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COURT OF APPEALS
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No. 10-2-00409-2.SEA

65379-2

COURT OF APPEALS,
DIVISION 1
OF THE STATE OF WASHINGTON

THOMAS OFNER, Appellant,

v

RONALD SABANDO AND KRISTEENA SABANDO,
Respondents

BRIEF OF APPELLANT

Thomas Ofner
8037 NE 169th St.
Kenmore, WA 98028

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TABLE OF AUTHORIES

State v. Brett, 126 Wn.2d 136, 199, 829 P.2d 29; *State v. Brett*, 126 Wn.2d 136, 199, 829 P.2d 179 (1955).....1

Sacotte Const., Inc. v. National Fire & Marine Ins. Co., 143 Wn.App. 410, 414-15, 177 P.3d 1147 (2008) (quoting *Morin v. Burris*, 160 Wn.2d 745, 749, 161 P.3d 956 (2007)).4

Hardesty v. Stenchever, 82 Wn.App. 253, 262, 917 P.2d 577 (1966) (quoting *White v. Holm*, 73 Wn. 2d 348, 351, 438, P.2d 581 (1968)).5

Johnston v. Medina Imp. Club, 10 Wn.2d 44, 52, 116 P.2d 272 (1941).5

Canam Hambro Systems, Inc. v. Horbach, 33 Wn.App. 452, 456, 655 P.2d 1182 (1982) (holding that the trial court abused its discretion by refusing to set aside an order in light of good cause shown).5

I. ASSIGNMENT OF ERRORS

1. Superior court should have quizzed council as to whether means, alternative to checking the computerized docket, had been explored by my lawyer, in an effort to locate time and place of the missed hearing, and if not why not.

2. Because of this failure, Superior court was unable to establish that my council was being mute on this crucial factor in the case, despite my instruction.

3. My council's performance caused a pivotal point to be withheld from the court, and therefore fell below an objective standard of reasonableness. But for my council's stubborn will to act against my specific instruction, which was to tell about my former attorney's culpability in causing me to miss the hearing, I am confident that the Superior Court's finding would have been in my favor. *State v. Brett*, 126 Wn.2d 136, 199, 829 P.2d 29; *State v. Brett*, 126 Wn.2d 136, 199, 829 P.2d 179 (1955). After all, I was, and am, only asking that my right to my day in court be restored.

II. STATEMENT OF ISSUES

1. I, the appellant, lost my case by default for failure to appear at its hearing. This occurred because my lawyer, Elena Garella, was unable to determine the time and place of the hearing. Since I was totally dependent on my lawyer, there was no way for me to know time and place.

2. I appealed in Superior Court. My appeals lawyer, Theresa Wang, based the appeal-argument chiefly on the true fact that due to the unusual slowness of the court computer, Ms. Garella was

unable to determine what was happening in the case, and continually reported to me that the case was dismissed.

3. Ms. Wang failed to inform the court that Ms. Garella should have given me alternative ways to find out the time and date of the hearing, which failure was the sole reason I missed the hearing. The court failed to ask whether alternative ways had been sought. Thus, both my appeals lawyer, Ms. Wang, and my former lawyer, Ms. Garella, provided massively ineffective, and outright misleading assistance.

III. STATEMENT OF THE CASE

1. Introduction

I do not know much about the law, but I do know that it has something to do with society's longing for justice. I pray that the court will agree that granting a (default) judgment against me, without allowing for a hearing of the case that is being adjudicated, is an injustice, especially in my specific situation. On the day of the hearing, March 9, 2010, neither my lawyer nor I knew that the hearing was taking place. Later I learned, when it was too late, that this absence of knowledge could have been avoided, had my lawyer given me suitable advice.

2. The Facts

The following events transpired. I was served at my place of work, the Pike Place Market, where I am a vendor. My belongings, the things I sell and all items peripheral to displaying and selling, are heaped onto a push-cart as I bring these items to my designated stall daily. The served envelope was placed into this pile and apparently lost on my way to my locker before I had a chance to look at it. I

immediately called my lawyer, Elena Garella. She told me that as far as she can determine from the computer, implying that the computer was the only source from which such information can be gleaned, the Sabando/Ofner case was dismissed, as it had been from the day I had hired her, but she would keep an eye on the docket. I trusted that she would bring light to what may have been inside the missing envelope, and I knew of no alternative but to trust her advice. I have an email from her that states that up to five days before the hearing she was still advising me that the case was dismissed.

After I was informed that the hearing had taken place without my presence, and that I lost by default, I still wanted to know what may have been in the lost envelope, though by then I was able to infer that. I asked Ms. Garella how I could eventually find out. It was then that she revealed that I could have obtained a copy of the missing serving from the court clerk as soon as it was found to be missing. Never having had anything to do with the courts, or its procedures, I, without proper professional assistance, had no idea that there even was a clerk. Thus Ms. Garella essentially misled me regarding the thing to do in the event of lost legal papers.

3. My lawyer protects her colleague

I hired another lawyer, Theresa Wang, to whom all of the above was conveyed. She was to attempt to vacate the court's default ruling, based on the above facts. However, during that hearing she never mentioned Ms. Garella's sole culpability that caused my ignorance of the date and place of the missed hearing. Ms. Wang apparently thought that the argument, that the court computer's slowness caused the failure, was a strong enough argument. Were her argument indeed strong enough, she would be spared from having to implicate her

colleague. She acted specifically counter to my instructions. I was not at this hearing, so I could not add the missing element.

4. Conclusion

With this new and central fact having been brought forth, in regard to my lawyers' behavior counter to their client's best interest, and the court's failure to correct it with suitable questioning, my hope is that this court will grant me my day in court, and do away with the default judgment. I was penalized for something that officers of the court did. This is where I am asking for justice!

IV. ARGUMENT

1. I was denied effective assistance of council. It is understandable that the court should have ruled as it did, given that the court had not been fully informed. I had been served, after all, and therefore I should have shown up for the hearing. However, the court was not informed of the fact that I did all I could in the interest of showing up, but I was given outright false and deficient information by council, and I did perform exactly as council instructed. Having been told that council was unable to locate correct information on the computer regarding the place and time of the missed hearing, the court should have quizzed council as to whether alternative ways of seeking this information was considered, and if not why not.

2. Washington courts favor the resolution of cases based on their merits; courts "liberally set aside default judgments pursuant to CR 55(c) and CR 60 and for equitable reasons in the interest of fairness and justice." *Sacotte Const., Inc. v. National Fire & Marine Ins. Co.*, 143 Wn.App. 410, 414-15, 177 P.3d 1147 (2008) (quoting *Morin v. Burris*, 160 Wn.2d 745, 749, 161 P.3d 956 (2007)). CR 55(c)

provides that “[f]or good cause shown and upon such terms as the court deems just, the court may set aside an entry of default.” Courts are to exercise their discretion liberally to preserve justice and substantial rights between the parties. *Hardesty v. Stenchever*, 82 Wn.App. 253, 262, 917 P.2d 577 (1966) (quoting *White v. Holm*, 73 Wn. 2d 348, 351, 438, P.2d 581 (1968)).

3. A party moving forward for the vacation of a default order need not demonstrate a defense on the merits of a case – only a “reasonable excuse for the delay in appearing is required.” *Johnston v. Medina Imp. Club*, 10 Wn.2d 44, 52, 116 P.2d 272 (1941). Courts hold that “while excusable neglect and a meritorious defense are not necessarily required to set aside an order of default . . . assertion of the two provides the good cause required by CR 55©.” *Canam Hambro Systems, Inc. v. Horbach*, 33 Wn.App. 452, 456, 655 P.2d 1182 (1982) (holding that the trial court abused its discretion by refusing to set aside an order in light of good cause shown). My excuse is that I was following my lawyer’s advice to the tee.

**Superior Court of Washington
County of**

In re:

Thomas Ofner

Petitioner,

And Kristeena & Ronald Sabando

Respondent.

No.

**Return of Service
(Optional Use)
(RTS)**

I Declare:

1. I am over the age of 18 years, and I am not a party to this action.
2. I served the following documents to (name) Ronald Sabando:

- summons, a copy of which is attached
- petition in this action
- proposed parenting plan or residential schedule
- proposed child support order
- proposed child support worksheets
- sealed financial source documents cover sheet and financial documents
- financial declaration
- Notice Re: Dependent of a Person in Military Service
- notice of hearing for _____
- motion for temporary order
- motion for and ex parte order
- motion for and order to show cause re: _____
- declarations of _____
- temporary order
- other: **Appellant's Brief**

3. The date, time and place of service were (if by mail refer to Paragraph 4 below):

July 30, 2010 10:40 AM

Date: July 30, 2010 Time: 10:40 AM a.m./p.m.
 Address: Pike Place Market, Seattle WA

4. Service was made:

- by delivery to the person named in paragraph 2 above.
- by delivery to (name) _____, a person of suitable age and discretion residing at the respondent's usual abode.
- by publication as provided in RCW 4.28.100. (File Affidavit of Publication separately.)
- (check this box only if there is a court order authorizing service by mail) by mailing two copies postage prepaid to the person named in the order entered by the court on (date) _____. One copy was mailed by ordinary first class mail, the other copy was sent by certified mail return receipt requested. (Tape return receipt below.) The copies were mailed on (date) _____.
- (check this box only if there is a statute authorizing service by mail) by mailing a copy postage prepaid to the person requiring service by any form of mail requiring return receipt. (Tape return receipt below.) The copy was mailed on (date) _____.

5. Service of Notice on Dependent of a Person in Military Service.

- The Notice to Dependent of Person in Military Service was served on mailed by first class mail on (date) _____.
- Other:

6. Other:

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at (city) Seattle, (state) WA on (date) July 30, 2010.


Signature

Autumn Cheyenne Burnham
Print or Type Name

Fees:
 Service _____
 Mileage _____
 Total _____

(Tape Return Receipt here, if service was by mail.)

File the original Return of Service with the clerk. Provide a copy to the law enforcement agency where protected person resides if the documents served include a restraining order signed by the court.