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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

STEPHEN ROBINSON et al.,

Plaintiffs and Appellants,

v.

PUBLIC STORAGE,

Defendant and Respondent.

H045607

(Santa Clara County

Super. Ct. No. 16CV296527)

Appellants Stephen Robinson and Sheila Robinson appeal the trial court's order granting respondent Public Storage's motion to vacate and set aside a default. Because a trial court's order granting a motion to vacate a default is not itself an appealable order, we dismiss the Robinsons' appeal.

**I. FACTS AND PROCEDURAL BACKGROUND**

The facts underlying the Robinsons' complaint against Public Storage are largely not relevant to this appeal. The Robinsons filed an initial complaint in June 2016 and then a first amended complaint in October 2016. The parties dispute whether Public Storage was properly served with either document.

In November 2017, the Robinsons filed a request for entry of default against Public Storage using Judicial Council Form No. CIV-100. The Robinsons checked the box titled "Entry of Default," but they did not check either of the other options marked

“Clerk’s Judgment” or “Court Judgment.” The Robinsons also left blank the section of the form labeled “Judgment to be entered.” The clerk entered the default on the day the request was filed.

A hearing was later scheduled in the trial court to “prove up” the default. In such a hearing, a “[p]laintiff is required to ‘prove up’ the default (i.e. present evidence to a judge) to obtain a default judgment in any case other than those in which a clerk’s default judgment is allowed.” (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2018) ¶ 5:171, p. 5–44.) In December 2017, the trial court issued an order vacating the prove-up hearing, citing a number of deficiencies with the Robinsons’ paperwork (the prove-up order).

On January 10, 2018, Public Storage filed a motion to set aside the default pursuant to Code of Civil Procedure section 473, subdivisions (b) and (d), arguing that it had never been served with the Robinsons’ complaints and thus the trial court had no jurisdiction to enter the default previously entered in November 2017. The Robinsons filed a written opposition.

On February 13, 2018, after a hearing (for which there is no transcript in the appellate record), the trial court granted Public Storage’s “motion to vacate and set aside default.” The trial court’s order states, “Motion to set aside default judgment is granted.” Shortly thereafter the Robinsons filed a notice of appeal from the trial court’s order setting aside the default.

## **II. DISCUSSION**

On appeal, the Robinsons contend the trial court erred in its orders vacating the prove-up hearing in December 2017 and in setting aside the default against Public Storage on February 13, 2018. Public Storage maintains that the trial court did not commit error but primarily argues that this court lacks jurisdiction because the Robinsons have appealed a nonappealable order. Based on our review of the record, we agree that we have no jurisdiction.

We first note that, while the Robinsons’ brief on appeal addresses the prove-up order, their notice of appeal does not reference it. As the notice of appeal defines the scope of the appeal, we will not review the trial court’s order from December 2017. (Cal. Rules of Court, rule 8.100(a)(2); see *Morton v. Wagner* (2007) 156 Cal.App.4th 963, 967.)

Turning to the trial court’s February 2018 order setting aside the default, we first address our jurisdiction. It is well settled that “[w]hen a trial court grants a motion to vacate a default, an appeal does not lie in the absence of entry of a default judgment.” (*Misic v. Segars* (1995) 37 Cal.App.4th 1149, 1154.) Issues relating to the granting of the defendant’s motion to set aside the default may only be raised on appeal from the judgment. (Code Civ. Proc., § 904.1, subd. (a); *Veliscescu v. Pauna* (1991) 231 Cal.App.3d 1521, 1523 (*Veliscescu*)). After careful review of the record, we conclude that it does not contain a default judgment.

We have considered that the record contains a number of references to the phrase “default judgment.” For example, the “register of actions” for this case includes an entry dated November 13, 2017 (only five days after the Robinsons filed their request for entry of default), stating, “Judgment: Notice of Entry (Civil) [¶] For: Plaintiff Robinson, Stephen; Plaintiff Robinson, Sheila.” However, this entry does not contain a reference to any document purporting to be a judgment, nor does it indicate any judgment was made “against” any party. Even assuming the clerk entered a judgment on that date against Public Storage, it would not be valid. A clerk may only enter a default judgment in limited circumstances. (Code Civ. Proc., § 585, subd. (a).) “The *clerk* always enters the *default*. Thereafter, in a limited class of cases (contract actions for money or damages; unlawful detainer), the clerk may also enter *judgment on the default*, . . . but in most cases the judgment may only be entered by the *court*.” (See 6 Witkin, Cal. Proc. (5th ed. 2008) Proceedings Without Trial, § 134, p. 572.) Those limited circumstances in which a clerk may enter judgment on the default are not applicable here. Accordingly, only the court

could enter a default judgment in favor of the Robinsons, and there is no record that it did so.

The trial court's order dated February 13, 2018, also states (without any further analysis) that it is setting aside a "default judgment." However, a trial court's order "granting defendant's motion to set aside the 'default judgment' " is not appealable where "no default judgment appears in the record." (*Leo v. Dunlap* (1968) 260 Cal.App.2d 24, 25.) As we are confronted here with such a circumstance, we have no power to make the February 2018 order appealable. (*Veliscescu, supra*, 231 Cal.App.3d at p. 1523.) Accordingly, we must dismiss this appeal.<sup>1</sup>

### **III. DISPOSITION**

The appeal from the nonappealable order of February 13, 2018, is dismissed. Public Storage is entitled to its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

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<sup>1</sup> Because we hold the order is not appealable, we need not address Public Storage's other arguments.

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DANNER, J.

WE CONCUR:

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GREENWOOD, P.J.

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BAMATTRE-MANOUKIAN, J.

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