Filed 10/24/14 Chen v. Institute of Medical Education CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

ARTHUR CHEN et al., Plaintiffs and Respondents, v. INSTITUTE OF MEDICAL EDUCATION INC., et al., Defendants and Appellants.	H039327 (Santa Clara County Super. Ct. No. 1-11-CV205651)

Plaintiffs Arthur Chen, Minh Duc Do, Cynthia Donovan, Eduardo Espinoza, Alejandro Loquillano, Jr., Lynnett Reyes, and Lisa Saminathen were students at the Institute of Medical Education, Inc. (IME). They brought an action against defendants IME and Sunil Vethody (Vethody) for various misrepresentations relating to plaintiffs' employment prospects and their ability to take licensing examinations following their graduation from the IME. The trial court entered defendants' default and rendered judgment for plaintiffs. On appeal, defendants contend: (1) the trial court abused its discretion in denying their motion to set aside the default and default judgment; (2) the trial court erred in entering default and default judgment, because plaintiffs did not serve them with a statement of damages; (3) the trial court's award of economic damages of $910,840 and noneconomic damages in the amount of $1.4 million was excessive and not supported by the evidence; (4) the trial court erred by awarding punitive damages

pursuant to the Consumer Legal Remedies Act (CLRA) absent evidence of compliance with notice requirements; and (5) the trial court erred in entering the default judgment against Vethody based on alter ego liability. The judgment is modified by striking the award of punitive damages. As modified, the judgment is affirmed.[1]

I. Background

In July 2011, plaintiffs filed their complaint for unfair business practices (Bus. & Prof. Code, § 17200 et seq.), fraud, negligent misrepresentation, violation of the CLRA, breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, and negligence. The complaint alleged the following. The IME was a trade school, which offered training in a wide variety of health care professions, and had locations in San Jose and Oakland. Vethody was the owner, officer, and director of the IME.

Defendants told prospective students, including plaintiffs, that they would be able to complete the ultrasound technology program (program) in 18 months and that the IME graduates would be eligible to take the national licensing examination administered by the American Registry of Diagnostic Medical Sonography (ARDMS). The IME's salespersons and brochures falsely claimed that the IME program was "approved and accredited by ARDMS." However, a program must be accredited by the Commission on Accreditation of Allied Health Education Programs (CAAHEP) in order for its graduates to qualify to take the ARDMS examination upon completion of the program. Since the IME was never accredited by the CAAHEP, plaintiffs would not be eligible to take the ARDMS examination after completion of the IME program or be able to obtain

[1] Defendants contend that plaintiffs failed to file their brief on August 28, 2013, and thus it was untimely. There is no merit to this contention. Plaintiffs were required to file their brief on August 28, 2013. It was filed on August 29, 2013, and was timely under California Rules of Court, rule 8.25(b)(3)(B).

employment as ultrasound technicians. Students who complete a program accredited by the CAAHEP have employment placement rates from 70 to 100 percent. The IME salespersons also provided plaintiffs with a list of clinics and hospitals in the area where students would be placed by the IME to complete the IME's required six-month clinical work and where the IME program graduates had been hired. Plaintiffs were also told that the IME program consisted of 12 months of coursework and that they could expect to earn $75,000 to $100,000 per year as ultrasound technicians after they completed the IME program. Based on defendants' representations, plaintiffs took out loans and paid fees ranging from $19,400 to $25,000.

Plaintiffs were in the same IME program class that began on August 11, 2008. The course work and instruction was very good at the beginning of the program. However, the quality of the teaching declined significantly. Nonqualified instructors often taught classes and instructors failed to cover necessary topics. Since classes were often cancelled, plaintiffs were unable to complete the necessary coursework in 12 months and thus were unable to begin or complete their six months of clinical work. Plaintiffs also learned that the hospitals and clinics listed in the IME brochure had no relationship with the IME. Instead, the IME had contracts with "a handful" of very small clinics or practitioners. Consequently, there were long waiting periods for plaintiffs to receive clinical placements. Moreover, very few of the clinical instructors were adequately certified. As a result of the lack of clinical sites, plaintiffs Chen, Do, Donovan, Espinoza, Reyes, and Saminathen were unable to obtain the clinical hours necessary to complete the IME program. Plaintiff Loquillano was able to complete his clinical hours in 32 months.

Despite the IME's statements that there was a "huge demand" for ultrasound technicians, plaintiffs learned that a reputable clinic or hospital in California would only hire an ultrasound technician who had either graduated from a CAAHEP-accredited

school and/or had passed the ARDMS exam. In December 2010, plaintiffs Chen, Do, Donovan, Espinoza, Reyes, and Saminathen discovered that the IME was not accredited by the CAAHEP, ARDMS, or any accrediting body. Thus, plaintiffs would not be eligible to take the ARDMS examination in order to obtain their ultrasound technician license. Loquillano completed the IME program, but he discovered in April 2011 that he was ineligible to take the ARDMS examination.

The complaint alleged that the IME was "seriously undercapitalized and underfunded," defendants failed to observe legally required corporate formalities in managing IME's affairs, and Vethody "so co-mingled his personal affairs with the affairs of IME that the corporate entity is no longer a distinct legal entity." Thus, plaintiffs requested that the court hold Vethody individually responsible for the actions of the IME.

Plaintiffs sought damages for tuition and other payments made to the IME "in an amount . . . not less than $160,840.00," "general and special damages in an amount . . . not less than $3.5 million," and punitive damages.

In August 2011, defendants filed their answer.

On February 27, 2012, James Cai, defendants' counsel, filed a motion to be relieved as counsel. Defendants were served with this motion. On March 26, 2012, the order granting the motion to withdraw was filed and defendants were ordered to appear on April 12, 2012. Though defendants were served with this order by the court, they failed to appear at the hearing.

On April 12, 2012, June 18, 2012, and July 10, 2012, the trial court issued orders directing defendants to appear in court. Though defendants were served with these orders by the court, they failed to appear.

On July 17, 2012, the trial court issued a notice and order that defendants appear in court on July 26, 2012, to show good cause regarding their failure to appear at the case management hearing on June 5, 2012, and as ordered by the court on July 5, 2012.

Defendants were also notified that their failure to appear would result in the striking of their answers to the complaint and the entry of a default judgment against them. Though defendants were served with this notice and order by plaintiffs, they failed to appear at the hearing.

On July 27, 2012, the trial court issued an order striking defendants' answers. It was also ordered that defaults be entered against defendants by the court clerk. Defendants were served by plaintiffs. Defaults were entered against defendants on August 13, 2012.

On October 16, 2012, plaintiffs requested entry of default judgment in the amount of $3,661,235 and served defendants.

On October 22, 2012, defendants, who were then represented by Bruce Funk, brought a motion to set aside default and for leave to defend the action. Defendants' motion was made pursuant to Code of Civil Procedure section 473.5[2] on the ground that they had not received notice of the proceedings prior to plaintiffs' request to enter default. Alternatively, the motion was brought pursuant to section 473, subdivision (b) on the ground that default was entered by the party's mistake, inadvertence, surprise or excusable neglect. Defendants submitted the declarations of Vethody, his wife Bindu Vethody, and their attorney.

Vethody's declaration stated that the only notice that he had received after the filing of the complaint was plaintiffs' notice that they were seeking default. Vethody never received notice from Cai or the court that Cai had withdrawn as counsel of record. However, he was informed by another of Cai's clients that Cai had withdrawn. He never received notice of court appearances, and if he had known of these appearances, he would have appeared at them once he learned that Cai was no longer representing him.

---

[2] All further statutory references are to the Code of Civil Procedure unless stated otherwise.

The declaration of Bindu Vethody stated that she was the president of the IME and the corporation's designated agent for service of process. The only notice that she had received after the receipt of the complaint was plaintiffs' notice of default. She did not receive notice from Cai that he was withdrawing as counsel for the IME, though she was also informed by another of Cai's clients that he had withdrawn. If she had received notices of court appearances, an appearance would have been made on the IME's behalf.

Funk's declaration stated that he agreed to represent the IME and its officers in defense of various creditor claims on September 4, 2012. He met with another attorney on October 3, 2012, to seek her assistance in setting aside various defaults against the IME. She learned from a court clerk that the present case was scheduled for a hearing on October 18, 2012. Funk appeared at this hearing on October 18, 2012, and learned that the case was set for a default hearing on October 22, 2012. The following day, he went to the courtroom where the default hearing was to be held. Since the courtroom was dark, he did not know where notices were sent or their content. He consulted the court's online docket and learned that the answer had been stricken, Cai was still listed at attorney of record for Vethody, and no address was given for the IME.

Plaintiffs filed opposition to defendants' motion to set aside default and for leave to defend the action. They argued that the claims of Vethody and Bindu Vethody that they did not receive notice of the various court orders were not credible. Plaintiffs submitted the declaration of their counsel Kathryn Curry, various exhibits, and a request for judicial notice.

Curry's declaration and various exhibits established the following. On February 13, 2012, the California Bureau for Private Postsecondary Education issued an emergency order shutting down the IME, because it was not an accredited institution. On February 27, 2012, Cai filed his motion to be relieved as defendants' counsel. Cai averred under penalty of perjury that he had served defendants with the motion to be

relieved as counsel by mail at their last known address and he had confirmed that this address was current within the last 30 days by a telephone call with his clients. The address was 130 S. Almaden Blvd., San Jose (Almaden address). This was the same address that the IME and Vethody provided the California Secretary of State on February 7, 2012. The IME Web site also listed this address for its San Jose campus.

Since the motion to withdraw as counsel was going to be heard on March 22, 2012, Seth Weiner of Schein & Cai LLP sent Curry an e-mail on March 5, 2012, in which he requested an extension of time for defendants to respond to plaintiffs' discovery requests. After Curry agreed to the request, Weiner sent Vethody a copy of his reply e-mail to Curry to advise him of the discovery deadline so that Vethody could work with Curry to choose dates for the early neutral evaluation.

On March 22, 2012, the trial court granted the motion to withdraw and ordered defendants to appear on April 12, 2012. The order also advised defendants that it was their duty to keep the court and other parties informed of their current address and that if they did not do so, it could result in their losing the case. The trial court served defendants with this order at the Almaden address. Defendants failed to appear at the hearing.

On April 12, 2012, the trial court issued a notice of further case management conference directing defendants to appear on June 5, 2012. The trial court served the notice at 830 Stewart Dr., #135, Sunnyvale (Stewart address)[3] while plaintiffs served the notice at the Almaden address. Defendants failed to appear.

On June 18, 2012, the trial court issued an order for defendants to appear in court on July 5, 2012. The trial court served the notice at the Stewart address. Defendants failed to appear at the hearing.

---

[3] In a substitution of attorney form, which was filed on May 14, 2012, Vethody listed his address as the Stewart address in the case *Gonzalez v. IME, Sunil Vethody, Bindu Vethody et al.*, case No. 112CV219838.

On July 10, 2012, the trial court issued an order that defendants appear in court on July 26, 2012, to show good cause regarding their failure to appear at the further case management conference. Defendants were served at the Stewart address.

On July 17, 2012, defendants were ordered to appear on July 26, 2012, and to show good cause why they failed to appear on June 5, 2012, and as ordered by the court on July 5, 2012. Defendants were also notified that their failure to appear would result in the striking of their answers to the complaint and the entry of a default judgment against them. Defendants were served at the Almaden address. Defendants failed to appear at the hearing.

On August 13, 2012, plaintiffs' request for entry of default was served on defendants at the Almaden address and Vethody was served at 2172 Wood Hollow Ct., San Jose.

According to defendants' Web site, the IME surrendered its California license and ceased all operations on July 19, 2012, and listed the Almaden address for its San Jose campus.

Defendant filed a reply. Vethody's declaration stated that the IME was closed down on February 13, 2012. He put in a request to the post office that all mail to the Almaden address be forwarded to the Stewart address effective March 15 through June 1, 2012. He was informed that some mail directed to the IME at the Almaden address was returned to the sender. He subsequently put in a request with the post office to forward mail directed to the Stewart address effective June 1, 2012. Despite that request, he did not receive any notice from the court or counsel until the request for entry of default, which was sent to his home address. He thought that his wife had registered their home address for the agent for service designation, but he later learned that she had registered the address of the IME.

The trial court denied the motion to set aside default and for leave to defend the action. Following a hearing, the trial court entered a default judgment on December 20, 2012. The trial court awarded plaintiffs $910,840 in economic damages, $1.4 million in noneconomic damages, punitive damages of $500,000, and costs of $395.

On February 14, 2013, defendants notified the trial court and plaintiffs that Wiener was now representing them.[4] Defendants filed a notice of appeal on the same day.

II. Discussion

A. Motion to Set Aside Default

Defendants contend that the trial court erred when it refused to set aside the default that was entered against them for their failure to appear at court hearings.

Section 473, subdivision (b) provides in relevant part: "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect."

"'A ruling on a motion for discretionary relief under section 473 shall not be disturbed on appeal absent a clear showing of abuse.' [Citation.] '"[T]hose affidavits favoring the contention of the prevailing party establish not only the facts stated therein but also all facts which reasonably may be inferred therefrom, and where there is a substantial conflict in the facts stated, a determination of the controverted facts by the trial court will not be disturbed."' [Citations.]" (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 257-258.) "When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for

[4] On March 3, 2014, this court granted Wiener's motion to withdraw as counsel. On March 7, 2014, Vi Katerina Tran was substituted as counsel for defendants.

that of the trial court. [Citations.]" (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479.)

Defendants argue that they did not receive notice of either their attorney's withdrawal or the missed court hearings that resulted in the entry of their default and thus the trial court erred in refusing to set aside the default. They point out that the March 22, 2012 order granting the motion to be relieved as counsel and the July 17, 2012 order to show cause regarding the failure to appear at the June 5, 2012 and July 5, 2012 hearings were both served by mail on defendants at the Almaden address. Thus, they argue that since the IME had already been shut down, they did not receive notice of these orders.

Though the declarations of Vethody and Bindu Vethody stated that they did not receive notice of their counsel's withdrawal and the missed court hearings, the trial court impliedly found that that their statements were not credible based on evidence presented by plaintiffs. First, Bindu Vethody's statement that she was the IME's agent for service of process was refuted by a certified copy of the Statement of Information from the California Secretary of State, which had been filed on February 7, 2012, designating her husband as the IME's agent for service of process. It also listed the address for service of process as the Almaden address.[5] Defendants counter that the February 7, 2012 Statement of Information does not serve to establish that Bindu Vethody was not the IME's agent for service of process as of the date of her declaration. However, her declaration states that "the only notices that [she received] relating to this action since receipt of the complaint was plaintiffs' notice that they were seeking default . . . ." Thus, the trial court could have reasonably interpreted this statement that she was identifying herself as the IME's agent for service of process prior to the date of her declaration.

[5] We also note that, the IME's Web site, which listed the Almaden address for its San Jose campus, stated: "As of July 19, 2012, school has surrendered the license and no longer in operation . . . ."

Second, the Vethodys' denials of receiving notice of their counsel's withdrawal were contradicted by their former counsel's declaration and the e-mail that he sent to Vethody. Defendants argue that Cai's declaration did not establish that Vethody was either personally served or that he received the March 5, 2012 e-mail advising him to contact plaintiff's counsel. Given that Cai had verified his clients' address by telephone prior to filing his motion to withdraw, the trial court could have reasonably concluded that Vethody was not credible.

Third, Vethody had requested that mail be forwarded to the Stewart address after March 15, 2012. Thus, even if they did not receive notice of the motion to withdraw that was served on February 23, 2012, they would have received the March 22, 2012 order granting the motion to withdraw that was served on defendants after the forwarding became effective. This order also advised defendants that it was their duty to keep the court and other parties informed of their current address and that if they did not do so, it could result in their losing the case. In response, defendants contend that some of the mail directed to the IME at the Almaden address was returned to sender despite the forwarding request. However, defendants' lack of credibility was also established by evidence that the April 12, 2012, June 18, 2012, and July 10, 2012 notices were sent directly to the Stewart address and Vethody also claimed that he never received these notices.

In sum, since there was sufficient evidence that defendants were properly served, they failed to show that the default was taken against them through their mistake, inadvertence, surprise or excusable neglect. Thus, they failed to meet their burden to establish that the trial court abused its discretion in denying their motion to set aside default.

B. Statement of Damages

Defendants contend that the default and default judgment must be set aside, because plaintiffs failed to serve them with a statement of damages pursuant to sections 425.11 and 425.115.

As the court explained in *Van Sickle v. Gilbert* (2011) 196 Cal.App.4th 1495, "'[i]t is fundamental to the concept of due process that a defendant be given notice of the existence of a lawsuit and notice of the specific relief which is sought in the complaint served upon him. The logic underlying this principle is simple: a defendant who has been served with a lawsuit has the right, in view of the relief which the complainant is seeking from him, to decide not to appear and defend. However, a defendant is not in a position to make such a decision if he or she has not been given full notice.' [Citation.]" [¶] To effectuate this due process principle, California law provides that where a plaintiff seeks to recover money or damages, the amount sought generally must be stated in the complaint. (§ 425.10, subd. (a)(2).) There are two exceptions to this rule: (1) 'where an action is brought to recover actual or punitive damages for personal injury or wrongful death, the amount demanded shall not be stated' (§ 425.10, subd. (b)); and (2) '[n]o claim for exemplary [i.e., punitive] damages shall state an amount or amounts' (Civ. Code, § 3295, subd. (e)). [¶] Sections 425.11 and 425.115 provide methods for satisfying the due process requirement of notice while honoring the bar against pleading a specific amount of damages in the two circumstances described above. . . . [¶] Including in the complaint a request for a specific amount of money, or serving a statement of damages when pleading a specific amount is not permitted, is critical because section 580, subdivision (a) provides that '[t]he relief granted to the plaintiff, if there is no answer, cannot exceed that demanded in the complaint, in the statement required by Section 425.11, or in the statement provided for by Section 425.115 . . . .' '[A] default judgment

greater than the amount specifically demanded is void as beyond the trial court's jurisdiction.' [Citation.]" (*Id.* at pp. 1520-1521.)

Relying on *Schwab v. Rondel Homes, Inc.* (1991) 53 Cal.3d 428, 432 (*Schwab*) and *Jones v. Interstate Recovery Service* (1984) 160 Cal.App.3d 925, 930 (*Jones*), defendants argue that section 425.11 is applicable in the present case because plaintiffs' "personal injury claims predominated and were closely tied to the other claims for relief."

In *Schwab*, one of the plaintiffs was deaf and used a signal dog. (*Schwab, supra*, 53 Cal.3d at p. 430.) After the defendants refused to rent to the plaintiffs because of the signal dog, they brought an action for housing discrimination and sought "damages for each plaintiff for mental and emotional distress and for 'further monetary and pecuniary losses and damages' in amounts according to proof" and punitive damages of $500,000. (*Ibid.*) The defendants failed to respond to the complaint and default was entered against them. (*Ibid.*) Following a prove-up hearing, the trial court awarded the plaintiffs $50,000, punitive damages of $100,000, and attorney's fees and costs. (*Id.* at pp. 430-431.) The California Supreme Court rejected the plaintiffs' argument that their complaint was not subject to the notice requirement of section 425.11, because they did not bring an action for "'personal injury or wrongful death'" within the meaning of section 425.10. (*Schwab*, at p. 432.) The court reasoned that the "plaintiffs' own pleadings belie their assertion that mental or emotional distress does not, in fact, lie at the heart of their action." (*Ibid.*)

In *Jones*, the defendant wrongfully repossessed the plaintiffs' vehicle. (*Jones, supra*, 160 Cal.App.3d at p. 927.) During this process, one of the plaintiffs, who was pregnant, was thrown against a garage wall. (*Ibid.*) The plaintiffs' children were also present during the incident and allegedly suffered emotional injury. (*Ibid.*) The plaintiffs brought an action for trespass, assault, conversion, and infliction of emotional distress, and they eventually obtained a default judgment. (*Ibid.*) However, the trial court granted

the defendant's motion for relief of default judgment, because the plaintiffs did not serve a notice of damages pursuant to section 425.11. (*Jones*, at pp. 927-928.) *Jones* affirmed the order and found that the plaintiffs' "nonpersonal injury claims [were] tied so closely to the personal injury claims that section 425.11 applie[d] to all causes of action." (*Id.* at p. 930.)

Schwab and *Jones* are distinguishable from the present case. Here, the complaint alleged causes of action for unfair business practices, fraud, negligent misrepresentation, violation of the CRLA, unjust enrichment, and negligence and sought both economic and noneconomic damages. However, unlike in *Schwab*, plaintiffs' emotional distress damages were not "at the heart of their action." (*Schwab*, *supra*, 53 Cal.3d at p. 432.) Moreover, in contrast to *Jones*, the complaint in the present case did not allege any causes of action for personal injury. Nor are we persuaded by either *Schwab* or *Jones* that the trial court's award of $910,840 in economic damages and $1.4 million in noneconomic damages transformed the present case into "an action to recover damages for personal injury . . . ." (§ 425.11.)

The present case is factually similar to *Sporn v. Home Depot USA, Inc.* (2005) 126 Cal.App.4th 1294 (*Sporn*). In that case, the plaintiff brought an action for negligence, gross negligence, theft of identity, fraudulent misrepresentation, and fraud and sought $5 million in general damages and $10 million in punitive damages for each cause of action. (*Id.* at p. 1297.) The trial court eventually issued a default judgment for plaintiff for $930,000. (*Id.* at p. 1298.) *Sporn* rejected the defendant's argument that the plaintiff was required to serve it with a statement of damages pursuant to section 425.11 and failed to do so. (*Sporn*, at p. 1302.) *Sporn* reasoned that "the complaint, which was not limited to personal injuries and did not claim wrongful death, expressly apprised defendant of the amount demanded. A statement of damages would have been superfluous and was not

required under these circumstances." (*Ibid.*) Similarly, here, plaintiffs were not required to serve defendants with a statement of damages pursuant to section 425.11.

We next consider the issue of punitive damages. Relying on section 425.115, defendants contend that no statement of punitive damages was ever served on them and thus plaintiffs' default and default judgment must be set aside.

Section 425.115, subdivision (b) provides that a "plaintiff preserves the right to seek punitive damages pursuant to Section 3294 of the Civil Code on a default judgment by serving upon the defendant" a statement specifying the amount of punitive damages being sought. (§ 425.115, subd. (b).) Civil Code 3294 allows the recovery of punitive damages "[i]n an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice . . . ." (Civ. Code, § 3294, subd. (a).) A plaintiff "shall serve the statement upon the defendant pursuant to this section before a default may be taken, if the motion for default judgment includes a request for punitive damages." (§ 425.115, subd. (f).)

Plaintiffs contend that defendants have failed to meet their burden on appeal to offer evidentiary support for their contention that they failed to serve a statement of punitive damages. Though section 425.115 does not expressly require that the statement of punitive damages be filed with the trial court, it does require that the statement be served on the defendant "before a default may be taken." (§ 425.115, subd. (f).) Here, plaintiffs have never asserted either before the trial court or on appeal that they served defendants with the statement of punitive damages. Thus, there is no basis for concluding that plaintiffs served defendants with a statement of damages.

Plaintiffs also contend that defendants "should be estopped from making the argument [regarding their failure to serve the statement of punitive damages] because [defendants] claimed in the Trial Court and claim here on appeal that they never received

any of the papers served by Plaintiffs or the Trial Court other than the request for default judgment. Thus, the Defendants allegedly should not know whether they were served with any damage statements pursuant to § 425.115 . . . ." Plaintiffs have provided no substantive argument or citation to authority to support their contention regarding estoppel, and we therefore deem it abandoned. (*Ellenberger v. Espinosa* (1994) 30 Cal.App.4th 943, 948.)

Here, plaintiffs' failure to file a statement of damages pursuant to section 425.115 prior to entry of default deprived defendants of due process. Accordingly, the trial court erred in awarding punitive damages to plaintiffs.

Plaintiffs point out , however, that section 425.115 applies only to actions brought pursuant to Civil Code section 3294. Noting that they also sought punitive damages pursuant to the CLRA,[6] plaintiffs contend that the sole limitation on the award of damages was the one imposed by section 580, that is, that the relief granted cannot exceed that demanded in the complaint. They point out that the complaint demanded damages of $3,660,840 and the trial court awarded damages of $2,810,840.

Becker v. S.P.V. Construction Co. (1980) 27 Cal.3d 489 (*Becker*) is instructive. In that case, the complaint for breach of contract, fraud, and negligent misrepresentation sought damages " 'in excess of $20,000 . . . or according to proof,' punitive damages of $100,000, and costs." (*Id.* at p. 492.) Following entry of default and a prove-up hearing, the trial court rendered a default judgment for $26,457.50 in compensatory damages, $2,500 in attorney's fees, and costs. (*Id.* at p. 493.) *Becker* observed that the purpose of section 580 was "to insure that defendants in cases which involve a default judgment have adequate notice of the judgments that may be taken against them. [Citation.]" The

---

[6] Here, the prayer states in relevant part: "For actual and punitive damages pursuant to Civil Code section 1782." However, Civil Code section 1782 does not refer to punitive damages. Civil Code section 1780, subdivision (a)(4) authorizes the trial court to award punitive damages pursuant to the CLRA in certain circumstances.

California Supreme Court held that since the complaint alleged damages in the amount of $20,000, "the trial court exceeded its jurisdiction under section 580 insofar as it awarded damages in excess of that amount. It is irrelevant that the award of damages was within the total amount of compensatory and punitive damages demanded in the complaint. Since compensatory and punitive damages are different remedies in both nature and purpose, a 'demand or prayer for one is not a demand legally, or otherwise, for the other, or for both.' [Citation.]" (*Becker*, at pp. 494-495.)

Here, the complaint put defendants on notice that plaintiffs were seeking $3,660,840 in general and special damages. However, though the complaint also sought punitive damages, it did not specify any amount. Under *Becker*, plaintiffs could not rely on allegations of other elements of damages to provide the requisite notice of the amount of punitive damages that they sought. Thus, the trial court exceeded its jurisdiction under section 580 in awarding punitive damages of $500,000. However, the entire judgment is not void, but only that portion of the judgment which exceeds the trial court's jurisdiction. (*Becker, supra*, 27 Cal.3d at p. 495.)[7]

C. Sufficiency of the Evidence

Defendants also contend that the amounts of the economic and noneconomic damages were excessive and unsupported by the evidence.

Defendants are entitled to challenge the sufficiency of the evidence to support the default judgment. (*Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 288.) "'[T]he general rule that the sufficiency of the evidence tendered in a default proceeding cannot be reviewed on an appeal from a default judgment . . . is true as to matters for

---

[7] Since we have concluded that the trial court erred in awarding punitive damages of $500,000, we need not consider defendants' argument that the award of punitive damages must be set aside because plaintiffs failed to comply with the notice requirements of the CRLA.

which no proof is required by virtue of the admission by default of the allegations of the complaint. [Citation.] However, as to damages which, despite default, require proof[,] the general rule does not apply.'" (*Scognamillo v. Herrick* (2003) 106 Cal.App.4th 1139, 1150.) Thus, an appellate court will reverse damages awarded on a default judgment not only when the award is so excessive that it "shocks the conscience" and is the result of "passion [or] prejudice," but also when "the damages awarded are unsupported by sufficient evidence." (*Ibid.*)

A prove-up hearing may include live testimony or, in the trial court's discretion, affidavits or declarations setting forth "with particularity" the facts that are "within the personal knowledge" of the declarant. (§ 585, subd. (d).)

Here, the evidence at the default prove-up hearing consisted of each plaintiff's testimony as well as his or her declaration. Plaintiffs also presented exhibit 1, which is a chart itemizing damages. It states the amount of tuition that each plaintiff paid, the amount of wages that each plaintiff lost while attending the IME, and the amount of wages that each plaintiff lost because he or she did not enroll in an accredited program. The amount of the total financial losses was $1,473,236. The chart also refers to other damages, including medical and emotional distress, but does not specify the amounts of these damages. Following argument, the trial court stated: "Typically on these kinds of cases on the default calendar I would make rulings from the bench as you would see me do a couple times earlier this afternoon, but you've gone to some measure of trouble preparing your declarations, and I think that each one deserves to be read by itself and to be analyzed along with Exhibit 1 presented to the court. So unless you have anything further, that's what I'm going to do." The trial court subsequently awarded plaintiffs $910,840 in economic damages and $1.4 million in noneconomic damages.

A party challenging a judgment has the burden of showing reversible error by an adequate record. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574.) Here, defendants have

failed to include plaintiffs' declarations in the record on appeal. Since the trial court relied on plaintiffs' declarations, we cannot presume error from an incomplete record. (*In re Kathy P.* (1979) 25 Cal.3d 91, 102 (*Kathy P.*).) Accordingly, we reject defendants' contention that the amounts of the economic and noneconomic damages were excessive and unsupported by the evidence.

D. Alter Ego Liability

Defendants next contend that the trial court erred in entering default judgment against Vethody based on the vague allegations in the complaint that the IME was the alter ego of Vethody. However, even assuming that Vethody was not liable under an alter ego theory, the complaint adequately stated a claim against him for fraud.

"The elements of fraud are: (1) a misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage." (*Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 990.)

The complaint alleged that Vethody, who was a director of the IME, made several false representations to plaintiffs. These representations included: successful completion of the program would entitle them to obtain positions as ultrasound technicians; the IME program would take only 18 months to complete; and the IME program would make them eligible to take and prepare them to pass the ARDMS licensing exam. When Vethody made these representations, he knew or should have known that they were false. Vethody also failed to disclose to plaintiff s numerous material facts, including that the IME program was not accredited by CAAHEP, which was the accrediting body recognized by the ARDMS, the students who completed the IME program would not be eligible to take the ARDMS exam, the quality of instruction was inadequate, the IME program could not be completed in 18 months due to a lack of both qualified instructors

and clinical sites, and there were no job opportunities for ultrasound technicians who had not passed the ARDMS exam or graduated from a CAAHEP-accredited institution. Vethody "made the representations and/or non-disclosures with the intent to defraud Plaintiffs" and "for the purpose of inducing Plaintiffs to rely on them" and enroll in the IME program. Plaintiffs were unaware of the nondisclosures and/or the falsity of the representations and were justified in acting in reliance upon their belief in the truth of the representations. As a proximate result of the misrepresentations and/or failure to disclose material facts by Vethody, plaintiffs suffered damages. Thus, the complaint sufficiently stated a cause of action against Vethody for fraud.

Defendants' claim that the evidence presented at the prove-up hearing was insufficient to support the fraud claim fails. As previously stated, the trial court relied upon plaintiffs' declarations in entering judgment in their favor. Since these declarations were not included in the record on appeal, we cannot presume error. (*Kathy P.*, *supra*, 25 Cal.3d at p. 102.)

III. Disposition

The judgment is modified by striking the award of punitive damages of $500,000. As modified, the judgment is affirmed. The parties are to bear their own costs on appeal.

_____
Mihara, J.

WE CONCUR:

_____
Bamattre-Manoukian, Acting P. J.

_____
Grover, J.