

FILED
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THE SUPREME COURT
STATE OF WASHINGTON
No. 1011423

COURT OF APPEALS
DIVISION III
OF
THE STATE OF WASHINGTON
No. 382087

THEODORE DENISON, MARTHA DENISON and

GWENEVER (KIRA) LOREN SAPIER

PLAINTIFFS/APPELANTS

v.

SPENCER GORMAN,

DEFENDANT/RESPONDENT

Respondent's Answer to Appellants' Petition for
Review to the Supreme Court.

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I. IDENTIFY OF RESPONDENT

Spencer Gorman, Defendant in the Superior Court action and Respondent in the Division III of the Court of Appeals, requests this court to deny review of the Court of Appeals' Decision.

II. STATEMENT OF THE CASE

Plaintiff commenced this action by filing a Summons and Complaint in Spokane County Superior Court on October 23, 2019. CP 12. Plaintiff filed a Motion for Default on November 19, 2019. CP 6. The Order of Default states that service was accomplished on August 18, 2019. CP 6. Attached to the Motion for Default was the Declaration of Thomas Farrell in Support of Plaintiffs' Motion for Default. Mr. Farrell's declaration states that Defendant was served on August 18, 2019. Mr. Farrell's declaration is dated November 19, 2019. CP 10.

Attached as an exhibit to the Motion for Default was a Declaration of Service. The Declaration of Service was prepared by Farrell Law Office. The Declaration of Service was signed by Melvin Miller on October 10, 2019. Mr. Miller's declaration states that defendant was served on October 5, 2019. CP 12-13.

Counsel for plaintiffs filed a Motion for Default Judgment on November 19, 2019. The Motion for Default Judgment on Defendant states that Defendant was served on August 18, 2019. CP 17. Attached to the Motion for Default Judgment is a second declaration completed by Plaintiffs' counsel in support of Plaintiffs' Motion for Default Judgment dated November 19, 2019. CP 22-25. The second declaration of Mr. Farrell states that Defendant was served on August 18, 2019. CP 23; CP 10. The declaration in support of Default Judgment also requested costs, including fees for service of process totaling seventy-five dollars (\$75.00). CP 24.

The first hearing on the Motion for Order of Default and Default Judgment was held on December 13, 2019. The Order of Default references that Defendant was "properly served on August 18, 2019." CP 213. The Order of Default was entered by the Spokane County Superior Court on December 13, 2019. CP 214.

A subsequent hearing was held on Plaintiffs' Motion for Entry of Default Judgment. That hearing was held on January 3, 2020. Counsel filed additional memoranda and declarations in support of the

motion for default judgment. The Memorandum in Support of Default Judgment states that Defendant was served on August 18, 2019. CP 215. Counsel for the Dennison's filed his third declaration in support of Plaintiffs' Motion for Default Judgment. The third declaration states that Defendant was served on August 18, 2019. CP 240. The court entered three default judgments against Mr. Gorman on January 3, 2020. The judgments do not reference the date of service. CP 245-250.

Mr. Gorman's insurer, State Farm, learned of the Default Judgments through correspondence from Plaintiffs' counsel on January 8, 2021. Plaintiffs' counsel again referenced in his correspondence to State Farm that Mr. Gorman was served on August 18, 2019. CP 306.

Defendant Gorman moved to set aside the default judgments on March 8, 2021. CP 251.

In opposition to the Motion to Vacate Order of Default and Default Judgments, counsel for Plaintiffs filed another declaration

dated March 12, 2021. CP 417-418. Counsel again states that Mr. Gorman was served on August 18, 2019. CP 417; CP 440; CP 438.

Counsel for Plaintiff filed a second declaration from the Process Server, Mr. Miller, dated March 12, 2021. The process server stated he was unaware he was not licensed as a process server. CP 442. Mr. Miller's declaration states that he served Defendant Gorman on October 5, 2019. CP 442. The process server stated that he served Mr. Gorman's mother with an envelope. CP 443.

Judge Moreno of the Spokane County Superior Court held a hearing on Defendant's Motion to Vacate Order of Default and Default Judgments on March 26, 2021. RP at 5-8; 7-9; CP 477.

The Judge made an oral ruling at the time of the hearing. Judge Moreno was concerned about the number of irregularities by counsel in obtaining the default judgments against Mr. Gorman. RP 21:17. Judge Moreno considered the service of process argument on behalf of Mr. Gorman. The court stated there were various irregularities in the statements regarding the service of process by plaintiffs' counsel as well as conflicting Affidavits of Service filed by the process server,

Mr. Miller. RP. 22-24. Judge Moreno referenced the conflicting affidavits filed by Mr. Miller indicating he served the Summons and Complaint and that he served “Jenny” Gorman with an “envelope.” RP 22-23. Judge Moreno referred to the conflicting dates of service in the multiple declarations. RP 22-23.

The process server initially stated that Gorman was served on October 5, 2019. RP 22. Judge Moreno referred to the fact that the process server was not validly licensed. RP 23. Judge Moreno stated that she was concerned about the credibility of the process server with regard to if or when service of process occurred. RP 24.

Judge Moreno ruled that based upon all of the irregularities, the issues with service of process, and the fact that she could not conclude that there was proper service on Mr. Gorman, that she vacated the Order of Default and the Default Judgments. RP 27.

The written order vacating default and default judgments was signed and entered by Judge Moreno on April 16, 2021. CP 481-483.

Counsel for Plaintiffs did not propose an alternative order or make any argument in opposition to Defendant’s proposed order.

The Order Vacating the Order of Default states that Mr. Gorman failed to appear or answer because of improper and inadequate service on Mr. Gorman, lack of actual notice to the defendant, including irregularities in proof of service, failure to meet the requirements 50 USC § 3931(b)(1) and failure to appoint a guardian ad litem for Mr. Gorman. CP 482.

Judge Moreno found that Mr. Gorman had a meritorious defense to Plaintiffs' claims, that Mr. Gorman acted with due diligence after notice of entry of the default judgments, and that Plaintiffs would not suffer substantial hardship if the default judgments were set aside and Mr. Gorman was allowed to appear and answer. CP 482.

III. ARGUMENT

1. A Motion to Vacate an Order of Default and Default Judgment is Equitable in Nature and Relief is to be Afforded in Accordance with Equitable Principles

Relief from a default judgment is governed by equitable principles. However, the grounds and procedures to put those principles into effect are governed by CR 60(b). *White v. Holm*, 73

Wn.2d 348, 351, 438 P.2d 58-82 (1968); *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979).

The Court of Appeals applied and used an equitable analysis under CR 60(b)(5) in the *Lee v. Western Processing Inc.* action.

The Court of Appeals in *Lee v. Western Processing, Co., Inc.*, 35 Wn.App 466, 667 P.2d 638 (1983) specifically sites to the equitable test under the *White v. Holm* matter and *Griggs v. Averbeck Realty* matter. See, *Lee v. Western Processing, Co., Inc.*, 35 Wn.App. 466, 468, 667 P.2d 638 (1983). The *White v. Holm* factors apply to each subsection under CR 60(b).

Plaintiffs did not dispute that Gorman met the first, third and fourth factors of the *White v. Holm* test in the trial court or the Court of Appeals.

2. The Court of Appeals' Decision in this Action Does Not Conflict with a Prior Decision of the Superior Court or Court of Appeals.

The Court of Appeals reviewed the facts underlying Defendant's Motion to Vacate the Order of Default and Default Judgments de

novo and did not apply an abuse of discretion analysis to Judge Moreno's decision.

3. The Court of Appeals Reviewed the Evidence Underlying Gorman's Motion to Vacate Order of Default and Default Judgments de novo and any Error Referencing an Abuse of Discretion Standard is Harmless

The Court of Appeals in *Dennison v. Gorman*, Division III, No. 38208-7 III, unpublished, July 12, 2022 references an abuse of discretion standard at page 11. However, review of the Court's decision indicates that it applied a de novo review analysis to the facts underlying Gorman's Motion to Vacate Order of Default and Default Judgments. The Court of Appeals reviewed the evidence submitted through declarations by both parties at length and came to its own conclusion that Defendant Gorman was not properly served. Review of the Court of Appeals' decision shows no deference to the Superior Court's reasoning in this action. *Dennison v. Gorman*, pages 10-21. Any error in referring to an abuse of discretion standard as opposed to de novo review is harmless.

4. The Court of Appeals Determined that Plaintiffs Failed to Meet its Initial Burden to Present Prima Facia Proof of Sufficient Service of Process

Plaintiffs confuse the issues of whether or not service of process is invalid with the presumption that arises when an affidavit regular in form and substance is filed. Plaintiff never filed an Affidavit of Service in proper form or substance sufficient to create the presumption of valid service. In the absence of an Affidavit in proper form and substance, there is no presumption of validity. See, Coughlin v. Jenkins, 102 Wn.App. 60, 65, 7 P.3d 818 (2000). In the absence of a presumption, plaintiffs had the burden to establish service on Defendant Gorman. Plaintiffs' efforts to amend the Affidavits of Service only created additional discrepancies. Plaintiffs never offered sufficient proof of valid of service on Defendant Gorman. As a result, both the trial court and Court of Appeals concluded that the judgments were void under CR 60(b)(5).

Plaintiffs filed multiple conflicting declarations of service. The original Declaration of Service was not regular in form or substance. The subsequent declarations that were filed contained additional irregularities and defects that were never fully cured. As a result, the Court of Appeals concluded that the burden never shifted to Gorman.

Proper service of the Summons and Complaint is essential to evoke personal jurisdiction over a party, and a default judgment entered without proper jurisdiction is void. *Ahten v. Barnes*, 158 Wn.App 343, 349, 242 P.3d 35 (Div 1 2010). The Court has a nondiscretionary duty to vacate void judgments. A trial court's decision to grant or deny a CR 60(b) motion to vacate a judgment for want of jurisdiction is reviewed de novo. *Ahten* at 350. There is no time limit to bring a motion to vacate a default judgment that is void. *Ahten* at 350.

When a defendant challenges service of process, the plaintiff has the initial burden of proof to establish a prima facie case for service. *Gross v. Sunding*, 139 Wn.App 54, 60, 161 P.3d 380 (2007). To be sufficient, service must be accomplished according to the required statutory procedure. A plaintiff can establish a prima facie case by providing a declaration of a process server, regular in form and substance. State ex rel. *Coughlin v. Jenkins*, 102 Wn.App 60, 65, 7 P.3d 818 (2000). An affidavit of service in proper form and substance is presumed valid. There is no presumption of validity if the affidavit is not in proper form or substance. See, *Coughlin* at 65. If the

Plaintiffs file a proper Affidavit establishing service then the burden then shifts to the defendant to show by clear and convincing evidence that service was improper. Woodruff v. Spence, 76 Wn.App 207, 210, 883 P.2d 936(1994).

Plaintiff relies on *Leda V. Whisnand*, 150 Wn.App. 69, 207, P.3d 468 (2009). In *Leda*, the Court of Appeals was unable to determine whether or not Defendant's claim that there were inconsistent dates on the notices had merit because of the lack of a record before the court on the issue. The Court distinguished *Leda* from *Lee v. Western Processing, Co., Inc.* on the basis that in *Lee* there was evidence of discrepancies in the dates on the documents in addition to evidence of lack of service. *Leda* at 86.

Plaintiff never served Mr. Gorman. To establish proper service of process in this action, plaintiff was required to show proper substitute service, with an affidavit proper in form and substance. Plaintiff failed to file an Affidavit of Service in proper form and substance.

Counsel for Plaintiff filed a declaration in support of the Order of Default stating Defendant was served on August 18, 2019. CP 9.

The Declaration of Service was not attached to the Summons or endorsed on the Summons. CP 1-2. The Order of Default entered on December 13, 2019 presented by Plaintiffs' counsel, states that Defendant was properly served on August 18, 2019. CP 213-14. Plaintiffs' Motion for Order of Default against Mr. Gorman states he was served on August 18, 2019. CP 6-7. Mr. Farrell's declaration in Support of the Motion for Default states that Mr. Gorman was served on August 18, 2019. CP 9-10. The declaration of service signed by Melvin Miller is dated October 10, 2019. This declaration states that he served a "Ms. Gorman" on October 5, 2019. CP 12. Counsel filed another declaration also dated November 19, 2019 in support of the default judgments stating that service on Mr. Gorman was accomplished on August 18, 2019. CP 22-25. Mr. Farrell filed another declaration dated January 3, 2020 stating that Mr. Gorman was served on August 18, 2019. CP 240-244.

After becoming aware of the Default Judgments in January 2021, Defendant moved to vacate the Order of Default and Default Judgments, and filed supporting declarations of Spencer Gorman, CP 293-296, his mother, Jennifer Duncan, CP 351-354, and the

declaration of State Farm Claim Specialist, Stephanie Buchli. CP 299-304. The declarations unequivocally state that Mr. Gorman was not served and his mother, Jennifer Duncan, was not served through substitute service.

After the motion to vacate the Order of Default and Default Judgments were filed, Plaintiffs' counsel filed another declaration dated March 12, 2021 stating that he had Defendant properly served on August 18, 2019. CP 438-440. Counsel for Plaintiffs also filed a second declaration from Mr. Miller dated March 12, 2021 in direct conflict stating that he completed service on October 5, 2019. CP 442-443. The discrepancy in the multiple declarations of service as to the date of purported service on Defendant were never corrected or clarified. The declaration from Mr. Miller added additional confusion when he stated that he handed Ms. Duncan an "envelope" that he told her was for her son. CP 443. The declarations of service were not in proper form, were not endorsed on the Summons or attached to the summons. Plaintiffs are not entitled to a presumption of validity with regard to the declarations of service because the multiple davits of Service were not in proper form or substance, were not endorsed on

the Summons, and were not attached to the Summons. As a result, the burden to establish that service of process was improper never shifted to Defendant.

The multiple inconsistencies in the various declarations filed by Mr. Farrell and Mr. Miller combined with the declarations from Mr. Gorman and Jennifer Duncan, establish that Mr. Gorman was not properly served with the Summons and Complaint in this action. In the absence of proper service on Mr. Gorman the Superior Court lacked personal jurisdiction over Mr. Gorman and the Order of Default and Default Judgments were void and were properly vacated under CR 60(b)(5).

The burden is on counsel for Dennison to file an Affidavit of Service that was regular in form and substance. Failure to file an Affidavit of Service that was regular in form and substance was insufficient to trigger the presumption of service.

Discrepancies in the dates of the documents create doubt as to whether or not a Summons and Complaint are properly served. Discrepancies in the declarations of service filed by Mr. Miller and Mr. Farrell compared with the dates that the Complaint was signed and

filed combined with the failure to attach or endorse the Affidavit of Service on the Summons as required by CR 5(g)(2) creates substantial evidence that service of the Summons and Complaint never occurred. See, Lee v. Western Processing Co., Inc., 35 Wn.App 466, 469-70, 667 P.2d 638 (1983).

Plaintiffs' failure to file an Affidavit of Service in proper form or attach the Affidavit of Service to or endorse it on the Summons and Complaint as required by CR 4(g) is substantial evidence that plaintiffs did not serve Defendant Gorman as reflected in their multiple declarations of service and filings in this action.

Plaintiffs' failure to file an Affidavit of Service that was regular in form and substance was insufficient to trigger the presumption of proper service.

The evidence submitted by Plaintiff on if or when Mr. Gorman was served was conflicting, lacked credibility or weight even after Plaintiffs were given the opportunity to correct the multiple declarations of service.

Defendant Gorman provided clear and convincing evidence to the trial court that Mr. Gorman was not served with the Summons and

Complaint. The Order of Default and Default Judgments were properly vacated under CR60(b)(5).

5. This Action Does Not Involve an Issue of Substantial Public Interest under RAP 13.4(b)(4).

Division III Court of Appeals' decision in this matter is unpublished. It has no precedential value.

6. The Court of Appeals Did not Rule on Defendant's Arguments Under CR 60(b)(11).

The Court of Appeals did not reach Gorman's arguments under CR 60(b)(4), CR 60(b)(11) or any of the alternative arguments asserted by Gorman to vacate the Order of Default and Default Judgments in either the Superior Court or the Court of Appeals. *Gorman v. Dennison*, 2022 WL 2677513 (Unpublished Div. III, July 12, 2022) pg. 15.

CONCLUSION

Respondent Spencer Gorman respectfully requests this court deny review of the Court of Appeals decision in this action.

This document contains 3052 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 2 day of September 2022.

WAGNER, LULOFF & ADAMS, P.L.L.C.



Gary R. Luloff, WSBA #20287
Attorney for Respondent

CERTIFICATE OF SERVICE I hereby certify under penalty of the perjury under the laws of Washington that on the 2nd day of September 2022, I personally mailed a true and correct copy of the foregoing document "Respondent's Answer to Appellants' Petition for Review to the Supreme Court" with postage prepaid to the following:

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