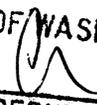


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COURT OF APPEALS
DIVISION II

2015 JAN 16 PM 1:07

STATE OF WASHINGTON

BY  DEPUTY

No. 46565-5-II

Court of Appeals
DIVISION II
STATE OF WASHINGTON

DONALD C. LINKEM and ELIZABETH A. LINKEM, husband and wife, and the marital community composed thereof; PAUL E. WILSON and KELLY I. WILSON, husband and wife, and the marital community composed thereof; PACIFIC RESOURCE DEVELOPMENT, INC., a Washington corporation; DAVID A. PARKER and VELMA L. PARKER, husband and wife, and the marital community composed thereof; RICHARD T. BRUNAUGH and AMANDA B. BRUNAUGH, husband and wife, and the marital community composed thereof; PACIFIC BAY, INC., a Washington corporation,

APPELLANTS,

v.

UNION BANK, N.A., as successor in interest to the FDIC as Receiver of Frontier Bank,

RESPONDENT

APPELLANTS' OPENING BRIEF

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III. INTRODUCTION

Donald C. Linkem and Elizabeth A. Linkem, husband and wife, and the marital community composed thereof; Richard T. Brunaugh and Amanda B. Brunaugh, husband and wife, and the marital community composed thereof; Paul E. Wilson and Kelly I. Wilson, husband and wife, and the marital community composed thereof; Pacific Resource Development, Inc., a Washington corporation; David A. Parker and Velma L. Parker, husband and wife, and the marital community composed thereof; Richard T. Brunaugh and Amanda B. Brunaugh, husband and wife, and the marital community composed thereof; Pacific Bay, Inc., a Washington corporation (hereinafter “Appellants”) submit this brief. This case raises the issues of whether a trial court can vacate a final judgment, pursuant to Superior Court Rule of Civil Procedure 60(b), based on the Court later stating that it did not intend to dismiss all Defendants, despite the Court’s own language and consent by the attorney representing the party whom is having its claims dismissed. Additionally, this case raises the issue of whether a different ruling in a completely different appellate case, in a division other than where the trial court was located, can be the basis for vacating a final order of the trial court pursuant to CR 60(b). Pursuant to CR 60(b), the answer to that questions is “no.” Therefore, the Court should reverse the judgment of the trial court and award the Appellants their attorney fees.

IV. ASSIGNMENT OF ERROR

Appellants challenge the trial court's order vacating the order dismissing the Union Bank's claims against the Appellants. CP 638-640, (Appendix D). The trial court incorrectly held, that procedural irregularities existed, pursuant to CR 60(b), that allowed for the judgment that was entered dismissing all of Union Bank's (hereinafter the "Bank") claims against Appellants to be vacated.

V. ISSUES PRESENTED ON APPEAL

A. Was the Judgment Dismissing Bank's claims against Appellants a final judgment?

Answer- Yes, the trial court on the record, and in its order dismissed all claims against all Defendants.

B. Does a different ruling, in a different case, in a different jurisdiction constitute a procedural irregularity and serve as a basis for vacating a final judgment?

Answer- No, a ruling in a different case located in a different jurisdiction does not serve as a basis for vacating a final judgment.

VI. STATEMENT OF THE CASE

On or about December 31, 2013 Minne and Trudy Vanderhoek ("Vanderhoek") brought a motion for a summary judgment to dismiss Union Bank's claim against them in the above captioned case. In their motion for summary judgment, Vanderhoek asked for dismissal of the action brought by Union Bank based on the ruling in the Citizens Bank &

Trust Co. v. Cornerstone Homes & Development, LLC, 178 Wn. App. 207 (2013) (Div. II, decided December 3, 2013)¹. CP 322-343.

Appellants filed a joinder in which the Defendants asked for the ability to join in the motion with Vanderhoek in asking for dismissal of the claim against Appellants. CP 387-390.

The Court heard the arguments of counsel and concluded that summary judgment would be granted and that all claims of the Bank would be dismissed against all Defendants. CP 429-431. The trial court also ruled that the request for joinder of Defendants be allowed. CP 429-431. The trial court ruled that the claims of the Bank against all Defendants in the trial court case must be dismissed:

“I am going to allow the remaining defendants' summary judgment today as well, because it makes no sense to me that we go through a fair value hearing if this is ultimately all going up anyway.”. CP 647-678 Court Transcript.

Counsel for Bank reviewed and signed the order that was filed with the Court. CP 429-431 Order Dismissing Claims.

On February 18, 2014 the Division I Court of Appeals held issued an opinion which disagreed with the Division II Court of Appeals opinion in First Citizen. Washington Federal v. Gentry, 179 Wash.App.470 (Div. I 2014).

¹ Division II court of Appeals held that deed of trust was secured by guaranty and thus a non judicial foreclosure of a deed of trust eliminated foreclosing party's ability to seek a deficiency against guarantor. Id.

On March 27, 2014, Bank brought a Motion to Address Change in Controlling Law Governing Guarantors' Liability for a Deficiency. CP 432-446. On April 4, 2014, the Court denied this motion. CP 491-493.

Bank filed an appeal of the final order on May 8, 2014.

On June 13, 2014, Bank brought a motion to vacate pursuant to CR 60(b)(1), (5), and (11). CP 494-510. Bank offered into evidence that the counsel for Bank, at the time the January 31, 2014 summary judgment order, did not contemplate that the motion to dismiss included Vanderhoek Associates, LLC and could not sign off on the order dismissing all claims against all Defendants. CP 511-532. Additionally, Bank argued that the ruling by the Washington State Appellate Court in Division I² gave a basis for vacating the judgment. CP 494-510. This Court vacated this order on procedural irregularities regarding the intent of the parties when dismissing all of the Defendants and signing the order on January 31, 2014 and the subsequent ruling in Appellant Division I. CP 638-640: Order Vacating.

VII. ARGUMENT

A. Standard of Review.

The parties dispute how to construe the language of written orders and ruling of the Court. The trial court resolved the dispute by granting motion vacating the previous order and judgment of that trial court. The standard of review is therefore *de novo*.³

B. Judgment is Final

² *Washington Federal v. Gentry*, 179 Wash.App.470 (Div. I 2014)

³ *Haley v. Highland*, 142 Wash.2d 135, 156, 12 P.3d (2000).

The summary judgment order entered by the trial court was final because it dismissed all claims against all Defendants. Rose v. Fritz, 104 Wash.App. 116, 121 (Div. II 2001). The court in Rose defined a final judgment as an order, in writing, signed by the judge, and filed forthwith that adjudicat[es] all the claims, counts, rights, and liabilities of all the parties and this can include orders for summary judgment. Id. at 120 citing Fox v. Sunmaster Products, Inc., 115 Wash.2d 498, 503, 798 P.2d 808 (1990); Anderson & Middleton Lumber Co. v. Quinault Indian Nation, 79 Wash.App. 221, 225, 901 P.2d 1060 (1995) (final judgment is “a judgment that ends the litigation”), aff’d, 130 Wash.2d 862, 929 P.2d 379 (1996); Greenlaw v. Smith, 67 Wash.App. 755, 759, 840 P.2d 223 (1992) (quoting Catlin v. United States, 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed. 911 (1945)); Rhodes v. D & D Enterprises, Inc., 16 Wash.App. 175, 178, 554 P.2d 390 (1976) (final judgment settles all issues in a case); Pekin Insurance Co. v. Benson, 306 Ill.App.3d 367, 375, 239 Ill.Dec. 640, 714 N.E.2d 559.

Based on the facts and evidence in this matter, the trial court dismissed all claims against all defendants, including the Appellants in this matter. The attorney for Bank signed and initialed the order that clearly had language stating that all claims against all Defendants were dismissed.

C. No Procedural Irregularities

The judgment dismissing Bank’s claims against Appellants cannot be vacated because there was no irregularity of the process or extraordinary circumstance surrounding the entry of that judgment. Shum v. DOL, 63

Wash.App. 405, 408 (Div. II 1991). The court in Shum held that only extraordinary circumstances which relate to irregularities which are extraneous to action of court or go to question of regularity of its proceedings are a basis for vacating an order under Rule 60(b). Id.

Applied to the facts of this case, the trial court stated in its ruling that all of Bank's claims should be dismissed against all defendants, including the Appellants. The attorney for Bank reviewed, initialed and signed the order and judgment dismissing all claims against Appellants and the other defendants in this case. The trial court later decided that it did not intend to dismiss all claims against all defendants in that matter and vacated the judgment. Because the order and judgment dismissing all of the claims against all defendants was fully contemplated by the trial court and the parties at the time of entry, the order vacating the judgment must be overruled.

D. Cannot Vacate Based on other Jurisdiction Decisions

The subsequent ruling of appellate of Division I Appellate Court does not provide a basis, under CR 60, to retroactively vacate a final judgment. Columbia Rentals, Inc. v. State, 89 Wash.2d 819, 823 (1978); Lynn v. Washington State Department of Labor and Industries, 130 Wash.App. 829, 836 (Div. 1 2005); State v. Atsbeha, 142 Wash.2d 904, 917 (2001); Martin v. Martin, 20 Wash.App. 686, 690 (Div. 2 1978). The Washington Supreme Court in Columbia Rentals held that the res judicata effect of final decisions already rendered is not affected by subsequent

judicial decisions giving new interpretations to existing law. Columbia, 89 Wash.2d 823. The court in Columbia Rentals further held that there is an important policy consideration in precluding subsequent judicial decisions from effecting prior final decisions of the a court: “If prior judgments could be modified to conform with subsequent changes in judicial interpretations, we might never see the end of litigation.” Id.

The only instance where a subsequent change in law was allowed retroactive effect on previous decisions of the Court occurs when the legislature or congress changed the law to retroactively have an effect on previous decisions of the Court. Flannagan v. Flannagan, 42 Wash.App. 214 (Div. 2 1985); In Giroux, 41 Wash.App.315 (Div 1 1985). In both Flannagan and Giroux the court vacated previous divorce decrees to apply changes in the Uniformed Services Former Spouses Protection Act, under 10 U.S.C § 1408 that occurred after the decrees in these cases were entered. Id. The courts in both cases held that congress specifically stated that a statute was retroactive and affected divorce decrees that occurred prior to the changes in the statute. Id. Bank’s motion here is clearly distinguishable because there has been no change in the controlling statute by the legislature that specifies a retroactive effect on decisions of a trial court.

Similarly, Bank cannot vacate the judgment in this matter based on an error of law pursuant to CR 60. Shum, 63 Wash.App. 405, 408 (Div. II, 1991). The court in Shum held that any issue involving questions of law are matters for appeal and should be left to the appellate court to deal with

in these instances. Id. Applied to the facts of this case, the trial court held that the Division II court appeals ruled incorrectly in First Citizens. The trial court held that the Division I court appeals ruling in Washington Federal v. Gentry was correct ruling even though it directly contradicted the prior ruling of the Division II court of appeals in First Citizens, the division in which the trial court is located. The trial court then used this as a basis for vacating the judgment dismissing all claims against the defendants.

Applied to the facts of this case, the decision of the trial court to vacate the its final order was based entirely on the Division One Court of appeals decision. The legislature did not change the controlling statute in this matter. The Division II decision in First Citizens occurred on December 3, 2014. The trial court entered the judgment dismissing the claims against all defendants, including Appellants, on January 31, 2014. The Division I opinion in Washington Federal was entered on February 18, 2014. The trial court then vacated the judgment dismissing the claims on July 3, 2014. Therefore, since the trial court vacated the judgment, based on a subsequent ruling in Division I, the order vacating the judgment in this matter must be reversed.

VIII. CONCLUSION

Because the judgment of the trial court dismissing all claims against all defendants, including the Appellants, was a final judgment and there were no irregularities, the Court should reverse the trial court's decision to vacate the order and judgment against Bank entered on January 31, 2014.

Dated this 15th day of January, 2015.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that on the 15th day of January, 2015, I caused to be served in the manner indicated a true and correct copy of this Appellants' Opening Brief upon the following via facsimile, and electronic mail:

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