

Court of Appeals No. 66418-2-1

IN DIVISION ONE OF THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

HUNGRY BUZZARD RECOVERY, LLC,

Appellant

vs.

MICHAEL BERG AND JANE DOE BERG, et al,

Respondent

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COURT OF APPEALS
STATE OF WASHINGTON
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BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant Hungry Buzzard, Inc., contends that the Trial Court improperly denied entry of a default judgment against debtors Michael Berg and Interior Construction Services against whom Hungry Buzzard had already obtained an Order of Default.

II. RESTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The trial court erred in entering the order of November 10, 2010, denying Hungry Buzzard's motion for entry of default judgment against debtors Michael Berg and Interior Construction Services.

Whether the trial court improperly denied Hungry Buzzard's motion for entry of default judgment against debtors Michael Berg and Interior Construction Services when Hungry Buzzard had previously obtained an Order of Default against them, when the Crossclaim/Counterclaim/Fourth Party Complaint had pled a sum-certain as to the amount owed, and when the amount of the judgment to be entered was the same as what was pled in the Crossclaim/Counterclaim/Fourth Party Complaint?

Whether the trial court abused its discretion in denying Hungry Buzzard's motion for reconsideration when the decision was in direct contradiction to CR 55(1)(B)?

III. RESTATEMENT OF THE CASE

On April 7, 2009, Hungry Buzzard, Inc. (hereinafter "Hungry Buzzard") filed a Crossclaim, Counterclaim, and Fourth Party Complaint (hereinafter "Complaint") against debtors Interior Construction Services (hereinafter "ICS") and Michael Berg (hereinafter "Berg") for monies due and owing for unpaid recycling container services. (CP 1-13). Hungry Buzzard specifically pled a sum-certain as to the amount due and owing to be \$11,199.48, plus interest at 12% per annum. (CP 6-9). After more than 30 days had passed without receiving an Appearance or Answer from ICS or Berg, Hungry Buzzard filed a motion for default. (CP 14-30). The Court granted Hungry Buzzard's motion for default on July 1, 2009. (CP 31-34).

On October 10, 2010, Hungry Buzzard moved for entry of default judgment consistent with the amount pled in its Complaint against ICS and Berg. (CP 41-99). The motion was made without oral argument, and was unopposed by any party. The Court denied Hungry Buzzard's motion, and, utilizing its own form of Order,

indicated that the denial was because the action had been dismissed by Clerk's Order. (CP 100-102). Hungry Buzzard moved for reconsideration based on the fact that the clerk's order specifically stated that it did not apply to judgments. (CP 106-118). The Court denied Hungry Buzzard's motion for reconsideration without explanation. (CP 119-121).

IV. ARGUMENT

A. THE TRIAL COURT IMPROPERLY DENIED HUNGRY BUZZARD'S MOTION FOR ENTRY OF DEFAULT JUDGMENT AGAINST PARTIES IT HAD ALREADY OBTAINED AN ORDER OF DEFAULT AGAINST

CR 55(b)(1) reads, in pertinent part:

When the claim against a party, whose default has been entered under section (a), is for a sum certain or for a sum which can by computation be made certain, the court upon motion and affidavit of the amount due **shall** enter judgment for that amount and cost as against the party in default, if he is not an infant or incompetent person. Findings of fact and conclusions of law are not necessary under this subsection even though reasonable attorney fees are requested and allowed.

(Emphasis added).

Further, Washington case law consistently holds that a party is entitled to recover judgment in the amount pled against a defaulting party. See, e.g., Skidmore v. Pacific Creditors, Inc., 18

Wn.2d 157, 162, 138 P.2d 664 (1943), Pedersen v. Klinkert, 56 Wn.2d 313, 318-319, 352 P.2d 1025 (1960).

Hungry Buzzard obtained a default order against ICS and Berg on July 1, 2009 for the sum certain pled in its Complaint of \$11,199.48, plus interest at 12% per annum. (CP 31-34). Pursuant to CR 55(b)(1), Hungry Buzzard subsequently moved for judgment to be entered in the same amount as was pled. (CP 41-99). The motion was unopposed. Because the amount pled for in the motion for judgment was substantially the same as what was pled in its Complaint, Hungry Buzzard was entitled to have a judgment entered in the amount pled, plus attorney fees and costs. Skidmore vs. Pacific Creditors, *supra*.

The Court's denial of Hungry Buzzard's motion was improper, because the Clerk's Order of Dismissal, which was the basis for the Court's denial, stated that the dismissal did not affect judgments. (CP 113).

B. THE TRIAL COURT IMPROPERLY DENIED HUNGRY BUZZARD'S MOTION FOR RECONSIDERATION

CR 59(a)(7) allows a motion for reconsideration to be granted if the decision made "is contrary to law." CR 59(a)(9) further allows reconsideration to be granted if "substantial justice

has not been done.” Because both requirements were met in this case, the Trial Court improperly denied Hungry Buzzard’s motion for reconsideration.

First, denial of Hungry Buzzard’s motion for reconsideration was improper because the Order denying Hungry Buzzard’s motion for entry of a default judgment was contrary to both case law and CR 55(b)(1), as argued above. Hungry Buzzard obtained a default order against ICS and Berg for a sum certain. (CP 31-34, CP 6-9). The motion for entry of judgment against ICS and Berg was for the amount pled. (CP 41-99). Accordingly, Hungry Buzzard was entitled to have judgment entered in accordance with the amount pled against the parties of whom it obtained default against. The Clerk’s Order of Dismissal did not apply to judgments, (CP 113), and thus the Court’s denial of Hungry Buzzard’s motion was contrary to case law and the Civil Rules of Procedure. Pursuant to CR 59(a)(7), Hungry Buzzard was entitled to reconsideration of an Order than was made contrary to law.

Second, denial of hungry Buzzards motion for reconsideration was improper because substantial justice had not been done. (CR 59(a)(9)). ICS and Berg obtained the benefit of Hungry Buzzard’s recycling services without paying for those

services. (CP 1-13). Hungry Buzzard had to file claims against ICS and Berg to recover money Berg and ICS were contractually obligated to pay. (CP 1-13). ICS and Berg did not deny that the money was owed, and Hungry Buzzard in turn obtained a default order against them. (CP 31-34). For the court to deny Hungry Buzzard's motion which merely requested entry of the amount of judgment against ICS and Berg after obtaining an Order of Default against them amounts to a substantial injustice against Hungry Buzzard. Hungry Buzzard is entitled to recover money it was owed for services it performed, and in the amount that ICS and Berg were Ordered in Default on. (CP 31-34). The trial court's denial of Hungry Buzzard's motion was erroneous, and subjects Hungry Buzzard to substantial injustice.

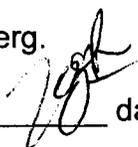
V. CONCLUSION

The trial court improperly denied Hungry Buzzard's motion for entry of default judgment against ICS and Berg because Hungry Buzzard had previously obtained an Order of Default against both ICS and Berg for a sum certain, and the amount of money pled in the judgment was the same as what ICS and Berg were found to be in Default on. Hungry Buzzard's motion was unopposed, and the Court improperly denied Hungry Buzzard's motion based upon an

incorrect reading of a Clerk's Order, as that Order clearly stated that it did not impact judgments, and Hungry Buzzard was merely trying to have a judgment entered in the same amount as was determined in the Order of Default.

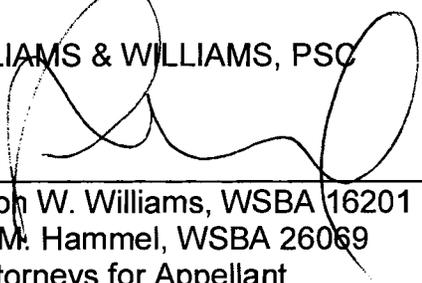
Further, the trial court improperly denied Hungry Buzzard's motion for reconsideration, as the Order denying Hungry Buzzard's motion for entry of judgment was contrary to law, and served to work a substantial injustice on Hungry Buzzard. ICS and Berg had already been found to owe Hungry Buzzard the amount pled in its motion for entry of judgment by way of Default; Hungry Buzzard requires a judgment to be entered so it can attempt to collect the monies it is legally owed.

For these reasons, Hungry Buzzard respectfully requests the Court reverse the trial court's rulings, and allow entry of judgment against ICS and Berg.

Dated this  day of February, 2011.

Respectfully submitted,

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Attorneys for Appellant

Certificate of Service

I, Christine Knoke, affirm and state:

That on February 28, 2011, I caused to be served a true and correct copy of the Brief of Appellant to which this certificate is attached, by the method indicated below, and addressed to each of the following:

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XX By delivering to a messenger company on February 28, 2011, a full, true and correct copy thereof for delivery to the attorney(s) as shown above on February 28, 2011.

Dated this 28th day of February, 2011.



Christine Knoke
Paralegal to
Lisa M. Hammel
Kinnon W. Williams