (*Strathvale*, *supra*, 126 Cal.App.4th at p. 1246.) The trial court granted the motion to vacate and the motion to quash and dismissed the action as to both defendants. (*Id.* at p. 1248.) On the plaintiffs' appeal, the court determined that the timely motion to vacate under section 473, subdivision (d), was a direct attack and that the trial court therefore properly considered extrinsic evidence. (*Strathvale*, at p. 1249.) For the reasons already given, *Phelan* is not to the contrary.

Plaintiffs' only other criticism of *Strathvale* is that it cited *Walker v. San Francisco Housing Authority* (2002) 100 Cal.App.4th 685 (*Walker*), which involved subdivision (b) of section 473 rather than subdivision (d). That is correct, but it does not show that the legal principle on which *Strathvale* relied—that a timely motion under section 473, subdivision (d), to set aside a void judgment is a direct attack, and a court hearing such a motion may accordingly consider extrinsic evidence—is incorrect. The principle is neither novel nor controversial. (See, e.g., *Estate of Estrem* (1940) 16 Cal.2d 563, 571 ["[l]ong prior" to 1933 it was "settled that [the superior court] had the power *within a reasonable time* . . . to set aside a *default* judgment or order void, not on its face, but because of want of jurisdiction over the person of a defendant who had at no time been present in the proceedings"]; *Rogers v. Silverman*, *supra*, 216 Cal.App.3d at pp. 1121, 1122 [before 1933, "'the law was settled that courts of record possessed inherent power to set aside a void judgment, whether or not it was void on its face, provided that, as to a void judgment not void on its face, the motion was made within a reasonable time'"; enactment of the final paragraph of section 473 "'merely gave express statutory recognition to an inherent power of the court'"];

People v. One 1941 Chrysler Sedan (1947) 81 Cal.App.2d 18, 21-22, disapproved on another ground in *People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 303.)

B. *Defendants Did Not Forfeit the Issue of Res Judicata*

Plaintiffs argue that by defaulting, defendants forfeited the issue of res judicata concerning lack of personal jurisdiction. The argument lacks merit.

First, issue preclusion (also known as collateral estoppel) is the form of res judicata at issue, and it need not be pleaded. (See, e.g., *Ponce v. Tractor Supply Co.* (1972) 29 Cal.App.3d 500, 507.) Plaintiffs cite no authority to the contrary. Rather, the cases cited by plaintiffs hold that issue preclusion must be pleaded *or proved*. (See, e.g., *Harley v. Superior Court* (1964) 226 Cal.App.2d 432, 436 ["'res judicata . . . must be presented either by pleading or evidence by the one relying on it'"]; *Wolfsen v. Hathaway* (1948) 32 Cal.2d 632, 638 ["res judicata" is waived "in the absence of either pleading or proof of a former judgment upon litigated issues"], overruled on another ground in *Flores v. Arroyo* (1961) 56 Cal.2d 492, 497; *Rideaux v. Torgrimson* (1939) 12 Cal.2d 633, 638 [issue preclusion "is waived if not raised either by the pleadings or the evidence"].) Defendants did argue and introduce evidence in the trial court that relitigation of personal jurisdiction was barred by issue preclusion. Their failure to file an answer raising the defense of issue preclusion did not constitute a forfeiture. Although not raised by the pleadings, issue preclusion was raised by the evidence.

Second, a defendant does not forfeit the issue of lack of personal jurisdiction by defaulting. On the contrary, courts have long had the power, codified in section 473, to set aside a default

or default judgment for lack of personal jurisdiction over the defendant. (See, e.g., *Estate of Estrem*, *supra*, 16 Cal.2d at p. 571 [it was "settled" before 1933 that the superior court has "the power *within a reasonable time* . . . to set aside a *default* judgment or order void, not on its face, but because of want of jurisdiction over the person of a defendant who had at no time been present in the proceedings"].) Having properly raised the issue of lack of personal jurisdiction in their motions to vacate and to quash, defendants were entitled to argue that the prior determination of that same issue between the same parties was preclusive. Again, plaintiffs cite no authority to the contrary.

C. *Issue Preclusion Applies*

Plaintiffs argue that because their complaint in the present action "contained new specific allegations and supporting evidence that differed from" their complaint in the prior action, issue preclusion does not apply. The argument lacks merit.

"A prior decision precludes relitigation of an issue under the doctrine of collateral estoppel only if five threshold requirements are satisfied: 'First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.' [Citations.]" (*Johnson v. GlaxoSmithKline, Inc.* (2008) 166 Cal.App.4th 1497, 1507-1508.)

Plaintiffs do not argue that any of those conditions are not satisfied, and all of them clearly are. The present action is based on the same claims concerning the same conduct as the prior action. The identical issue of personal jurisdiction over defendants was actually litigated by the same parties in that prior action, it was decided in the prior action, and the decision is final. Issue preclusion therefore applies.

Plaintiffs' contention that issue preclusion does not apply because plaintiffs have presented "new specific allegations and supporting evidence" is incorrect as a matter of law. (See *MIB, Inc. v. Superior Court* (1980) 106 Cal.App.3d 228, 235 ["Plaintiffs cannot escape the bar of the prior decisions by asserting . . . that plaintiffs have other evidence which was not introduced in the earlier proceedings"].) Plaintiffs cite no authority to the contrary. Indeed, the relevant section of plaintiffs' opening brief cites no legal authority at all.[3]

D. *Plaintiffs' Remaining Arguments Fail*

Plaintiffs argue that the trial court erred in setting aside defendants' defaults because (1) defendants' motion was untimely as to the defaults, and (2) defendants' motion sought to vacate

---

[3] In their reply brief, plaintiffs argue that issue preclusion does not apply because "a finding of lack of jurisdiction is not a finding on the merits." Arguments not raised until the reply brief are deemed abandoned absent a showing of good cause for failure to raise them sooner; no such showing has been made here. (See *Roos v. Honeywell Internat., Inc.* (2015) 241 Cal.App.4th 1472, 1487.) In any event, the issue of personal jurisdiction was decided on the merits in the prior action.

only the default judgment, not the defaults. These arguments lack merit.

First, defendants' motion was timely as long as it was filed within two years of entry of the default judgment or 180 days of service of notice of entry of the defaults. (See fn. 2, *ante*.) The record on appeal contains no notice of entry of the defaults. Plaintiffs have therefore failed to carry their burden on appeal of providing this court with an adequate record to support their claim of error. (See, e.g., *Osgood v. Landon* (2005) 127 Cal.App.4th 425, 435.) We must therefore presume that the motion was timely. (*Ibid.*)

Second, defendants' motion did not seek only to vacate the default judgment. It also sought to quash service of summons, and necessarily implicit in that request was a request to vacate the defaults. It was not improper for defendants to request or for the trial court to grant all of that relief at the same time—vacating the defaults, quashing service, and vacating the judgment. (See, e.g., *Summers v. McClanahan* (2006) 140 Cal.App.4th 403, 406-407.)[4]

In light of our conclusion that the trial court correctly decided that the prior determination of lack of personal jurisdiction is binding and conclusive in the present action, we need not address plaintiffs' argument that they substantially complied with the requirements for service of process abroad.

---

[4] Plaintiffs further argue that defendants' attack on the default judgment was improper because once defendants' defaults were entered, defendants could not properly request—and the trial court could not grant—any species of relief other than to have the defaults set aside. The argument fails because the court properly vacated defendants' defaults.

Service of process alone is not sufficient to establish personal jurisdiction over a foreign defendant. A foreign defendant also must have such minimum contacts with the forum state that the exercise of jurisdiction comports with fair play and substantial justice. (*Snowney v. Harrah's Entertainment, Inc*. (2005) 35 Ca.4th 1054, 1061.) We also need not address plaintiffs' argument that the trial court did have personal jurisdiction over defendants. Plaintiffs litigated that issue against defendants in the prior action, and plaintiffs lost. They cannot relitigate it now.

DISPOSITION

The orders are affirmed. Defendants shall recover their costs on appeal.

MENETREZ, J.*

We concur:

PERLUSS, P. J.

ZELON, J.

---

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.