Filed 12/24/19 Dong v. Ryu CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JIAN DONG et al., Plaintiffs and Respondents, v. OU J. RYU, Defendant and Appellant.	B289871 (Los Angeles County Super. Ct. No. BC581714)

APPEAL from an order and judgment of the Superior Court of Los Angeles County. Barbara M. Scheper, Judge. Affirmed as modified.

LP+W and Miriam Liu Wu for Defendant and Appellant.

Law Offices of David S. Lin and David S. Lin for Plaintiffs and Respondents.

Defendant and appellant Ou J. Ryu appeals from a default judgment entered against her and in favor of plaintiffs and respondents Jian Dong, Yuqin Guo, and Xiao Tong Dong, by and through her guardian ad litem, Jian Dong. Defendant contends that the judgment must be set aside because (1) she was not personally served, (2) the trial court exceeded its jurisdiction in its award of damages, (3) all claims against defendant were previously released by a settlement agreement, and (4) the parties' contract is racially restrictive and unenforceable. Defendant also asserts that the punitive damage award must be stricken because defendant was not served with a statement of damages and plaintiffs provided no evidence of her financial condition.

We affirm the trial court's order denying defendant's motion to quash service of summons; substantial evidence supports the trial court's order that defendant was personally served with the summons and operative complaint. Substantial evidence also supports the trial court's determination that defendant was personally served with the statement of damages. Moreover, defendant is not covered by the settlement agreement. However, we vacate the punitive damages portion of the default judgment entered against defendant because plaintiffs failed to present evidence of defendant's financial condition.

FACTUAL AND PROCEDURAL BACKGROUND

The First Amended Complaint (FAC)

Plaintiffs initiated this lawsuit on May 12, 2015. The FAC, the operative pleading, alleges that Jian Dong and Yuqin Guo, who are residents of China, decided to enroll their daughter, Xiao Tong Dong, at Alverno High School in Sierra Madre, California. Because plaintiffs speak very limited English and the high school

does not provide caregiver services, plaintiffs entered into an agreement with defendant whereby defendant and Victoria Wu would provide caregiver services and "other educational welfare or in-kind support" for Xiao Tong Dong. Plaintiffs paid defendant $51,400, but defendant and Victoria Wu did not provide the services promised. Based upon the foregoing allegations, the FAC sets forth claims for breach of contract, fraud and deceit (intentional misrepresentation), fraud and deceit (negligent misrepresentation), breach of the covenant of good faith and fair dealing, and intentional infliction of emotional distress. Plaintiffs sought general and special damages "according to proof at trial," as well as punitive damages "in accordance with proof at trial."

As is relevant to the issues raised in this appeal, the FAC generically alleges that each defendant was "at all material times mentioned," the "agent, servant, employee, partner, franchisee, and/or joint venturer of each other co-defendant, and at all times was acting within the course, and scope of said agency, service, employment, partnership, franchise, and/or joint venture." The FAC also generically alleges that "at all times mentioned", "each of the co-defendants[] was acting within the course, scope, purpose, consent, knowledge, ratification, and authorization of such agency, employment, joint venture, and conspiracy."

Request for Entry of Defendant's Default

Plaintiffs served defendant[1] by personal service with the summons and FAC on August 5, 2016. It was filed on August 22, 2016.

---

[1] At some point, plaintiffs served Victoria Wu (Victoria), and she appeared, through attorney Miriam Liu Wu (Miriam), in the

Because defendant did not answer the FAC, on September 9, 2016, plaintiffs requested that her default be entered. Plaintiffs' request was denied because the filing date of the FAC was incorrect on the document.

On September 23, 2016, plaintiffs again requested that defendant's default be entered. Again, their request was denied, this time because plaintiffs failed to personally serve defendant with a statement of damages/punitive damages.

On October 19, 2016, plaintiffs filed their amended proof of service of summons, reflecting that the FAC and plaintiffs' statement of damages had been personally served on defendant on August 5, 2016. Notably, the statement of damages seeks "at least $49,080" in general damages, "not less than $50,000" in emotional distress damages, and "not less than $150,000" in punitive damages. It is dated August 20, 2015.

On October 21, 2016, plaintiffs filed their third request that defendant's default be entered. Their request for entry of default was served on Miriam, a counsel for Victoria, and defendant, on October 20, 2016, by mail. The trial court entered defendant's default on October 21, 2016.

Request for Entry of Default Judgment

Plaintiffs then requested that a default judgment be entered against defendant in the amount of $426,367.72. As is relevant to the issues raised in this appeal, plaintiffs requested general damages in the amount of $57,705 and punitive damages in the amount of $350,000. In support, plaintiffs offered evidence

---

action. Because Victoria and Miriam share the same last name, we refer to them by their first names. No disrespect is intended.

of defendant's misrepresentations. But, plaintiffs offered no evidence of defendant's financial condition or net worth.

All supporting documents were served on Miriam, as attorney for Victoria, and defendant on July 24, 2017, by mail.

Settlement Agreement Between Plaintiffs and Victoria

While plaintiffs' request for entry of default judgment was pending, plaintiffs entered into a settlement agreement with Victoria. The settlement agreement provides that it is between plaintiffs, on the one hand, and Victoria, on the other hand. It further provides that it "constitutes the entire Agreement between the Parties" and "supersedes all prior or contemporaneous agreements, understandings, negotiations and discussions, whether oral or written, in connection with the subject matter hereof." Moreover, all terms of the agreement were binding upon the parties and "their assigns, parents, affiliates, partners, joint venturers, owners, predecessors, successors, heirs, administrators, trustees, receivers, spouses, agents, representatives, contractors, subcontractors, laborers, materialmen, equipment providers, lawyers and all persons acting by, through, under or in concert with them, whether past, present or future." It also includes a clause reflecting that all parties had the opportunity to consult with counsel.

Default Judgment

On March 5, 2018, a default judgment was entered against defendant in the amount of $134,062.77.

Defendant's Motion to Quash Service and Set Aside Default Judgment

On March 22, 2018, Miriam filed a motion on behalf of defendant to quash defective service of process and set aside the default judgment. Defendant argued that because she was never

served with process, the default judgment must be set aside. In support, defendant filed a declaration asserting that she had "never been personally served with any document regarding or relating to this action. I was not personally served with any document on August 5, 2016. I am not aware of any person attempting to serve documents at my residence on August 5, 2016, or before or after that date."

She also argued that the judgment was void because the damage award exceeded plaintiffs' request in their FAC. In support, defendant pointed out that the only dollar amount mentioned in the FAC was the lump sum payment to defendant and Victoria in the amount of $51,400. Thus, at most, plaintiffs were entitled to $51,400. And, defendant argued that the statement of damages was defective.

Finally, defendant asserted that plaintiffs had released their claims against defendant when they entered into the settlement agreement with Victoria. After all, the FAC alleges that Victoria and defendant were agents of one another. Given the broad release set forth in the settlement agreement, plaintiffs could not pursue a judgment against defendant.

Plaintiffs opposed defendant's motion. They argued that the declaration from the process server was sufficient to prove that defendant had been personally served. Moreover, the statement of damages was sufficient. And, the settlement agreement did not encompass any parties. In fact, Miriam expressly represented to plaintiffs' counsel that defendant was not a party to the settlement agreement. In an e-mail to Miriam, plaintiffs' counsel confirmed: "I will convey [the settlement offer] to my clients for their consideration but just so we are clear the offer is only as to your client, Ms. Wu."

Trial Court Order Denying Defendant's Motion

After entertaining oral argument, the trial court denied defendant's motion. Regarding defendant's claim that she was never served with the summons and FAC on August 5, 2016, the trial court rejected her argument on the grounds that she failed to explain her delay in seeking to quash service of summons. The trial court noted that defendant could not claim to have been unaware of the claims against her. After all, not only were copies of the purportedly defective proofs of service served on Miriam's office, but "multiple requests for entry of default and default judgment were served on defendant herself." Defendant's default was entered on October 21, 2016, but the default judgment was not entered until March 5, 2018, nearly 17 months later. "Accordingly, the motion to quash is grossly untimely."

Next, the trial court rejected defendant's argument that the default judgment is void because the total amount of the judgment exceeds the amount requested in the FAC's prayer for relief. To the extent defendant was arguing that plaintiffs were limited to $51,400 at most, the trial court noted that (1) the FAC alleged two separate counts of fraud (apart from breach of contract) that could support a damage award, and (2) it significantly reduced plaintiffs' damage award from the amount requested. In so ruling, the trial court clarified that the damages awarded in the default judgment were comprised of "actual damages in the amount of $57,705 and punitive damages in the amount of $57,705."

Finally, the trial court found that the settlement agreement did not cover plaintiffs' claims against defendant. "While it is true that the FAC alleges that [Victoria] and [defendant] were agents and co-conspirators, defendant's argument ignores the fact

that the FAC also alleges sufficient facts to hold [defendant] liable in her individual capacity." Thus, "[w]hile the settlement agreement may work as a release of claims against [defendant] to the extent that any of her wrongful acts were done as [Victoria's] agent or partner, the settlement agreement cannot work to release claims that arise out of [defendant's] own actions."

Defendant's Appeal

Defendant's timely appeal ensued.

DISCUSSION

I. *Motion to quash*

A. Standard of review

The standard of review on an appeal from an order granting a motion to quash service of summons is as follows: "When there is conflicting evidence, the trial court's factual determinations are not disturbed on appeal if supported by substantial evidence." (*Serafini v. Superior Court* (1998) 68 Cal.App.4th 70, 77.) However, "[w]hen no conflict in the evidence exists . . . the question of jurisdiction is purely one of law and the reviewing court engages in an independent review of the record." (*Ibid.*)

B. Analysis

Substantial evidence, namely the declaration from the process server, supports the trial court's implied finding that defendant had been personally served with the summons and FAC. While the trial court was presented with conflicting evidence, namely defendant's self-serving declaration, the trial court was free to weigh the evidence and determine which evidence was credible. "Under [the substantial evidence] standard of review, our duty 'begins and ends' with assessing whether substantial evidence supports the verdict. [Citation.]

'[The] reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact.' [Citation.] We review the evidence in the light most favorable to the respondent, resolve all evidentiary conflicts in favor of the prevailing party and indulge all reasonable inferences possible to uphold the jury's verdict. [Citation.]" (*US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 908.) "'It is not our task to weigh conflicts and disputes in the evidence; that is the province of the trier of fact.' . . . [W]e do not evaluate the credibility of the witnesses or otherwise reweigh the evidence. [Citation.] Rather, 'we defer to the trier of fact on issues of credibility. [Citation.]' [Citation.]" (*Escamilla v. Department of Corrections & Rehabilitation* (2006) 141 Cal.App.4th 498, 514–515.)

Having determined that there was ample evidence to support the trial court's implied finding that defendant was personally served with the summons and FAC, we turn our attention to the timeliness of defendant's motion. Defendant offers no basis for reversal. She limits her argument to the claim that her motion must have been timely because she was never properly served. But, it is well-established that an appellant must "present argument and authority on each point made" (*County of Sacramento v. Lackner* (1979) 97 Cal.App.3d 576, 591; Cal. Rules of Court, rule 8.204(a)(1)(B)) and cite to the record to direct the reviewing court to the pertinent evidence or other matters in the record that demonstrate reversible error. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115.) It is not our responsibility to comb the appellate record for facts, or to conduct legal research in search of authority, to support the contentions on appeal

(*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768) and an appellant's "[f]ailure to provide an adequate record on an issue requires that the issue be resolved against [the appellant]. [Citation.]" (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.) If the appellant fails to cite to the record or relevant authority, we may treat the issue as forfeited. (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545–546.)

As set forth above, we conclude that ample evidence supports the trial court's finding that defendant was properly served. Defendant offers us no reason to disturb the trial court's finding that her motion to quash was untimely. It follows that we must affirm the trial court order denying defendant's motion to quash.

II. *Settlement agreement did not release defendant from her own liability*

Defendant argues that the settlement agreement between plaintiffs and Victoria precludes a default judgment against her.

"A release given in good faith to a tortfeasor does 'not discharge any other such party from liability unless its terms so provide.' [Citation.] To determine whether the '"terms so provide,"' we apply the rules governing contract interpretation. [Citation.]

"A third party may enforce a contract that is expressly made for his benefit. [Citation.] The third party need not be named in the contract, but he has the burden to show the contracting parties intended to benefit him. [Citation.] Determining this intent is a question of contract interpretation. [Citation.] 'In determining the meaning of a written contract allegedly made, in part, for the benefit of a third party, evidence

of the circumstances and negotiations of the parties in making the contract is both relevant and admissible. And, "[i]n the absence of grounds for estoppel, the contracting parties should be allowed to testify as to their actual intention . . . ." [Citations.]' [Citation.]

"A contract must be interpreted to give effect to the mutual intention of the parties at the time of contracting. [Citation.] The intention of the parties to a written contract is to be determined from the writing alone, if possible; subject, however, to other statutory rules of contract interpretation. [Citation.] These rules include the following. 'A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates.' [Citation.] 'However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract.' [Citation.] . . .

"'As has been recognized by our Supreme Court, it is often impossible for the parties to be precise in expressing their intent in a written document. Therefore, even if the trial court personally finds the document not to be ambiguous, it should preliminarily consider all credible evidence to ascertain the intent of the parties. "The test of whether parol evidence is admissible to construe an ambiguity is not whether the language appears to the court to be unambiguous, but whether the evidence presented is relevant to prove a meaning to which the language is 'reasonably susceptible'" [Citation.]' [Citation.]" (*Cline v. Homuth* (2015) 235 Cal.App.4th 699, 705–706.)

Applying these well-established rules, we conclude that there is no evidence that the parties intended defendant to be encompassed by the terms of the settlement agreement between

plaintiffs and Victoria. The settlement agreement identifies the parties as plaintiffs and Victoria. There is no mention of defendant anywhere.

In urging reversal, defendant points out that the FAC alleges that defendant and Victoria were partners, agents, and joint venturers, and that the settlement agreement binds the parties' agents and successors. We are not convinced. Absent evidence of the parties' intent to bind defendant to the terms of the settlement agreement, the boilerplate allegations of the FAC are insufficient for a court to conclude that the parties intended for defendant to be bound by the terms of the settlement agreement. (See, e.g., *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 134, fn. 12 [egregious examples of generic boilerplate allegations].)

III. *Judgment must be modified to strike the punitive damage award given the absence of evidence pertaining to defendant's financial condition*

Having determined that defendant was properly served with the summons and FAC and that a judgment against her is not barred by the settlement agreement between plaintiffs and Victoria, we turn to the propriety of the judgment entered. For the reasons set forth above, we reject defendant's argument that the default judgment is void because the statement of damages was not properly served. According to plaintiffs' proof of service, defendant was personally served with the summons, FAC, and statement of damages on August 5, 2016.

Defendant further argues that plaintiffs are not entitled to damages for breach of contract because the contract at issue violated public policy. We need not reach this issue because, as set forth above, the trial court awarded damages for any or all of

the claims in the FAC, except intentional infliction of emotional distress. Regardless of whether the contract violated public policy, there was ample evidence to support a judgment against defendant for the other torts.

Finally, defendant argues that the trial court erred in awarding plaintiffs punitive damages because the appellate record contains no evidence of her financial condition. We agree.

Absent exceptions not applicable in this case, an award of punitive damages cannot be sustained on appeal unless the record contains meaningful evidence of the defendant's financial condition. (*Kelly v. Haag* (2006) 145 Cal.App.4th 910, 915; *Adams v. Murakami* (1991) 54 Cal.3d 105, 112, 114–115; see also *id*. at p. 119 ["evidence of the defendant's financial condition is a prerequisite to a punitive damages award"].) The plaintiff bears the burden of producing such evidence. (*Id*. at p. 119.) Our Supreme Court's direction in this regard has been clear and unambiguous—punitive damages may not be awarded unless the plaintiff tenders some evidence of a defendant's financial condition. We cannot ignore this directive. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Here, plaintiffs failed to present any evidence of defendant's financial condition in the default prove up proceeding. Accordingly, the default judgment must be modified to strike the punitive damage award ($57,705).

In urging us to affirm the judgment, plaintiffs suggest that they were not required to present evidence of defendant's financial condition because they obtained their judgment following defendant's default; thus, they did not have any opportunity to obtain evidence regarding her financial condition. Aside from the fact that plaintiffs offer no legal authority in

support of this proposition (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852), we are unconvinced. As set forth above, "an award of punitive damages cannot be sustained on appeal unless the trial record contains meaningful evidence of the defendant's financial condition." (*Adams v. Murakami*, *supra*, 54 Cal.3d at p. 109.) Nothing in *Adams v. Murakami* or its progeny indicates that that principle is limited to matters that proceed to trial.

To the extent plaintiffs are suggesting that they were somehow denied an opportunity to obtain this requisite evidence, our review of the record reveals no showing of what efforts, if any, were undertaken by plaintiffs to obtain information regarding defendant's financial condition.

Alternatively, plaintiffs contend that if evidence of defendant's financial condition is required in order to obtain punitive damages as part of a default judgment, then the matter should be remanded for further proceedings. In support, they rely upon a comment in *Devlin v. Kearny Mesa AMC/Jeep/Renault* (1984) 155 Cal.App.3d 381, 386–387 (*Devlin*): "[W]hen further proceedings are necessary following reversal of a default judgment because the damages are determined to be excessive as a matter of law [citation], those further proceedings only mean the plaintiff must participate in a second judgment hearing."

Devlin is readily distinguishable. First, the Court of Appeal's comment arose in the context of addressing whether a defendant had the right to participate in a default judgment hearing. (*Devlin*, *supra*, 155 Cal.App.3d at pp. 385–386.) That is not the issue in this case; there is no evidence or argument that defendant wanted to participate in the prove up proceedings

here. Second, in any event, the Court of Appeal held that the punitive damages awarded against the defaulted defendant were not excessive as a matter of law based upon the evidence presented. (*Devlin*, *supra*, at p. 387.) In contrast, here, we are not reversing a judgment because the damage award is excessive. We are reversing a punitive damage award for failure to present any evidence of defendant's financial condition.

DISPOSITION

The order denying defendant's motion to quash service of summons and FAC is affirmed. The default judgment is modified by striking the $57,705 punitive damage award. As modified, the judgment is affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT