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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

FEYZOLAH AKDOT et al., Plaintiffs and Respondents, v. ADRIAN OLABUENAGA, Defendant and Appellant.	B232795 (Los Angeles County Super. Ct. No. NCC02944B)

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

Law Office of Robert G. Klein, Robert G. Klein for Defendant and Appellant.

Lowe Law, Steven T. Lowe, Kelly Houle for Plaintiffs and Respondents.

Appellant contends that plaintiffs' renewal of a default judgment against him should have been vacated. He argues that the default judgment was improper because the operative complaint did not provide adequate notice of the amount of damages sought. We find that the complaint did provide appellant with adequate notice, and therefore the court's denial of his motion to vacate renewal of the default judgment was proper.

FACTUAL AND PROCEDURAL BACKGROUND

The judgment at issue in this case is over 20 years old. In 1986, plaintiffs and respondents Feyzolah and Nedralyn Akdot sued defendant and appellant Adrian Olabuenaga and another defendant. The operative first amended complaint, filed in 1989, pleaded six causes of action, including claims for breach of contract and fraud.

The Akdots alleged that they agreed to purchase the company A&M Accessories, Inc. (A&M) from defendants. A&M was in the business of selling celebrity likeness-themed merchandise. The Akdots paid a total of $40,000 to defendants in exchange for all the issued and outstanding capital stock of the company. The parties further agreed that plaintiffs would eventually pay defendants an additional $66,000 in exchange for consulting and training services. Part of this additional amount was secured by a deed of trust on the Akdots' house.

According to the first amended complaint, soon after the sale closed, the Akdots discovered that defendants made numerous material misrepresentations regarding the company. These included misrepresentations regarding: (a) the company's balance sheet—defendants represented that the value of inventory and accounts receivable less accounts payable was a positive $32,000, when it was actually a negative $30,000, including $15,000 in undisclosed, unpaid taxes; (b) the value of the company's inventory, most of which could not be sold due to nonexistent or ineffective licenses; (c) undisclosed, preexisting debts incurred by defendants which led to legal proceedings against A&M and which plaintiffs were forced to expend monies to defend; (d) personal debts that defendants intentionally incurred in the name of A&M after the sale; and (e) checks made payable to A&M that defendants cashed for their own benefit after the sale. Further, defendants failed to provide any of the consulting and training services they

promised. Plaintiffs' breach of contract cause of action sought cancellation of the purchase agreement and deed of trust on the Akdots' home and return of all monies paid to defendants, as well as damages. The fraud cause of action sought "damages in an amount in excess of this Court's Jurisdiction" and "punitive damages in an amount in excess of this Court's Jurisdiction."

Olabuenaga failed to respond to the first amended complaint and his default was taken in December 1989. An uncontested prove-up hearing was held in which testimony and documentary evidence were presented. In December 1990, the trial court issued a judgment in favor of the Akdots and against Olabuenaga. The judgment rescinded the purchase agreement and deed of trust and related documents, and awarded restitution of the $40,000 paid to defendants, plus interest in the amount of $26,030. The judgment further awarded $25,000 in compensatory damages and $25,000 in punitive damages on the fraud cause of action. In sum, the judgment totaled $116,030.

In November 2000, the Akdots successfully renewed the judgment against Olabuenaga. They renewed the judgment again in November 2010. Shortly after this second renewal, Olabuenaga filed a motion to vacate the renewal of the judgment. Following briefing by the parties, the trial court denied Olabuenaga's motion to vacate. Olabuenaga now appeals that denial.

DISCUSSION

Olabuenaga contends that the default judgment entered against him in 1990 violated his rights to due process because the first amended complaint did not contain an adequate statement of the damages sought. He argues that since the judgment was improper, the trial court erred by denying his motion to vacate the renewal of the judgment.

The period that a judgment remains enforceable may be extended for 10 years by the filing of an application for renewal. (Code Civ. Proc., §§ 683.110, subd. (a), 683.120.) Renewal of a judgment is a ministerial act performed by the court clerk. (*Fidelity Creditor Service, Inc. v. Browne* (2001) 89 Cal.App.4th 195, 198 (*Fidelity Creditor*).) Following renewal of a judgment, a judgment debtor has 30 days to seek to

vacate renewal. (Code Civ. Proc., § 683.170, subd. (b).) The renewal may be vacated "on any ground that would be a defense to an action on the judgment, including the ground that the amount of the renewed judgment . . . is incorrect." (Code Civ. Proc., § 683.170, subd. (a).)

The judgment debtor bears the burden of proving, by a preponderance of the evidence, that the renewal of the judgment should be vacated. (*Fidelity Creditor*, *supra*, 89 Cal.App.4th at p. 199.) We review the trial court's order for an abuse of discretion and examine the record in the light most favorable to the order. (*Ibid*.) To the extent that our review involves statutory interpretation and pure questions of law, our review is de novo. (See *id.* at p. 200.)

Pertinent to this appeal, Code of Civil Procedure section 580 provides that a default judgment may not award damages in excess of the amount demanded in the complaint. The purpose of this restriction "is to ensure that a defendant is given adequate notice of the amount of the judgment that may be entered against the defendant, as required by due process. [Citation.] A defendant who is denied adequate notice of the amount of the default judgment that may be entered against the defendant is effectively denied a fair hearing." (*Matera v. McLeod* (2006) 145 Cal.App.4th 44, 61.) A default judgment that awards excess damages is beyond the jurisdiction of the court and is therefore void. (*Id.* at p. 59; *Stein v. York* (2010) 181 Cal.App.4th 320, 326.) Renewal of such a judgment may be vacated pursuant to Code of Civil Procedure section 683.170. (See *In re Marriage of Henderson* (1990) 225 Cal.App.3d 531, 535; *Fidelity Creditor*, *supra*, 89 Cal.App.4th at pp. 203-204.)

The trial court denied Olabuenaga's motion to vacate renewal of the judgment, finding that the first amended complaint gave him adequate notice of the amount of damages sought.

I. Restitution of the $40,000 plus interest

The first monetary component of the default judgment was restitution of the $40,000 paid by plaintiffs to defendants, plus interest on that amount. The prayer in the

first amended complaint asked for interest but did not request a specific dollar amount in damages or restitution, seeking only damages according to proof.

Despite this deficient prayer, we find that the pleadings as a whole were sufficient for the trial court to award restitution of $40,000 plus interest. The complaint's allegations supported the award. Although a prayer that only seeks damages according to proof is generally inadequate, it does not prevent recovery when "a specific amount of damages is alleged in the body of the complaint." (*Becker v. S.P.V. Construction Co.* (1980) 27 Cal.3d 489, 494.) "[A]llegations of a complaint may cure a defective prayer for damages." (*Greenup v. Rodman* (1986) 42 Cal.3d 822, 829.)

The allegations of the first amended complaint would have given Olabuenaga adequate notice that a default judgment could require him to return the $40,000 paid by plaintiffs, plus interest. Paragraph 28 specifically requested "return of all monies paid to Defendants by Plaintiffs" and paragraph 23 stated that "Defendants received a total of $40,000 from Plaintiffs." The fact that plaintiffs were seeking the return of $40,000 was readily ascertainable from the first amended complaint, and interest was explicitly requested. Therefore the trial court did not exceed its jurisdiction in awarding $40,000 plus $26,030 in interest.

Olabuenaga also argues that the judgment was erroneous because it awarded $40,000 as part of the rescission of the purchase agreement. He contends that for the judgment on rescission to be effective, it should have required plaintiffs to restore to him the business assets they received as consideration. This argument is not well taken. First, Olabuenaga cites to no legal authority for the proposition that renewal of a judgment may be vacated because the judgment inadequately dealt with the issue of rescission. It is likely there is no such authority since, while Code of Civil Procedure section 580 expressly limits a monetary judgment to amounts demanded in the complaint, it provides that "in any other case, the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issue."

Second, Olabuenaga is unable to show that the trial court failed to thoroughly consider the implications of ordering rescission. Civil Code section 1692 provides, in

pertinent part: "If in an action or proceeding a party seeks relief based upon rescission, the court may require the party to whom such relief is granted to make any compensation to the other which justice may require and may otherwise in its judgment adjust the equities between the parties." The first amended complaint alleged that A&M actually had a negative value. Pursuant to Civil Code section 1692's provision allowing for adjustment of the equities between the parties, the trial court may have rightly declined to order plaintiffs to return any purported business assets to defendants.

Lastly, Olabuenaga has failed to provide a record that could possibly support a finding that the trial court erred in ordering rescission. The judgment makes clear that the prove-up hearing included presentation of oral and documentary evidence. We have no record of the transcript from that hearing or the evidence that was presented. It is entirely possible that the trial court found nothing of value to return to Olabuenaga. In the absence of a transcript or other record affirmatively showing error, we cannot reverse. (See *Thorson v. Western Development Corp.* (1967) 251 Cal.App.2d 206, 214.)

II. $25,000 in damages for fraud

The second amount awarded in the judgment was $25,000 as compensatory damages for fraud. Olabuenaga again argues that the first amended complaint provided inadequate notice that these damages could be awarded. He also argues that the award of damages for fraud was improper because it was based on an improper failure to elect remedies and represented a partial double recovery of the $40,000 awarded as restitution.

We find that the first amended complaint gave adequate notice that plaintiffs were seeking at least $25,000 in damages for fraud. Plaintiffs' fraud cause of action sought "damages in an amount in excess of this Court's Jurisdiction." A statement that the plaintiff seeks an amount exceeding the jurisdictional requirements of the court is sufficient to put a defendant on notice that the jurisdictional minimum of the court may be awarded. (*Greenup v. Rodman*, *supra*, 42 Cal.3d at p. 830; *Julius Schifaugh IV Consulting Services, Inc. v. Avaris Capital, Inc.* (2008) 164 Cal.App.4th 1393, 1396.) At the time the first amended complaint was filed and the judgment was entered, the jurisdictional minimum of the superior court was $25,000. (See Code Civ. Proc., §§ 85,

86, 88.) Thus, while an award for compensatory damages for fraud in excess of this jurisdictional minimum would have been improper, the award of $25,000 was proper.[1]

We also find that the amount awarded did not improperly provide a double recovery or disregard law pertaining to election of remedies. The first amended complaint stated that plaintiffs suffered damages differing and separate from the $40,000 they spent to purchase A&M. Plaintiffs were "forced to spend monies to defend" legal proceedings instituted against A&M for preexisting, undisclosed debts incurred by defendants. Furthermore, following plaintiffs' purchase of the business, defendants cashed checks made payable to A&M and retained the proceeds, and defendants refused to indemnify plaintiffs for undisclosed amounts owing to creditors, including unpaid taxes. Thus, the first amended complaint gave adequate notice that Olabuenaga could be found liable for compensatory damages in the amount of $25,000, separate from the $40,000 purchase price. Given the absence of a record of the trial court proceedings, we must assume that plaintiffs' entitlement to $25,000 in compensatory damages was proven. Olabuenaga may not claim at this stage of the proceedings that there was insufficient support for such an award. (See *Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1749.)

Correspondingly, the trial court's decision to order rescission of the purchase agreement and restitution of the $40,000 purchase price did not prevent the court from finding additional damages on the fraud claim. "A claim for damages is not inconsistent

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[1] Olabuenaga points out that recent case law has criticized the holding in *Greenup v. Rodman*, *supra*, 42 Cal.3d 822, that a request for damages in excess of the court's jurisdiction is sufficient to give notice of the amount sought. (See *Van Sickle v. Gilbert* (2011) 196 Cal.App.4th 1495, 1529.) This criticism is not applicable here because it rests on the rationale that following unification of the municipal and superior courts all causes come within the original jurisdiction of the superior court. The instant case was brought and decided well prior to the unification of the municipal and superior courts, which occurred after enactment of Proposition 220 in 1998. (See *Lempert v. Superior Court* (2003) 112 Cal. App.4th 1161, 1169, fn. 3.) At the time the first amended complaint was filed, the $25,000 superior court jurisdictional minimum still applied.

with a claim for relief based upon rescission. The aggrieved party shall be awarded complete relief, including restitution of benefits, if any, conferred by him as a result of the transaction and any consequential damages to which he is entitled; but such relief shall not include duplicate or inconsistent items of recovery." (Civ. Code, § 1692.) As explained, the additional compensatory damages that plaintiffs sought were not duplicative of the amount paid to defendants. The court's judgment, therefore, did not effect an improper failure to elect remedies. Even if it had, the doctrine of election of remedies is an affirmative defense that ordinarily must be specifically pleaded. (*Modoc Mineral & Oil Co. v. Cal-Vada Drilling etc. Co.* (1965) 236 Cal.App.2d 868, 875.) There is no question that Olabuenaga failed to plead the defense, and there is no basis for reversal.

III. $25,000 in punitive damages

Finally, we find that the judgment's award of $25,000 in punitive damages was appropriate. By his default, Olabuenaga admitted the allegations of "willful, fraudulent, malicious, oppressive and despicable" conduct underlying the request for punitive damages. (See *Ostling v. Loring, supra,* 27 Cal.App.4th at p. 1750.)

Further, the awarded amount of $25,000 was not erroneous. Olabuenaga mistakenly argues that the Akdots waived their claim to punitive damages by failing to serve notice of the amount of punitive damages sought pursuant to Code of Civil Procedure section 425.115. That section requires a plaintiff to serve the defendant with a statement of the amount of punitive damages sought in order to preserve the right to seek punitive damages on a default judgment. Section 425.115, however, did not become effective until 1996 (Sen. Bill No. 45 (1995 Reg. Sess.) § 3), well after entry of the default judgment.

As with the request for compensatory damages, the first amended complaint sought punitive damages in an amount in excess of the superior court's jurisdiction, which was $25,000. Although Civil Code section 3295, subdivision (e) provides, "No claim for exemplary damages shall state an amount or amounts," case law predating the enactment of Code of Civil Procedure section 425.115 held that a default award of

punitive damages could be based on a complaint's statement of the amount of punitive damages sought. (See *Cummings Medical Corp. v. Occupational Medical Corp.* (1992) 10 Cal.App.4th 1291, 1296-1298; *Wiley v. Rhodes* (1990) 223 Cal.App.3d 1470, 1472-1473; *Greenup v. Rodman*, *supra*, 42 Cal.3d at p. 830.) Apparently, this was because prior to enactment of section 425.115, the code provided no method for apprising a defendant of the amount of punitive damages sought by default. (See *Cummings Medical Corp. v. Occupational Medical Corp.*, *supra*, at pp. 1296-1298; *Wiley v. Rhodes*, *supra*, 223 Cal.App.3d at p. 1472.) As in these roughly contemporaneous cases, at the time of this case, the only feasible method for the Akdots to notify Olabuenaga of the amount of punitive damages they sought was by stating the amount in the complaint. Since the amount was stated, the default judgment's award of $25,000 in punitive damages was proper.[2]

DISPOSITION

The order denying the motion to vacate renewal of the default judgment is affirmed.

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BOREN, P.J.

We concur:

DOI TODD, J. ASHMANN-GERST, J.

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[2] In his reply brief, Olabuenaga argues that since plaintiffs never presented evidence of his net worth, punitive damages could not be supported. We do not consider this issue, which was not raised in the trial court and was raised for the first time in the reply brief. (*California Retail Portfolio Fund GMBH & Co. KG v. Hopkins Real Estate Group* (2011) 193 Cal.App.4th 849, 862; *Chicago Title Ins. Co. v. AMZ Ins. Services, Inc.* (2010) 188 Cal.App.4th 401, 427.) In any event, Olabuenaga has not presented the record required to even possibly consider the argument. Without a transcript of the prove-up hearing, it is unknown what information was considered by the trial court.