

Medical Education Services, Inc. v. Sutherland Holdings, Ltd., No. E030128 (Cal.App. Dist.4 09/13/2002)

[1]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT DIVISION TWO

[2]

No. E030128

[3]

2002.CA.0008416

[4]

September 13, 2002

[5]

MEDICAL EDUCATION SERVICES, INC., PLAINTIFF AND RESPONDENT,

v.

SUTHERLAND HOLDINGS, LIMITED, ET AL., DEFENDANTS AND APPELLANTS.

[6]

APPEAL from the Superior Court of Riverside County. Joan F. Ettinger, Temporary Judge. (Pursuant to Cal. Const., art. VI., § 21.) Dismissed in part; affirmed in part. (Super.Ct.No. 338962)

[7]

Lana Borsook for Defendants and Appellants.

[8]

Garrett Skelly for Plaintiff and Respondent.

[9]

The opinion of the court was delivered by: Ward, J.

[10]

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

[11]

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

[12]

OPINION

[13]

Defendants and appellants Susan Alter and Sutherland Holdings, Limited (collectively, defendants) appeal the following: (1) default judgment against defendants; (2) order denying defendants' motion to vacate void default and default judgment; and (3) order denying defendants' motion to reconsider the denial of motion to vacate. We do not reach the merits of the appeal from the default judgment but dismiss the appeal because defendants' notice of appeal was not timely filed. We do not reach the merits of the appeal from the order denying defendants' motion to reconsider but dismiss that appeal because the order is not appealable. As to the order denying defendants' motion to vacate void default and default judgment, we affirm the trial court's order.

[14]

## FACTUAL AND PROCEDURAL HISTORY

[15]

Plaintiff Medical Education Services, Inc. is a personal service corporation of Timothy Luckett, a registered nurse. On February 14, 2000, plaintiff filed a complaint for breach of contract and common counts against Willow Glen Enterprises, Inc., dba Moreno Valley Ambulatory Surgery Center (Willow), John Bohn, Susan Alter, SJR, Inc./Enterprises (SJR), JBS Enterprises/Inc. (JBS), Sutherland Holdings Center (Sutherland), and Pomona Valley Surgery Center.

[16]

The complaint alleged that (1) plaintiff had an oral agreement with Willow, Bohn, Alter, SJR and JBS, but not Sutherland, to provide Willow with medical services, "including trained medical personnel and purchasing medical supplies/equipment" for the defendants; (2) plaintiff performed all obligations to defendants; (3) defendants breached the agreement by failing to pay plaintiff; and (4) plaintiff suffered damages in the sum of \$82,268.62. The complaint also sought an order piercing the corporate veil of Willow, SJR, JBS and Sutherland "because the Defendant corporation[s] are [] shell corporation[s], insolvent, and a sham," and "holding the individual Defendants JOHN BOHN and SUSAN ALTER, jointly and severally liable for the Corporate Defendant[s]' debts and obligations."

[17]

In March and April of 2000, efforts were made to settle the case between plaintiff and defendants Willow and Alter. On April 27, 2000, in another civil action pending in Riverside wherein Willow was a named defendant, Willow was placed under a receivership. The appointment of a receiver aborted the settlement discussions in this case.

[18]

On May 19, 2000 -- with no answers on file by any of the defendants -- plaintiff filed a request for entry of default, which was entered that day. \*fn1

[19]

In June of 2000, Willow filed for bankruptcy. On July 10, 2001, the trial court denied plaintiff's request for a default judgment against most of the defendants because the declarations failed to support plaintiff's alter ego claim and because plaintiff had proven his case only as to Willow. On August 4, 2000, August 14, 2000, and November 8, 2000, the trial court again denied plaintiff's request for a default judgment because plaintiff was unable to provide enough evidence to prove his alter ego allegations.

[20]

On September 22, 2000, plaintiff filed Luckett's supplemental declaration to support his default prove-up. On January 18, 2001, the trial court held a hearing on plaintiff's alter ego theories. Apparently, the court had preliminarily ruled that the alter ego theories were "okay" as to Willow and Alter, "but as far as Sutherland Holdings and Pomona Valley Surgery Center, [the court] had some questions." After hearing testimony from Luckett regarding the relationships of the various corporate and individual defendants, the trial court granted plaintiff's request for default judgments.

[21]

On March 1, 2001, a judgment by court after default against defendants was filed. On March 20, 2001, plaintiff mailed a notice of entry of judgment to Willow's last known

address, and to the attorneys who had represented defendants during the settlement negotiations. Sutherland alleges that it learned of the default judgment one month later -- in April of 2001, when plaintiff levied on its bank account.

[22]

On May 22, 2001, defendants Sutherland and Alter filed a motion under Code of Civil Procedure \*fn2 section 473, subdivision (b) to vacate the default and default judgment. On July 9, 2001, the trial court denied the motion. Plaintiff mailed the notice of ruling that same day.

[23]

On July 23, 2001, Sutherland filed an ex parte application to shorten the notice of its motion to reconsider the denial of its motion to vacate the default and default judgment. On July 26, 2001, the court held a hearing on Sutherland's ex parte application. On that date, the trial court continued the hearing on the motion to reconsider and asked the parties to submit additional briefing.

[24]

On August 9, 2001, the court considered the supplemental briefing filed by the parties and found that "there's simply no basis to set aside the default based upon improper service or based upon a claim of a de facto amendment," and that there was sufficient evidence to find liability against defendants under the alter ego theory.

[25]

Defendants Sutherland and Alter appeal the following: (1) judgment by court after default, filed March 1, 2001; (2) order denying defendants' motion to vacate the default and default judgment; and (3) order denying defendant Sutherland's motion to reconsider denial of motion to vacate.

[26]

## ANALYSIS

[27]

### I. The Appeal From the Default Judgment Is Dismissed

[28]

We must first address whether defendants' appeal is timely. In our order dated September 20, 2001, we noted that the notice of entry of default judgment was served on March 20, 2001, but that the notice of appeal was not filed until August 21, 2001 -- more than 60 days after the notice of entry was sent. After we received briefing from defendants and plaintiff, on November 16, 2001, we reserved the ruling on the issue of the timeliness of the appeal from the default judgment with the appeal.

[29]

Under California Rules of Court, rule 2(a), "a notice of appeal must be filed on or before the earliest of: [¶] . . . [¶] (2) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled `Notice of Entry' of judgment or a file-stamped copy of the judgment, accompanied by proof of service; or [¶] (3) 180 days after entry of judgment."

[30]

Hence, "[w]here notice is by a party, sending an endorsed copy of the judgment showing its date of entry constitutes sufficient notice and failure to file notice of appeal within 60 days results in dismissal of the appeal." [Citation.]" \*fn3 Effective service, however, requires strict compliance with sections 1012, 1013, and 1013a. \*fn4 \*fn5

[31]

Here, the default judgment was entered on March 1, 2001, the notice of entry of default judgment (notice of entry) was served on March 20, 2001, and the notice of appeal was filed on August 21, 2001. Under California Rules of Court, rule 2(a), because a notice of entry was served, defendants should have filed their notice of appeal within 60 days from the service of the notice of entry of default -- May 21, 2001 (May 19 fell on a Saturday). Because the notice of appeal was not filed until August 21, the appeal from the default judgment is untimely.

[32]

Defendants argue that their appeal is timely because plaintiff mailed the notice of entry to the wrong address. "Code of Civil Procedure section 1012 authorizes service by mail. (. . .) In setting forth the requirements for such service, section 1013, subdivision (a), provides that the notice must be mailed `in a sealed envelope, with postage paid, addressed to the person on whom it is to be service, at the office address as last given by that person on any document filed in the cause and served on the party making service by mail; . . .' (Italics added.)" \*fn6 Under section 1013, the notice may also be addressed at the party's place of residence. \*fn7 A corporation's residence is considered to be its principal place of business. \*fn8

[33]

Here, there was no office address last given on any document filed by Sutherland because it never appeared in this action. However, in its "Statement and Designation by Foreign Corporation" filed with the California Secretary of State on May 22, 1998, Sutherland indicated that the address of its principal executive office was "24384 Sunnymead Boulevard, Moreno Valley, California" (the Sunnymead address). Alter, as president of Sutherland, executed the statement and designation. In fact, this is the address wherein Sutherland was served with the summons and complaint. Plaintiff mailed the notice of entry of judgment to the Sunnymead address.

[34]

Sutherland contends that the mailing of the notice of entry to the Sunnymead address was improper because it filed subsequent statements with the Secretary of State providing different addresses. First, in June of 2000, Sutherland filed a "Statement by Foreign Corporation," which indicated a different principal executive office in Rancho Mirage, with Allen J. Sheerin as its president. Second, on March 12, 2001, Sutherland filed a Statement by Foreign Corporation indicating that its new principal executive office was located in Pomona. These new statements, however, were filed after plaintiff had successfully served Sutherland at the Sunnymead address.

[35]

As to Alter, during settlement negotiations between plaintiff and defendants Willow and Alter, the address Alter provided to plaintiff was the Sunnymead address. This is the address wherein Alter was served with the summons and complaint. Plaintiff mailed the notice of entry of judgment to the Sunnymead address.

[36]

Defendants admit that the Sunnymead address was the correct address for defendant Willow. However, on April 27, 2000, almost one year before plaintiff mailed his notice of entry, "the Riverside Superior Court named a receiver for Willow, and authorized [the receiver] to take Willow's mail." Then, on May 18, 2000, the same court revised its

previous order and authorized the receiver to take all mail, "regardless of address, including but not limited to all mail addressed to the following: Moreno Valley, Suzi Alter, Sutherland Holdings, Ltd., . . ." (Italics added.) Based on this order, defendants allege that defendants "got no mail at Sunnymead, and could not get mail forwarded from there. So they never got notice of entry."

[37]

Defendants' contention is belied by the court's May 18 order: The court ordered the receiver forward all mail "to the Other Addressees, [which included Alter and Sutherland,] as their addresses are known to the Receiver," after he removed all checks and other payments from mail addressed to the other addressees. According to this order, all mail was to be forwarded to Alter and Sutherland. Because Alter served as president for both Willow and Sutherland, and knew about the appointment of a receiver for Willow, we fail to see how Alter would have failed to notify the receiver about her and her company's current whereabouts.

[38]

Based on the foregoing, we hold that plaintiff properly served the notice of entry to defendants at the Sunnymead address, and "service [was] complete at the time the document [was] deposited in the mail. [Citation.]" \*fn9

[39]

Therefore, defendants' appeal of the default judgment is dismissed because defendants filed their notice of appeal more than 60 days after the notice of entry was served.

[40]

II. Appeal of the Order Denying Defendants' Motion to Vacate Is Affirmed in Part and Dismissed in Part

[41]

Next, we must determine whether defendants can appeal from the denial of their motion to vacate the default and default judgment (motion to vacate).

[42]

Section 904.1, subdivision (a)(2), provides that an appeal may be taken from an order made after an appealable judgment, but "not every postjudgment order that follows a final appealable judgment is appealable." To be appealable "the issues raised by the appeal from the order must be different from those arising from an appeal from the judgment." \*fn10

[43]

Thus, "[a]n order denying a motion to vacate an appealable judgment is generally not appealable if such appeal raises only matters that could be reviewed on appeal from the judgment itself. The reason for this general rule is that to allow the appeal from the order of denial would have the effect of allowing two appeals from the same ruling and might in some cases permit circumvention of the time limitations for appealing from the judgment. [Citations.]" \*fn11

[44]

There are, however, several exceptions to this rule. The most significant exception for our purposes is that the rule does not apply where the underlying judgment is void. \*fn12 "In such a case, the order denying the motion to vacate is itself void and appealable because it gives effect to a void judgment. [Citations.]" \*fn13

[45]

A judgment is void in this sense if it is vulnerable to collateral attack. \*fn14 Thus, a judgment is void if the court rendering it lacked subject matter or personal jurisdiction, or if it granted relief it had no power to grant. A judgment is not void merely because it involved a mistake of law, violated a statute, or granted excessive relief. \*fn15

[46]

Accordingly, to determine appealability, we must examine each of defendants' contentions one by one. If a contention challenges the denial of the motion to vacate, then the essence of the contention must be that the default judgment was void; otherwise, that contention is not cognizable on appeal. Defendants had to raise all such contentions in an appeal from the default judgment, and they are barred by their failure to do so.

[47]

A. Compliance With Section 412.30

[48]

Sutherland contends that the trial court lacked jurisdiction over Sutherland because plaintiff improperly served the corporate defendants under section 412.30. Because this contention goes to whether the judgment was void, it is cognizable in this appeal.

[49]

Section 412.30 provides that: "In an action against a corporation or an unincorporated association (including a partnership), the copy of the summons that is served shall contain a notice stating in substance: `To the person served: You are hereby served in the within action (or special proceeding) on behalf of (here state the name of the corporation or the unincorporated association) as a person upon whom a copy of the summons and of the complaint may be delivered to effect service on said party under the provisions of (here state appropriate provisions of Chapter 4 (commencing with Section 413.10) of the Code of Civil Procedure).' If service is also made on such person as an individual, the notice shall also indicate that service is being made on such person as an individual as well as on behalf of the corporation or the unincorporated association. [¶] If such notice does not appear on the copy of the summons served, no default may be taken against such corporation or unincorporated association or against such person individually, as the case may be."

[50]

"Although under the case law interpreting the above statute the provisions of section 412.30 are mandatory [citations], all that is required is substantial compliance in order to render the service of summons upon a corporation effective. [Citation.]" \*fn16

[51]

In this case, plaintiff served Sutherland by personally serving Alter, its president. Absent from the record, however, is a copy of the summons that was served on Sutherland. In its brief, Sutherland has cited to portions of the proofs of service for the service of the summons, but not to the actual summons.

[52]

Obviously, if defendant Sutherland is challenging whether the service upon it was proper under section 412.30, a copy of the summons must be provided in the record. "Appealed judgments and orders are presumed correct, and error must be affirmatively shown. [Citation.] Consequently, [Sutherland, as the appellant challenging the judgment,] has the

burden of providing an adequate record. [Citation.] Failure to provide an adequate record on an issue requires that the issue be resolved against [Sutherland]. [Citation.]" \*fn17  
[53]

Notwithstanding this lack of evidence, even if we were to consider Sutherland's argument based on the proof of service filed, we would find that there was substantial compliance. The proof of service clearly indicated that Sutherland was being sued as a business, and Alter was served as president of Sutherland. In essence, Sutherland complains that there can be no substantial compliance with section 412.30 because plaintiff failed to state that Sutherland was being sued as a corporation. We disagree. Here, the evidence clearly indicates that Alter knew that she was being sued personally, and that she was served as president of Sutherland, which she knew to be a corporation. "The provisions of this chapter should be liberally construed to effectuate service and uphold the jurisdiction of the court if actual notice has been received by the defendant, and in the last analysis the question of service should be resolved by considering each situation from a practical standpoint. . . ." \*fn18  
[54]

Therefore, we hold that service upon Sutherland was proper because plaintiff substantially complied with section 412.30.

[55]

#### B. Sufficiency of the Complaint

[56]

Next, Sutherland contends that the trial court erred in denying its motion to vacate because the complaint failed to state a claim against Sutherland or allege that it was an alter ego of Willow. Moreover, both defendants contend that the default judgment is void because "it exceeded the relief sought in the Complaint, and was inconsistent with the case made by the Complaint and embraced within its issues. [Citations.]" We must determine whether such errors would void the default judgment before we address the merits of the argument.

[57]

As stated above, a judgment is void in this sense if it is vulnerable to collateral attack. \*fn19 And, "[a] collateral attack will lie only for a claim that the judgment is void on its face for lack of personal or subject matter jurisdiction or for the granting of relief which the court has no power to grant. [Citations.] The lattermost category extends to a claim that a default judgment exceeds the amount demanded in the complaint. [Citation.] However, a collateral attack will not lie for a claim that the judgment is not supported by substantial evidence [citations] nor for failure of the complaint to state a cause of action [citation]." \*fn20

[58]

Here, Sutherland is basically complaining that the complaint fails to state a valid cause of action against it or that the alter-ego liability imposed in the judgment is not supported by substantial evidence. Hence, this is not a contention that the ultimate judgment was void. Accordingly, we do not consider it.

[59]

#### C. Plaintiff's Qualification to Sue or Defend Appeal

[60]

Defendants contend that because plaintiff is a Nevada corporation that was never qualified to conduct business in California, it cannot sue on the contract or defend itself on this appeal.

[61]

This contention need not be addressed because it is not a contention that the ultimate judgment was void -- there was no lack of personal or subject matter jurisdiction and the court did not grant relief beyond its powers. Accordingly, we do not consider it.

[62]

In summary, we hold that the trial court had jurisdiction over Sutherland, and hence, the trial court properly denied defendants' motion to vacate.

[63]

III. Defendants' Appeal From the Trial Court's Denial of Their Motion for Reconsideration Is Dismissed

[64]

Defendants appeal from the denial of their motion to reconsider denial of motion to vacate default and default judgment (motion to reconsider).

[65]

"Courts are split as to whether an order denying reconsideration is appealable. Some courts allow the appeal if the underlying order was appealable and the motion for reconsideration was based on new or different facts. Other courts deem orders denying reconsideration analogous to non-appealable orders denying a new trial and, thus, treat them as non-appealable." \*fn21

[66]

We, in *Rojas v. Riverside General Hospital*, have held that an order denying a motion for reconsideration is not appealable. \*fn22

[67]

Accordingly, we hold that defendants' appeal from the denial of their motion for reconsideration is not appealable. "Because we have concluded that the denial of a motion for reconsideration is not an appealable order, we dismiss that portion of the appeal which purports to be from the trial court's denial of [defendants'] motion for reconsideration." \*fn23

[68]

DISPOSITION

[69]

Defendants' appeal of the default and default judgment is dismissed. Defendants' appeal of the denial of their motion to reconsider its motion to vacate default and default judgment is also dismissed. The trial court's denial of defendants' motion to vacate default and default judgment is affirmed. Plaintiff shall recover costs on appeal.

[70]

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[71]

We concur:

[72]

Hollenhorst, Acting P. J.

[73]

Richli, J.

## Opinion Footnotes

[74]

\*fn1 The request was not made as to Bohn, and Bohn was eventually dismissed from this case.

[75]

\*fn2 All statutory references are to the Code of Civil Procedure unless otherwise specified.

[76]

\*fn3 *Sharp v. Union Pacific R.R. Co.* (1992) 8 Cal.App.4th 357, 360.

[77]

\*fn4 *Sharp v. Union Pacific R.R. Co.*, *supra*, 8 Cal.App.4th 357, 360.

[78]

\*fn5 Section 1012 states: "Service by mail may be made where the person on whom it is to be made resides or has his office at a place where there is a delivery service by mail, or where the person making the service and the person on whom it is to be made reside or have their offices in different places between which there is a regular communication by mail." Section 1013, in pertinent part, states: "(a) In case of service by mail, the notice or other paper shall be deposited in a post office, . . . , or other like facility regularly maintained by the United States Postal Service, in a sealed envelope, with postage paid, addressed to the person on whom it is to be served, at the office address as last given by that person on any document filed in the cause and served on the party making service by mail; otherwise at that party's place of residence. The service is complete at the time of the deposit . . . . Section 1013a provides that the party serving the notice of entry of judgment provide a proof of service.

[79]

\*fn6 *Lee v. Placer Title Co.* (1994) 28 Cal.App.4th 503, 508.

[80]

\*fn7 Section 1013, subdivision (a).

[81]

\*fn8 See *Stangvik v. Shiley Inc.* (1991) 54 Cal.3d 744, 755; *Sea World, Inc. v. Superior Court* (1970) 13 Cal.App.3d 100, 104.

[82]

\*fn9 *Sharp v. Union Pacific R.R. Co.*, *supra*, 8 Cal.App.4th 357, 360.

[83]

\*fn10 *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 651.

[84]

\*fn11 *Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351, 358.

[85]

\*fn12 *Carlson v. Eassa* (1997) 54 Cal.App.4th 684, 691; *Residents for Adequate Water v. Redwood Valley County Water Dist.* (1995) 34 Cal.App.4th 1801, 1805.

[86]

\*fn13 Carlson v. Eassa, supra, 54 Cal.App.4th 684, 691  
[87]

\*fn14 Carlson v. Eassa, supra, 54 Cal.App.4th 684, 691- 692.  
[88]

\*fn15 Carlson v. Eassa, supra, 54 Cal.App.4th 684, 691- 693; see generally Estate of Buck (1994) 29 Cal.App.4th 1846, 1853- 1857.  
[89]

\*fn16 Cory v. Crocker National Bank (1981) 123 Cal.App.3d 665, 669.  
[90]

\*fn17 Hernandez v. California Hospital Medical Center (2000) 78 Cal.App.4th 498, 502.  
[91]

\*fn18 Cory v. Crocker National Bank, supra, 123 Cal.App.3d 665, 670, italics omitted.  
[92]

\*fn19 Carlson v. Eassa, supra, 54 Cal.App.4th 684, 691- 692.  
[93]

\*fn20 Molen v. Friedman (1998) 64 Cal.App.4th 1149, 1156- 1157.  
[94]

\*fn21 Alioto Fish Co. v. Alioto (1994) 27 Cal.App.4th 1669, 1679, citations omitted.  
[95]

\*fn22 Rojas v. Riverside General Hospital (1988) 203 Cal.App.3d 1151, 1160- 1161, disapproved on other grounds in Passavanti v. Williams (1990) 225 Cal.App.3d 1602, 1605- 1608.  
[96]

\*fn23 Rojas v. Riverside General Hospital, supra, 203 Cal.App.3d 1151, 1161.