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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

CREDITORS ADJUSTMENT BUREAU, INC., Plaintiff and Appellant, v. CITIGUARD, INC., Defendant and Respondent.	B290266 (Los Angeles County Super. Ct. No. PC057932)

APPEAL from an order of the Superior Court of Los Angeles County, Melvin D. Sandvig, Judge. Affirmed.

Law Offices of Kenneth J. Freed, Kenneth J. Freed, Mark F. Didak and David Weeks for Plaintiff and Appellant.

Sina Law Group and Reza Sina for Defendant and Respondent.

Plaintiff Creditors Adjustment Bureau, Inc. (Creditors), appeals from an order granting defendant Citiguard, Inc.'s motion to vacate default and default judgment entered against it. Creditors contends the trial court abused its discretion in granting the motion because there was no evidence of mistake, surprise, inadvertence, or excusable neglect, and the trial court failed to consider evidence Citiguard received notice of the complaint and summons. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Complaint, Service, and Entry of the Default and Default Judgment*

The State Compensation Insurance Fund (State Fund) "is a quasi-public company created by the Legislature to ensure that mandatory workers' compensation insurance will be available to California employers. (Ins. Code, § 11770 et seq.)" (*ReadyLink Healthcare, Inc. v. Jones* (2012) 210 Cal.App.4th 1166, 1169; accord, *State Compensation Ins. Fund v. Superior Court* (2010) 184 Cal.App.4th 1124, 1127 [State Fund is the "state's largest workers' compensation insurance carrier[,] and is organized as a public enterprise fund subject to the jurisdiction and control of the state Insurance Commissioner."].) The insurance premiums for businesses are based on estimated wages paid to employees based on the prior year's payroll information. (*ReadyLink Healthcare*, at p. 1169.)

In or before 2014 State Fund and Citiguard entered into a contract under which State Fund provided a workers' compensation insurance policy to Citiguard to cover the period from October 17, 2014 to October 17, 2015, in exchange for

Citiguard paying premiums.[1] The following year State Fund provided a workers' compensation insurance policy to Citiguard to cover the period from October 17, 2015 to October 17, 2016. Following the policy periods, State Fund conducted an audit of Citiguard's payroll records and determined Citiguard owed additional premiums for the first policy period. State Fund claimed Citiguard failed to pay its back premiums and failed to comply with an audit in connection with the second policy period. State Fund calculated the premiums it claimed Citiguard owed and sent Citiguard an invoice for that amount. After Citiguard failed to pay the claimed back premiums, State Fund assigned the debt owed by Citiguard to a collections agency, Creditors, for collection.

On August 17, 2017 Creditors filed a complaint against Citiguard and 10 Doe defendants, alleging causes of action for breach of contract, open book account, account stated, and recovery of the "reasonable value" of the services provided. The complaint alleged Citiguard breached the contract by failing to pay its premiums for the two policies. The complaint sought $166,986.20 in damages, plus interest, costs, and further appropriate relief.

On August 28, 2017 a process server served the summons and complaint on Sami Nomair, the owner and registered agent for service of process for Citiguard,[2] by substituted service on

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[1] The facts are taken from the complaint and Creditors' opposition to Citiguard's motion to vacate the judgment.

[2] Creditors requests we augment the record and take judicial notice of Citiguard's September 8, 2016 Statement of Information filed with the California Secretary of State, which lists Nomair as the registered agent for service of process for Citiguard. We take

Pauline Chavez, the "person in charge," at Citiguard's business address at 9301 Corbin Avenue, suite 1800, Northridge, California 91324 (Corbin address).[3] On August 29, 2017 the process server mailed copies of the documents to Citiguard at the Corbin address.

On October 13, 2017, after the deadline to file a responsive pleading had passed, Creditors mailed a letter addressed to Nomair at the Corbin address, advising him Creditors would request a default if an answer was not filed within seven days. On October 27 Creditors filed a request for entry of default, which it served on Citiguard (not directed to Nomair) at the Corbin address. The court clerk entered the default on October 31. On November 8 Creditors filed a request for entry of judgment, which it served by mail on Citiguard at the Corbin address (also not addressed to Nomair). Creditors dismissed the Doe defendants on the same day. On November 28, 2017 the trial court entered a default judgment against Citiguard.[4]

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judicial notice of Citiguard's filed Statement of Information. (Evid. Code, §§ 452, subds. (c), (h), 459, subd. (a); *Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 375, fn. 4 [taking judicial notice of transcripts of two public hearings before local agency]; *StorMedia Inc. v. Superior Court* (1999) 20 Cal.4th 449, 457, fn. 9 [taking judicial notice of registration statement filed with Securities and Exchange Commission].)

[3] The process server also served a notice of case management conference, notice of case assignment, and an alternative dispute resolution package.

[4] The parties have not included in the record the judgment that was entered. However, the trial court in granting the

B. *Citiguard's Motion To Vacate the Default and Default Judgment*

On March 13, 2018 Citiguard filed a motion under Code of Civil Procedure section 473, subdivision (b),[5] to vacate the default and default judgment on the grounds of mistake, inadvertence, and excusable neglect.[6] Citiguard argued it had been diligent, and Creditors would not be prejudiced if the trial court set aside the default and default judgment.

In his declaration filed in support of the motion, Nomair stated, "I was not aware that a lawsuit had been filed. I was shocked and surprised to find out that there was a default judgment taken against my company." Nomair declared he was "rarely in the office from mid-August to mid-September" because he was caring for his disabled aunt. Nomair declared further that, as a result of his absence, he "never received the summons and complaint that were left with the receptionist." When Nomair returned to his "normal office schedule," he received a copy of the proof of service of summons, dated September 7, 2017, which listed a hearing date of January 12, 2018. Nomair "misunderstood that to be the date of the hearing where

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motion to vacate the default and default judgment stated the judgment was entered on November 28, 2017.

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

[6] The joint appendix contains a copy of the motion, which is not conformed to reflect the filing date. On our own motion we augment the record to include the superior court docket, which reflects the March 13, 2018 filing date of the motion. (Cal. Rules of Court, rule 8.155(a)(1)(A).)

Citiguard gets to contest the audit," and he appeared in court on January 12 with his accountant to contest the audit.

Nomair stated he learned from the court clerk when he appeared in court on January 12, 2018 that a default judgment had been entered against Citiguard. Over the next "couple days," Nomair asked an attorney friend to contact Creditors to stipulate to set aside the judgment. Creditors declined. Nomair then "met with a couple of attorneys to assist in this matter" and "moved as quickly as possible between Citiguard and the lawyer's schedule to get this motion filed."

Citiguard submitted declarations from Nomair and Citiguard's accountant, John Adefowara, in support of its motion. Nomair's mother confirmed Nomair spent August and September 2017 caring for his aunt. Adefowara stated he worked with Nomair to prepare a response to the audit, and he accompanied Nomair to court on January 12, 2018, which is when he and Nomair learned a default judgment had been entered against Citiguard.

Creditors opposed Citiguard's motion, arguing Citiguard did not meet its burden under section 473, subdivision (b), to show its failure to respond was due to mistake, surprise, inadvertence, or excusable neglect. Creditors argued it properly served Citiguard by substituted service at its place of business, mailed a copy of the summons and complaint to Citiguard at the same address, mailed Nomair a letter advising him Creditors would enter a default, and mailed Citiguard copies of its requests for default and default judgment. Creditors' attorney stated the letter to Nomair was not returned by the postal service to Creditors. Creditors asserted Citiguard failed to exercise diligence in seeking relief because Nomair knew about the

summons and complaint as of October 2017, when he returned to the office after caring for his aunt in August and September 2017.

In his declaration in support of Citiguard's reply, Nomair attested, "I **never** received the summons and complaint that were left with the receptionist because I was not in the office . . . ." Nomair reiterated he "was not aware that a lawsuit had been filed." He declared, "The only document that I received [was] a document entitled 'Proof of Service of Summons' with a hearing date of January 12, 2018."

After a hearing on April 25, 2018, the trial court granted Citiguard's motion and vacated the October 31, 2017 default and November 28, 2017 default judgment. The trial court found, "The declarations of Sami [N]omair submitted in support of the motion and reply are sufficient to establish that the default and default judgment were entered against [Citiguard] due to mistake, inadvertence, surprise or excusable neglect." The trial court also found "the evidence indicates that [Citiguard] acted diligently in seeking to have the default and default judgment set aside after learning about [them]."

Finally, the court found Citiguard sought relief "well within the six[-]month statutory deadline[, and] there is no evidence that [Creditors] will suffer undue prejudice if the default and default judgment are set aside."

Creditors timely appealed.[7]

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[7] The trial court's order is appealable as an order following a judgment that is appealable under section 904.1, subdivision (a)(1). (§ 904.1, subd. (a)(2); *Minick v. City of Petaluma* (2016) 3 Cal.App.5th 15, 23, fn. 2 [trial court's order granting motion to vacate default judgment under § 473, subd. (b), was appealable order].)

DISCUSSION

A. *Standard of Review*

"'A ruling on a motion for discretionary relief under section 473 shall not be disturbed on appeal absent a clear showing of [an] abuse'" of discretion. (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 257 (*Zamora*); accord, *Austin v. Los Angeles Unified School Dist.* (2016) 244 Cal.App.4th 918, 929 (*Austin*).) Under this standard, "we may reverse only if we conclude the trial court's decision is '"so irrational or arbitrary that no reasonable person could agree with it."'" (*Mechling v. Asbestos Defendants* (2018) 29 Cal.App.5th 1241, 1249 [affirming grant of equitable relief from default judgment]; accord, *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773.) "That a different decision could have been reached is not sufficient because we cannot substitute our discretion for that of the trial court. The trial court's ruling must be beyond the bounds of reason for us to reverse it." (*Mechling*, at p. 1249; accord, *Minick v. City of Petaluma* (2016) 3 Cal.App.5th 15, 24 (*Minick*).)

We defer to the trial court's factual findings made in the exercise of its discretion in reviewing the court's ruling granting or denying discretionary relief under section 473, subdivision (b). (*Zamora, supra*, 28 Cal.4th at p. 258 ["'"where there is a substantial conflict in the facts stated, a determination of the controverted facts by the trial court will not be disturbed"'"]; *Fernandes v. Singh* (2017) 16 Cal.App.5th 932, 940 ["we defer to the trial court's resolution of any factual conflicts in the declarations"]; *Minick, supra*, 3 Cal.App.5th at p. 24 [trial court's

"factual findings in the exercise of [its] discretion are entitled to deference"].)[8]

"Because the law favors disposing of cases on their merits, 'any doubts in applying section 473 must be resolved in favor of the party seeking relief from default [citations]. Therefore, a trial court order denying relief is scrutinized more carefully than an order permitting trial on the merits.'" (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 980, 984 [trial court abused its discretion in denying relief from default judgment where default entered based on defendants' failure to pay entirety of filing fee for answer, but defendants' error was based on incorrect information from clerk's office]; accord, *Austin, supra*, 244 Cal.App.4th at pp. 929, 932 [trial court abused its discretion in denying motion for relief from judgment entered after summary judgment motion under § 473, subd. (b), based on failure of self-represented plaintiff to sign motion for relief under penalty of perjury]; *Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 696, 703 [trial court abused its

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[8] Creditors contends the record must contain "substantial evidence" to support the trial court's findings, citing *Carmel, Ltd. v. Tavoussi* (2009) 175 Cal.App.4th 393, 399. *Carmel* was in the context of the mandatory relief provision of section 473, subdivision (b). (*Carmel*, at p. 399.) As discussed, we review a trial court's decision to grant discretionary relief under section 473, subdivision (b), for an abuse of discretion. However, "[t]he abuse of discretion standard includes a substantial evidence component," under which "'[w]e defer to the trial court's factual findings so long as they are supported by substantial evidence, and determine whether, under those facts, the court abused its discretion.'" (*Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 1006; accord, *Hansen v. Sandridge Partners, L.P.* (2018) 22 Cal.App.5th 1020, 1028.)

discretion in denying motion under § 473, subd. (b), for relief from default judgment entered after defendant's insurer failed to file answer].)

B. *The Trial Court Did Not Abuse Its Discretion in Granting Citiguard's Motion To Vacate the Default and Default Judgment*

Section 473, subdivision (b), provides, "The court may, upon any terms as may be just, relieve a party . . . from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief . . . shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken." Under section 473, subdivision (b), "neglect is excusable if a reasonably prudent person under similar circumstances might have made the same error." (*Austin, supra*, 244 Cal.App.4th at p. 929; accord, *Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1423.)

A moving party must show diligence in order to obtain relief under section 473, subdivision (b). (*Minick, supra*, 3 Cal.App.5th at p. 33; *Huh v. Wang, supra*, 158 Cal.App.4th at pp. 1420-1421.) Whether a party has filed its motion within a reasonable time is a question of fact for the trial court, which "'"depends upon the circumstances of [the] particular case."'" (*Minick*, at p. 33; accord, *Huh*, at p. 1420.) "A delay is unreasonable as a matter of law only when it exceeds three months and there is no evidence to explain the delay." (*Minick*, at p. 34 [defendant acted within a reasonable time where he filed motion for relief a little over five weeks after receiving notice of entry of judgment]; accord, *Benjamin v. Dalmo Mfg. Co.* (1948)

31 Cal.2d 523, 529-530 (*Benjamin*) [finding lack of diligence where defendant waited over three months after learning of entry of default before filing motion for relief and failed to provide an explanation for the delay]; *Stafford v. Mach* (1998) 64 Cal.App.4th 1174, 1184 ["It appears from our independent review of the case law that this same three-month unofficial 'standard' [set forth in *Benjamin*] remains true today."].)

Creditors contends the trial court abused its discretion because Nomair's claim he never received the summons and complaint, but instead only received the proof of service of the documents, was not credible. But we defer to the trial court's factual findings made in the exercise of its discretion under section 473, subdivision (b). (*Zamora, supra*, 28 Cal.4th at p. 258; *Minick, supra*, 3 Cal.App.5th at p. 24.) The trial court, in finding the declarations in support of the motion were sufficient to show the default judgment was entered due to mistake, inadvertence, surprise, or excusable neglect, made an implied finding Nomair's statement he did not receive the summons and complaint or learn of the lawsuit until he showed up in court on January 12, 2018 was credible. (*Griffith Co. v. San Diego College for Women* (1955) 45 Cal.2d 501, 507-508 ["'When the evidence is conflicting, it will be presumed that the court found every fact necessary to support its order that the evidence would justify.'"]; *Stafford v. Mach, supra*, 64 Cal.App.4th at p. 1182 [""""""So far as [the court] has passed on the weight of evidence or the credibility of witnesses, its implied findings are conclusive."""""""].)

The trial court's findings were not "beyond the bounds of reason." (*Mechling*, at p. 1249; accord, *Minick, supra*, 3 Cal.App.5th at p. 24.) Nomair declared he did not receive the summons and complaint left with Citiguard's receptionist

because he was "rarely in the office" when the documents were served, and he later received only the proof of service of summons that listed a January 12, 2018 hearing date. Nomair's mother confirmed Nomair was taking care of his disabled aunt during August and September 2017. Nomair stated he mistakenly believed the hearing was an opportunity for him to respond to the audit and, indeed, prepared for the hearing with his accountant. Adefowara confirmed he prepared a response to the audit after Nomair called him in September to advise him of the January hearing date. Adefowara also confirmed he appeared with Nomair in court on January 12, at which time the court clerk advised Nomair and Adefowara a default judgment had been entered.[9]

Creditors also contends the trial court erred by failing to consider the evidence Creditors had mailed multiple documents to Citiguard, including the October 13, 2017 letter to Nomair, the request for entry of default, and the request for entry of default judgment, which would have placed Citiguard on notice of the lawsuit against it. While Creditors is correct a letter correctly addressed and properly mailed may be presumed to have been

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[9] At oral argument counsel for Creditors argued Nomair's testimony he mistakenly prepared for the audit was not credible because he would not have known State Fund assigned its claim to Creditors unless he had reviewed the complaint. But documents filed by Creditors in opposition to Citiguard's motion to vacate the default and default judgment included a letter from Creditors to Nomair on April 20, 2017, informing Nomair that State Fund had assigned Nomair's debt to Creditors. In addition, according to the declaration of Luther Jao, a collections representative for State Fund, on July 6, 2017 Jao discussed with Nomair the need for an audit.

received (Evid. Code, § 641), the presumption is rebutted upon testimony denying receipt. (*Bear Creek Master Assn. v. Edwards* (2005) 130 Cal.App.4th 1470, 1486; *Craig v. Brown & Root, Inc.* (2000) 84 Cal.App.4th 416, 421-422.) Once the presumption is rebutted, "'"[t]he trier of fact must then weigh the denial of receipt against the inference of receipt arising from proof of mailing and decide whether or not the letter was received."'" (*Bear Creek Master Assn.*, at p. 1486, italics omitted; accord, *Craig*, at pp. 421-422.) Although the trial court did not address in its written ruling the documents Creditors mailed to Citiguard, the trial court impliedly decided the documents were not received after considering Nomair's testimony and the supporting declarations. We defer to this factual finding.

Creditors asserts further the trial court erred in finding Citiguard acted diligently in seeking relief once it learned of the default and default judgment. But Creditors bases its argument on Citiguard's claimed failure to file the motion for over five months after learning of the default. The five-month timeline assumes Nomair received the October 13 letter addressed to him and requests for entry of default and default judgment in October 2017, after Nomair returned to the office. But as discussed, the trial court impliedly found Nomair did not receive these documents, and instead Nomair first learned of the lawsuit on January 12, 2018. The trial court did not abuse its discretion in finding Nomair acted diligently from this date to respond to the complaint. After learning of the lawsuit, Nomair had an attorney contact Creditors to see if it would stipulate to set aside the default judgment. When Creditors declined, Nomair "met with a couple of attorneys" and "moved as quickly as possible" to seek relief. Citiguard filed its motion to set aside the default judgment

on March 13, 2018, just over two months after Nomair first learned of the default judgment, less than the three-month period the courts have found to be a reasonable period in which to file a motion to vacate a default and default judgment. (*Benjamin, supra*, 31 Cal.2d at pp. 529-530; *Minick, supra*, 3 Cal.App.5th at p. 34.)[10]

The cases cited by Creditors are distinguishable. The Courts of Appeal in these cases reviewed the trial court's orders denying (instead of granting) a motion to vacate a default, and further, the parties seeking relief delayed taking action although they acknowledged they were served with the summons and complaint and had inadequate excuses for their delay. (*Bellm v. Bellia* (1984) 150 Cal.App.3d 1036, 1038 [trial court did not abuse its discretion in denying motion for relief from default where moving party did nothing in response to service of complaint for two months, claiming he delayed because of "business pressures" and vague statements about ill parents]; *Davis v. Thayer* (1980) 113 Cal.App.3d 892, 905-906, 909 [trial court did not abuse its discretion in denying motion for relief from default where moving parties waited over six months after service of complaint with

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[10] Creditors also contends on appeal it will suffer prejudice if the default judgment is vacated. Creditors has forfeited this issue on appeal by failing to raise it below. (*Pittman v. Beck Park Apartments Ltd.* (2018) 20 Cal.App.5th 1009, 1026 [an argument """"may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it""""]; *Professional Collection Consultants v. Lauron* (2017) 8 Cal.App.5th 958, 972 [""""[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court.""""].)

inadequate excuses]; *Martin v. Taylor* (1968) 267 Cal.App.2d 112, 117-118 [trial court did not abuse its discretion in denying relief from entry of default where defendant had "full knowledge" of the lawsuit and a default judgment, but the attorney was too "'busy'" to seek relief until nearly six months after learning of entry of the default judgment].)[11]

As discussed, we scrutinize a trial court's order denying relief more carefully than one granting relief. (*Rappleyea v. Campbell, supra*, 8 Cal.4th at p. 984.) Further, in contrast to the facts in the cases cited by Creditors, Nomair declared he never received the summons and complaint, instead only receiving the proof of service that included the January 12, 2018 hearing date. Once he learned of the default, he acted promptly to retain an attorney to file a motion to vacate the default, which he filed just over two months later. Notwithstanding conflicting evidence presented by Creditors, the trial court did not abuse its discretion

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[11] Creditors also cites to the appellate department opinion in *Gilio v. Campbell* (1952) 114 Cal.App.2d Supp. 853, 855-856, 858, in which the appellate division concluded the trial court abused its discretion in setting aside a default where the defendant was personally served with the summons and complaint, the constable performing the service told the defendant he needed to respond to the complaint, and the summons made clear if defendant did not respond, a judgment could be taken against him, but the defendant still delayed almost three months before seeking relief. (*Id.* at p. 857.) In contrast to the facts here, the defendant was placed on notice of the actual summons and complaint, yet he had no excuse for why he did not take action other than his asserted lack of understanding of the process and that he was "very busy." (*Id.* at pp. 856-858.)

in granting Citiguard's motion for relief. (*Zamora, supra*, 28 Cal.4th at p. 257; *Minick, supra*, 3 Cal.App.5th at p. 24.)

DISPOSITION

The order granting Citiguard's motion to vacate the default and default judgment is affirmed. Citiguard is entitled to costs on appeal.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

SEGAL, J.