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No. 62396-6-I

COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

UNIFUND CCR, Assignee for Key Classic,

Respondent,

v.

ABDUL G. MALIK,

Appellant.

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 STATE OF WASHINGTON
 COURT OF APPEALS
 DIVISION I
 STAFF OF CLERK

APPELLANT'S REPLY BRIEF

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ORIGINAL

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I. INTRODUCTION

Abdul G. Malik never had an opportunity to be heard on the fundamental question of whether he was served with the Respondent's collection lawsuit before the default judgment was entered. Counsel for Respondent highlights just how critical such an evidentiary hearing would have been in this case by arguing that clear and convincing evidence was never produced and that certain questions about service of process remain unanswered. *See, e.g.*, Respondent's Brief at 1, 8. Because there was never a hearing or a finding of fact on the notice issue, this case should be reversed and remanded. In addition, because the Appellant is not the correct Unifund debtor and has shown more than a prima facie defense to the underlying collection action, fairness and justice require that the default judgment be vacated so that there can be a trial on the merits.

II. ARGUMENT

A. WASHINGTON COURTS USE THE DE NOVO STANDARD OF REVIEW ON QUESTIONS OF ADEQUATE NOTICE AND CONSTITUTIONALITY

The Washington Supreme Court favors resolution of disputes on the merits and "will liberally apply" the civil rules and equitable principles to vacate default judgments where fairness and justice require. *Morin v. Burris*, 160 Wn.2d 745, 759 (2007). While trial court decisions on motions to vacate default judgments are reviewed for an abuse of

discretion, *Little v. King*, 160 Wn.2d 696, 702-03 (2007), questions of law are reviewed de novo. *Morin*, 160 Wn.2d at 753. Questions of law include those related to adequacy of notice and constitutional rights. See *Rosander v. Nightrunners Transport, Ltd.*, 147 Wn. App. 392, 399 (2008). Proper service of process is one of the constitutional guarantees of due process and the fundamental right to be heard. See *Wichert v. Cardwell*, 117 Wn.2d 148, 151 (1991). Indeed, "[d]efault proceedings . . . must be carefully scrutinized for potential due process violations. *Boyd v. Kulczyk*, 115 Wn. App. 411, 415 (2003).

Because the primary question presented challenges the service of process and the constitutionally void default judgment, de novo is the proper review standard.¹

¹ Even if this Court accepts the Respondent's contention that these questions of law should be reviewed using the abuse of discretion standard, the Washington Supreme Court has held that a trial court's use of the wrong legal standard places a discretionary decision on untenable grounds and warrants reversal. See *Magaña v. Hyundai Motor Am.*, No. 80922-4, 2009 WL 4070952, at *9-10 (Wash. Nov. 25, 2009). Even the cases cited by the Respondent support this conclusion. See, e.g., *Little* 160 Wn.2d at 699, 703 (holding that "discretion is abused when it is based on untenable grounds, such as a misunderstanding of law"). In this case, the trial court's failure to use the correct legal standard is both an error of law that warrants de novo review and an abuse of discretion that justifies reversal. See, e.g., *Morris v. Palouse River & Coulee City R.R.*, 149 Wn. App. 366, 372 (2009) (reversing trial court's denial of a CR 60(b)(5) motion to vacate because the default judgment was made void by invalid service of process), *review denied*, 166 Wn.2d 1033 (2009).

B. THE TRIAL COURT'S REFUSAL TO HEAR THE APPELLANT'S DUE PROCESS CHALLENGE BY IMPOSING A TWO-YEAR TIME LIMIT ON THE APPELLANT'S CR 60(b)(5) MOTION WAS AN ERROR OF LAW AND REQUIRES REVERSAL

1. The Appellant's request to be heard on the lack of notice and voidness of the default judgment was ignored by the trial court.

The record illustrates how the trial court ignored the due process issue. The very first reason given by the Appellant for vacating the default judgment was that he "never received notice of any lawsuit." CP at 97.

Again, in completing his form motion to vacate, the Appellant checked the box for CR 60(b)(5) indicating that he made his motion in part because the default judgment is void. CP at 100. And again, the second sentence of the Appellant's declaration in support of his motion to vacate states that he was never "served any notice of a lawsuit." CP at 172.

In response to the Appellant's repeated insistence that the Respondent never served him with the summons and complaint, the trial court concluded as a matter of law that the motion was untimely unless the original creditor admitted the alleged debt did not belong to the Appellant. RP 8/12/2008 at 16. The court made no exception for a CR 60(b)(5) motion. In fact, when the Appellant argued that "he was never served," the Respondent's counsel misleadingly stated that this was "not alleged" and had "never been alleged," and the trial court simply stated "that's a

different question," without inquiring about service of process or making any findings. RP 8/12/2008 at 19. In so doing, the trial court erroneously concluded that the Appellant's CR 60(b)(5) motion to vacate was brought two years after the default judgment and was, therefore, untimely.

2. The trial court had a nondiscretionary duty to vacate the constitutionally void default judgment.

The Respondent's brief fails to address the trial court's erroneous imposition of a two-year limitation period for bringing a CR 60(b)(5) motion, and that is for good reason. Washington law clearly says there is no time limit to challenge a judgment as void. *See Roberts v. Johnson*, 137 Wn.2d 84, 92 (1999). Thus, a motion to vacate under CR 60(b)(5) may be brought at any time after entry of judgment. *See Lindgren v. Lindgren*, 58 Wn. App. 588, 596 (1990).

A judgment is void if entered by a court that did not have jurisdiction. *See In re Marriage of Ortiz*, 108 Wn.2d 643, 649 (1987). A court does not have jurisdiction over a defendant if he did not receive proper service of the summons and complaint. *See Morris v. Palouse River & Coulee City R.R.*, 149 Wn. App. 366, 372, *review denied*, 166 Wn.2d 1033 (2009); *In re Marriage of Markowski*, 50 Wn. App. 633, 635-36 (1988). Therefore, a default judgment entered without proper service of the summons and complaint is void, and Washington courts have "a

nondiscretionary duty to vacate." *See In re Dependency of A.G.*, 93 Wn. App. 268, 276 (1998); *Leen v. Demopolis*, 62 Wn. App. 473, 478 (1991).

C. THE TRIAL COURT'S FAILURE TO MAKE THE NECESSARY FINDINGS OF FACT REGARDING THE REASONABLENESS OF THE APPELLANT'S DELAYED MOTION TO VACATE REQUIRES REVERSAL

Trial courts have an obligation to make findings on all material issues in order to inform the appellate court as to "what questions were decided by the trial court, and the manner in which they were decided." *Fed. Signal Corp. v. Safety Factors, Inc.*, 125 Wn.2d 413, 422 (1994) (internal quotation marks and citations omitted). Trial courts are not required to make findings of fact on all matters but must make "findings which establish the existence or non-existence of determinative factual matters." *Maehren v. City of Seattle*, 92 Wn.2d 480, 487-88 (1979).

The issue here is whether the trial court failed to weigh the evidence and make any findings of fact that service of process was or was not effected. The record demonstrates that the trial court failed to do just that, and this failure is an error of law.

- 1. The trial court's failure to apply the "reasonable time" standard to determine the timeliness of the Appellant's CR 60(b)(4) motion is an error of law requiring vacation of the order.**

A CR 60(b)(4) motion to vacate due to fraud, misrepresentation, or other misconduct of an adverse party must be made within a reasonable

time after judgment. *See* CR 60(b). What constitutes a reasonable time depends on the facts of the case, and the "mere passage of time between the entry of the judgment and the motion to set it aside is not controlling." *See In re Marriage of Thurston*, 92 Wn. App. 494, 500 (1998).

The Appellant's motion repeatedly seeks vacation of the judgment due to the Respondent's fraud and misrepresentation. In a sworn and notarized statement made on September 18, 2007, the Appellant states that he has "been fraudulently accused of a debt that is not [his]." CP at 102. He again states that the Respondent "fraudulently garnished" his wages and that the Respondent is "fraudulently scamming [him] to collect a debt that does not belong to [him]." CP at 105, 108. Again, in the hearing, the Appellant argued that the Respondent's fraud justifies vacation of the default judgment. RP 8/12/2008 at 10. Though the Appellant did not check the box indicating he made his motion pursuant to CR 60(b)(4), his motion, evidence, and arguments demonstrate that he has consistently argued and sought to prove that the default judgment should be vacated due to the Respondent's fraud. The Appellant, therefore, also brought his motion under CR 60(b)(4).

The trial court concluded that, as a matter of law, the Appellant's claims, including his CR 60(b)(4) claim of fraud, were untimely if brought two years after entry of the default judgment. RP 8/12/2008 at 16. This

conclusion is an error of law. CR 60(b)(4) does not require that motions to vacate based on fraud be brought within two years after default judgment. Rather, they must be brought within a reasonable time after the default judgment. *See Thurston*, 92 Wn. App. at 500. Thus, the trial court applied the wrong legal standard when it held that the Appellant's CR 60(b)(4) motion was untimely, and this Court should reverse that decision.

2. If the trial court had made findings, the record demonstrates that the Respondent suffered no prejudice and that the Appellant had good reason for bringing his action when he did.

A remand would be fruitful in this case because the record provides ample support for findings that the Respondent was not prejudiced by the timing of the motion, and the Appellant had good reason for filing his motion when he did.²

As soon as the Appellant learned of the lawsuit, he contacted the Respondent. CP at 172. The Respondent refused to speak with him, but shortly after the Appellant's telephone call, the garnishment stopped. CP at 172. The Respondent's silence and lack of action convinced the Appellant that the Respondent agreed the debt did not belong to him.

² The Respondent has provided no evidence showing it was prejudiced by the timing of the CR 60(b)(4) motion and even continued to garnish the Appellant's wages while the motion to vacate was pending. CP at 179.

As soon as the Appellant learned of the second garnishment, he again sought to discuss the matter with the Respondent. CP at 176. Again, the Respondent refused to discuss the matter. *Id.*

This Court has previously held, under similar facts, that there was good reason for bringing a motion to vacate a default judgment almost 17 months after entry of the default judgment. *Suburban Janitorial Servs. v. Clarke Am.*, 72 Wn. App. 302, 304 (1993). In sum, this Court should reverse and remand to allow the trial court to apply the "reasonable time" standard and make the necessary findings of fact.

D. THE APPELLANT'S COMPLETE DEFENSE TO THE RESPONDENT'S UNDERLYING COLLECTION ACTION IS AN INDEPENDENT REASON FOR REVERSAL AND VACATION OF THE DEFAULT JUDGMENT

1. The clear and convincing evidence standard applies only to the service of process question.

The Respondent suggests throughout its brief that the Appellant's motion to vacate was properly denied for failure "to provide clear and convincing evidence." *See, e.g.*, Respondent's Brief at 1, 10, 11, 12, 13, 15, 16, 19. While it is true that the Appellant would have been required to prove the Respondent's failure to serve process by clear and convincing evidence at a hearing on that issue, *see Leen*, 62 Wn. App. at 478; *In re A.G.*, 93 Wn. App. at 276-77, the trial court never had such a hearing, *see*

RP 8/12/2008 at 19 (stating that service of process is "a different question" and ignoring the issue).

Furthermore, setting aside the service of process issue, this Court has held that a "motion to vacate a default [judgment] must be supported by an affidavit setting forth 'the facts constituting a defense to the action or proceeding.'" *See Farmers Ins. Co. of Wash. v. Waxman Indus., Inc.*, 132 Wn. App. 142, 145-46 (2006) (quoting CR 60(e)(1)). "The prime purpose of the rule is to prove to the court that there exists, at least prima facie, a defense to the claim." *Id.* at 146 (emphasis added). "The requirement to set forth facts constituting at least a prima facie defense is not burdensome, as it does not demand conclusive proof." *Id.* at 148. Moreover, if a judgment is void for want of jurisdiction due to lack of notice, then no meritorious defense is required to vacate the judgment. *See Leen*, 62 Wn. App. at 477.

In this case, the Appellant's defense to the default judgment is simple and straightforward: The debt is not his. The information he provided the trial court established an absolute defense to the collection action. Thus, regardless of any findings on the service of process question, the Appellant's prima facie defense to the underlying claims requires reversal and vacation of the default judgment.

2. The Respondent's brief relies heavily on inapplicable cases.

The Respondent's brief relies heavily on *Leen* and *In re AG*. See Respondent's Brief at 13-15. That reliance is misplaced legally and factually.

Leen involved an attorney who sued his client to recover unpaid attorneys' fees and is factually very different from the Appellant's case. *Leen*, 62 Wn. App. at 475. The attorney in *Leen* called his client and told him that he was filing a collection suit, the client acknowledged receipt of the summons and complaint during their conversation, and the client agreed to sign an acceptance of service. When the attorney did not receive the signed form from his client, he asked the client's next-door neighbor to personally serve process. *Id.* The next-door neighbor then confirmed personal service and signed an affidavit of service. *Id.* Despite actual and formal notice, the client failed to answer the complaint and a default judgment was entered. *Id.* at 476.

Next, the attorney mailed the client a copy of the default judgment and the client did nothing. Finally, when the attorney sought to execute and seize the client's personal property, the client filed a motion to vacate the default judgment, relying on declarations asserting that he was not properly served. The client argued that service was defective because he

found a document called a "Complaint for Monies Due" in his mailbox. The client also failed to appear at either hearing on his own motion to vacate. *Id.* at 476-79. On appeal, the client argued that the trial court erroneously denied his motion to vacate the default judgment because there were conflicting affidavits regarding service of process. *Id.* at 477.

In that particular case, where the defendant was personally made aware of the lawsuit at the time it was filed by his former attorney, the defendant acknowledged finding a copy of the complaint in his mailbox, and the defendant was personally served by his next-door neighbor, the Court of Appeals ruled that the defendant had the burden of attacking service of process by clear and convincing evidence. *Id.* at 478. In addition, the court ruled that the client's failure to appear at the hearings on his motion to vacate waived his argument that the trial court inappropriately considered conflicting affidavits of service when it denied his motion. *Id.* at 479.

Similarly, the Respondent's reliance on *In re A.G.* is misplaced because of the stark factual differences and the fact that the trial judge actually had a hearing where specific findings of fact on the service of process issue were made. *In re A.G.* involved an order terminating parental rights and the mother's appeal of an unsuccessful motion to vacate. The mother was served with the petition for termination of

parental rights at her last known address, where a co-resident of the house accepted the documents, and the State gave notice of the proceeding by publication. *Id.* at 274. Although the mother failed to appear at the rights termination hearing, the court heard testimony from the caseworker that the mother had confirmed her knowledge of the petition to terminate by telephone. *Id.* at 275.

Upon learning that her parental rights had been terminated, the mother filed a motion to vacate the termination order, claiming that she was not personally served. The mother then failed to appear for the hearing on her own motion to vacate even though her attorney told her where and when it would occur and provided her with copies of the pertinent documents. *Id.* at 275-76. In denying the motion to vacate, the trial court specifically found that the mother had been served as required by statute, both by publication and by substitute personal service. *Id.* at 276. In addition, the mother's attorney conceded the validity of personal service. *Id.* at 277-78. As a result, the trial court's denial of the motion to vacate was affirmed on appeal. *Id.* at 278.

The critical differences between the Appellant and the defendants in *Leen* and *In re A.G.* are: (1) the Appellant never received any notice of the original collection action; (2) the Appellant attended the hearings on his motion to vacate but was ignored when he raised the service of process

issue; and (3) the Appellant's default judgment was obtained against the wrong person.

E. THE TRIAL COURT ERRED WHEN IT REQUIRED THAT THE APPELLANT PROVIDE AN ADMISSION OF NO DEBT FROM THE CREDITOR TO PREVAIL ON HIS MOTION TO VACATE

Washington courts favor resolving cases on the merits and have long held that courts should "set aside default judgments liberally." *Morin*, 160 Wn.2d at 754.

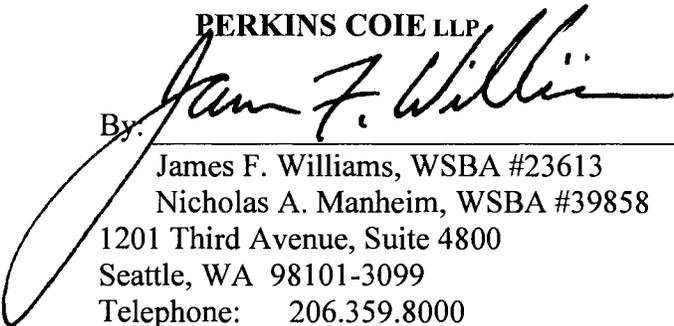
The trial court did not apply this legal standard when reviewing the Appellant's motion to vacate. Instead, the trial court concluded that the Appellant's motion was untimely unless the original creditor admitted that the debt did not belong to the Appellant. RP 8/12/2008 at 16, 19. This standard required that the assignor of the alleged debt stipulate to the motion to vacate over the wishes of the assignee in order for the Appellant to prevail. This standard is virtually impossible to meet and far exceeds what Washington courts require for vacating default judgments.

III. CONCLUSION

The Appellant asks this Court to reverse the Superior Court's order and remand the case for a trial on the merits.

RESPECTFULLY SUBMITTED this 14th day of December, 2009.

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CERTIFICATE OF SERVICE

CAROL KNESS states as follows:

1. I am a secretary at the law firm of PERKINS COIE LLP, attorneys of record for the Appellant, have personal knowledge of the facts set forth herein and am competent to testify thereto.

2. On the 14th day of December, 2009, I made arrangements for the original and one copy of the foregoing Appellant's Reply Brief to be filed with this Court.

1. On the same day, I made arrangements for copies of the same documents to be hand delivered to counsel for the Respondent as follows:

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I CERTIFY UNDER PENALTY OF PERJURY under the laws of the State of Washington that the foregoing is true and correct.

SIGNED at Seattle, Washington this 14th day of December, 2009

by CAROL KNESS.



Carol Kness