

Appellate Reports and cases in brief

Recent cases of interest to members of the plaintiffs' bar

By Jeffrey Isaac Ehrlich

Kim v. Westmoore Partners, Inc.

(2011) __ Cal.App.4th __ (4th Dist., Div. 3)

Who needs to know about this case: Lawyers who want to take and enforce default judgments; trial judges who are asked to rule on default prove-ups

Why it's important: The Court wrote a primer for lawyers and trial judges on mistakes that are commonly made, and how to avoid them

Synopsis: Plaintiff Kim loaned money to Westmoore Partners and its principals, and brought suit on several promissory notes. The complaint pleads several causes of action, including breach of contract, negligent misrepresentation, professional negligence, conversion, and unfair business practices. The only amount of damages sought in the complaint was for defendants' failure to pay $13,020 per month, starting in 2008, which was alleged to have created a debt in excess of $78,000. When Kim served defendants with the complaint, however, he also served a formal statement of damages, claiming he had suffered "property damage" of $500,000; "unpaid fees" of $1.5 million; and loan payments of $2 million. He reserved the right to seek punitive damages of $5 million against each defendant.

Defendants did not respond to the complaint, and Kim obtained entry of their defaults. After two unsuccessful attempts to obtain a default judgment, Kim obtained one on the third attempt. Kim's application provided the court with the six statements of damages he served on defendants along with the complaint. Although each of those statements of damages set forth claims totaling $9 million, including punitive damages, Kim requested a judgment of only $5 million against each defendant, "for a total of $30 million." Kim made no effort to correlate that amount to any particular claim or promissory note, or even to explain the extent to which it represented compensatory and punitive damages. Instead, Kim's declaration simply stated that "[c]onsistent with the statement of damages, each defendant owes me at least $5 million." He goes on to explain that a judgment of $5 million against each defendant, for a total of $30 million, "would not be an excessive sum. [It] would be a reasonable sum, if they ever paid it. It would compensate me for some of the devastation caused by these defendants."

Remarkably, the trial judge signed the judgment proposed by Kim with no changes. As drafted, it was not clear whether the judgment was for $5 million against all defendants, or against each defendant for $5 million, for a total of $30 million. The defendants appealed.

The Court of Appeal reversed, writing a primer for lawyers and judges on the default process. There is lengthy analysis of the process, and each party's responsibilities along the way. Here is how the opinion begins:

> We reluctantly return in this case to the question of default judgments with a cautionary tale – well, three actually. The first is a tale for plaintiff's attorneys, who may assume a defendant's default is an unalloyed gift: an opportunity to obtain a big judgment with no significant effort. It is not. Instead, when a defendant fails to timely respond to the complaint, the first thing plaintiff's counsel should do (after offering an extension of time to respond) is review the complaint with care, to ascertain whether it supports the specific judgment the client seeks. If not, a motion to amend is in order. In this case, counsel for plaintiff Gil Kim failed to do that. Instead, he simply asked the court to enter defendants' defaults on the complaint as initially alleged. Unfortunately for Kim, the factual allegations of that complaint do not support any judgment in his favor.
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> The second cautionary tale is for trial courts. And it's not the first time we have told this tale. As we previously explained . . . '[i]t is imperative in a default case that the trial court take the time to analyze the complaint at issue and ensure that the judgment sought is not in excess of or inconsistent with it. It is not in plaintiffs' interest to be conservative in their demands, and without any opposing party to point out the excesses, it is the duty of the court to act as gatekeeper, ensuring that only the appropriate claims get through. That role requires the court to analyze the complaint for itself – with guidance from counsel if necessary – ascertaining what relief is sought as against each defaulting party, and to what extent the relief sought in one cause of action is inconsistent with or duplicative of the relief sought in another. The court must then compare the properly pled damages for each defaulting party with the evidence offered in the prove-up.' Unfortunately, the trial court in this case seems not to have done that, and instead simply gave Kim what he asked for – which in this case was $30 million. Even more unfortunately, this trial court is certainly not alone in doing so [citing other cases]. We need to shore this up. The court's role in the process of entering a default judgment is a

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serious, substantive, and often complicated one, and it must be treated as such.

[The third cautionary tale is for appellate counsel, who should not mislead the court or file boilerplate briefs that request sanctions against opposition counsel without having any factual basis for seeking sanctions.]

The opinion is excellent reading for its discussion of the elements of the substantive legal theories pleaded in the complaint, the process of obtaining a default judgment, and the standards for appellate review of default judgments.

Short(er) takes

Mistake, inadvertence, excusable neglect, motions to set aside judgments under Code Civ. Proc. § 473(b); Sanctions under Code Civ. Proc. § 128.7: *Hopkins & Carley v. Gens* (2011) __ Cal.App.4th __ (6th Dist.)

Gens, a patent attorney in Illinois, engaged a law firm, Hopkins & Carley ("H&C") to advise him in a business dispute, and to represent him in litigation in California stemming from the dispute. The retainer agreement contained an arbitration clause. When H&C's bills reached $415,000, he refused to pay, claiming the firm had exceeded the budget without his authorization. When H&C demanded arbitration before the AAA, Gens failed to respond. Days before the arbitration was scheduled, he demanded AAA not hold the arbitration. The arbitrator went forward anyway, and Gens did not attend. The arbitrator awarded H&C fees of $474,000, plus expenses.

Gens filed a petition in the Superior Court to vacate the award, and H&C filed a petition to confirm the award. The award was confirmed and the court entered judgment on the award. Gens appealed and lost. More than six months after the judgment was entered, Gens, represented by counsel, filed a motion in the trial court from relief of judgment under Code of Civil Procedure section 473. The motion asserted that the judgment had been entered against Gens through mistake, inadvertence or excusable neglect. The supporting memorandum suggested that Gens had belatedly discovered certain defenses to H&C's claim for fees, including that recovery was barred by H&C representing conflicting interests without client consent, and that the judgment was based on an impermissible ex parte default award.

H&C opposed the motion for relief from judgment and filed a separate sanctions motion against Gens and his counsel under § 128.7 arguing that the motion was procedurally barred because it was filed more than six months after the claimed mistake, inadvertence or excusable neglect on which the motion rested, and because there was no substantive basis for relief. The trial court denied the motion for relief and imposed sanctions on Gens and his counsel of $9,000. Gens and his attorneys appealed.

Affirmed. A party making a section 473 motion bears a double burden – it must show a satisfactory excuse for the default and must show diligence in making the motion after discovery of the default. Gens failed to carry either burden. "It is simply not enough to assert a general state of misapprehension or ignorance on some subject bearing on a possible defense. He must specify the actual cause of his failure to present the defense the first time around, and explain why that failure should be excused. He has made no real attempt to do this. The trial court therefore quite properly denied relief." Gens failed to demonstrate that he was unaware of the facts on which his grounds for relief ultimately rested. The fact that Gens was acting in pro per does not provide a basis for relief. "One who voluntarily represents himself is not, for that reason, entitled to any more (or less) consideration than a lawyer. Thus, any alleged ignorance of legal matters or failure to properly represent himself can hardly constitute mistake, inadvertence, surprise or excusable neglect as those terms are used in section 473."

The court also rejected Gens's suggestion that the arbitration proceeding should be set aside as the product of a "default." It noted that the underlying arbitration award might be viewed as the product of a "default" in the broad sense that Gens was not there, having elected to stand on an improbable and unsubstantiated suggestion that he lacked proper notice. But by the time the judgment was entered, there had been an intervening proceeding on H&C's motion to confirm the award. "In that proceeding Gens had every opportunity to prevent the ripening of the arbitration award into a judgment; indeed he sought to do so, but failed to raise a colorable defense. This was his trial on the merits." The court also affirmed the sanctions award against Gens and his counsel.

Excess insurance; insurance-contract interpretation; insurance agent liability: *Wallman v. Suddock* (2011) __ Cal.App.4th __ (2d Dist., Div. 4.)

Wallman and members of his family were partners in a real estate partnership that owned apartment buildings. In 1994 Anthony Rodriquez, then a child, fell from a third-floor window in a building owned by the partnership (Ingraham property.) In 1994, the Ingraham property was insured under a policy issued by Crusader Insurance. The partnership sold the property in 2001. In 2004, the partnership asked its insurance agent, Suddock, to obtain primary and excess coverage for its properties. He procured primary coverage through Capital Insurance Group, which issued separate policies to the various LLCs within the partnership for the policy period of July 15, 2005, to July 15, 2006. He procured excess coverage through American Guarantee. The schedule of underlying insurance on the excess policy listed the primary insurer as "Capital Insurance Group" but listed the policy number as "TBD." It listed the policy term as July 15, 2005 to July 15, 2006. The excess policy also only applied to the scheduled properties owned by the partnership in 2005.

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Rodriquez brought suit against the partnership in 2006. The defense was tendered to Crusader, which insured the Ingraham property in 1994, when the incident occurred. When the partnership learned that the Crusader policy limits were unlikely to be sufficient to resolve the Rodriquez litigation, they tendered the claim to American Guarantee, which denied coverage because the Crusader policy was not one of the underlying policies listed on the schedule of underlying coverage, and none of the identified policies had been exhausted. The partnership settled the litigation for $1 million, of which Crusader paid $500,000, and the partnerships paid the balance. The partnerships then sued Suddock for negligence, and American Guarantee for breach of contract and bad faith. The trial court granted summary judgment to both defendants, and the plaintiff appealed. Affirmed.

First, the court held that the American Gurantee excess policy could not be reasonably construed to be excess to the Crusader policy. The court held that the failure of the schedule of underlying coverage to list the Capital Insurance Group primary policies added some degree of ambiguity, but it was insufficient to allow the policy to be interpreted to include the Crusader policy issued in 1994, since the scheduled did refer to "Capital Insurance Group" and showed the correct policy term for the primary coverage issued by that company. The policy also only applied to the scheduled properties, which did not include the Ingraham property, which the partnership had sold years before the policy had been issued.

Second, the court held that there were no triable issues of fact concerning the claim against Suddock, for his failure to procure coverage for properties they no longer owned. The plaintiffs' statements to Suddock about the type of coverage they wanted were extremely general. In their declarations, the plaintiffs said that they told Suddock they needed "higher insurance limits to adequately protect us should another substantial claim be made," and they testified in deposition that they asked Suddock to "make sure that we're covered for any possible lawsuit that could happen in the future." They did not say that they wanted coverage for past years or properties the family no longer owned. The court held that, "Under these circumstances, Suddock could not reasonably have known that plaintiffs wanted excess insurance for past years or for properties they no longer owned." In addition, plaintiffs' claims that Suddock held himself out as an insurance expert, and that they relied on him as a result are too conclusory. Notably missing from them is what Suddock actually said to give rise to their belief he was an expert. Finally, the fact that when plaintiffs supposedly asked if Suddock could imagine any claim that would not be covered by the policy, he answered that he could not, did not constitute a misrepresentation about the nature of the coverage Suddock had procured.


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