

No. 75107-7-1

**IN THE COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON**

ASSET ACCEPTANCE, LLC

Respondent

V.

VIET TUAN NGUYEN

Appellant

BRIEF OF RESPONDENT

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I. INTRODUCTION

This is a seven-year-old case in which the Appellant, Viet Tuan Nguyen (hereafter “Nguyen”), seeks to ask the court to vacate a judgment that was entered on April 16, 2009, and one which Nguyen has known about since at least 2012. (CP at 288). Nguyen has attempted to vacate this judgment three (3) times since he was made aware of it in 2012. (CP at 20, 50, 104). Nguyen has failed each time to meet his burden to show through clear and convincing evidence that he was not served with the summons and complaint. (CP at 41 68, 429). While Nguyen should be barred from bringing a Motion to Vacate for a third time, Judge Spector specifically ruled that “the Court cannot find that defendant’s motion met the standard of proof (clear and convincing evidence) that he had not been properly served). (CP 429 – 430).

Nguyen now claims that the trial court erred for a third time in denying his Motion to Vacate. (CP at 431). As recognized by the trial court, Nguyen failed in his burden to provide clear and convincing evidence that he was not properly served. The trial court found that that Nguyen is held to the same standard of proof regardless of his background, and that Nguyen had brought these identical issues to the trial court twice before. (CP 429 – 430). As a result, Nguyen’s Motion to Vacate was denied for a third time and Asset Acceptance, LLC (hereafter Asset) respectfully requests that

this Court affirm the third order denying Nguyen's Motion to Vacate the Default Judgment that was entered on April 8, 2016.

II. STATEMENT OF THE CASE

Nguyen was served with the Summons, Complaint, and Notice to Service Members and Their Dependents on March 12, 2009, at the address 3802 S Benefit St Seattle. (CP at 408). No Answer was filed or received by Asset. (CP at 6-17). Default Judgment was entered on April 16, 2009. *Id.* On or around July 25, 2012, Asset received a letter from Nguyen requesting Validation of the Debt. (CP at 295). Asset responded to this letter by providing Nguyen with a copy of the Judgment (CP at 306). Nguyen then filed an Order to Show Cause on August 22, 2012, noting his own Motion to Vacate to be heard on September 3, 2012. (CP at 20-33). Nguyen's Motion contained a detailed affidavit that laid out his reasons why he believed the Default judgment should be vacated, including that he was not properly served. Asset filed a response to this Motion. (CP at 34-40). The trial court denied Nguyen's motion to vacate and entered an order to that effect on September 6, 2012. (RP at 3). Nguyen did not file an appeal. (RP at 3).

Along with Nguyen's Motion to Vacate, Nguyen filed a FDCPA and Fraud Complaint in the Western District Court of Washington on August 23, 2012. (CP at 323). Nguyen again pled that he was not served. Asset had

to defend itself in this lawsuit. The FDCPA and Fraud Complaint was dismissed on January 25, 2013. (CP a 323). It is clear from these filings that Nguyen was aware of the Judgment against him, and that he was competent enough to file an Order to Show cause, a Motion to Vacate, an affidavit in Support of the Motion, and a FDCPA lawsuit in federal court.

Following Nguyen's filing of the first Motion to Vacate and his FDCPA lawsuit, Nguyen continued to send Asset documents concerning the account, including Discovery requests which Asset received on October 22, 2012. (CP at 288-289). Asset responded in a letter dated October 23, 2012, stating that as Judgment has been entered and thus no responses will be provided. Additionally, Asset advised Nguyen that his first Motion to Vacate had been denied. (CP at 288 – 289).

On October 22, 2012, Asset also received another letter from Nguyen, requesting another validation of the debt. (CP at 288 – 289). Asset responded again by providing a copy of the Judgment. Id.

On July 15, 2013, Nguyen filed a second Motion to Vacate Judgment, again stating lack of service and lacking any knowledge of the debt on which judgment was entered against him. (CP at 50-60). Nguyen appeared at the hearing. (RP at 1). At this hearing, Judge North on the record stated that due to the fact that he was not aware that the previous Motion to Vacate was denied based on Nguyen's arguments, which included lack of

service, and it being in the wrong forum, he would deny without prejudice. (RP at 2-4). This denial without prejudice was not made to allow Defendant to continue to file Motion's to Vacate. Judge North specifically stated that if the previous Order denying Nguyen's Motion to Vacate was not based on any argument regarding service, Nguyen must note the matter in front of the proper Judge. (RP at 2-4). After this ruling, Nguyen again failed to renote or reset the hearing for almost three (3) years.

Asset continued to garnish Nguyen's wages and Nguyen was aware of the garnishment as seen by the numerous certified return receipts signed by Nguyen. (CP at 288-289). Additionally, on or around February 12, 2014, Asset received a phone call from a third party claiming to be Nguyen's post litigation representation. (CP at 288-289). Asset had no authorization and requested it be sent in. On February 14, 2014, Asset received POA authorization for Coast Law Center. (CP at 289). Nguyen was again aware of the Judgment and garnishment all the way into 2015 as shown by the signed certified receipt dated May 18, 2015. (CP at 289)

Nguyen subsequently obtained current counsel, who filed a third Motion to Vacate with the court. (CP at 70 – 103). The trial court heard oral arguments from both sides and reiterated to Nguyen that, "you keep assuming that I'm going to find the judgment is void. You have a certain burden before you get to that assumption...and you keep avoiding it." (RP

at 20). Thus, it is clear from the record that the trial court in using sound discretion properly denied Nguyen's third motion to vacate. (RP at 8-25, CP at 429-430).

III. ARGUMENT

A. ISSUES ON APPEAL

1. Whether the trial court erred in treating Nguyen's motion to vacate as precluded or prejudiced by his previous Motions
2. Whether the trial court erred in finding that Nguyen failed to show clear and convincing evidence that he was not properly served.

B. STANDARD OF REVIEW

1. MOTION TO VACATE DEFAULT JUDGMENT

An appellate court engages in an abuse of discretion review of motions to vacate orders, meaning the trial court's ruling will not be disturbed unless it clearly abused its discretion. Lindgren v. Lindgren, 58 Wash. App. 588, 595, 794 P.2d 526, 531 (1990).

2. COLLATERAL ESTOPPEL REGARDING A MOTION TO VACATE DEFAULT JUDGMNET

Nguyen makes the incorrect assumption that collateral estoppel in regards to a Motion to Vacate is reviewed de novo. The case Nguyen cites, Christensen v. Grant Cnty. Hosp. Dist. No. 1, 152 Wn.2d 299, 305-06, 96 P.3d 957 refers to a collateral estoppel argument within a Summary Judgment ruling, which is reviewed de novo. In the present case, when

deciding whether to vacate a default judgment under CR 60, the Court must decide if the moving party has presented substantial evidence to support defense of its underlying claim. M & M Harrison Elec., Co. v. Ins. Co. of State of Pennsylvania, 117 Wash. App. 1049 (2003). Collateral estoppel prevents litigation of an issue after an opposing party has had full and fair opportunity to litigate the case. Id. The trial court's ruling regarding a Motion to Vacate a default judgment, with the issue of collateral estoppel, is reviewed with an abuse of discretion standard. See Id.

C. ANALYSIS

1. **The Order Denying the Motion to Vacate Should be Upheld Because Nguyen is barred by Equitable Estoppel to bring the Motion a Third Time.**

Collateral estoppel prevents relitigation of an issue after the party has had a full and fair opportunity to present its case. Hanson v. City of Snohomish, 121 Wash. 2d 552, 561, 852 P.2d 295, 300 (1993). Relitigation of a claim is barred once it has been decided. Nielson By & Through Nielson v. Spanaway Gen. Med. Clinic, Inc., 135 Wash. 2d 255, 262, 956 P.2d 312, 315 (1998). The purpose of the doctrine of collateral estoppel is to promote the policy of ending disputes. Id.

Collateral Estoppel requires that (1) the issue that is being decided is identical with the one presented; (2) that there was a final judgment on the merits; (3) the person making the claim was a party in the previous litigation;

and (4) no injustice will come to the party who the doctrine will be applied. McDaniels v. Carlson, 108 Wash. 2d 299, 303, 738 P.2d 254, 257 (1987). In bringing the two motions to vacate pro se, Nguyen is held to the same standard as if he was represented by an attorney. Patterson v. Superintendent of Pub. Instruction, 76 Wash. App. 666, 671, 887 P.2d 411, 415 (1994). As a pro se litigant, Nguyen must be bound by the same rules of procedure and substantive laws as attorneys. Westberg v. All-Purpose Structures Inc., 86 Wash. App. 405, 411, 936 P.2d 1175, 1178 (1997), as amended (June 13, 1997).

Here, Nguyen represented himself in filing both motions. While Nguyen may have had help from outside sources, he is still to be held to the same standard and rules as his own lawyer would be. Through the two motions, Nguyen raised the issue of service. Nguyen has had every opportunity to litigate the issue of service, file any motions to reconsider, or to appeal the Court's orders and has failed to do so. Additionally, Nguyen proceeded to file a detailed FDCPA claim in Federal Court, as well as request Discovery from Asset. It is clear that Nguyen should be held to the same standard as an attorney as he produced and filed detailed motions, filed his own federal lawsuit, and produce discovery. Nguyen has been awarded every opportunity to be heard in this case and every opportunity to seek proper counsel. Even when proper counsel was obtained, the trial court still

ruled that Nguyen failed to show through clear and convincing evidence that he was not served.

Nguyen raised the issue of service in both of his previous motions to vacate and both were denied. The first motion Nguyen submitted to the Court contained an Affidavit of Defendant. (CP at 155). This Affidavit states that Nguyen did not know that there was an outstanding lawsuit against Nguyen, and thus he did not file an Answer. Nguyen goes on to say that he was never served with the lawsuit.

Nguyen is the same party in this action and is bringing the same claims against Asset. Nguyen for the third time attempted to raise the issue of service as to why the default judgment should be vacated. From the evidence provided it is clear Nguyen has had every opportunity to bring these Motions, seek any type of legal counsel and make any claims he believes to be necessary. Nguyen has had every opportunity to resolve any issues.

Thus, it is clear Nguyen's Motion was properly denied based on the fact these issues have already been litigated and ruled upon. Regardless, the trial court, in its written ruling, stated that it denied Nguyen third motion based on the fact that Nguyen did not meet the required standard of proof.

2. The Trial Court Did Not Err in Finding that Nguyen failed to Meet the Standard of Proof of Clear and Convincing Evidence.

The Court reviews a Motion to Vacate Default Judgment through an abuse of discretion standard. Lindgren v. Lindgren, 58 Wash. App. 588, 595, 794 P.2d 526, 531 (1990). The issues concerning a motion to vacate a default judgment are addressed to the sound judicial discretion of the trial court. White v. Holm, 73 Wash. 2d 348, 351, 438 P.2d 581, 584 (1968). The ruling of the trial court should only be disturbed if it is made clear that sound discretion has been abused. Id. Nguyen has failed to show how the trial court clearly abused its sound discretion when it made its ruling based on all of the evidence before it.

Nguyen has the burden of showing by clear and convincing evidence that the service was improper. An affidavit of service is presumed to be valid if it is regular in its form and substance. State ex rel. Coughlin v. Jenkins, 102 Wash. App. 60, 65, 7 P.3d 818, 822 (2000). Once the Plaintiff meets the initial burden to prove a prima facie case that service was proper, the party challenging the service must demonstrate by *clear and convincing* evidence that service was improper. Scanlan v. Townsend, 181 Wash. 2d 838, 847, 336 P.3d 1155, 1159 (2014) (emphasis added).

A return of service stands as “*prima facie* correct.” John Hancock Mutual Life Insurance Co. v. Gruley, 196 Wn. 357 (1938) (emphasis added).

RCW 4.28.080(15) reads in relevant part that service is accomplished, “In all other cases, to the defendant personally, or by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein.” In the Declaration of Service dated March 12, 2009, C. Legge states under oath that at “3802 S Benefit St Seattle,” the Defendant, Viet Tuan Nguyen was served by personally delivering 1 true and correct copy and leaving the same with Yen Doe, CO RESIDENT, residing at the defendant’s usual place of abode. This Declaration of Service, regular in form and substance, was filed, establishing that the Defendant was served on March 12, 2009.

Expanding on what is needed to meet the burden of proof of clear and convincing evidence the court in Coughlin found that the party contesting service failed to meet its burden of clear and convincing evidence. Coughlin, the party contesting service, did not provide an affidavit until four years after service. Id. The affidavit included no real substantive proof that Coughlin did not reside at the address in question. Conversely, the State provided evidence such as address searches through Equifax and Affiliates demonstrating the correct address was used, as well as other evidence showing the party did in fact live at the address. Id. Thus the Court found that the trial court correctly ruled that the standard of proof of clear and convincing was not met.

Further, the Court in Northwick v. Long, 192 Wash. App. 256, 264, 364 P.3d 1067, 1071 (2015), referenced documents that can be used to meet the high standard of proof to show clear and convincing such as: documentation relating to housing, banking, and other activities highly probative of domestic activity linking the person to a different address. Id. The party contesting service failed to submit any such documentation, thus the burden of clear and convincing evidence was not met.

The same set of facts are found in this case. Here, the trial court, using its sound discretion, found that the evidence provided by Nguyen did not show by clear and convincing evidence that he was not properly served. Nguyen did not submit any relevant evidence to show that he did not reside at the address during the time of service.

The trial court weighed the evidence provided by Nguyen, which only included self-serving affidavits, provided over seven years after service, and a tax return to attempt to show that he was not residing at the service address. Nguyen's affidavit admits that Nguyen had resided at the address where service occurred. Nguyen also submits a declaration from a Bach Yen Thi Huynh, who admits to living at the address of service. (CP at 75). Nguyen fails to provide any information regarding his location during the time of service such as employment stubs or other forms of documentation. The lack of evidence provided by Nguyen clearly fails to

meet the standard of clear and convincing evidence. (*see Scanlan v. Townsend*, 181 Wash. 2d 838, 847, 336 P.3d 1155, 1159 (2014)).

Nguyen attempts a third bite at the apple with self-serving declarations and one tax return. Nguyen fails to provide any evidence that clearly shows his situation during the period when service occurred. Additionally, in Nguyen's first declaration he fails to state he never received the summons and complaint. The declaration of Bach Yen Thi Huynh also fails to state that he was never served with a summons and complaint. (CP at 75). Mr. Huynh only states he does not recall and if he was he would not have understood. (CP at 75). Only until Asset pointed out this lack of denial did Nguyen submit a sur declaration to state he was never served.

The trial court also considered Asset's evidence, which included the original proof of service, TLO Property search showing the service address as a residence of Nguyen during the time period of the service, and the numerous communication Nguyen had with Asset. The trial court also heard lengthy argument from both parties as shown in the report of proceedings provided. The trial court had knowledge of every aspect of this case, had researched the case law concerning the issues, and reviewed all the pleadings submitted. Upon review of all of these factors, the trial court used its sound discretion and denied Nguyen's third Motion to Vacate finding that Nguyen could not prove by clear and convincing evidence that service

was improper. The trial courts written ruling made it clear that the trial court found that Nguyen's motion did not meet the standard of proof.

3. Nguyen failed to satisfy the Factors of CR 60 to Vacate Default Judgment

In determining whether to grant a motion to vacate default judgment, the court must consider the following factors:

“(1) That there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by the opposing party; (2) that the moving party's failure to timely appear in the action, and answer the opponent's claim, was occasioned by mistake, inadvertence, surprise or excusable neglect; (3) that the moving party acted with due diligence after notice of entry of the default judgment; and (4) that no substantial hardship will result to the opposing party.”

White v. Holm, 73 Wn.2d 348, 352, 438 P.2d 581 (1968). The first two factors are the most important, and the moving party must demonstrate each of them as elements to vacate a default judgment. The last two factors are intended to supplement the first two. *Id.*

Nguyen has failed to explain through clear and convincing evidence as to why he had failed to timely appear. Further, Nguyen has been aware of this judgment for at least four years. Throughout that time, Nguyen engaged in the following activity: letters sent back and forth between Nguyen and Asset, the two Motions to Vacate, the FDCPA lawsuit, the untimely discovery, the two requests for validation, the obtaining of a debt consolidation service, and the numerous garnishments. With all of that litigation Nguyen failed to meet the standard of proof required of him. Only

until early 2016 did Nguyen finally seek legal counsel, who filed a Motion to Vacate without even notifying Asset's counsel of record. It is clear that Nguyen has had every opportunity to timely appear and resolve any issues he had.

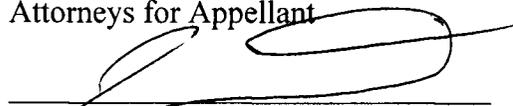
Nguyen has had over six (6) years to make any motions, obtain counsel, and to properly resolve any issues he believes he had. At this time, Asset will be greatly prejudiced if the Judgment is vacated and will suffer a substantial hardship. This suit was filed on April 16, 2009, with the date of last payment being February 2, 2005. Plaintiff brought this suit within the statute of limitations. Now, if the judgment is vacated due to service, Asset would be estopped from bringing the claim again as the statute of limitations would now have run. Further, the amount of time that has passed since the original account was charged off and sold would prejudice Asset in its record retention ability.

IV. CONCLUSION

For the foregoing reasons, the order denying Nguyen's third motion to vacate should be upheld.

Dated this 28 day of July, 2016.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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ASSET ACCEPTANCE LLC

Respondent,

vs.

VIET TUAN NGUYEN

Appellant.

NO. 75107-7-1

DECLARATION OF MAILING

SHW Reference no. 169200.001

2016 JUL 29 AM 9:58
COURT OF APPEALS DIV I
STATE OF WASHINGTON
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The undersigned declares and states as follows:

I am a citizen of the United States of America, and of the State of Washington,
over the age of twenty-one years, not a party to the above entitled proceeding and
competent to be a witness therein.

On 7/28/16 I mailed a copy of the Brief of Respondent in the above
entitled action to:

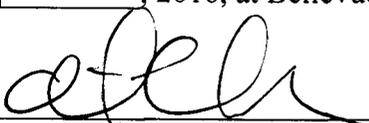
The Sullivan Law Firm
Attn: Mina Shahin
701 5th Ave, Ste 4600
Seattle, WA 98104

Via UPS, next day air.

\\

Declarant states the foregoing is true and correct to the best of his/her knowledge and belief, subject to the penalty of perjury under the laws of the State of Washington.

DATED this 28 day of July, 2016, at Bellevue, Washington.



Alicia Clark