

No. 36449-2-II

DIVISION II OF THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

L.S., an individual,
Respondent-Cross-Appellant,

vs.

TITUS-WILL FORD SALES, INC., a Washington
Corporation, d/b/a/ MALLON FORD, BILL
HANFORD, HENRY KREBBS,

Cross-Appellants,

BRODERICK LaDRAE GORDON,

Defendant,

RICHIE CARTER,

Cross-Respondent,

MICHAEL R. DOLAJAK,

Appellant.

RECEIVED
SUPERIOR COURT
PIERCE COUNTY
WASHINGTON
JAN 10 2005
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APPEAL FROM THE SUPERIOR COURT
OF WASHINGTON FOR PIERCE COUNTY

Cause No. 05-2-07726-9

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. Dolajak's motion to vacate the default and judgment pursuant to CR 55(c) in that Mr. Dolajak had not been served with notice of the proposed default pursuant to CR 55(f)(2)(a).

2. The trial court erred in failing to set aside the default and judgment pursuant to CR 60(b).

3. The trial court erred in entering a judgment against Mr. Dolajak in the sum of \$2.5 million as the court failed to follow the requirements of CR 55(b)(2).

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in denying Mr. Dolajak's motion to vacate the default and judgment pursuant to CR 55(c) in that Mr. Dolajak had not been served with notice of the proposed default pursuant to CR 55(f)(2)(a)? (Assignment of Error #1).

2. Did the trial court err in failing to set aside the default and judgment pursuant to CR 60(b)? (Assignment of Error #2)

3. Did the trial court err in entering a judgment against Mr. Dolajak in the sum of \$2.5 million when the court failed to follow the requirements of CR 55(b)(2)? (Assignment of Error #3)

STATEMENT OF THE CASE

A. Procedural History

On May 10, 2005, plaintiff L.S. filed a lawsuit against certain named defendants, including Michael R. Dolajak, alleging that Mr. Dolajak, among others had non-consensual sex with her. CP 1.

On July 25, 2005, Mr. Dolajak was served with the complaint in this matter. CP 6. Mr. Dolajak did not respond to the summons and complaint. L.S. had filed another lawsuit arising from the same incident against defendants Titus-Will Ford Sales, Inc., Bill Hanford and Henry Krebs, which was consolidated with this case on June 30, 2006. CP 8. These defendants responded and defended the cases. Defendants Richie Carter and Broderick LaDrae Gordon also filed answers in the case. CP 76, 74.

On May 7, 2007, the matter was set for trial before the Honorable Vicki L. Hogan. Plaintiff had previously settled with defendants Titus-Will Ford Sales, Inc., Bill Hanford and Henry Krebs. On the date of trial none of the three remaining defendants appeared. Plaintiff elected to dismiss

the complaint against Broderick LaDrae Gordon, CP 10, entered an order of default against Richard Carter and Michael Dolajak, CP 11, and obtained default judgments pursuant to CR 55 against Richard Carter and Michael Dolajak, CP 12-14. The court ordered judgment be entered in the sum of \$2.5 million against Mr. Carter and Mr. Dolajak. CP 12-14.

On May 31, 2007, Mr. Dolajak moved to set aside the judgment and default pursuant to CR 55 and CR 60. CP 267-268.

Mr. Carter also filed a motion to set aside the judgment and default. CP 317-331. The court consolidated the matters and a hearing was held on June 8, 2007. 6/8/07 RP 1-35.

On the above date, the court set aside the judgment and default against Mr. Carter, CP 382-384, but denied Mr. Dolajak's motion to set aside the default and judgment, CP 385-386.

Mr. Dolajak timely appealed. CP 387-392.

B. Facts

In her complaint filed May 10, 2005, plaintiff L.S. alleged that she had non-consensual sex with certain named defendants including Mr.

Dolajak on or about May 11, 2003 in the early morning hours. CP 1-5. According to police reports, the plaintiff went to Tacoma General Hospital approximately 24 hours later where she made contact with police investigators who happened to be at the hospital on an unrelated matter. CP 146-151.¹ Thereafter, a lawsuit was filed by the plaintiff on May 10, 2005, alleging non-consensual sex with Mr. Dolajak, among others. CP 1-5. Mr. Dolajak was served with a summons and complaint on July 25, 2005. CP 6-7.

Mr. Dolajak had no contact with any of the parties or attorneys in this case until May 1, 2007. CP 248-253. On May 1, 2007, Dan'L Bridges contacted Mr. Dolajak and advised him that he was the attorney for Mallon Ford and that a trial in the above matter had been scheduled for May 7, 2007. He further indicated to Mr. Dolajak that Mr. Dolajak had to be there and attend the trial. Mr. Bridges further indicated that he was not Mr. Dolajak's attorney but he would give him pointers

¹This matter was investigated criminally and no charges were filed.

and advice on what to do and what to say. CP 248-49.

Based on the information provided by Mr. Bridges to Mr. Dolajak, Mr. Dolajak intended to attend the trial beginning on May 7th. CP 248-253. On May 4, 2007, Mr. Dolajak received two messages from Mr. Bridges. One message was left on his home answering machine. Id. In that message, Mr. Bridges advised Mr. Dolajak that there was no trial on Monday, that it had been canceled, and that Mr. Dolajak did not have to appear in court and that Mr. Bridges was sorry for getting him worked up. A second message was left at his work by Mr. Bridges. Mr. Dolajak picked up this message at his place of work on the date of the message. CP 248-253.

On Monday, May 7, 2007, Mr. Dolajak was notified that a default judgment had been entered against him in the sum of \$2.5 million. Mr. Dolajak did not receive any notice that plaintiff was asking the court for a default judgment.

As discussed above, Mr. Dolajak filed a motion to vacate the default and judgment pursuant to CR 55 and CR 60 alleging (1) that he had been

served over one year prior to the default being taken and did not receive notice of entry of the default and judgment pursuant to CR 55(f)(1); (2) that he was entitled to relief pursuant to CR 60(b) in that he had been misled by an opposing counsel's attorney and was told that he did not have to appear in court; and (3) that there was insufficient information available to the court to enter judgment in the amount ordered and that the court did not submit proper findings of fact and conclusions of law pursuant to CR 55(b)(2). CP 267-68.

Defendant Ritchie Carter submitted a motion to vacate the judgment as well, arguing that he had filed an answer and had not been notified of the plaintiff's motion for default and judgment. CP 317-331.

At the time of the hearing, it was determined that Mr. Carter had indeed filed a one-line pro se response to the complaint on April 20, 2007. CP 76, 6/8/07 RP 34. The parties acknowledged that this document had been overlooked at the time of the earlier hearing. Id.

In response to Mr. Dolajak's motion to set aside default and judgment the plaintiff argued that they had obtained a judgment pursuant to CR 40(a)(5) in that they had brought the matter to trial and the court had tried the matter on its merits and awarded judgment under said rule. CP 332-358, 6/8/07 RP 21-28. While the court's oral ruling on this issue is somewhat unclear, the order setting aside the Carter default leaves no argument as to what rule the court used to set aside the default.²

Upon hearing the argument of counsel, the court orally found that a complaint had been filed on May 5, 2005 and that service on Mr. Carter and Mr. Dolajak had been obtained in July, 2005. 6/8/07 RP 33. The court further found that Mr. Carter had filed a document on April 20, 2007, found it to be an answer and determined that the order of default needed to be set aside against Mr. Carter. 6/8/07 RP 34.

Regarding Mr. Dolajak, the court found that Mr. Dolajak had neither filed an answer or

²Plaintiff's arguments also seem foreclosed by a Division I ruling in In re Marriage of Daley, 77 Wn.app. 29, 888 P.2d 1194 (1994).

appeared on the day of trial. 6/8/07 RP 34. On June 8, 2007, the court entered an order setting aside the default and judgment against Mr. Carter pursuant to CR 55. CP 382-384. On the same date, the court denied Mr. Dolajak's motion. CP 385-386.

SUMMARY OF ARGUMENT

1. The trial court erred in entering a default judgment against Mr. Dolajak pursuant to CR 55. It is clear from the court's order vacating the default of Ritchie Carter and the court's finding that Mr. Carter had entered an answer, that the court vacated the judgment against Mr. Carter pursuant to CR 55.

In denying Mr. Dolajak's motion, the court simply found that Mr. Dolajak had "done nothing". 6/8/07 RP 34. In entering the default and judgment, the court ignored the specific requirements of CR 55(f)(1) and (2) that the court "shall not sign an order of default or enter a judgment until a notice of the time and place of the application for the order or judgment is served on the party in default, not less than 10 days prior to the entry. Proof by affidavit of the

service of the notice shall be filed before entry of the judgment."

2. The court erred in failing to find that Mr. Dolajak was not entitled to relief from judgment pursuant to CR 60(b) in that Mr. Dolajak had intended to appear at the trial and had been told not to attend the trial by a co-defendants' attorney who was the attorney for his employer at the time of the event. Said directive by the co-defendants' attorney constituted excusable neglect which the court failed to recognize.

3. The court erred in awarding a judgment in the sum of \$2.5 million. There was simply no information in the record to support the court's determination of the judgment amount. The court failed to voice on the record or otherwise the evidence it used to conclude that the plaintiff had suffered damages in the sum of \$2.5 million. Further, the court failed to enter any findings of fact and conclusions of law to support the judgment amount.

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ARGUMENT

- I. THE TRIAL COURT ERRED IN DENYING MR. DOLAJAK'S MOTION TO SET ASIDE THE DEFAULT AND JUDGMENT PURSUANT TO CR 55.

CR 55(c)(1) states in part:

(c) Setting Aside Default.

(1) Generally. For 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 likewise set it aside in accordance with rule 60(b).

CR 55(f)(1) states:

(f) How Made After Elapse of Year.

(1) Notice. When more than 1 year has elapsed after service of summons with no appearance being made, the court shall not sign an order of default or enter a judgment until a notice of the time and place of the application for the order or judgment is served on the party in default, not less than 10 days prior to the entry. Proof by affidavit of the service of the notice shall be filed before entry of the judgment.

On May 7, 2007, the trial court entered an order of default pursuant to CR 55 upon the motion and request of the plaintiff, who specifically requested a default under CR 55. See 5/7/07 RP 9, 11-12. See also 6/8/07 RP 11. This request and entry of default was taken in violation of CR 55(f)(1) and (2). As can be seen by the

declaration of Mr. Dolajak, CP 248-253, he had been served with the summons and complaint almost two years before the defaults were entered and was never notified of the intent of the plaintiff to take a default or enter a judgment against him. Nor did the plaintiff file proof of service of the notice of her intent to take a default prior to the entry of the default or judgment.

A party who has not received proper notice is entitled as a matter of right to have any resulting default judgment vacated. Housing Authority of Grant County v. Newbigging, 105 Wn.App. 178, 19 P.3d 1081 (2001).

II. THE COURT ERRED IN FAILING TO SET ASIDE THE DEFAULT AND JUDGMENT PURSUANT TO CR 60(B).

It is also Mr. Dolajak's position that the trial court erred in failing to grant relief from its judgment pursuant to CR 60(b)(1) and (4). CR 60(b) states:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

. . .

(4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

It is Mr. Dolajak's position that he should be granted relief from judgment as a result of the communications he received from the attorney for Mallon Ford, Dan'L Bridges, and communications from plaintiff to Mr. Bridges. As discussed in the affidavits of Michael R. Dolajak and Daniel Bridges, Mr. Dolajak was first contacted by Mr. Bridges on May 1st advising him of the required attendance at trial. Thereafter, having made plans to attend the trial, Mr. Dolajak received messages on May 4th and May 5th unequivocally stating that the case had been settled, that there would be no trial on May 7th and that Mr. Dolajak did not need to attend.

It appears from the affidavit of Mr. Bridges that these communications occurred as a result of the plaintiff's counsel advising him that they intended to dismiss the case against Mr. Dolajak and providing him a notice of nonsuit which Mr.

Bridges apparently relied upon in notifying Mr. Dolajak that the case was being dismissed and he did not need to appear at trial. In reviewing the affidavit of Mr. Bridges, it appears that subsequent to the May 5th notice to Mr. Dolajak not to attend the trial, he received information suggesting that the case may not be dismissed against Mr. Dolajak. It is uncontested that Mr. Bridges failed to re-contact Mr. Dolajak to advise him of the possible change in circumstances. It is the position of Mr. Dolajak that under Rule 60(b)(1) that the communications between plaintiff's counsel and Mr. Bridges and communications between Mr. Bridges and Mr. Dolajak amount to surprise, excusable neglect and/or irregularity in obtaining a judgment or order. It is also Mr. Dolajak's position that the described communications consisted of misrepresentations or other misconduct of an adverse party under CR 60(b)(4).

In not attending the trial or defending this matter, Mr. Dolajak relied on the statements of counsel of record for Mallon and other defendants after having made plans to attend the trial.

Based on these facts, the trial court should have found that Mr. Dolajak's failure to defend the case was a result of excusable neglect. It is also Mr. Dolajak's position that the statements between counsel outlined in Mr. Bridges' affidavit and the consequential notification to Mr. Dolajak not to attend the trial, constitute misrepresentation or other misconduct of an adverse party. It is clear that plaintiff's counsel led Mr. Bridges to believe that claims against Mr. Dolajak and others would be dismissed upon the agreed upon settlement. Once Mr. Bridges determined that his assumptions may have been in error, his failure to recontact Mr. Dolajak constituted misrepresentation or other misconduct of an adverse party. It is Mr. Dolajak's position that Mr. Bridges' clients were adverse to Mr. Dolajak's interests. In Mr. Bridges' answer to plaintiff's complaint, he pleaded that liability for plaintiff's injuries was several and not joint and that the jury must apportion fault, if any, amongst the defendants. Thus, Mr. Bridges' clients' interests became adverse to Mr. Dolajak.

In deciding a motion to vacate a default judgment, a court must consider two primary and two secondary factors that must be shown by the moving party. One, the existence of substantial evidence to support at least a prima facie defense to the opposing party's claim, and (2) the failure to timely proceed as a result of mistake, inadvertence, surprise or excusable neglect. The secondary factors are (1) the party's seeking relief after receiving notice of the default judgment and (2) the effect on the opposing party would not be prejudicial if the judgment were vacated. See Housing Authority of Grant County v. Newbigging, supra. Equitable principles guide the court in considering a motion to vacate judgment. Id. at 132. The trial court does not act as a trier of fact in considering a motion for relief from judgment. Pfaff v. State Farm Mutual Auto Ins. Co., 103 Wn.App. 829, 14 P.3d 837 (2000), review denied 143 Wn.2d 1021, 25 P.3d 1019 (2001).

The trial court must take the evidence and reasonable inferences in the light most favorable to the movant in deciding whether the movant has presented substantial evidence of a prima facie

defense sufficient to obtain relief from the default judgment. Id.

Here the factors strongly weigh in favor of setting aside the default and judgment. Mr. Dolajak has asserted a prima facie defense to the opposing party's claim and the notification by another party's attorney that he did not have to attend the trial is clearly a very unusual circumstance that would seem by most standards to be excusable neglect. Upon notification of this horrendous judgment, Mr. Dolajak took timely steps to request relief from the trial court and there has been no indication by plaintiff that she would be prejudiced by a vacation of the judgment.

III. THE COURT ERRED IN ENTERING A JUDGMENT AGAINST MR. DOLAJAK IN THE SUM OF \$2.5 MILLION AS THE COURT FAILED TO FOLLOW THE REQUIREMENTS OF CR 55(B)(2).

It is the position of Mr. Dolajak that the judgment against him is void and should be set aside by this court as the court entered a judgment without complying with CR 55(b)(2) which states:

(b) Entry of Default Judgment. As limited in rule 54(c), judgment after default may be entered as follows, if

proof of service is on file as required
by subsection (b) (4):

. . .

(2) When Amount Uncertain. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings as are deemed necessary or, when required by statute, shall have such matters resolved by a jury. Findings of fact and conclusions of law are required under this subsection.

On May 7, 2007, the trial court entered a judgment against Mr. Dolajak in the sum of \$2.5 million. The only reference in the record as to the court's consideration and calculation as to the amount of the judgment is the court's statement at 5/7/07 RP 16, at the request of Mr. Beauregard to enter the judgment, where the court states:

All right. You can go ahead and send your materials forward. Clearly by the time I got everything read, and then the word that the case had settled. The court is prepared at this time, . . .

There is no indication in the record as to what the court considered or how it arrived at its decision to award such a large sum of money. An

examination of the record suggests there is simply no support for an award of such magnitude.

In entering such an award, CR 55(b) (2) requires findings of fact and conclusions of law when the amount is uncertain. The default judgment entered by the trial court does not comply with this rule in that no findings of fact and conclusions of law were made by the court. The handwritten sentence at the end of the judgment written by plaintiff's counsel hardly complies with the requirements of CR 55(b) (2). CP 12-13.

Following a default, a trial court must conduct a reasonable inquiry to determine the amount of damages. See Smith v. Behr Process Corp., 113 Wn.App. 306, 64 P.2d 664 (2002). It is Mr. Dolajak's position that the May 7, 2007 proceeding did not constitute a reasonable inquiry that would result in a judgment of \$2.5 million. The amount recoverable after a default judgment is entered for an unliquidated amount must be established by appropriate proof. See Skidmore v. Pacific Creditors, 18 Wn.2d 157, 138 P.2d 664 (1943).

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CONCLUSION

This court should reverse the ruling of the trial court and order that the default and judgment be set aside for the reasons described above. The trial court's inconsistent rulings as to Mr. Carter and Mr. Dolajak have no basis in the law as pointed out by counsel in the arguments before the trial court. In order to take a default against a party who has appeared, the opposing party must serve a written notice and supporting affidavit upon the other party at least five days before the hearing on the motion. See CR 55(a)(3). With regard to moving for a default against a party who has not responded and who has been served more than one year before the motion, the language of the court rule is even stronger in favor of the non-moving party. Under these circumstances, the rule directs that the court *shall not* sign an order of default without proper notice. See CR 55(f)(1). This rule prevented the trial court from entering a default order against Mr. Dolajak.

It is also the position of Mr. Dolajak that the trial court erred in failing to set aside the

default under CR 60. Mr. Dolajak had been advised of the trial date and had intended to attend. Within the days leading up to the trial date, he had been advised that the matter was not going to trial and that he did not need to attend. It is believed that these unusual circumstances and directives from opposing counsel constitute excusable neglect which requires the trial court to set aside the default in this matter.

This court should also set aside the judgment of \$2.5 million in this matter. There is simply no evidence, much less insufficient evidence, to support a judgment in such an amount. The trial court not only failed to review any information to support such a verdict, but failed to enter findings and conclusions to support the judgment.

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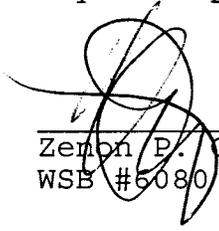
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For these reasons, this court should reverse the trial court's order denying Mr. Dolajak's motion to set aside the default and judgment.

RESPECTFULLY SUBMITTED this 5th day of September, 2007.

LAW OFFICE OF ZENON
PETER OLBERTZ
Attorney for Appellant

By:



Zenon P. Olbertz
WSB #5080

CERTIFICATE OF SERVICE

Kathy Herbstler, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of brief of appellant to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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Signed at Tacoma, Washington this 5th day
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Kathy Herbstler

STATE OF WASHINGTON
BY _____
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CLERK OF SUPERIOR COURT