No. 312160

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CAPITAL ONE BANK (USA), N.A., RESPONDENT,

vs.

CHARMON WALLACE, APPELLANT.

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. The Court erred in denying Defendant's Motion to Vacate the Default Judgment after an appearance by letter by the defendant in an unfiled case.
2. The Court erred in entering Judgment against the Defendant where the Plaintiff failed to provide required documents and information pursuant to Spokane County Local Court Rules.
3. The Court erred in denying Defendant's Motion to Vacate the Default Judgment since the Plaintiff did not provide any notice of its Motion for Default Judgment to the Defendant.
4. The Court erred in denying Defendant's Motion to Vacate the Default Judgment since the Plaintiff's attorney promised to vacate the default judgment but failed to do so.
5. The court erred in refusing to enforce the settlement which Plaintiff unilaterally claimed was breached and that the Plaintiff claimed unilaterally as a remedy for the breach was enforcement of a judgment it had agreed to vacate.
6. The court erred by suspending the local rules on lack of timeliness of Plaintiff's response to the Order to Show Cause to Vacate but refusing to consider the Reply to this late file information. The

Court erred by refusing to strike and then considering the conclusory hearsay affidavit of the attorney for the Plaintiff.

FACTS

This lawsuit was commenced on May 11, 2010, by the service of a Summons and Complaint. *CR 3(a); CP 6; see CP 1-5.* But the lawsuit was *not filed* until November 10, 2010. As is the common practice of the Plaintiff's collection law firm, the lawsuit was first filed in conjunction with a Motion and Declarations for Default. *CP 1-5.*

On June 30, 2010, the defendant [Wallace] prepared and mailed a Notice of appearance in the form of a letter to Plaintiff's counsel Suttell & Hammer, P.S.. *CP 125, paragraph 5; CP 129.* The letter fully complied with CR 4(a)(3) (notice of Appearance) since it was written, signed by the Defendant Charmon Wallace, and mailed to "Suttell and Hammer, 1450 114th Ave. SE #240, Bellevue, WA 98004". CR 4(a)(3); *CP 129.* At the hearing on the Order to Show cause regarding vacation of the judgment, the court acknowledged that Ms. Wallace had sent the letter defending the lawsuit to the Suttell law firm. The Court said: "I look at one important bit of evidence that was submitted by the defendant here; the letter of June 30th. 'I received your Summons and am responding'". *Transcript of August 17, 2012 hearing, p. 19, lines 5-7.* In the June 30, 2010 letter, Ms.

Wallace says she "disputes the charge applied to the account as I do not feel they are just...the account balance, fees, and interest applied to this account are unjust... I was promised the fees would stop." CP 129; CP 48. It is undisputed that the Plaintiff did not give notice of the November 10, 2010 hearing for default despite the June 30, 2010 appearance letter responding to the Summons.

On November 16, 2010, the Court entered an Order of Default. *CP 16.* Plaintiff Capital One Bank, N.A. did not serve any notice of the Motion for Default, despite the Notice of Appearance served by Defendant Wallace. CR 55(a)(3) ("Any party who has appeared in the action for any purpose shall be served with a written notice of motion for default and the supporting affidavit at least 5 days before the hearing on the motion."); CP 125, paragraph 5; CP 129.

On March 7, 2011, the Plaintiff obtained an order requiring the Defendant to appear for supplemental proceedings pursuant to RCW 6.32 (Served on the Defendant on March 20, 2011). *CP 21-22; CP 23.* On March 31, 2011, the Defendant appeared for the supplemental proceedings (as required by the March 7, 2011 order). *CP 126.* Ms. Wallace met with attorney Mark Case of Suttell and Hammer, P.S. *CP 126, paragraph 12.* Ms. Wallace provided Mr. Case with a copy of her June 30, 2010 Notice of Appearance sent to Suttell and Hammer. *CP 126, paragraph 12.* Mr.

Case contacted his office and confirmed that no notice of default had been sent to Ms. Wallace and that she had appeared in the lawsuit before the default was entered. *CP 126, paragraph 13-14.* Mr. Case promised to vacate the default judgment. *CP 126, paragraph 15*; *CP 48-49.* Mr. Case cancelled the Supplemental Proceedings and Ms. Wallace was allowed to leave the courthouse[1]. *CP 126, paragraph 16.* Mr. Case and Ms. Wallace discussed the possibility of settlement. Unknown to Ms. Wallace, Mr. Case failed to follow through and vacate the judgment as he had promised.

In April 2011, Mr. Case and Ms. Wallace entered into a settlement agreement discounting the claim against her. CP 50; CP 49. In the settlement offer letter, there is no mention of a judgment. CP 50. Mr. Case never informed Ms. Wallace that he would not vacate the judgment as he had promised at the courthouse on March 312, 2011. CP 48. Ms. Wallace paid most of the settlement amount. CP 51-56. She settled "under the impression that I was entering a settlement under my own will" and not coerced by a judgment that Mr. Case had told her he would vacate. CP 49.

On July 25, 2012, the Court entered an Order directing the Plaintiff, Capital One Bank, N.A. to appear and show cause why the default judgment entered on November 16, 2010, should not be vacated

[1] Ms. Wallace was compelled to attend the Supplemental Proceedings

setting the hearing for August 17, 2012. *CP 158-159; see CP 125-129, 137-143 144-145, 150, 152-103.*

On July 27, 2012, Defendant Wallace timely and properly served upon Plaintiff Capital One Bank NA's registered agent, the Court Order to show cause and other pleadings in support of vacating the Default Judgment. *CR 60(e)(3) ("Service. The motion, affidavit, and the order to show cause shall be served upon all parties affected in the same manner as in the case of summons in a civil action.");see Spokane LCR 40(b)(10); CP 249.*

Plaintiff Capital One Bank, NA failed to timely respond to the motion to quash garnishment and failed to timely respond to the Court's Order to Show Cause regarding vacating thee garnishment judgment and vacating the default judgment. Plaintiff Capital One Bank NA's Response to the Motion to Vacate and the Court's Order was *due* August 10, 2012. *Spokane LCR 40(b)(10) ("Any responding documents must be served and filed at least seven days before the hearing').* On August 14, 2012 (three days prior the hearing) Plaintiff Capital One Bank, N.A. finally filed (late) a Response memorandum and Declaration. *CP 160-187; see Spokane LCR 40(b)(10).* Despite the extreme lateness of the Response, on August 15, 2012, Defendant Wallace *timely* filed a Reply memorandum and supporting declaration. *CP 188-209; Spokane LCR 40(b)(10).* On August

16, 2012, (One day before the hearing) Plaintiff Capital One Bank NA filed *another* Response Memorandum and Supplemental Declaration. *CP 210-233.* Therefore, on August 17, 2012, Defendants counsel filed another Reply Declaration in response to the Plaintiff's late-filed Response and Supplemental Response. CP 234-243. The court refused to consider Plaintiff Wallace's second Reply but the Court considered both of Plaintiff Capital One Bank NA's late-filed responses. The Defendant Wallace's Reply to the Supplemental filings of Plaintiff Capital One Bank, N.A. included excerpts of deposition testimony of Mr. Case, directly rebutting the second late filed declaration of Mr. Case by demonstrating that Mr. Case had testified in other case that he has an almost complete lack of knowledge regarding the correspondence that is received by his law firm for the 200,000 pending cases, and that he has in the past promised to do things at the Spokane County Courthouse but completely forgotten to follow through by the time he returns to his office in Bellevue, Washington.

At the conclusion of the August 17, 2012 hearing, the court ruled that "the judgment itself was properly entered, was properly obtained, and it will stand in this case." 8/17/2012 RP 20:24-25; 21:1. Defendant's counsel then stated to the court "our argument, in a nutshell, was she (Wallace) was entitled to notice of the default hearing; she didn't get

notice. How are you ruling on that?" 8/17/2012 RP 21:5-7. The court ruled that the Defendant "had proper notice." Id. At 21:8. There is absolutely nothing in the record to indicate that Ms. Wallace received any notice of the November 10, 2010 Motion for Default. In fact Ms. Wallace testified that she did not receive any notice. CP 126, paragraph 7.

The Court was aware that Defendant Wallace had responded to the Summons and Complaint but had not been given notice of the hearing for default, but the Court refused to vacate the default. Cf *RCW 4.28.210.* The Court's September 18, 2012, written order states in part that "Defendant was on notice that the Judgment had been entered for more than one year before bringing this Motion...". Ms. Wallace believed that Mr. Case would keep his word and vacate the default and that she has settled the Plaintiff's claim for a discounted amount. The Court further determined that "Defendant was not entitled to notice of entry of the Judgment." CP 247-248; but cf CR 55. The Court denied the Defendant's Motion to Vacate the default judgment. *Id.*

On April 5, 2012, the court issued a writ of garnishment for the Defendant's bank account. *CP 29-30.* On May 8, 2012 the Defendant filed an exemption claim along with an untitled "Written Motion". *CP 43-57.* The Defendant's May 8, 2012, "Written Motion" stated in pertinent part that the Defendant responded to the Summons and Complaint and that she

was assured by Plaintiff's counsel that the case would be dismissed. *CP 48-49.* On May 15, 2012, the Spokane County Superior Court found the funds held in the Defendant's bank account were nonexempt and awarded the Plaintiff a judgment of the garnished funds in the amount of $3,940.82. *CP 59-60.*

STATEMENT OF THE CASE

Plaintiff obtained a default judgment without notice to the defendant who had appeared by letter to the Plaintiff's attorneys in an unfiled case. The judgment is void.

STANDARD OF REVIEW

A trial court has no authority to enter a default judgment against a party who has appeared but did not receive proper notice. CR 55(a)(3); *Shreve v. Chamberlin*, 66 Wash.App. 728, 731, 832 P.2d 1355 (1992), review denied, 120 Wash.2d 1029, 847 P.2d 481 (1993). As a result, a party who did not receive required notice is entitled as a matter of right to have a default judgment set aside. *Tiffin v. Hendricks*, 44 Wash.2d 837, 847, 271 P.2d 683 (1954); see also *Ware v. Phillips*, 77 Wash.2d 879, 884–85, 468 P.2d 444 (1970) (holding a lack of notice voids a judgment on due process grounds).

The court reviews de novo questions of law, including questions of adequacy of notice, constitutional law, and whether, on undisputed facts,

appearance has been established as a matter of law. *Rosander v. Nightrunners Transp., Ltd.*, 147 Wash. App. 392, 399, 196 P.3d 711, 714 (2008); *Dep't of Ecology v. Campbell & Gwinn, LLC,* 146 Wash.2d 1, 9, 43 P.3d 4 (2002).

"A decision on a motion to vacate a final order for lack of jurisdiction as void is reviewed de novo..." 2A Wash. Prac., Rules Practice RAP 2.5 (7th ed.).

"Because Washington law disfavors default judgments, the court is more likely to find an abuse of discretion and to reverse a trial court decision refusing to vacate a default judgment than one that sets aside such a judgment". *White v. Holm*, 73 Wn.2d 348, 351–52, 438 P.2d 581 (1968); *Showalter v. Wild Oats*, 124 Wn.App. 506, 511, 101 P.3d 867 (2004).

"A trial court's decision to grant or deny a motion to vacate a default judgment is generally reviewed for an abuse of discretion." *Allstate Ins. Co. v. Khani*, 75 Wash. App. 317, 323-24, 877 P.2d 724, 727-28 (1994) ; *Leen v. Demopolis,* 62 Wash.App. 473, 478, 815 P.2d 269 (1991), *review denied,* 118 Wash.2d 1022, 827 P.2d 1393 (1992)). "However, a court has a nondiscretionary duty to vacate a void judgment." *Id* ; *In re Marriage of Markowski,* 50 Wash.App. 633, 635, 749 P.2d 754 (1988); *Brickum Inv. Co. v. Vernham Corp.,* 46 Wash.App. 517, 520, 731 P.2d 533 (1987).

ARGUMENT

A. Defendant Wallace properly made a Notice of Appearance in Compliance with CR 4(a)(3)

CR 4(a)(3) provides that "A notice of appearance, if made, 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." *CR 4(a)(3); RCW 4.28.210("A defendant appears in an action when she ... gives the plaintiff written notice of his or her appearance").* In this case, on June 30, 2010, Ms. Wallace responded to the Summons and Complaint "in writing". *Id; CP 129.* She signed the letter. *Id.* She mailed the letter to the Plaintiff's attorneys, Suttell & Hammer. *Id.* Ms. Wallace formally and in full compliance with the CR 4(a)(3) made a notice of appearance. *Id.* But even an informal appearance would preclude a default being entered. "After commencement of a legal action, a defendant or his attorney may informally comply with the notice requirements of CR 4 by acknowledging the existence of the action and apprising the plaintiff of his intent to defend." *Old Republic Nat. Title Ins. Co. v. Law Office of Robert E. Brandt, PLLC,* 142 Wash. App. 71, 73, 174 P.3d 133, 134 (2007).

The concept of "appearance" is construed broadly for purposes of CR 55. *City of Des Moines v. Personal Property Identified as $81,231 in U.*, 87 Wash. App.689, 943 P.2d 669 (1997) *Skilcraft Fiberglass, Inc. v.*

Boeing Co., 72 Wash.App. 40, 45, 863 P.2d 573 (1993) (citing *Gage v. Boeing Co.*, 55 Wash.App. 157, 161, 776 P.2d 991 (1989)). "Whether a party has "appeared"... is generally a question of intention, as evidenced by acts or conduct, such as the indication of a purpose to defend or a request for affirmative action from the court, constituting a submission to the court's jurisdiction." *Gage v. The Boeing Company*, 55 Wash.App. 157, 161, 776 P.2d 991 (1989). See *Dlouhy v. Dlouhy*, 55 Wash.2d at 722, 349 P.2d 1073 (1960).

"In the normal course, a party 'appears' in an action when the party 'answers, demurs, makes any application for an order therein, or gives the plaintiff written notice of his appearance.'" *Ellison v. Process Sys. Inc. Const. Co.*, 112 Wash. App. 636, 643, 50 P.3d 658, 661 (2002) (citing: RCW 4.28.210). Whether a party has appeared is generally "a question of 'intention, as evidenced by acts or conduct, such as the indication of a purpose to defend.' " *Gage v. Boeing Co.*, 55 Wash.App. 157, 161, 776 P.2d 991 (1989) (quoting Annotation, What Amounts to "Appearance" Under Statute or Rule Requiring Notice, to Party Who Has "Appeared," of Intention to Take Default Judgment, 73 A.L.R.3d 1250, 1254 (1976)).

B. Defendant Wallace was entitled to Notice of the Default Hearing.

CR 55(a) provides in relevant part:

> (3) Notice. Any party who has appeared in the action for any purpose shall be served with a written notice of motion for default and the supporting affidavit at least 5 days before the hearing on the motion.

CR 55(a)(3); RCW 4.28.210(After appearance a defendant is entitled to notice of all subsequent proceedings). CR 55 was " 'intended to protect those parties who, although delaying in a formal sense by failing to file pleadings within the twenty-day period, have otherwise indicated to the moving party a clear purpose to defend the suit' " *Gage*, 55 Wash.App. at 161, 776 P.2d 991. Default judgments are normally viewed as proper only when the adversary process has been halted because of an essentially unresponsive party. *Gage*, 55 Wash.App. at 160-61, 776 P.2d 991 (citing *Livermore*, 432 F.2d at 691) . Defendant Wallace sent written, signed correspondence to the Plaintiff regarding this case. CP 125, 129. At the time that the letter was sent to Plaintiff's counsel, it is noteworthy that the action was not filed in the Spokane County Superior Court. The Defendant had no opportunity before the Plaintiff moved the Court for Default and Default Judgment to appear by filing her appearance with the Superior Court. It was not until November 10, 2010, the same day that the Plaintiff moved the Court for Default and Default Judgment, that this cause of action was filed. Because she had appeared in the action by sending written correspondence directly to the Plaintiff's representatives

after this action was commenced by service of the Summons and Complaint, Defendant was entitled to notice before entry of an Order of Default.

C. The Judgment Entered against the Defendant Is Void

"A trial court has no authority to enter a default judgment against a party who has appeared but did not receive proper notice." *Rosander v. Nightrunners Transport, Ltd.*147 Wash.App. 392,399, 196 P.3d 711, 714 (2008)(citing: CR 55(a)(3); *Shreve v. Chamberlin*, 66 Wash.App. 728, 731, 832 P.2d 1355 (1992), review denied, 120 Wash.2d 1029, 847 P.2d 481 (1993)). "As a matter of law, a defendant who appears in an action but is not given notice of a plaintiff's intention to seek an order of default is entitled to have any such order vacated." *Smith ex rel. Smith v. Arnold*, 127 Wash. App. 98, 105, 110 P.3d 257 260-61 (2005) (citing: CR 55(a)(3)). "If the court enters an order of default in a case where an appearing party lacks notice, the defaulted party is entitled as a matter of right to have the judgment set aside." *Ellison v. Process Sys. Inc. Const.* Co., 112 Wash. App. 636, 642, 50 P.3d 658, 661 (2002)(citing: *Shreve v. Chamberlin*, 66 Wash.App. 728, 731-32, 832 P.2d 1355 (1992)).

"A judgment is considered void as opposed to merely erroneous when the court lacks jurisdiction of the parties or the subject matter or lacks the inherent power to enter the particular order involved". *Doe v. Fife Mun.*

Court, 74 Wash. App. 444, 449, 874 P.2d 182, 185 (1994)(citing: *Bresolin,* at 245, 543 P.2d 325). "A void judgment must be vacated whenever the lack of jurisdiction comes to light." *Id* (citing: *Mitchell v. Kitsap Cy.,* 59 Wash.App. 177, 180-81, 797 P.2d 516 (1990).

"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. *Morin v. Burris*, 160 Wash. 2d 745, 755, 161 P.3d 956, 961 (2007) (citing: CR 60(b); *Dlouhy*, 55 Wash.2d 718, 349 P.2d 1073.

Default judgments are disfavored in the law. If a default judgment is rendered against a party who was entitled to, but did not receive, notice, the judgment *will be* set aside. *Tiffin v. Hendricks*, 44 Wash.2d 837, 847, 271 P.2d 683 (1954) (emphasis added). "As a result, a party who did not receive required notice is entitled as a matter of right to have a default judgment set aside." *Id.* (citing: *Tiffin v. Hendricks,* 44 Wash.2d 837, 847, 271 P.2d 683 (1954); *see also Ware v. Phillips,* 77 Wash.2d 879, 884-85, 468 P.2d 444 (1970) (holding a lack of notice voids a judgment on due process grounds)).

Defendant Wallace appeared and was entitled to notice before entry of the order of default. No balancing of the equities was required or allowed.

The trial court lacked subject matter jurisdiction to enter judgment. The trial court erred in determining that the passage of time and whether the defendant exhibited excusable neglect were relevant to the vacate analysis. Since defendant was not provided with any notice prior to entry of the default judgment, the court lacked jurisdiction. The judgment is therefore void and must be vacated.

D. Default Judgment Failed to Comply with Local Rules

In addition to the Plaintiff's failure to provide required notice, the default proceeding was irregular because it was granted without the insufficient documentation required by local court rule. LCR 55(b) requires that the following be "on file with the motion for default judgment":

> (4) On causes of action based on open account where the complaint is not specific, the last written statement of account sent to the debtor setting forth current charges and credits and the dates thereof and a statement of any interest or surcharges which are included...

Plaintiff included no properly authenticated "statement of account". Nowhere are "current charges", "credits" and "statement of interest or surcharges" found in any of the documents submitted in support of the Plaintiff's Motion for Default and Default Judgment. Spokane LCR 55(b)(9) states that "no judgment for accrued interest shall be allowed

unless there is on file proof of the factors necessary for computation of interest, including applicable dates, rate of interest, amounts subject to interest and the computation of the total interest claimed due."

The judgment entered in this case contains accrued interest. However, proof of the factors necessary for computation of the accrued interest is conspicuously absent and it is questionable whether this plaintiff would ever be able to obtain such required proof.

Once the Default judgment is vacated, litigation may proceed as though no default judgment was entered. "As a general matter, default judgments are not favored because, '[i]t is the policy of the law that controversies be determined on the merits rather than by default.'" *Little v. King*, 160 Wn2d 696, 703, 161 P.3d 345 (2007) (citing *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979)).

Respectfully submitted this 15th day of March, 2013.

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CERTIFICATE OF SERVICE

I certify that on the 15th day of March, 2013, I caused a true and correct copy of this Brief of Appellant to be served on the following in the manner indicated below:

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