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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

RODOLFO FUNEZ et al.,

Plaintiffs and Respondents,

v.

JORGE LUIS SALAZAR SR. et al.,

Defendants and Appellants.

E066420

(Super.Ct.No. CIVDS1314354)

OPINION

APPEAL from the Superior Court of San Bernardino County. Michael A. Sachs, Judge. Reversed with directions.

Law Offices of Randy K. Bell and Randy K. Bell for Defendants and Appellants.

Law Office of George T. Kelly and George T. Kelly for Plaintiffs and Respondents.

I. INTRODUCTION

This appeal arises from a personal injury action filed by plaintiffs and respondents Rodolfo Funez and Arlene Garcia against defendants and appellants Jorge Luis Salazar,

Sr. (Jorge Sr.), and Leslie Salazar.<sup>1</sup> In the course of the litigation, default has been entered against defendants three times. Twice, the trial court set aside the default at the request of defendants. The trial court denied defendants' request to set aside the default a third time and entered a default judgment in favor of Funez (but not Garcia) in the amount of \$91,186.02, reinstating a judgment entered, but later vacated, after the first entry of default.

On appeal, defendants raise several claims of error, but we need address only one. Plaintiffs failed to serve a statement of damages in accordance with the procedures required by Code of Civil Procedure<sup>2</sup> section 425.11. The resulting judgment is therefore void.

## II. FACTUAL AND PROCEDURAL BACKGROUND

The altercation giving rise to the present litigation took place in December 2011. According to plaintiffs, the altercation was triggered when Funez found Jorge Salazar, Jr. (Jorge Jr.)—the son of Jorge Sr. and the brother of Leslie—on the property where Funez and Garcia live. Jorge Jr. had allegedly trespassed on the property on prior occasions and had stolen tools. After Jorge Jr. refused verbal instructions to leave, Funez physically removed him from the property. Jorge Jr. later returned, together with Jorge Sr., Leslie, and other family members—a total of five people. A physical altercation ensued, during

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<sup>1</sup> For clarity and convenience, and not intending any disrespect, we will generally use first names to refer to persons who share last names with others involved in this matter.

<sup>2</sup> Further undesignated statutory references are to the Code of Civil Procedure.

which Jorge Sr., Jorge Jr., and Leslie beat Funez, seriously injuring him. During the course of the altercation, Garcia tried to push Jorge Jr. off of Funez. Jorge Jr. punched her twice in the head, knocking her to the ground, and returned to beating Funez.

Funez and Garcia brought suit against Jorge Sr. and Leslie on November 25, 2013. Jorge Jr. was not made a party to the lawsuit, because he had died in an automobile accident.

Plaintiffs filed a request for entry of default on February 10, 2014. The matter was set for a prove-up hearing on August 15, 2014. On August 15, 2015, plaintiffs filed a statement of damages with a proof of service showing a copy had been served by mail on Jorge Sr. and Leslie on February 6, 2014. After hearing testimony from Funez and Garcia, the trial court granted judgment in favor of Funez in the amount of \$91,186.02, but awarded nothing to Garcia.

Our record includes a form notice of entry of judgment filed by plaintiffs on September 16, 2014. The accompanying proof of service, however, indicates that the notice was mailed to Jorge Sr. and Leslie individually on an unspecified date in August 2014. No copy of the judgment signed by the trial court could have been attached to a notice served in August 2014, because judgment was not entered until September 2, 2014. There is no copy of the judgment, signed or unsigned, accompanying the copy of the notice filed with the trial court.

Jorge Sr. and Leslie, represented by counsel, brought separate motions to have the default judgment set aside based on defects in the service of the summons and complaint. The trial court granted the motions, and defendants' counsel accepted service of the

summons and complaint on defendants' behalf. Defendants' answers, however, were not timely filed, and plaintiffs again requested and were granted entry of default on June 18, 2015.

Acting in propria persona, defendants once again sought relief from default, which was granted on November 17, 2015. Defendants attempted to file an answer on December 18, 2015, but the trial court clerk rejected the document as defective in several respects.

On December 23, 2015, plaintiffs again requested and were granted entry of default against defendants. In January 2016, defendants substituted in new counsel, and yet again sought relief from default. On February 29, 2016, the trial court denied defendants' motion for relief from default.

On March 10, 2016, plaintiffs filed a motion to reinstate the original judgment in favor of Funez in the amount of \$91,186.02. At the motion hearing, counsel for defendants questioned the adequacy of the statement of damages and asked for an opportunity to brief the issue. The trial court denied the request for additional briefing and granted plaintiffs' motion to reinstate the judgment.

### III. DISCUSSION

Defendants argue, among other things, that the judgment against them is void, because they were never properly served with a statement of damages. We agree, and therefore reverse the judgment.

In accordance with section 425.10, subdivision (b), the complaint herein did not specify damages. Defendants therefore had the right to request a statement of damages

under section 425.11, subdivision (b). Even in the absence of any request, however, section 425.11 requires that a statement of damages be served on a defendant before a default may be taken. (§ 425.11, subd. (c).) Where a party has not appeared in the action, section 425.11 further requires that the statement of damages “be served in the same manner as a summons.” (§ 425.11, subd. (d)(1); see *Plotitsa v. Superior Court* (1983) 140 Cal.App.3d 755, 759 [statement of damages “is the functional equivalent of an amendment to a complaint that increases the amount of damages sought,” so “the same considerations regarding personal service must apply”].) Additionally, the Judicial Council has adopted Judicial Council Form No. CIV-050 [Statement of Damages (Personal Injury or Wrongful Death)] for mandatory use.<sup>3</sup> A default judgment awarding personal injury damages in the absence of compliance with section 425.11 is void. (*Plotitsa, supra*, 140 Cal.App.3d at p. 760.)

Plaintiffs did not use the mandatory form when they served defendants with a statement of damages on February 6, 2010. Moreover, although defendants had not yet appeared in the action, plaintiffs did not serve the document in the same manner as a summons, as required by section 425.11, subdivision (d)(1). For a defendant residing in California, it is permissible to serve a summons by mail, but it must be accompanied by a notice and acknowledgment of receipt, along with a postage prepaid return envelope. (§ 415.30.) There is no indication in the record that plaintiffs followed this procedure

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<sup>3</sup> Judicial Council of California CIV-050 [rev. January 1, 2007] at <<http://www.courts.ca.gov/documents/civ050.pdf>> [as of May 14, 2018]; see generally 6 Witkin, California Procedure (5th ed. 2008), Proceedings Without Trial, section 154, pages 594-596.

when they mailed a copy of their statement of damages to defendants on February 6, 2014.

Plaintiffs point to the circumstance that defendants' counsel "accepted service in court" when they sought relief from the first entry of default. The record indicates only that defendants' counsel accepted service of the summons and complaint. There is nothing in the record that defendants' counsel (either of them) was ever served with plaintiffs' statement of damages.

Plaintiffs argue that defendants "received more than fair and effective notice of the Judgment against them." If actual notice were the applicable standard, we might agree. But it is not. (See *Schwab v. Southern California Gas Co.* (2004) 114 Cal.App.4th 1308, 1321 ["Our state appellate courts have long held that due process requires *formal notice* of the defendant's potential liability, by service in the same manner as a summons. Under this view, actual notice is insufficient."].) "Because default judgment ends the controversy, the plaintiff must *precisely* follow certain rules which ensure that a defendant has sufficient knowledge of the pending action to make an informed choice as to whether to defend or ignore plaintiff's claims." (*Twine v. Compton Supermarket* (1986) 179 Cal.App.3d 514, 517, italics added.)

Plaintiffs failed to serve a statement of damages in the manner prescribed for service of a summons before the defendants' default was entered, or indeed at any time. The resulting default judgment is therefore void.

IV. DISPOSITION

The judgment is reversed, and the trial court is directed to set aside the default entered against defendants on December 23, 2015. Defendants and appellants Jorge Luis Salazar, Sr., and Leslie Salazar are awarded their costs on appeal.

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CODRINGTON

J.

We concur:

MCKINSTER

Acting P. J.

MILLER

J.