Supreme Court Appeal No. 90396-4

SUPREME COURT OF THE STATE OF WASHINGTON

Washington State Court of Appeals, Division III, Case No. 312160

CAPITAL ONE BANK (USA), N.A.

Respondent

V.

CHARMON WALLACE

Appellant

APPEAL FROM SPOKANE CASE NO. 10-2-04750-1

RESPONDENT'S ANSWER TO MOTION FOR DISCRETIONARY REVIEW

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TABLE OF AUTHORITIES

WASHINGTON STATUTES

WASHINGTON COURT RULES

IDENTITY OF RESPONDENT

Respondent is Capital One Bank (USA) N.A. the Plaintiff in the Trial Court proceeding and the judgment creditor.

DECISION

The Unpublished Opinion of Division III of the Court of Appeals filed on May 13, 2014, affirming the Trial Court's decision denying the Respondent's Motion to Vacate the Default Judgment entered against the Respondent.

RESPONDENT'S COUNTER STATEMENT OF THE CASE

The Appellant was personally served with a copy of the Summons and Complaint on May 11, 2010. CP 1-5, 6. No Notice of Appearance or communication or response to the Summons and Complaint was received by Respondent's counsel. When the Appellant failed to Appear in the action or respond to the Summons and Complaint, a Default Judgment was entered on November 16, 2010, in the amount of $5247.70. CP 7-15, 16. After the entry of the Default Judgment, the Appellant was mailed a copy of the Default Judgment at her address of 1506 E Desmet Ave, Spokane, WA 99202-2724. CP 160 paragraph 3. The letter was not returned to Respondent's counsel as an undeliverable and no response was made to the letter. CP 160 paragraph 3.

The Respondent then noted a Supplemental Proceeding for March 31, 2011. CP 18-20. The Appellant was served and appeared and claimed that she had responded to the underlying Summons and Complaint by letter. At the Supplemental Proceeding on March 31, 2011, Respondent's counsel advised the Appellant that he would agree to strike the Supplemental Proceeding to further investigate the matter. CP 168 paragraph 6. During the discussion between Respondent's counsel and the Appellant at the Supplemental Proceeding on March 31, 2011, the Appellant admitted that she owed the debt and stated that it was her desire to resolve the matter. CP 168 paragraph 7. The parties tentatively agreed on a figure that Respondent's counsel agreed to confirm with his client. CP 168 paragraph 7. Respondent's counsel did not agree to vacate the Judgment at the meeting with the Appellant on March 31, 2011, nor any time thereafter. CP 168 paragraph 6. After returning to his office and reviewing the file, Respondent's counsel confirmed that Respondent's law firm had no record of receiving the Appellant's letter dated June 30, 2010. CP 168 paragraph 6.

On April 6, 2011, Respondent's counsel sent a letter to the Appellant agreeing to settle the matter for $3,500.00, payable either in a lump sum or at $250.00 a month. CP 168 paragraph 8 & 172. This letter advised the Appellant that her failure to adhere to the terms of the

Settlement Agreement would result in other collection activity. CP 168 paragraph 8 & 172. The Appellant made the first four payments in May, June, July, and August of 2011. CP 168 paragraph 9 & 174. All of these payments were received after their respective due dates. CP 168 paragraph 9 & 174. The Appellant then failed to make the payment due in September of 2011, and only made a partial payment of $100, which was also received late, in October of 2011. CP 168 paragraph 9 & 174. In September 2011, a reminder letter was sent to the Appellant for the missed payment. CP 168 paragraph 10. She failed to respond to the September, 2011 letter about her missed payment or to make payments pursuant to the terms of the Agreement. CP 168 paragraph 10. On February 22, 2012, the Appellant made a payment of $1,000.00, which was applied to the balance; however, even after the payment was applied, there was still $400.00 needed to cure the default under the payment plan. CP 168 paragraph 10. When no payments were received in March or April 2012, a Writ of Garnishment was issued. CP 168 paragraph 10.

A Motion for Order to Show Cause was filed and issued by the Spokane Superior Court on July 25, 2012, CP 158-159 and Appellant's counsel then served the Order to Show Cause to Vacate the Judgment and Quash the Garnishment and supporting documents on the Respondent, by serving the Respondent's registered agent.

No documents regarding the Motion to Vacate the Judgment under CR 60 and to Quash the Garnishment were sent to Respondent's counsel, despite the fact that Respondent's counsel had appeared in the action and had been representing the Respondent and actively dealing with Appellant's counsel on the resolution of the garnishment issue and despite the fact that Appellant's Motions not only involved a Motion to Vacate under CR 60 but also a Motion to Quash the Garnishment. see CR 5(b)(1). CP 170 paragraph 17.

Respondent's counsel first became aware of the August 17, 2012, Order to Show Cause hearing on Monday, August 13, 2012, after Capital One Bank, the Respondent, e-mailed a copy of the Appellant's Motions to its attorneys. CP 170 paragraph 17. Upon receiving notice of the hearing, Respondent's counsel immediately contacted Appellant's counsel and asked Appellant's counsel to continue the hearing one week to the day the following week when Respondent's counsel was scheduled to be in Spokane so Respondent' counsel could be able to be present in Spokane County Superior Court for oral argument and could have an opportunity to timely respond. CP 170 paragraph 17, CP 186 and RP August 17, 2012, pages 9-10. Appellant's counsel refused the request. CP 170 paragraph 17.

After considering the evidence presented in support of the Motion and in opposition to the Motions and following oral argument, the Court denied the Appellant's Motion to Vacate the Judgment and Quash the Garnishment. Following the Court's oral ruling, Appellant's counsel exited the court room and, therefore, the Order could not be entered at that time because Appellant's counsel was not present. A notice of presentation of a proposed order was noted and scheduled and was ultimately heard by Judge Cozza on September 18, 2012. CP 244-246. The proposed order included language which stated:

". . . The Court finds that Plaintiff's Default Judgment against the Defendant was properly entered November 16, 2010. Defendant was not entitled to notice of entry of the judgment. Defendant was on notice that the judgment had been entered for more than one year before bringing this motion as evidence by the parties' agreement and the Defendant's partial performance of said judgment. . . ." CP 247-248

At the time of the presentation, Appellant's counsel objected to the finding in the order. Judge Cozza stated in response to Appellant's argument:

> ". . . I think that I am going to do; I am going to go ahead and leave the next to the last paragraph as is. I think that that is a correct statement at this point. So I will go ahead, then, and ask Mr. Miller to go ahead and note his objection on here, and we will enter this at this point. . . ."
> RP September 18, 2012 pages 3-4

Following an interlineations on the Order and Appellant's counsel's approval of the form of the Order ". . . with objection to finding

with respect to entitlement to Notice of Entry of Judgment," the Order Denying Appellant's Motion to Vacate Judgment and Motion to Quash Garnishment was entered by Judge Cozza and Appellant filed a Notice of Appeal. CP 247-248.

ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

The decision of the Trial Court was affirmed by Division III of the Court of Appeals by Unpublished Opinion. The Unpublished Opinion of the Court of Appeals affirms that decision of the Trial Court based on the disputed facts of that particular case and is limited to that case. The Unpublished Opinion does not involve an issue of substantial public interest, is not in conflict with any decisions of the Supreme Court or the Court of Appeals, and does not "open the door for more widespread abuse of the Washington Court system by mass litigators such as the Respondent herein." The Petition for Discretionary Review should be denied for the reasons outlined below.

First, the Opinion of Division III of the Court of Appeals is an unpublished opinion and the Court of Appeals has not be asked to publish the opinion. Because it is an unpublished opinion it has no precedential value except as it relates to affirming the decision of the Trial Court denying the Appellant's Motion to vacate the default judgment entered in that action. The unpublished opinion is based on the disputed facts in this

particular case and does not involve an issue of substantial public interest and is not in conflict with any decisions of the Supreme Court or the Court of Appeals.

Secondly, the Trial Court properly denied the Motion to Vacate finding based on the conflicting evidence that the Appellant was not entitled to notice of the default judgment and the default judgment was properly entered. The Court of Appeals properly affirmed the decision of the Trial Court.

Here, the Respondent's attorneys have denied ever receiving the letter dated June 30, 2010, that the Appellant contends that she mailed. In addressing that issue the Court of Appeals stated at page 10-11:

> ". . . Here, the trial court entered no findings on the disputed issues of whether Ms. Wallace sent or the bank's lawyers received the ostensible June 2010 letter. It made only ultimate findings that 'Plaintiff's Default Judgment against the Defendant was properly entered,' because 'Defendant was not entitle to notice of entry of the Judgment.' CP at 247. We know from these findings that the trial court believed either (1) that the letter was not sent or received or (2) that the letter was insufficient to constitute an appearance even if sent and received. We do not know which. Still we are able to affirm the trial court's order refusing to vacate the default because the June 2010 letter is insufficient to constitute an appearance even if it was sent and received. . . ."

A Trial Court's decision on a motion to vacate a Default Judgment will not be disturbed on appeal unless the Trial Court has abused its

discretion. Morin v. Burris, 160 Wash. 2d 745, 753, 161 P. 3rd 956 (2007); Yeck v. Dep't of Labor & Industries, 27 Wash. 2d 92, 95, 176 P.2d 359 (1947). An Appellate Court reviews the denial of a motion to vacate under CR 60(b) for abuse of discretion. Vance v. Offices of Thurston County Comm'rs, 117 Wash.App. 660, 671, 71 P.3d 680 (2003). "Discretion is abused when it is exercised on untenable grounds or for untenable reasons' Luckett v. Boeing, 98 Wn.App. 307, 309–10, 989 P.2d 1144 (1999) (*quoting Lane v. Brown & Haley*, 81 Wash.App. 102, 105, 912 P.2d 1040 (1996); see also, Griggs v. Averback Realty, Inc., 92 Wn. 2d 576, 582, 599 P.2d 1289 (1979); State v. Santos, 104 Wn.2d 142, 145, 702 P.2d 1179 (1985); Braam v. State, 150 Wash.2d 689, 706, 81 P.3d 851 (2003); Lane v. Brown & Haley, supra and only the propriety of the denial, not the impropriety of the underlying Judgment, is before the reviewing court. Barr v. MacGugan, 119 Wash.App. 43, 78 P.3d 660 (2003).

Appellate Courts review questions of law de novo Department of Ecology v. Campbell & Gwinn, L.L.C., 146 Wash.2d 1, 9, 43 P.3d 4 (2002), and will not overturn the findings of fact by the trial court if supported by substantial evidence. Thorndike v. Hesperian Orchards, Inc., 54 Wn. 2d 570, 343 P.2d 183 (1959). "Substantial evidence" does not mean uncontradicted evidence, but rather that character of evidence which

would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. Arnold v. Samstol, 43 Wn. 2d 94, 98, 260 P.2d 327 (1953). An Appellate Court will not ordinarily substitute its Judgment for that of the trial court even though it might have resolved the factual dispute differently. Beeson v. Arco, 88 Wn.2d 499, 563 P. 2d 822 (1977). The trial court is generally free to believe or disbelieve a witness in reaching factual determinations. State v. Chapman, 78 Wn.2d 160, 469 P. 2d 883 (1970).

The Court's opinion in Morin v. Burris, supra and its analysis of the Court rules that are applicable are clearly relevant to the present case and the unpublished opinion does not overrule or expand the Supreme Court's holding in that opinion: The Court stated beginning at page 753:

> ". . . This narrow question is best addressed in its larger context and requires us to consider several different civil rules and standards. Under CR 4(a)(3), a "notice of appearance" shall "be in writing, shall be signed by the defendant or his attorney, and shall be served upon the person whose name is signed on the summons." Default judgment is largely governed by CR 55, but CR 60 also sets forth when a judgment may be vacated or set aside.
>
> A party who has appeared in an action is entitled to notice of a default judgment hearing and, if no notice is received, is generally entitled to have judgment set aside without further inquiry. *Tiffin*, 44 Wash.2d at 847, 271 P.2d 683. CR 55 does not define "appear" or "appeared." It provides that, "[w]hen a party against whom a judgment for affirmative relief is sought has failed to appear, plead, or otherwise defend as provided by these rules and that fact is made to appear by motion and affidavit, a motion for

default may be made." CR 55(a)(1). The rule further provides, "[f]or good cause shown and upon such terms as the court deems just, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with rule 60(b)." CR 55(c)(1). CR 60 sets out specific grounds upon which a party may apply to set aside a default judgment. Much litigation focuses on whether default judgment should be set aside because of inadvertence, excusable neglect, surprise, or irregularity in obtaining the judgment or order. CR 60(b)(1).

Again, we do not favor default judgments. *Griggs v. Averbeck Realty, Inc.*, 92 Wash.2d 576, 581, 599 P.2d 1289 (1979). We prefer to give parties their day in court and have controversies determined on their merits. *Id.* (quoting *Dlouhy v. Dlouhy*, 55 Wash.2d 718, 721, 349 P.2d 1073 (1960)). A proceeding to vacate or set aside a default judgment is equitable in its character, and the relief sought or afforded is to be administered in accordance with equitable principles and terms. *Roth v. Nash*, 19 Wash.2d 731, 144 P.2d 271 (1943). Thus, for more than a century, it has been the policy of this court to set aside default judgments liberally. *Hull v. Vining*, 17 Wash. 352, 360, 49 P. 537 (1897) (" 'where there is a showing, not manifestly insufficient, the court should be liberal in the exercise of its discretion in furtherance of justice.' ") (quoting Robert Y. Hayne, New Trial and Appeal § 347).

Applying CR 55 and CR 60 liberally, this court has required defendants seeking to set aside a default judgment to be prepared to establish that they actually appeared or substantially complied with the appearance requirements and were thus entitled to notice. CR 60(b); *Dlouhy*, 55 Wash.2d 718, 349 P.2d 1073.[FN2] Or, alternately, defendants may set aside a default judgment if they meet the four part test set forth in *White:*

FN2. The other grounds set forth in CR 60(b) are not before us. (1) That there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by the opposing party; (2) that the moving party's failure to timely appear in the action, and answer the opponent's claim, was occasioned by mistake, inadvertence, surprise or excusable

neglect; (3) that the moving party acted with due diligence after notice of entry of the default judgment; and (4) that no substantial hardship will result to the opposing party. *White*, 73 Wash.2d at 352, 438 P.2d 581 (citing *Hull*, 17 Wash. 352, 49 P. 537). Finally, a default judgment should be set aside if the plaintiff has done something that would render enforcing the judgment inequitable. *See* *Trickel*, 52 Wash. 13, 100 P. 155; *cf.* CR 60(b)(4) (allowing default to be set aside based on fraud, misrepresentation, or misconduct by adverse party).

Turning to the narrower issue of what constitutes an "appearance" under the civil rules, for over a century, this court has applied the doctrine of substantial compliance. *See, e.g.*, *Trickel*, 52 Wash. 13, 100 P. 155. We have not exalted form over substance but have examined the defendants' conduct to see if it was designed to and, in fact, did **962 apprise the plaintiffs of the defendants' intent to litigate the cases. However, where we have applied the substantial compliance doctrine, the defendant's relevant conduct occurred after litigation was commenced. *Trickel*, 52 Wash. at 14, 100 P. 155 (the defendant did not file a formal notice of appearance but served interrogatories upon the plaintiff); *cf.* *Dlouhy*, 55 Wash.2d at 722, 349 P.2d 1073 (defendant's personal appearance in court in divorce action to oppose temporary restraining order sufficient to establish appearance); *Warnock v. Seattle Times Co.*, 48 Wash.2d 450, 452, 294 P.2d 646 (1956) (service of the demand for security for costs was sufficient to constitute appearance); *Tiffin*, 44 Wash.2d at 844, 271 P.2d 683 (withdrawal of defendant's counsel did not rescind appearance after written notice of appearance was served on plaintiff's counsel); *State ex rel. LeRoy v. Superior Court*, 149 Wash. 443, 271 P. 87 (1928) (defendants appearance on a bond in an unlawful detainer action).

It appears to us that mere intent to defend, whether shown before or after a case is filed, is not enough; the defendant must go beyond merely acknowledging that a *dispute* exists and instead acknowledge that a dispute exists *in court.* Respondents misread *Dlouhy* as supporting a far broader understanding of what can constitute an appearance. *Dlouhy* held that an appearance *in court* to

resist a motion to convert a temporary restraining order into an injunction was a general appearance entitling the defendant to notice of the default judgment hearing. *Dlouhy*, 55 Wash.2d at 722, 349 P.2d 1073. In effect, this court held that by actually appearing in court the defendant substantially complied with the appearance requirement. *Dlouhy*, 55 Wash.2d at 719, 724, 349 P.2d 1073.

Respondents may have been misled by dicta in *Gage v. Boeing Co.*, 55 Wash.App. 157, 776 P.2d 991 (1989). In *Gage*, the Court of Appeals held that the defendant had appeared in the lawsuit under Washington statutory law by appearing and vigorously contesting the plaintiff's claims in the administrative hearing that led to the court case. *Id.* at 162, 776 P.2d 991. Although the *Gage* court mentioned in passing that other jurisdictions had recognized the concept of informal appearance, the court explicitly did not reach whether it was the law of *this* state. *Id.* Subsequently, at least two divisions of our Court of Appeals have relied upon *Gage* and its progeny to adopt the informal appearance doctrine. E.g., *Matia Inv. Fund*, 129 Wash.App. at 546, 119 P.3d 391 (Division Two); *Skilcraft Fiberglass v. Boeing Co.*, 72 Wash.App. 40, 45, 863 P.2d 573 (1993) (Division One). In *Skilcraft*, the court also set aside default judgment on the appropriate grounds that plaintiff's counsel misled defendants. *Id.; see also* CR 60(b)(4).

Certainly, there is appeal to the concept of less formal forms of dispute resolution; under some circumstances, less formal forums are available. *See, e.g.*, ch. 7.04A RCW (uniform arbitration act). But litigation is inherently formal. All parties are burdened by formal time limits and procedures. Complaints must be served and filed timely and in accordance with the rules, as must appearances, answers, subpoenas, and notices of appeal. Each has its purpose and each purpose is served with a certain amount of formality monitored by judicial oversight to ensure fairness.

We believe that our existing approach of liberal application of rules permitting equity, vacation of default judgments, and application of substantial compliance adequately promote justice. The informal appearance doctrine urged by

> the respondents would permit any party to a dispute, or any claims representative to a potential dispute, to simply write a letter expressing intent to contest litigation, then ignore the summons and complaint or other formal process and wait for the notice of default judgment before deciding whether a defense is worth pursing. If a less formal approach to litigation is to be adopted, it should be by rule and not by this court's adoption of an informal appearance rule. Parties formally served by a summons and complaint must respond to the summons and complaint or suffer the consequences of a default judgment. Accordingly, we hold that parties cannot substantially comply with the appearance rules through prelitigation **963 contacts. Parties must take some action acknowledging that the dispute is in court before they are entitled to a notice of default judgment hearing, . . . "

Here, there was conflicting evidence about whether the Defendant had appeared in the action prior to entry of the Order of Default and Default Judgment. The Appellant contended that she sent a letter to Respondent's counsel approximately 1 ½ months after she was personally served and Appellant contended that this letter with its text constituted an appearance. Other than the Appellant's contention that she sent it, she had no proof that it was received. The letter that was attached to her Declaration which she stated was a reproduction of the letter she allegedly mailed not signed and did not contain the attachments referred to in the letter.

Respondent's counsel denies that the Appellant's June, 2010 letter was received. Respondent's counsel stated in his Declaration in

Opposition to the Motion that after reviewing all electronic notes and records on this file, he stated that his office received no communication or response from the Defendant to the Summons and Complaint personally served on her on May 11, 2010 and his office did not received the June 30, 2010 letter attached to the Appellant's Declaration until she presented it to Respondent's counsel, at the Supplemental Proceeding on March 31, 2011. Respondent's Counsel also stated in his Declaration that his office received no response to the demand letter sent to the Appellant on or about March 4, 2010.

After considering the evidence presented and after hearing oral argument, the Trial Court found that the Default Judgment was properly entered and the Appellant was not entitled to notice of entry of the Default Judgment. Based on the evidence considered by the Trial Court, the Trial Judge did not abuse his discretion in finding "that Plaintiff's Default Judgment against the Defendant was properly entered November 16, 2010. Defendant was not entitled to notice of entry of the Judgment." The Trial Court's finding is supported by substantial evidence and should not be disturbed on appeal.

Here, there is substantial evidence to support the finding of the Trial Court that Appellant was not entitled to notice of the entry of the Judgment and the Trial Court did not abuse its discretion in denying the

Motion to Vacate the Default Judgment and this Court should not accept review of the Unpublished Opinion of Division of the Court of Appeals.

CONCLUSION

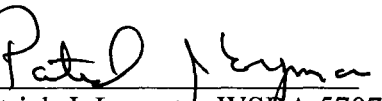
The Respondent denies ever receiving the June 30, 2010, letter the Appellant contends she mailed and as a result a Default Judgment was entered against her. In her letter and at the post judgment supplemental proceedings, the Appellant admitted that she owed the debt. After she entered into a payment plan that she subsequently defaulted on, and over a year and a half after she admits she was aware of the debt, she finally moves to vacate the Default Judgment. After considering the conflicting evidence, the Trial Court found that the Default Judgment was properly entered and the Appellant was not entitled to notice of entry of the Default Judgment.

The decision of the Trial Court was affirmed by Division III of the Court of Appeals by unpublished opinion. The Unpublished decision of the Court of Appeals affirms that decision of the Trial Court based on the disputed facts of that particular case. The Unpublished Opinion does not involve an issue of substantial public interest, is not in conflict with any decisions of the Supreme Court or the Court of Appeals, and does not "open the door for more widespread abuse of the Washington Court

system by mass litigators such as the Respondent herein." The Appellant's Petition for Discretionary Review should be denied.

Dated this 21 day of July, 2014.

SUTTELL & HAMMER, P.S.



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CAPITAL ONE BANK (USA), N.A. Respondent vs. CHARMON WALLACE Appellant	SUPREME COURT No. 9-0396-4 CERTIFICATION OF MAILING

TO: Clerk of the Court

AND TO: Appellant & her Attorneys

I certify that on July 21, 2014 I mailed, postage prepaid, a copy of the Respondent's Answer to Motion for Discretionary Review to:

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