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No. 70917-8

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JACOB A. BECKWITH,

Respondent/Plaintiff,

v.

SEIL REVELS and SQPUTT, LLC, a Washington limited liability company,

Appellants/Defendants.

APPELLANTS' BRIEF

ATTORNEYS FOR Defendants/Appellants
SEIL REVELS and SQPUTT, LLC

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I. Introduction

This appeal seeks reversal of default judgments that were entered against an individual and a limited liability company (LLC). The default judgments were entered only because the defendants' lawyers were negligent and the judgment against the LLC was entered after the defendant had answered the complaint.

The trial court vacated both judgments, but the Order vacating the judgments was conditioned on payment of attorney fees and costs that the defendants could not pay. The trial court exceeded its authority by imposing conditions and the condition he imposed was an abuse of discretion under all the circumstances.

II. Assignments of Error

1. The trial court erred by imposing a condition to the Order Vacating Default Judgment.

2. The trial court abused its discretion by ordering payment of attorney fees and costs from defendant rather than the attorneys whose negligence allowed the default judgments to be entered.

Issues Pertaining to Assignments of Error

1. No statute grants the trial court power to make an order vacating a default judgment conditional on payment of terms. While pursuant to CR

55 and 60, the court may impose "such terms as are just" when vacating a default judgment, should that power include the power to take the defendants' property where the defendants' attorneys negligently allowed the judgments to be entered?

2. Is it just to punish the client for the lawyers' mistakes?

3. Did the trial court abuse its discretion by conditionally vacating the judgments and then re-instate the judgments when the defendants could not pay the attorney fees award?

4. Did the condition imposed in the order vacating the judgments deny the defendants access to justice?

III. Statement of the Case

Appellants, Seil Revels and SQPUTT, LLC, were defendants in a suit brought by Respondent, Jacob Beckwith. CP 1.

The claims in the suit arise from an invention and the efforts of the inventor to manufacture and sell the invention. CP 1, 2. SQPUTT, LLC is a Washington Limited Liability Company that was formed to manufacture and market the invention. CP 2, 3. Seil Revels is the inventor and he is the Manager of SQPUTT, LLC. CP 4.

In August 2011, Mr. Revels offered to bring Mr. Beckwith in to the venture as an investor and possible manufacturer of the product. CP 1, 2. They had a falling out, and Mr. Beckwith commenced suit against Mr.

Revels and SQPUTT, LLC by filing a Complaint in King County Superior Court on May 28, 2013. CP 1. Less than 30 days later, default judgments were entered against both defendants after they had retained counsel. CP 15, 16, 25, 26, 38.

The Superior Court file is accessible online and it shows that on June 4, 2013 the process server filed an Affidavit of Service stating that he served Mr. Revels on May 30, 2013. CP 7. Mr. Beckwith served SQPUTT, LLC's registered agent at Davis Wright Tremaine on June 3, 2013. CP 8.

Mr. Revels retained Seattle attorney Ryan Hogaboam, and the firm of inVigor Law Group PLLC to defend the case. CP 37, 38. Mr. Revels met with them to discuss the case on June 18, 2013. CP 38. At the end of the meeting they agreed to represent SQPUTT, LLC and Mr. Revels, and one of his attorneys said they would file the Answer on June 20, 2013.[1]

They did not file the Answer as promised, and a default judgment was entered against Mr. Revels personally on June 21, 2013. CP 15, 16.

The defense lawyers filed the Answer on behalf of both defendants on June 24, 2013. CP 18.

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[1] In accordance with the language and spirit of RAP 9.10 and 9.11, Appellants request the court take into account Mr. Revels' Declaration in Support of Motion on the Merits, which Commissioner Neel denied on November 5, 2013.

On June 25, 2013 a Default and Judgment was entered against SQPUTT, LLC. CP 25. Mr. Beckwith and his attorneys gave no notice of the motion for entry of default judgment against SQPUTT, LLC. CP 34.

The defense attorneys neglected to serve the Answer until July 12, 2013. CP 47. They filed their Notice of Appearance for Mr. Revels and SQPUTT, LLC even later, on July 15, 2013. CP 41.

The defense attorneys filed a Motion to Vacate the Judgments. CP 30-36. But it was denied for defective procedure. CP 66 - 68. The second attempted Motion to Vacate was filed on August 5, 2013 and noted for hearing without oral argument. CP 69. After making four findings of fact, on August 15, 2013 the trial court, Judge Jim Rogers, vacated both Judgments ***conditionally***. CP 140, 141. The condition was that Mr. Revels pay plaintiff's attorney fees and costs allegedly incurred in obtaining the default judgments and responding twice to the two Motions to Vacate the Judgments. CP 140-144.

The trial court then set the attorney fees. The Order Awarding Attorney's Fees and Setting Deadline for Payment/Satisfaction of Conditional Order is dated August 30, 2013 and it was filed on September 3, 2013. CP 164, 165. It gave Mr. Revels 14 days to pay. The Order said if the defendants did not pay, then the Default Judgments "shall remain in

full force and effect and defendants shall be entitled to no further relief from entry of said judgments." CP 164, 165.

Mr. Revels had no funds with which to pay the award.[2] He asked his former attorneys to pay some or all of the award because it appeared to him that the Default Judgments were entered due to their mistakes. After agreeing to take the case, they failed to telephone, email, FAX or otherwise notify plaintiff's attorneys of the fact that they were appearing as counsel. They should have done so on June 18, 19, and/or 20. If they had taken this simple step, then the Defendants would have been entitled to notice of Plaintiff's Motion for Entry of Default on June 21.[3] The defense lawyers told Mr. Revels they would not pay.

IV. Argument

A. The standard of review.

The standard of review of an error of law as to the scope of a trial court's authority in imposing a condition not set forth in a statute is *de novo*. *State v. Hooper*, 154 Wn.App. 428, 225 P.3d 446 (Div. 3 2010).

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[2] Appellants request, again, the court take into account Mr. Revels' Declaration in Support of Motion on the Merits, in accordance with the language and spirit of RAP 9.10 and RAP 9.11.

[3] No expert testimony should be required to conclude the attorneys were negligent in failing to serve and file the Notice of Appearance until over three weeks after the default judgments were entered.

Where the trial court has discretion, the standard of review is abuse of discretion. *Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007).

B. Default judgments are not favored.

Justice Chambers stated the principles governing default judgments most recently in *Morin v. Burris, Id.*, Justice Bridges concurring. He wrote for the unanimous Court:

> Again, we do not favor default judgments. We prefer to give parties their day in court and have controversies determined on their merits. 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. Thus, for more than a century, it has been the policy of this court to set aside default judgments liberally. *Hull v. Vining*, 17 Wn. 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). (Other internal citations omitted.).

The appellate court's "primary concern is that a trial court's decision on a motion to vacate a default judgment is just and equitable." *Showalter v. Wild Oats*, 124 Wn.App. 506, 101 P.3d 867 (Div. 2 2004).

In depriving the Defendants of their day in court, the trial court was unmoved by these principles.

C. SQPUTT, LLC was entitled to notice of the entry of default.

The defense attorneys filed an Answer to the Complaint on June 24, 2013. That was an appearance and the defendant was entitled to notice of all further proceedings. The default judgment against SQPUTT, LLC was

improper because no notice of the proceeding was provided to anybody. RCW 4.28.210 is set forth in its entirety here.

> RCW 4.28.210
> Appearance, what constitutes.
> A defendant appears in an action when he or she answers, demurs, makes any application for an order therein, or gives the plaintiff written notice of his or her appearance. After appearance a defendant is entitled to notice of all subsequent proceedings; but when a defendant has not appeared, service of notice or papers in the ordinary proceedings in an action need not be made upon him or her. Every such appearance made in an action shall be deemed a general appearance, unless the defendant in making the same states that the same is a special appearance.

A plain reading of the statute says that a defendant appears in the action when it does one of two things: answers the complaint **or** gives the plaintiff written notice of his or her appearance. In this case, the defendant answered the complaint before the plaintiff ran down to *ex parte* to obtain its default judgment.

CR 55(a)(3) is the same: "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."

Mr. Beckwith may argue that because CR 12(a) says that a "defendant shall serve his answer" the filing of the answer is of no moment. But that would be incorrect. The entry of a default and judgment is governed by

CR 55(a)(1), and it states in relevant part, "*Motion*. When 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." The defendants did "plead or otherwise defend" and in accordance with RCW 4.28.210, the Answer was an appearance.

The *Buris* Court's admonition that principles of equity and justice call for a liberal approach to vacating default judgments should be applied to this case. The Answer was an appearance and, consequently, absent notice, the court did not have jurisdiction to enter a default judgment. It is as simple as that.

The judgment against SQPUTT, LLC was entered unlawfully and should be reversed.

D. It was an error of law under these circumstances to make the vacation of the default judgment conditional.

1. No statute grants the trial court power to make the order vacating a default judgment conditional on payment of terms.

The trial court's power to vacate a judgment is stated in RCW 4.72.010. App. A-1. The relevant portion of RCW 4.72.010(3) says:

> The superior court in which a judgment or final order has been rendered, or made, shall have power to vacate or modify such

judgment or order: (3) For mistakes, neglect or omission of the clerk, or irregularity in obtaining a judgment or order.

This statute contains no grant of power to impose conditions. Under the plan terms of the statute, once the court finds that the judgment was entered by mistake, neglect or omission of the clerk or irregularity on obtaining the judgment, it should be vacated.

RCW 4.72.050[4] does set a condition precedent to vacation, but the only condition is that there be a valid defense to the action in which the judgment was rendered. The trial court found there was substantial evidence of a prima facie defense to the claim. CP 140, 141.

RCW 4.72.060[5] grants the court the power to first try the alleged grounds for vacating a judgment, but it does not grant the court the power under these circumstances to impose any condition before a default judgment may be vacated.

The trial court made the following findings of fact:

1. Substantial evidence exists to support, at least prima facie, a defense to the claim asserted by the opposing party;

2. The moving party's failure to timely appear in the action and answer the opponents claim was occasioned by mistake, inadvertence, surprise or excusable neglect;

3. The moving party acted with due diligence after notice of entry of the default judgment; and

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[4] Appendix A-2
[5] Appendix A-2

4. No substantial hardship shall result to the opposing party. CP 140, 141.

These findings are not contested. In view of these findings, the decision to vacate the default judgments was well within the trial court's discretion.

But imposing a condition not established in the statutory authority to vacate judgments was an unlawful exercise of power and an error of law and it should be reviewed *de novo* and reversed.

2. No court rule grants the trial court power to impose conditions for the vacation of default judgments like the ones in this case.

CR 55(c)(1) states, "for 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)." (Emphasis added). CR 60(b) also provides that the court may impose "such terms as are just". However, neither rule grants the power to make vacation of a default judgment "subject to" or "conditioned upon" payment of attorney fees. The court should not interpret the Civil Rules to empower the trial court to impose such a heavy handed and unjust condition, especially under these circumstances.

Imposing terms that may be reduced to judgment or applied to offset any eventual recovery is one thing. But it is a far different thing to

automatically re-instate a large money default judgment entered less than 30 days after the suit was commenced where the court made the findings that there was a defense, that the failure to appear and answer was the result of mistake, inadvertence, surprise or excusable neglect, that the party acted with diligence upon notice of the default, that there is no hardship on the opposing party, and there is no evidence of any misconduct or discovery violation or any other problem. In the face of those findings, making the order vacating the default judgment subject to or conditioned upon payment of attorney fees under the circumstances here would be completely inconsistent with the general principles of liberality and equity re-stated by Justice Chambers in *Morin v. Burris*, supra, 160 Wn.2d 745. No justice was done here. The opposite is true.

The court's decision in *Knapp v. Savidge*, 32 Wn.App. 754, 649 P.2d 175 (Div. 1 1982) is no precedent for a grant of power to condition the vacation of a default judgment on the payment of attorney fees. In *Knapp*, the presiding court dismissed a case that was called for trial and the plaintiff's attorney failed to appear. Plaintiff moved to vacate the order of dismissal under CR 60(b) and the court granted the motion and conditioned the dismissal upon payment of attorney fees.

Citing CR 60(b), which allows the court to set aside a final judgment "upon such terms as are just", the court wrote, "The decision to impose

terms as a condition on an order setting aside a judgment lies within the discretion of the court," citing *Pamelin Indus., Inc. v. Sheen-U. S. A., Inc.*, 95 Wn.2d 398, 622 P.2d 1270 (1981) and *Hendrix v. Hendrix*, 101 Wn. 535, 172 P. 819 (1918). But those were not decisions in cases where the default judgment was entered less than 30 days after the suit was commenced and then only because the dismissed party's lawyers negligently failed to serve a notice of appearance until three weeks after the default judgments were entered.

In *Pamelin Indus., Inc. v. Sheen-U.S.A., Inc.*, the default judgment was granted as a CR 37 sanction for discovery violations where the sanctioned party ignored court orders to provide discovery, and the holding was that the trial court did not abuse its discretion by setting aside the judgment on condition that defendants pay plaintiffs' attorney fees and post a $50,000 performance bond. And in *Hendrix*, again, the sanctions were imposed because the party seeking to vacate a prior judgment in a divorce case failed to comply with multiple court orders. The motion to vacate was filed *after* a trial of the matter and it appeared the moving party had attempted to hide assets. These two decisions should be no precedent for imposing a condition in this case.

In the end, in *Knapp*, the court concluded the court abused its discretion in awarding terms as a condition for vacating the order of

dismissal and re-instated the complaint. If anything, *Knapp* stands for the proposition that the award of terms here was an abuse of discretion.

Here, the default judgments were entered less than 30 days after the complaint was filed and then only because the defendants' very young and inexperienced lawyers did not know enough to telephone or email or FAX plaintiff's attorney and say "we are appearing for the defendants." There was no violation of court orders or misconduct or other untoward conduct warranting severe sanctions. In the absence of such misconduct, under these circumstances, the trial court should not have power to condition the vacation of a default judgment on payment of sanctions.

3. The civil rules cannot be used to deprive a party of substantive rights in the absence of a statutory grant of power.

The Civil Rules "govern the procedure in the superior court in all suits of a civil nature." CR 1. The Supreme Court's "coextensive authority with the superior courts to make rules governing practice and procedure in the superior courts is limited to procedural matters and not matters affecting substantive rights." *Sackett v. Santilli*, 146 Wn.2d 498, 47 P.3d 948, (2002), Justice Anderson in dissent citing *State v. Smith*, 84 Wn.2d 498, 501, 527 P.2d 674 (1974).

"Substantive law [a legislative function] prescribes norms for societal conduct and punishments for violations thereof. It thus creates, defines,

and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated." *State v. Thomas*, 121 Wn.2d 504, 851 P.2d 673, (1993), citing *Emwright v. King Cy.*, 96 Wn.2d 538, 543, 637 P.2d 656 (981) (quoting *State v. Smith*, 84 Wn.2d 498, 501, 527 P.2d 674 (1974)).

As shown above, the statutory grant of power to the trial court to vacate judgments in RCW 4.72.010 does not include the power to make a vacation of a default judgment under these circumstances conditional upon payment of attorney fees. Construing Civil Rules 55 or 60 to permit the court to vacate a default judgment conditionally in these circumstances deprives the defendant of substantive rights. The substantive right here is the right to a trial of the claim. It is the right of access to the courts. And the end result may be the loss of substantial property.

The people have a right of access to courts; indeed, it is "the bedrock foundation upon which rest all the people's rights and obligations." *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991). Citing a principle apt here in view of the defendants' inability to pay the attorney fee award, the *Puget Sound Blood Ctr* Court said:

> The administration of justice demands that the doors of the judicial system be open to the indigent as well as to those who can afford to pay the costs of pursuing judicial relief", and "[c]onsistent with

> our affirmative duty to keep the doors of justice open to all with what appears to be a meritorious claim for judicial relief, we hold that the plaintiff is entitled to the relief requested [waiver of fees and costs].

The civil rules did not give the trial court the power he invoked to deprive the defendants of their day in court.

D. Imposing a condition was an abuse of discretion.

Assuming only for purposes of argument that the trial court had such power, the imposition of the condition in this case was clearly an abuse of discretion. There is no justice whatsoever in the trial court's order.

As stated in *Morin v. Burris*, supra, 160 Wn.2d 745:

> We review a trial court's decision on a motion for default judgment for abuse of discretion. Discretion is abused if it is exercised on untenable grounds or for untenable reasons.

Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. *Doe v. Puget Sound Blood Center*, 117 Wn.2d 772, 819 P.2d 370 (1991), citing, *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

"A ruling based on an error of law constitutes an abuse of discretion." *King v. Olympic Pipeline Co.*, 104 Wn.App. 338, 355, 16 P.3d 45 (Div. 1

2000). The court could and should find an abuse of discretion because the trial court exceeded his statutory authority.

There is no transcript or other record showing the basis for the trial court's draconian ruling. The defense attorneys noted the motion to vacate judgment "without oral argument". CP 69. [6] The Conditional Order to Vacate did not explain why the court did what he did. CP 140, 141. When setting the attorney fees award, Judge Rogers wrote in this comment: "This award deducts $468.75 because the default judgment against the corporate defendant was entered after the answer was filed but not served." *Id.*. (emphasis in original). Why would the failure to serve the answer be a basis for reducing the award of attorney fees?

That fact makes Mr. Gossler's declaration that SQPUTT, LLC "failed to answer or otherwise plead in this action" false. CP 23. Rather than deduct fees, trial court should have unconditionally vacated the judgment against SQPUTT, LLC and imposed sanctions against Mr. Gossler for asking the *ex parte* Commissioner to rely on a false declaration. It was an error of law to do anything else and, therefore, an abuse of discretion.

The complaint was filed on May 28, 2013 and plaintiff's attorneys ran down to court the first possible day to enter default judgments exactly 21 days after service of process. While technically within their rights as to

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[6] That is further evidence of their negligence.

Mr. Revels, Judge Rogers' severe and hard line approach does not meet the Court's admonition that "the court should be liberal in the exercise of its discretion in furtherance of justice." *Morin v Burris*, supra. The condition he imposed is neither just nor equitable. *Showalter v. Wild Oats*, supra, 124 Wn.App. 506. There is no tenable ground or reason for the condition he imposed; it was an abuse of discretion to re-instate a substantial money judgment under these circumstances.

E. Making defendant pay for his lawyers' mistakes was an abuse of discretion.

The defendant was lead to believe on June 18, 2013 that he had competent counsel to defend the suit. The first default was entered three days later, the second default was entered seven days later and neither default would have been entered if the defense attorneys has simply picked up the telephone and called plaintiff's counsel to announce their appearance. Mr. Revels did nothing wrong in entrusting his lawyers to do what was necessary to protect his rights.

There is no tenable ground or reason to compel the client to pay for the sins of his lawyers. It was unjust to do so here. It was an abuse of discretion.

Appendix A-1

RCW 4.72.010
Causes for enumerated.

The superior court in which a judgment or final order has been rendered, or made, shall have power to vacate or modify such judgment or order:

(1) By granting a new trial for the cause, within the time and in the manner, and for any of the causes prescribed by the rules of court relating to new trials.

(2) By a new trial granted in proceedings against defendant served by publication only as prescribed in RCW 4.28.200.

(3) For mistakes, neglect or omission of the clerk, or irregularity in obtaining a judgment or order.

(4) For fraud practiced by the successful party in obtaining the judgment or order.

(5) For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings.

(6) For the death of one of the parties before the judgment in the action.

(7) For unavoidable casualty, or misfortune preventing the party from prosecuting or defending.

(8) For error in a judgment shown by a minor, within twelve months after arriving at full age.

Appendix A-2

RCW 4.72.050
Conditions precedent to vacation.

The judgment shall not be vacated on motion or petition until it is adjudged that there is a valid defense to the action in which the judgment is rendered; or, if the plaintiff seeks its vacation, that there is a valid cause of action; and when judgment is modified, all liens and securities obtained under it shall be preserved to the modified judgment.

RCW 4.72.060
Grounds for vacation may first be tried.

The court may first try and decide upon the grounds to vacate or modify a judgment or order, before trying or deciding upon the validity of the defense or cause of action.

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I, Michael J. Bond, certify and declare as follows:

I am over the age of 18 and am otherwise competent to make this declaration. This declaration is made upon personal knowledge setting forth facts I believe to be true.

On November 20, 2013, I served a copy of the Appellants' Brief and this Certificate of Service by deposit in US Mail postage prepaid addressed to:

Michael E. Gossler
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Seattle, WA 98104-7096

DATED: November 20, 2013 at Mercer Island, Washington.

Michael J. Bond

Michael J. Bond, WSBA #9154