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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

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| CITY AND COUNTY OF SAN FRANCISCO,<br>Plaintiff and Appellant,<br>v.<br>ARDEN VAN UPP,<br>Defendant and Respondent. | A123528<br><br>(San Francisco County Super. Ct. No. 300674) |

Appellant City and County of San Francisco (City) appeals from an order vacating a default judgment against respondent Arden Van Upp. Among other reasons for its decision, the trial court concluded the default judgment is void because the affidavit supporting service of the summons by publication is legally insufficient. We agree with the trial court and, accordingly, affirm the order vacating the default judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

The action below began as a Building Code enforcement action against Van Upp. In 1996, the City's Department of Building Inspection charged Van Upp with violating the Building Code as a result of a " '[f]ailure to make parapet walls safe in order to withstand earthquake force so as not to pose a hazard to the public during an earthquake.' "[1] The Department of Building Inspection sent Van Upp a notice in

[1] A "parapet" is defined as "a low wall or similar barrier; *esp:* one to protect the edge of a platform, roof, bridge, or other structure." (Webster Third New International Dictionary (1970) p. 1638, col. 3.)

February 1996 stating that her house at 2550 Webster Street failed to comply with the City's parapet safety program requirements. The notice advised Van Upp that the Building Code required an engineer or architect to investigate the parapets on her building and submit a written report. The notice set the date for a hearing regarding a violation of the Building Code and informed Van Upp that she could avoid the hearing by submitting the requested report.

Within ten days of the hearing in February 1996, the Director of the Department of Building Inspection issued an order of abatement against Van Upp. The Director found that conditions existed at her home in violation of the Building Code and that the parapet structure constituted a public nuisance. The Director ordered Van Upp to submit an engineer's report or apply for a permit within 30 days.

The City filed an unverified complaint against Van Upp on January 21, 1999. The complaint contained three causes of action. In the first cause of action, the City alleged that Van Upp maintained a public nuisance by failing to secure parapet walls on her property. In the second cause of action for noncompliance with an administrative order, the City alleged that Van Upp had failed to respond to the March 1996 abatement order declaring the premises a public nuisance and ordering Van Upp to take steps to abate the nuisance. In the third cause of action for a violation of the Building Code, it was alleged that Van Upp had violated the Building Code and was subject to civil penalties in the amount of $500 per day for each violation.

On April 22, 1999, after numerous attempts to personally serve Van Upp with the summons and complaint, the City filed an application to serve the summons by publication. In support of the application, the City filed the declaration of Deputy City Attorney Phoebe Libarle. Libarle declared under penalty of perjury that numerous attempts had been made to personally serve Van Upp during January and February 1999. Libarle attached a copy of the unverified complaint to the declaration. Paragraph four of the Libarle declaration purports to contain the factual support for the causes of action against Van Upp. That paragraph states in its entirety as follows: "The City's complaint in this action was filed on January 21, 1999. A true and accurate copy of the complaint is

attached hereto, as Exhibit A. The complaint contains three causes of action against Arden D. Van Upp as the property owner of the subject property, which is creating a public nuisance. The building has unsafe parapet walls that violate the San Francisco Building Code."

By order dated April 29, 1999, the trial court approved serving the summons by publication. The order directed the City to publish notice of the action at least once a week for four successive weeks in the San Francisco Daily Journal. The order further directed the City to serve Van Upp by mail at her last known address with a copy of the summons, the complaint, and the court's order for service by publication.

On June 9, 1999, the City filed proof of publication. The City filed the original summons with the court on June 15, 1999. However, the City did not at that time file a proof of service reflecting that it had served Van Upp by mail with a copy of the summons, complaint, and publication order.

At the City's request, the court entered a default against Van Upp on July 28, 1999. Following an August 31, 1999, prove-up hearing, the trial court entered both a judgment and an injunction to address the alleged Building Code violations. As set forth in the injunction, the court enjoined Van Upp from maintaining her home at 2550 Webster Street with unsafe parapet walls. The judgment ordered Van Upp to pay civil penalties totaling $614,500. In addition, the court awarded the City costs of $344.25 and attorney fees of $2,500.

On November 1, 2002, Van Upp filed a motion to set aside both the default and the default judgment. Van Upp argued that she was entitled to relief on the following grounds: her conduct constituted excusable neglect, extrinsic fraud or mistake justified vacating the default, the City failed to use reasonable means to effect personal service, and the penalties were unconstitutional. Van Upp stated in a declaration submitted with the motion that the necessary work to remedy the Building Code violation had been completed in 2001. On December 20, 2002, the trial court denied the motion to set aside the default and default judgment.

In early 2005, the City filed an application to renew the judgment. The renewed money judgment was in an amount exceeding $950,000, including postjudgment interest that had accrued since the date of the original 1999 judgment.

On May 2, 2008, Van Upp filed a motion to vacate the judgment on the ground it was void. Van Upp argued the judgment was void for three distinct reasons: (1) the City failed to mail the summons, complaint, and publication order to her; (2) the City's declaration in support of its application for service by publication failed to adequately set forth facts establishing that the City had a cause of action against her; and (3) the monetary relief granted exceeded the amount demanded in the complaint.

In its opposition to the motion, the City submitted a declaration by a legal secretary who claimed to have served Van Upp by mail in May 1999 with the summons, complaint, and order for publication of summons. A proof of service attached to the declaration reflected that the legal secretary had served the documents on Van Upp by mail on May 10, 1999. In its opposition brief, the City claimed that neither the Code of Civil Procedure nor the trial court's order for service by publication required the City to file the proof of service.

In an order filed October 17, 2008, the trial court granted Van Upp's motion to vacate the judgment as void. The court granted the motion on all three grounds asserted by Van Upp. With respect to the claim the City's declaration was insufficient to support an order for service by publication, the court's order stated: "Also, the judgment is void on the face of the record because the declaration supporting the application to serve by publication was not accompanied by an adequate declaration setting forth that the City has a meritorious claim. The statements in the L[i]barle Declaration that the property was maintained as a nuisance and had unsafe parapet walls that violate the Building Code are improper conclusions . . . . Furthermore, the declaration does not set forth specific facts showing that the declarant has personal knowledge of the facts in the declaration."

The City filed a timely appeal from the order vacating the judgment.

## DISCUSSION

On appeal, the City contends the trial court erred as a matter of law in concluding that the judgment was void. It argues the default judgment is not void on its face as a result of the City's failure to file the proof of service on Van Upp before the entry of default. It also argues the court erred in concluding that the declaration of Deputy City Attorney Libarle was insufficient to support an order allowing service by publication because of the declaration's failure to state a cause of action. Finally, it contends the court erred in concluding that the judgment exceeded the amount requested in the complaint. As explained below, we agree with Van Upp that the declaration submitted in support of the application for service by publication was legally insufficient under Code of Civil Procedure section 415.50.[2]

As both parties agree, our consideration of whether a default and default judgment comply with constitutional and statutory requirements involves a question of law to which we apply de novo review. (*Falahati v. Kondo* (2005) 127 Cal.App.4th 823, 828; see also *Transamerica Title Ins. Co. v. Hendrix* (1995) 34 Cal.App.4th 740, 741-742.)

Personal service is the preferred means to notify a defendant of the issuance of a summons and the commencement of a lawsuit. (*Olvera v. Olvera* (1991) 232 Cal.App.3d 32, 41.) When service of a summons and complaint is effected by substitute or constructive service, such as through publication of the summons, "strict compliance with the letter and spirit of the statutes is required. [Citation.]') (*Ibid.*) "[S]ervice of a summons by publication is in derogation of the common law, and in order to obtain such constructive service, the statute must be substantially complied with and its mandates observed. [Citation.]" (*Columbia Screw Co. v. Warner Lock Co.* (1903) 138 Cal. 445, 446.)

When personal jurisdiction over the defendant is accomplished by publication of the summons and such service is invalid, the resulting judgment is void and subject to collateral attack. (See *Olvera v. Olvera, supra,* 232 Cal.App.3d at p. 41; *Donel, Inc. v.*

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

*Badalian* (1978) 87 Cal.App.3d 327, 334.) A judgment that is void on the face of the record may be set aside at any time. (§ 473, subd. (d); *Manson, Iver & York v. Black* (2009) 176 Cal.App.4th 36, 47.) "A judgment is void if the court lacked jurisdiction over the subject matter or parties, for example, if the defendant was not validly served with summons. [Citation.]" (*Johnson v. E-Z Ins. Brokerage, Inc.* (2009) 175 Cal.App.4th 86, 98.)

As relevant here, an affidavit supporting an order allowing service by publication must establish (1) reasonable diligence in attempts to serve the party by other authorized means, and (2) that "[a] cause of action exists against the party . . . ."[3] (§ 415.50, subd. (a).) The parties do not dispute that the Libarle declaration establishes that the City had been reasonably diligent in attempting to serve Van Upp by other means. Instead, the focus of the parties' dispute is on whether the Libarle declaration establishes the existence of a cause of action against Van Upp.

It has long been established that a proper affidavit supporting service by publication is a jurisdictional prerequisite. (3 Witkin, Cal. Procedure (5th ed. 2008) Actions § 1035, pp. 1248-1249; see *Harris v. Cavasso* (1977) 68 Cal.App.3d 723, 726.) "The existence of a cause of action against the defendant, sought to be served by publication, is a jurisdictional fact, which must be shown as provided in the statute before an order for publication of summons can be made; and if it does not so appear, the order for publication is void, and the service by publication falls with the order. [Citations.]" (*Columbia Screw Co. v. Warner Lock Co., supra,* 138 Cal. at p. 446.)

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[3] Subdivision (a) of Code of Civil Procedure section 415.50 provides: "A summons may be served by publication if upon affidavit it appears to the satisfaction of the court in which the action is pending that the party to be served cannot with reasonable diligence be served in another manner specified in this article and that either: [¶] (1) A cause of action exists against the party upon whom service is to be made or he or she is a necessary or proper party to the action. [¶] (2) The party to be served has or claims an interest in real or personal property in this state that is subject to the jurisdiction of the court or the relief demanded in the action consists wholly or in part in excluding the party from any interest in the property."

An affidavit supporting an order for service by publication must state facts based on personal knowledge of the affiant and not on mere hearsay. (3 Witkin, Cal. Procedure, *supra,* Actions § 1037, pp. 1250.) "A number of decisions carrying out this idea say that the test of the sufficiency of the affidavit is whether it could be the foundation of an indictment for perjury if false. [Citations.]" (*Id.* at p. 1251.)

Case law offers examples of affidavits that are insufficient to show the existence of a cause of action. In *Columbia Screw Co. v. Warner Lock Co., supra,* 138 Cal. at p. 447, the court stated that an affidavit by the plaintiff's attorney based "upon information received by me from said plaintiff" was insufficient to satisfy the statute. In *Harris v. Cavasso, supra,* 68 Cal.App.3d at p. 726, the appellate court held that a verified complaint, by itself, does not satisfy the statutory requirements and "is no substitute for a sworn statement of facts which section 415.50 requires of the affiant."[4] The court concluded that "the affidavit filed by plaintiffs' attorney is devoid of any facts from which the trial court could draw the conclusion that a cause of action existed against defendants. [Citation.]" (*Ibid.*)

The decision in *Islamic Republic of Iran v. Pahlavi* (1984) 160 Cal.App.3d 620 is instructive. There, the plaintiff served the summons by publication after unsuccessfully attempting personal service on the defendant. (*Id.* at p. 623.) The court addressed whether the affidavit supporting service by publication properly established the existence of a cause of action. The court concluded the affidavit was insufficient, stating that "its contents are a medley of conclusions and political declamations and certainly fails to formulate a comprehensible cause of action." (*Id.* at p. 627.) The court continued: "It is dubious whether it would qualify for its expressed purpose if the true test of sufficiency ' " 'is whether it has been drawn in such a manner that perjury could be charged thereon if any material allegation contained therein is false.' " ' [Citation.]" (*Id.* at pp. 627-628.)

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[4] As the court in *Harris v. Cavasso* pointed out, a previous version of Code of Civil Procedure section 415.50 expressly allowed a cause of action to be shown by a verified complaint. (*Harris v. Cavasso, supra,* 68 Cal.App.3d at p. 726.) In 1969, the statute was amended and that alternative was omitted, leaving an affidavit as the only option for establishing that a cause of action exists. (*Ibid.*)

In this case, the Libarle declaration devotes just one short paragraph to the issue of whether a cause of action exists. In assessing whether the declaration satisfies the statutory requirements, we disregard the unverified complaint, which Libarle attached to her declaration, because it may not be considered as support for the existence of a cause of action even if it had been verified. (*Harris v. Cavasso, supra,* 68 Cal.App.3d at p. 726.) The only relevant "facts" set forth in the declaration are that Van Upp owned the subject property, the property was purportedly "creating a public nuisance," and the building had "unsafe parapet walls that violate the San Francisco Building Code."

The statements in the Libarle declaration are plainly inadequate to establish evidentiary support for a cause of action against Van Upp. The statement that her property was creating a public nuisance is conclusory and simply identifies the cause of action without stating any evidentiary support for it. The statement that Van Upp's building had unsafe walls in violation of the Building Code, too, is insufficient to support a cause of action. As an initial matter, the declaration fails to explain how it is that a deputy city attorney has personal knowledge of the condition of Van Upp's parapet walls or is competent to declare they are "unsafe" or in violation of the Building Code. It may be that Libarle was relying upon the abatement order or some other document prepared by the Department of Building Inspection, but we simply do not know.

Further, even if we credit the statement that Van Upp's parapet walls were in violation of the Building Code and unsafe, that statement by itself does not constitute evidentiary support for the causes of action alleged against Van Upp. The mere fact a building has unsafe parapet walls does not necessarily give rise to a public nuisance action against the owner of the building. (See *Melton v. Boustred* (2010) 183 Cal.App.4th 521, 542 [public nuisance liability does not hinge on whether defendant owns the property or is in a position to abate the nuisance; the key question is whether the defendant created or assisted in the creation of the nuisance].) Moreover, the existence of unsafe parapet walls does not support a cause of action for noncompliance with an administrative order, particularly in light of the fact that Libarle's declaration nowhere indicates that the City issued an administrative order to Van Upp or that she failed to

comply with any such order. Finally, with regard to an action for violation of the Building Code, the materials contained in the record make clear that no such cause of action exists until the City has pursued and exhausted administrative remedies against the violator.[5] The brief statement in the Libarle declaration gives no indication that Van Upp had prior notice of the violation, that she failed to comply with orders of the Department of Building Inspection, or that the City had exhausted its administrative remedies against Van Upp before pursuing a superior court action. In short, the Libarle declaration does not contain evidentiary support for a cause of action against Van Upp.

The fact that the declaration lacks evidentiary support for a cause of action is highlighted by the content of the City's brief that accompanied the Libarle declaration. Instead of relying upon the limited factual statements in the Libarle declaration, the brief either relied on the unverified complaint or failed to contain any citations supporting the City's factual assertions. Specifically, on page four of the brief, following the heading, "There are facts sufficient to support causes of action against Ms. Van Upp," the brief cites to the unverified complaint and an exhibit to the unverified complaint as support for certain assertions. However, there is no evidentiary support at all offered for most of the factual assertions in the brief that relate to whether a cause of action exists, such as the City's claims that Van Upp received a notice of violation from the City, that the City issued an order of abatement, that Van Upp failed to comply with the order of abatement, that the Department of Building Inspection determined that Van Upp's building had unsafe parapet walls, or that the parapet walls pose a hazard to the public because they lack sufficient strength and stability to withstand an earthquake. The brief simply offers these facts without citation to any supporting evidence.

We conclude the Libarle declaration is insufficient as a matter of law to establish that a cause of action existed against Van Upp. On its face, the declaration is legally

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[5] " 'Where an administrative remedy is provided by statute, relief must be sought from the administrative body and the remedy exhausted before the courts will act; a court violating the rule acts in excess of jurisdiction.' [Citations.]" (*Board of Police Commissioners v. Superior Court* (1985) 168 Cal.App.3d 420, 431-432.)

insufficient under section 415.50. As a consequence, the order allowing service by publication is void, and the resulting default judgment is necessarily void as well. (See *Harris v. Cavasso, supra,* 68 Cal.App.3d at pp. 726-727.)

In an attempt to avoid the consequences of its failure to demonstrate the existence of a cause of action, the City argues the declaration complied with section 415.50 because it established that Van Upp was a "necessary party" to its action to enforce the Building Code and had an interest in real property subject to the jurisdiction of the court. The City offers no authority for its position aside from the language of the statute itself, which does not support the City's argument.

The City relies upon a clause in section 415.50, subdivision (a)(1) providing that the affidavit in support of a request to serve the summons by publication must show "[a] cause of action exists against the party upon whom service is to be made *or* he or she is a necessary or proper party to the action." (§ 415.50, subd. (a)(1), italics added.) The City contends the Libarle declaration satisfies the statute because it sets forth facts showing that Van Upp was " 'a necessary or proper party to the action.' " We disagree with the City's unsupported assertion that a party seeking to serve a summons by publication need only show that the party to be served is a necessary party to an action. Such an interpretation would read out of the statute the requirement that an affidavit contain evidentiary support for a cause of action. We decline to adopt a statutory interpretation that would render the "cause of action" requirement mere surplusage. (*People v. Johnson* (2002) 28 Cal.4th 240, 247 ["[w]e will avoid an interpretation that makes surplusage of a portion of a statute"].) Moreover, the City's interpretation is at odds with the decisions in *Columbia Screw Co. v. Warner Lock Co., supra,* 138 Cal. 445, *Harris v. Cavasso, supra,* 68 Cal.App.3d 723, and *Islamic Republic of Iran v. Pahlavi, supra,* 160 Cal.App.3d 620. In each of those cases, it was beyond dispute that the party to be served was "necessary" or "proper," as the City interprets those terms. That fact alone did not dispense with the requirement that the moving party offer evidentiary support to show the existence of a cause of action.

The more plausible interpretation of subdivision (a)(1) of section 415.50 is that a party seeking to serve a summons by publication must show that a cause of action exists *and* that either (1) the cause of action is asserted against the party to be served, or (2) the party to be served is a necessary party to the action. "Necessary party" is a legal term of art referring to parties that ought to be joined in a lawsuit if possible. (See *County of San Joaquin v. State Water Resources Control Bd.* (1997) 54 Cal.App.4th 1144, 1149; see generally § 389.) Black's Law Dictionary defines "necessary party" as "[a] party who, being closely connected to a lawsuit, should be included in the case if feasible, but whose absence will not require dismissal of the proceedings." (Black's Law Dict. (8th ed. 2004) p. 1154, col. 2.) Here, Van Upp is the party against whom the action was asserted. She is not merely "necessary," as that term is used in legal parlance. Thus, the City's attempt to claim it satisfied section 415.50, subdivision (a)(1) simply because it showed that Van Upp was a necessary party to the action fails.

The City also relies on subdivision (a)(2) of section 415.50, which provides as an alternative to showing the existence of a cause of action that "[t]he party to be served has or claims an interest in real or personal property in this state that is subject to the jurisdiction of the court or the relief demanded in the action consists wholly or in part in excluding the party from any interest in the property." The City claims the Libarle declaration demonstrates that the party to be served owns property that is subject to the jurisdiction of the court. Once again, the City's interpretation would read the "cause of action" requirement out of the statute. Under the City's interpretation of the statute, one could obtain an order allowing service of a summons by publication merely by showing that the party to be served owns real property in the state of California, without regard to whether a cause of action has been asserted against that party. The more plausible interpretation of section 415.50, subdivision (a)(2) is that is allows service by publication when the moving party establishes that real or personal property is the basis for the court's assertion of jurisdiction, i.e., the action is one *in rem* that seeks to adjudicate interests in property. (See *Central Bank v. Superior Court* (1973) 30 Cal.App.3d 962, 965.) In this case, the causes of action are *in personam*—they seek to establish personal

liability against Van Upp for maintaining a nuisance and for failing to comply with an order of abatement. (*Ibid.* [*in personam* action seeks "to establish personal liability"].) Further, the City never suggested in the Libarle declaration or the related brief that service by publication was justified because it had established *in rem* jurisdiction. Instead, the City relied upon a claim that a cause of action existed against Van Upp, a claim we have determined is legally insufficient.

We conclude the declaration offered to support the order allowing service by publication was legally inadequate in that it failed to contain evidentiary support for a cause of action against Van Upp. We need not address the other grounds relied upon by the trial court to justify vacating the default judgment.

## DISPOSITION

The October 17, 2008, order vacating the default judgment as void is affirmed. Respondent shall be entitled to her costs on appeal.

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McGuiness, P.J.

We concur:

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Pollak, J.

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Siggins, J.