

COURT OF APPEALS NO. 74908-1-1

KING COUNTY SUPERIOR COURT NO. 15-2-122970-8

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

DANIEL and KRISTI PETERSON,

Appellants,

v.

U.S. BANK, N.A.

Respondent

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Court of Appeals
Division I
State of Washington

APPEAL FROM SUPERIOR COURT FOR KING COUNTY

RESPONDENTS U.S. BANK N.A.'S RESPONSE BRIEF

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TABLE OF CONTENTS

I. Introduction..... 1

II. Assignments of Error 1

III. Statement of the Case 2

IV. Argument 2

 A. Courts have a duty to vacate void judgments only when proper procedure has been followed 2

 B. Merely filing a motion to vacate the order of default and default judgment was not sufficient under CR 55 and CR 60 3

 1. The moving party must file an order to show cause setting a hearing under CR 60(e) 3

 2. The service requirements of CR 60(e)(3) support the Trial Courts assertion that CR 60 requires a hearing to vacate an order or judgment 4

 C. All sections of CR 60 are required when vacating an order of default and default judgment 5

 1. Compliance with the entirety of CR 60 furthers the goals of the court rules..... 5

 2. An order to show cause should be submitted for issuance by the moving party along with a motion and declaration..... 6

 D. Denial of the motion was appropriate given the Trial Court provided Appellants with instructions related to the proper procedure. 7

 1. The Trial Court clearly indicated that compliance with CR 60 (e) was required. 8

 2. Imposing compliance with CR 60 this requirement was not unduly burdensome and in no way prejudiced the parties..... 8

 E. Respondents request prevailing party attorney fees. 8

V. Conclusion 9

TABLE OF AUTHORITIES

State Cases

State v. Briggs, 94 Wn.App 299, 302, 971 P.2d 581 (1999).2

Lingren v. Lindgren, 58 Wn.App. 588, 593, 794 P.2d 526 (1990).6

State Rules

CR 553

CR 55(c)(1)3

CR 602-6

CR 60 (b)3

CR 60(b)(5)3

CR 60 (e)(2)4

CR 60 (e)(3)4,5

CR 60 (e)(1)6

CR 60 (e)6,7,8

GR 9(a).....5

RAP 18.19

Other Authorities

14 Wash. Prac. §9.3367

I. Introduction

This appeal comes before the court after the Trial Court denied Appellant's motion to vacate the order of default and default judgment. CP 172-173. The Trial Court instructed the appellant of the proper procedure for vacating an order and judgment. *Id.* Rather than follow the procedure referred to in the order, Appellants have appealed to this court seeking reversal of the denial. Respondent respectfully requests the appellate court uphold the Trial Court's order.

II. Assignments of Error

It is unclear from Appellant's brief under which standard of review they seek relief.

1. If the Appellants are arguing the applicability, validity, or meaning of CR 60, this court shall review the Trial Court's decision pursuant to the rules of statutory construction.
 - a. The standard of review for statutory construction is *de novo*.
2. If the Appellants are arguing that the Trial Court should have issued an order to show cause *sua sponte* and failed to do so, this court shall review the Trial Court's decision for abuse of discretion.

- a. The standard of review for abuse of discretion is de novo.

III. Statement of the Case

Respondents concede to Appellants' statement of the case as laid out in Appellants' brief. The Appellants assert that the Trial Court has refused to vacate the order of default and default judgment and consider whether the Trial Court had jurisdiction to enter those orders. Appellants Brief, Pg. 6. However, the central reasoning why the Trial Court ruled as it did creates Respondents disagreement with Appellant. The Trial Court failed to rule on the merits because the Appellants failed to follow proper procedure. CP 172-173. Respondents assert, along with the Trial Court, that the procedure in CR 60 (e) should be complied with.

IV. Argument

A. Courts have a duty to vacate void judgments only when proper procedure has been followed.

While it is correct to say that courts have a duty to vacate void judgments, they do not do so under improper procedure. *State v. Briggs*, 94 Wn.App 299, 302, 971 P.2d 581 (1999). The Trial Court order did not assert the judgment is not void. CP 172-173. Rather, the court did not entertain the merits since the matter was not properly set for hearing on the issue. *Id.* Because there was no hearing set on this matter, the Trial

Court's duty to vacate a void judgment had not yet been triggered.

Therefore, the Trial Court properly denied Appellant's motion. *Id.*

B. Merely filing a motion to vacate the order of default and default judgment was not sufficient under CR 55 and CR 60.

When a party seeks to set aside an order or judgment, CR 55 states, “[f]or 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 set it aside in accordance with rule 60(b).” CR 55(c)(1). Further, CR 60(b) states, “[o]n motion and upon such terms as are just, the court may relieve a party of the party’s legal representative from a final judgment, order, or proceeding for the following reasons: ... (5) [t]he judgment is void.” CR 60(b)(5). The Appellants argue these two rules simply require filing a motion stating an enumerated reason under CR 60 (b). Appellants’ Brief, Pg. 9. However, this is an incomplete understanding of this rule. As explained in our response to the Trial Court, filing a motion is the first step under these two rules, but more is required. CP 155-159. It is not enough to simply file a motion; a hearing must also be set. *Id.* The Trial Court also reminded Appellants of this requirement. CP 172-173.

1. The moving party must file an order to show cause setting a hearing under CR 60(e).

While it is correct that a motion must be filed for a reason provided in CR 60 (b), the method for obtaining full relief is outlined in CR 60(e)(2). The rule states, “[u]pon the filing of the motion and affidavit, the court shall enter an order fixing the time and place of the hearing thereof and directing all parties to the action or proceeding who may be affected thereby to appear and show cause why the relief asked for should not be granted.” CR 60(e)(2). As explained in our response to the Trial Court, this section indicates that more than just filing a motion is necessary. CP 155-159. The language includes setting a hearing, which the Appellants have failed to do. The Trial Court correctly pointed this out to Appellants. CP 172-173.

2. The service requirements of CR 60(e)(3) support the trial courts assertion that CR 60 requires a hearing to vacate an order or judgment.

Under CR 60 (e)(3), “[t]he motion, affidavit, and the order to show cause shall be served upon all parties affected in the same manner as in the case of summons in a civil action at such time before the date fixed for the hearing as the order shall provide.” CR 60(e)(3). The Appellants did serve the Respondent with the motion and declaration. CP 149-150. The Appellants did not serve an order to show cause as no order to show cause was ever issued. *Id.* Appellants argue they were only required to serve an

order to show cause if one was issued by the court. Appellant's Brief, Pg. 10. The Trial Court correctly informed Appellants that they are required to set a hearing and serve the order to show cause in compliance with CR 60 (e). CP 172-173.

C. All sections of CR 60 are required when vacating an order of default and default judgment.

Appellants cannot choose to only follow one section of a rule of procedure. The rules are designed to create uniformity along all causes and choosing to ignore one section disrupts that goal.

1. Compliance with the entirety of CR 60 furthers the goals of the court rules.

As Appellants cite, the court rules are designed "to promote justice by ensuring a fair and expeditious process." GR 9(a). CR 60 falls within that goal – requiring a hearing to give the parties opportunity to argue the merits of the motion and to allow the judge to make an informed ruling. The Trial Court summarily denied Appellants motion due to lack of compliance with CR 60. CP 172-173. By failing to comply with CR 60, Appellants deprived Respondent of this step. This is true even though Respondent received notice of the motion and had and had an opportunity to respond. Respondents focused on procedure in their response and the

merits of whether the judgment is void were never reached. CP 155-159. In order to reach the merits, the Appellant must comply with CR 60. The Trial Court correctly denied Appellants Motion to Vacate. CP 172-173. Further, Appellant's failure to comply denied Respondent an opportunity to be heard on the matter as no hearing was ever scheduled.

Appellant argues that because the bank responded to the motion, failing to set a hearing is excusable. However, the response filed did not address the merits, as the procedure was improperly followed, and thus, the merits were not yet at stake. CP 155-159. Further, failure to comply with CR 60(e) does not create a harmless error as appellant argues. In *Lindgren*, the court articulated that the purpose of CR 60(e)(3) is to provide notice to an opposing party. *Lingren v. Lindgren*, 58 Wn.App. 588, 593, 794 P.2d 526 (1990). While the Appellants use this to assert the Respondent was provided notice of the motion to vacate, they still failed to serve an order to show cause. Thus, the Trial Court correctly denied Appellant's Motion on the basis of noncompliance with CR 60. CP 172-173.

2. An Order to Show Cause should be submitted for issuance by the moving party along with a motion and declaration.

Under CR 60(e), “[a]pplication shall be made by motion filed in the cause stating the grounds upon which relief is asked, and supported by the affidavit of the applicant...setting forth a concise statement of the facts or errors upon which the motion is based, and if the moving party be a defendant, the facts constituting a defense to the action or proceeding.” CR 60 (e)(1). In the present case, Appellants did file a motion and supporting declarations pursuant to this rule. CP 150-154. However, Appellants argue that this was all that was required of them and that the Trial Court is required to set a hearing upon receiving this motion. This is an incorrect understanding of the rule. The meaning of ‘the court shall enter an order’ is that the court will schedule according to the proposed order presented along with the appropriate motion and declaration. The court does not schedule a hearing *sua sponte*. The Trial Court correctly ruled on this basis. CP 172-173.

D. Denial of the motion was appropriate given the Trial Court provided Appellants with instructions related to the proper procedure.

Requiring the parties to follow the procedures outlined in the court rules did not deprive the Appellants of the ability to re-file according to proper procedure. The motion to vacate was denied without prejudice and

thus, all the Appellants needed to do was resubmit their motion along with an order to show cause. CP 172-173.

1. The Trial Court clearly indicated that CR 60 (e) was required.

On the face of the order, the Trial Court clearly indicated that the moving party was required to comply with CR 60(e) and cited K. Tagland 14 Wash. Prac. §9.33 for support. CP 172-173. Inclusion of this instruction clearly indicated that the proper procedure was to set a hearing and serve an order to show cause. *Id.*

2. Imposing this requirement was not unduly burdensome and in no way prejudiced the parties

Requiring the moving party to re-file their motion and declarations along with an order to show cause setting a hearing on the matter is not unduly burdensome. This allows the parties an opportunity to reach the merits of the moving party's claim and furthers the goals of the civil rules. Because the motion was also denied without prejudice, the moving party was not harmed in the eyes of the court. They retained the ability to seek the remedy of vacating the order of default and default judgment once they followed proper procedure.

E. Respondents request prevailing party attorney Fees.

Under RAP 18.1(a) requires requests for attorney's fees, if allowed, to be included in their opening brief. The Respondent requests this court award Respondent their attorney's fees if they prevail in this appeal.

V. Conclusion

Appellants failed to set a hearing on the merits of their motion to vacate the order of default and default judgment. Rather than comply with the Trial Courts instruction of setting a hearing pursuant to CR 60(e), they appealed the denial. Motion practices throughout the civil rules require hearings, and relief from judgment is no different. This court should uphold the Trial Court's denial and require the Appellants to comply with proper procedure.

DATED this 4th day of August, 2016 at Mountlake Terrace, Washington

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Justin Hawthorne, certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

1. At all times hereinafter mentioned I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness herein.
2. That on this 4th day of August, 2016, I caused to be served a true and correct copy of Respondent U.S. Bank's Response Brief to Appellants in the above entitled matter by causing it to be delivered U.S. First Class Mail and Electronic-Email to the following:

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DATED this 4th day of August, 2016 at Mountlake Terrace, Washington

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