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No. 67849-3-I

THE COURT OF APPEALS OF
THE STATE OF WASHINGTON,
DIVISION ONE

Michael S. Reed, *Appellant*

v.

Arrow Financial Services, LLC, *Respondent*

APPELLANT'S OPENING BRIEF

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION ONE
2017 OCT 31 PM 1:52

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Court of Appeals Case No. 678493
Snohomish County Superior Court Case No. 10-2-03382-1

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(i) Assignments of Error

The following assignments of error are made by Reed:

1. The trial court erred in ruling that Reed's Motion to Vacate Default Judgment was untimely because it had been brought more than the one-year time limit allegedly imposed by CR 60.
2. The trial court erred in ruling that Reed needed to present a meritorious defense of the causes of action in his case as a part of his Motion to Vacate Default Judgment.
3. In a context where facts were seriously in dispute, the trial court erred in ruling on insubstantial evidence without the oral testimonies of Reed's witness and the server who signed the Affidavit of Service of process.

Issues Pertaining to Assignments of Error

1. Is it irrelevant for a CR 60(b)(5) motion to vacate a default judgment due to lack of jurisdiction to be "timely"? (Assignment of Error 1.)
2. Is it unnecessary for the movant in a CR 60(b)(5) motion to vacate a default judgment to present a meritorious defense? (Assignment of Error 2.)
3. May a court refuse to accept an Affidavit of Service of process in the face of substantial un rebutted evidence that contradicts it? (Assignment of Error 3.)

(ii) Abstract

Michael S. Reed, age 64, appeals from an Order of the trial court denying his motion to vacate a default judgment obtained by Arrow Financial Services, LLC against him. The motion was brought before Commissioner Lester H. Stewart of the Snohomish County Superior Court pursuant to CR 55(c) and CR 60(b) based on the ground that (i) Reed had never been served with a summons and complaint, the court had not obtained jurisdiction over him, and thus the judgment was void, and (ii) the affidavit of service filed with the court by a process server attesting that he had personally served Reed was fraudulent. The commissioner's ruling denied Reed's motion on the ground that (1) the motion was "untimely," having been brought more than one year after the entry of judgment, (2) Reed had failed to present a meritorious defense, and (3) the law compels the court, under most circumstances, to accept an affidavit of service on its face, which the commissioner elected to do. Reed appeals, assigning error to each of the above three assertions.

(iii) Statement of the Case and Its Procedural History

On March 18, 2010, Arrow Financial Services, LLC (hereafter, "Arrow"), Respondent herein, obtained an Order of Default and Judgment against Michael Reed (hereafter, "Reed"), Appellant herein, and Jane Doe Reed and the marital community comprised thereof. (CP 6) The default

judgment in the principal sum of \$4,187.52 plus interest and costs for a total sum of \$4892.27 was obtained base on the allegations of a complaint filed on March 16, 2010 that Reed had failed to meet a monetary obligation. The Order and Judgment was signed by Commissioner Lester Stewart of the Snohomish County Superior Court.

Arrow supported its motion for default with a declaration of service of summons and complaint signed on March 16, 2010 by T. Hanson attesting that he served Reed by personally delivering true copies of those documents to him on 2/14/2010 at 8:00 P.M. at the address of 22421 53rd Avenue S.E., Bothell, WA. The declaration further states that, at the same time and place, Hanson served Jane Doe Reed with another copy of the same documents. (CP 3) Jane Doe Reed was allegedly served by substitute service upon Michael Reed at her “usual place of abode.” (CP 3) Contrary to customary practice, the declaration lacks any server notes bearing a physical description of the persons who were allegedly served, such as height, weight, size, hair color, etc.

Reed was in fact never served with a summons and complaint, and was completely unaware that the default judgment had been entered against him. (RP 5, 6) He first became aware of it when supplemental proceedings were commenced by Arrow against him in June, 2011, more than a year later. (RP 5, 8) Upon finding out about the judgment in this manner, Reed diligently set about to have it vacated. Thoroughly unfamiliar with legal procedure, he

sought the assistance of Northwest Justice Project, a nonprofit legal services agency.

In July 2010, using the pre-printed motion forms supplied by that agency, Reed obtained an Order to Show Cause and then filed his motion to vacate the Default Order and Judgment. In that motion, he checked the box corresponding to “Civil Rule 60(b)(4): Fraud, misrepresentation or other misconduct of an adverse party” as authority. He supplemented his motion with his own declaration stating that he was not given notice of the lawsuit, together with a signed declaration by Cynthia St. Clair that states she was “in the company of Michael Reed the entire evening of February 14, 2010 in Everett, Washington” and that he was not at the address of 22421 53rd Ave. S.E., Bothell and was not served with notice of a lawsuit.

A hearing on the matter was held on August 30, 2011 before Commissioner Stewart at which Reed and Ms. St. Clair appeared in person. Reed was unrepresented. Arrow appeared by its attorney. The process server, T. Hanson, was not present. At the hearing, Reed presented unrebutted oral testimony that

- (1) He in fact does reside at 22421 53rd Ave. S.E., Bothell;
- (2) On the 14th of February, 2010, he was not present at that address during the entire evening, and he was with his companion, Ms. St. Clair, in Everett;

- (3) He is an unmarried person;
- (4) He is the sole occupant of the residence at 22421 53rd Ave. S.E., Bothell;
- (5) On the 14th of February, 2010, no one else was staying at that residence and the property was “empty at the time.”

(RP 3-5) Reed steadfastly maintained in his testimony that he was not served.

(RP 4-6, 8)

Arrow, through its attorney, merely asserted that it stands by the declaration of Hanson that he personally served Reed and Jane Doe Reed, each separately and individually. No claim as to having made substitute service upon Reed through Jane Doe Reed was asserted. (RP 6) The attorney for Arrow also testified that he had sent Reed 4 letters during the year after the judgment had been entered, which testimony conflicted with Reed’s contention that he first became aware of the judgment when he received notices of supplemental proceedings.

In the course of oral argument Reed raised the argument that the court issuing the judgment lacked personal jurisdiction over him because he “never got proper notice.” (RP 8) In so doing, he clearly implied that the judgment is void and that a further authority for his motion to vacate is CR 60(b)(5). Consistent with his position on the voidness of the judgment, Reed refused to offer a defense on the merits, stating that he would only be “honor bound” to

do so once he is “under the court’s jurisdiction” and has gotten “a day in court.” (RP 7-8)

Arrow denied that the server’s declaration of service is a false affidavit, “a lie,” or that it is perpetrating a fraud upon the court. (RP 7) However, it did not offer any further declaration from T. Hanson, the server. Nor did it petition the court for an evidentiary hearing at which time Hanson would be present such that he could be cross-examined and his credibility assessed by the court. It further argued that Reed’s motion is untimely, having been brought 15 months after the entry of judgment, and that it did timely apprise Reed of that entry on 4 occasions by letter. (RP 8) Finally, Arrow argued that for Reed to succeed on his motion he requires presentation of a meritorious defense but that none has been presented.

The commissioner agreed with Arrow that Reed requires a meritorious defense, requested such a defense from him (RP 4), and when Reed declined the commissioner issued his ruling. He ruled that the law compels the court, under most circumstances, to accept an affidavit of service on its face, and he is willing to do so. He denied Reed’s motion based on his reliance on the affidavit and upon the further ground that Reed’s motion under CR 60(b) has not been timely and that Reed has failed to put forth a meritorious defense.

On September 8, 2011, Reed timely moved for reconsideration of the commissioner’s ruling. (CP 32) Reed submitted a brief arguing in effect that

the court, in relying solely on the server's affidavit, had failed to take notice of the substantial amount of contradictory evidence that Reed had proffered. In so failing to take heed, argued Reed, the court's finding of fact was not based upon an overall consideration of the totality of evidence. Reed requested that the court review the evidence. He further argued that if the proceedings employed a summary judgment standard, he provided a sufficient amount of factual disputed evidence to warrant a denial of a summary order. Once again he raised the argument that, under Rule 60(b), a judgment is void when service has not been made. He cited two Washington cases, one of which, *Scott v. Goldman*, 82 Wn. App. 1, 917 P.2d 131 (1996), is directly on point with respect to the proposition that where a trial court lacks in personam jurisdiction over a party, any judgment entered against that party is void. He further cited a Massachusetts case on point.

Although not called for by the court, on September 27, 2011 Arrow responded to Reed's motion for reconsideration, arguing that Reed has failed to meet a four-factor judicial standard for vacating a default judgment. Addressing some of those factors, Arrow argued that Reed has not been diligent in moving for vacation of the judgment, has not produced a defense, and that his motion is untimely. Arrow also asserted that, as the plaintiff creditor, it has been prejudiced by Reed's delay as "the possibility that [it still] has copies of statements or canceled check[s] is very slim."

On September 30, 2011, Commissioner Stewart issued a decision denying Reed's motion for reconsideration. (CP 37, 38) No oral argument was permitted.

On October 31, 2011, Reed timely filed his Notice of Appeal.

(iv) Argument

Standard of Review

A decision on a motion to vacate a final order for lack of jurisdiction as void is reviewed *de novo*. *In re Marriage of Wilson*, 117 Wn. App. 40, 68 P.3d 1121 (2003). The prevailing view is that the court has no discretion when a judgment is void for want of jurisdiction; the judgment must be vacated. *Brickum Investment Co. v. Vernham Corp.*, 46 Wn. App. 517, 731 P.2d 533 (1987). As "there is no room for discretion," the adoption of an abuse of discretion standard is inappropriate. *Id.* at 520. "Consequently, trial courts have a *nondiscretionary* duty to grant relief from default judgments entered by courts without jurisdiction." *Id.*, citing *inter alia*, *Mid-City Materials v. Heater Beater's Custom Fireplaces*, 36 Wn. App. 480, 486, 676 P.2d 1271 (1984) and *Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica*, 614 F.2d 1247, 1256 (9th Cir., 1980)(emphasis added).

Thus, the question before this court, as it was before the *Brickum* court, “is not whether the trial court abused its discretion, but whether the judgment is void for want of jurisdiction.” *Id.* at 521.

In General.

Proceedings to vacate a judgment are equitable in nature and the court should exercise its authority liberally to preserve substantial rights and do justice between the parties. *In re Marriage of Hardt*, 39 Wn. App. 493, 693 P.2d 1386 (1985). A court will weight the policy of finality of judgments with the policy of allowing a defendant his day in court. *Calhoun v. Merritt*, 46 Wn. App. 616, 731 P.2d 1094 (1986); *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 599 P.2d 1289 (1979).

Default judgments are not favored. *In re Marriage of Campbell*, 17 Wn. App. 840, 683 P.2d 604 (1984). The law favors determination of controversies on their merits. *Lee v. Western Processing Co., Inc.*, 35 Wn. App. 466, 667 P.2d 638 (1983).

The process of setting aside a default judgment is principally governed by CR 55(c) and CR 60(b). CR 55(c) provides that “[f]or good cause shown and upon such terms as the court deems just” it may set aside an entry of default. It further provides that, where a default judgment has been entered, the court may set aside the judgment in accordance to CR 60(b).

A. *In Personam* Jurisdiction Requires Process.

In personam jurisdiction obtains only upon service of process.

Williams v. Steamship Mut. Underwriting Ass'n, 45 Wn.2d 209, 227, 273 P.2d 803 (1954); RCW 4.28.020. A party may raise the issue of lack of jurisdiction of a trial court for the first time in appellate court. RAP 2.5(a).

B. The Four-Factor Test is Irrelevant in Cases Brought Based on Lack of Jurisdiction.

In general, courts will typically consider four factors in deciding whether to vacate a default judgment: (1) whether the defendant has a meritorious defense, (2) the reasons for the defendant's failure to appear, (3) whether the defendant acted diligently upon learning of the default judgment, and (4) the effect upon the plaintiff if the judgment is vacated. 4 Tegland, Washington Practice: Rules Practice (2006).

However, special rules govern motions to vacate a judgment on the basis of lack of jurisdiction. *Id.* at 344. Where jurisdiction is at issue, the test is rendered irrelevant and "[i]t is not necessary for the moving party to address the four factors typically associated with motions to vacate." *Id.*, citing *In re Marriage of Markowski*, 50 Wn.App. 633, 74 P.2d 754 (1988)(Default judgment vacated for lack of personal jurisdiction without to the four-part test).

C. Reed's Motion Was Not "Untimely."

Under CR 60(b) there is a general requirement that "[t]he motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceedings was entered." Reasons (1), (2), and (3) have to do with mistakes, inadvertence, surprise, neglect, erroneous proceedings, and newly discovered evidence. The cause for fraud, misrepresentation or other misconduct of the adverse party comes under section (4) of the rule and is not subject to the 1-year limitation. (See also RCW 4.72.080.) Nor is the cause for voidness, which comes under section (5) of the rule.

It follows that Reed's motion was not subject to the 1-year time limitation and the trial court's pronouncements to the contrary are in error.

Still, the "within reasonable time" provision of the rule is applicable and must be dealt with. However, because a judgment entered without jurisdiction is void, a motion to vacate under CR 60(b)(5) "may be brought at any time" after entry of judgment. *Allstate Insurance Co. v. Khani*, 75 Wn. App. 317, 877 P.2d 724 (1994), quoting *Lindgren v. Lindgren*, 58 Wn. App. 588, 596, 794 P.2d 526 (1990). Motions to vacate under CR 60(b)(5) are not barred by the 'reasonable time' or 1-year requirement of CR 60(b). *Brenner v. Port of Bellingham*, 53 Wn. App. 182, 188, 765 P.2d 1333 (1989). Void judgments may be vacated regardless of the lapse of time. *In re Marriage of*

Leslie, 112 Wn.2d 612, 618-19, 722 P.2d 1013 (1989). Not even laches bars a party from attacking a void judgment. *Id.*

In *Khani*, the court reversed a trial court's denial of a motion to vacate brought over 5 years after entry of a default judgment, despite the fact that the defendant became aware of the judgment a few months after its entry. In *Brenner*, the court reversed a trial court's denial of a motion to set aside a default judgment entered 16 years prior, remanding the case back to the trial court with instructions to vacate. In the words of the *Khani* court, "*Brenner* provides a striking example of how meaningless the passage of time is in the context of a void judgment." *Khani*, at 324.

Khani held that that the trial court erred in finding that the defendant in that case did not bring his motion within a reasonable time. It held that the trial court's finding that the defendant had actual notice of the default judgment was "irrelevant." *Id.* at 324-25

It follows that, likewise in the case at bar, Reed's purported receipt of letters from Arrow's attorneys allegedly informing him of the default judgment having already been entered is irrelevant, as is his alleged actual knowledge of it. Reed was not under any time constraint to bring his motion to vacate, and the commissioner's finding that his motion was "untimely" was error.

D. Reed Did Not Need to Provide a Meritorious Defense.

With the application of the four-factor test being deemed irrelevant in instances where a judgment has been entered without personal jurisdiction, the need for a defendant to present a meritorious defense in the course of the proceedings is rendered unnecessary. Courts in this state have consistently held that the defendant need not demonstrate a meritorious defense in order to have a default judgment vacated on the grounds of lack of jurisdiction. Tegland, *supra*, at 346. Not even an *affidavit* of meritorious defense is necessary where judgment was entered without jurisdiction. Tegland, at 561, citing *inter alia*, *John Hancock Mut. Life Ins. Co. v. Gooley*, 296 Wash. 357, 83 P.2d 221 (1938). See also *Hatch v. Princess Louise Corp.*, 13 Wn.App. 378, 534 P.2d 1036 (1975), citing *Ballard Savings and Loan v. Linden*, 188 Wash 490, 62 P.2d 1364 (1936); *Mid-City Materials, Inc.*, *supra*, at 486: “The customary CR 60 meritorious defense requirement is immaterial where the court entering in personam judgment had no jurisdiction of the defendants in the first instance,” citing *Bennett v. Supreme Tent of Knights of Maccabees*, 40 Wash. 431, 436, 82 P. 744 (1905).

It follows that the commissioner’s ruling that Reed required a meritorious defense in order to succeed in his motion to vacate was error.

E. The Trial Court's Findings of Fact Do Not Meet the Substantial Evidence Rule.

An appellate court reviews a trial court's findings of fact for substantial evidence in support of its findings. *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P. 3d 162 (2010). Evidence is substantial if it is sufficient to persuade a fair-minded, rational person of the declared premise. *Id.*, citing *Bering v. SHARE*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986).

In the case at bar, the only evidence in support of the finding that Reed was served was the process server's declaration of service. This was a defect-ridden declaration in which the server purported to have served both Reed and his alleged wife even though Reed is unmarried. Absent live direct testimony in support of it, and testimony elicited by even a perfunctory cross-examination, this bare declaration is insufficient evidence to persuade a fair-minded, rational person in the face of clearly contradictory live and direct testimony provided by Reed stating that he was the sole occupant of the residence at the time, that he was unmarried, and that on the evening in question (Valentine's Day's eve) he was in another city with his companion, Ms. St. Clair. It is even less persuasive in the face of a corroborating declaration provided by Ms. St. Clair describing the circumstances of that evening. The server's declaration is insufficient as well for the simple reason that it is *defective*, purporting to have served a married man, and his wife,

alleged co-residents of the property, when Reed was in fact unmarried and the sole resident. This significantly reduces the credibility of the witness supplying the declaration and significantly diminishes the declaration's probative value.

Where the plaintiff has the burden of proving a negative, proof is sufficient if it renders the existence of the negative probable, or if it creates a fair and reasonable presumption of the negative until the contrary is shown. *Higgins v. Salowsky*, 17 Wn. App. 207, 211, 562 P.2d 655 (1977). The preponderance of the evidence standard requires that the evidence establish that the proposition at issue is more probably true than not true. *Mohr v. Grant*, 153 Wn.2d 812, 108 P.3d 768 (2005).¹

Given the evidence submitted by the witnesses in the proceeding, a rational, fair-minded person would not be persuaded that Reed was served process on the night of February 14, 2010. On the contrary, Reed's proof was sufficient as it rendered a negative—that he was *not* served—more probable. Reed's proof was sufficient in showing that a bona fide legitimate affidavit of service did not exist, or in creating a fair and reasonable presumption of its nonexistence until it is proven otherwise.

¹ It is granted that both Reed and St. Clair were interested witnesses. But so was T. Hanson, as he had a financial motive to state that the service had been accomplished and to maintain the stream of business from the collection company, Arrow. At any rate, interest merely affects the weight of testimony; it does not destroy its probative value. *McLaren v. Department of Labor and Industries*, 6 Wn.2d 164, 107 P.2d 230 (1940). It has been held, for example, that a trier of fact may not ignore the self-interested testimony of an accused law enforcement officer in an action against him. *Richmond v. Thompson*, 79 Wn. App. 327, 901 P.2d 371 (1995).

F. Reed's Motion Alleging Fraud, Misrepresentation or Other Misconduct Required a Full Evidentiary Hearing.

When facts are in serious dispute, an evidentiary hearing with testimony will be required. *In re Marriage of Maddix*, 41 Wn. App. 248, 703 P.2d 1062 (1985). In *Maddix*, the court was faced with a lower court's vacation of a dissolution decree pursuant to a CR(b)(4) motion alleging fraud, misrepresentation or other misconduct. Despite substantial conflicting facts expressed in affidavits, the lower court had found that the husband had failed to disclose the value of his business and on that ground vacated the decree. The appellate court reversed, stating that "[t]he affidavits raise an issue of fact which cannot be resolved without the taking of testimony." *Id.* at 252. It held that "[t]he trial court erred in vacating the judgment without first hearing and weighing testimony regarding fraud, misrepresentation or other misconduct." *Id.*

Circumstances are similar in the case at bar, in that the commissioner did not allow the oral testimony of Ms. St. Clair, and the server, T. Hanson, was not present. Thus, oral testimony from the server could not be adduced and no cross-examination could be conducted. Such a testimony is vital to the case as it would certainly result in a greater body of evidence, or possibly even an admission, and in the least would enable the commissioner to assess the

credibility of the witness, T. Hanson, who is suspected of perpetrating the fraud.

It is instructive that the former RCW 4.27.040 (repealed) provided that the procedure to vacate a judgment should be the same as those in an original action to the extent possible, except that the defendant was to introduce no new cause. This matter would likely have been resolved had a full evidentiary hearing including the weighing of testimony regarding fraud been properly conducted.

G. Conclusion

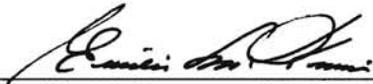
There is insubstantial evidence for the commissioner's finding of fact that Reed was served with process, and contrary to his ruling, the commissioner was not "compelled" by any doctrine, rule, or case law to accept the declaration of service in the face of seriously contradictory evidence. The commissioner's conclusion of law that Reed's motion was untimely and that Reed needed to present a meritorious defense are error and must be reversed.

The remedy herein sought by the Appellant is that this matter be remanded to the trial court with instructions that the commissioner's ruling be reversed and the judgment be vacated due to lack of jurisdiction, or in the alternative, that a full evidentiary hearing be held and testimony from all the witnesses taken.

Request for Costs and Attorneys' Fees.

Appellant respectfully requests an allowance of costs pursuant to RAP 14.2 and 14.3, as well as RCW 4.84.010, in the event he prevails in having this matter remanded. Appellant further respectfully requests reasonable attorneys' fees on appeal pursuant to RAP 18.1 as well as RCW 4.84.250 and .290.

Respectfully Submitted this 31st day of October, 2012



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