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No. 50755-2-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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BENEFICIAL FINANCIAL, Respondent

v.

PATRICIA A. CHATMAN, Appellant

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**BRIEF OF RESPONDENT BENEFICIAL FINANCIAL**

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## **II. INTRODUCTION**

Finality of judgments is a central value in the legal system. CR 60 (b) provides that the trial court may relieve a party from a final judgment, order, or proceeding for one of eleven stated reasons. See Union Bank, NA v. Vanderhoek Assocs., LLC, 191 Wn. App. 836, 846, 365 P.3d 223 (2015). However, vacation of a judgment is an extraordinary remedy. See Dalton v. State, 130 Wn. App. 653, 665, 124 P.3d 305 (2005).

This case stems from a complaint filed for judicial foreclosure on a loan obligation. More than two years after default was entered, and over one year after final judgment, Patricia Chatman moved the trial court to vacate on the sole basis of fraud. The court correctly determined that there was no clear and convincing evidence of fraud and that the judgment could not be vacated. Upon review, this court can also confidently determine that the trial court did not abuse its discretion and uphold the lower court decision.

## **III. ISSUES PRESENTED FOR REVIEW PERTAINING TO APPELLANT'S ASSIGNMENT OF ERRORS**

Whether the trial court properly denied the motion to vacate brought under CR 60 (b) (4), when there was no clear and convincing evidence of fraud related to obtaining default judgment.

#### **IV. STATEMENT OF THE CASE**

##### **1. Procedural History**

Beneficial Financial filed a complaint for judicial foreclosure in Kitsap County Superior Court on February 24, 2015. CP 278. The affidavit of service indicates Patricia Chatman was personally served the summons and complaint on February 28, 2015, at 5:11pm. CP 306. When no response was received, an order of default was entered on June 8, 2015. CP 293.

On March 9, 2016, the court entered a final order granting a foreclosure judgment. CP 293. That Judgment was amended October 19, 2016, to correct the address. CP 2. The clerk issued the order of sale on April 12, 2017, and the sheriff levied upon the judgment May 17, 2017. CP 3. The real property was subject to a sheriff sale notice of levy, but had not yet been sold at auction when Patricia Chatman filed her motion to vacate judgment. CP 279.

On June 29, 2017, the court granted a show cause hearing to vacate the judgment; on July 7, 2017, that hearing was continued. CP 284.

On July 28, 2017, after oral argument, the trial court denied Patricia Chatman's CR 60 (b) (4) motion to vacate judgment. CP 317-18.

The instant appeal followed from the courts order denying Patricia Chatman's request to vacate Judgment.

## **2. Facts**

On or about December 24, 1997, Patricia Chatman was granted a loan from Beneficial Washington Inc. dba Beneficial Mortgage Co. of Washington, in the amount of \$116,200.00. CP 293. At the same time, and to secure payment of the loan, a deed of trust was executed and recorded on December 31, 1997, for the real property commonly known as 5533 SW Paradise Lane, Port Orchard, WA. CP 299-301.

Patricia Chatman admittedly failed to make the monthly payments as agreed, and has failed to make any payments on the Note and Deed of Trust thereafter. CP 293. Upon failure to cure the default, the foreclosure process was initiated. CP 293. The original note is presumed lost or destroyed and a lost note affidavit was notarized July 13, 2007. CP 12. Beneficial Financial has consistently maintained that the original was lost and swore to it again in a lengthy affidavit provided to counsel in connection with the filing of the complaint in February 2014. CP 304-06.

Pursuant to the Deed of Trust, Beneficial Financial obtained a foreclosure judgement and sought to have the real property sold at sheriff sale. CP 1-6.

## V. ARGUMENT

### 1. **Standard of Review**

The decision to grant or deny a motion to vacate a judgment under CR 60(b) is within the trial court's discretion. Jones v. City of Seattle, 179 Wn.2d 322, 360, 314 P.3d 380 (2013). Therefore, appellate review of a decision not to vacate a default judgment under CR 60(b), is reviewed for abuse of discretion. See Tamosaitis v. Bechtel Nat'l, Inc., 182 Wn.App. 241, 254, 327 P.3d 1309, review denied, 181 Wn.2d 1029 (2014); TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc., 140 Wn. App. 191, 199, 165 P.3d 1271 (2007).

A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. See Dix v. ICT Grp., Inc., 160 Wn.2d 826, 833, 161 P.3d 1016 (2007). Moreover, review of a decision on a motion to vacate is limited to the decision on the motion, not the underlying judgment. Wright v. B&L Props., Inc., 113 Wn. App. 450, 456, 53 P.3d 1041 (2002).

**2. The Trial Court Properly Denied Patricia Chatman's Motion To Vacate**

**A. The Judgment Was Not Obtained Unfairly Under CR 60 (b) (4).**

CR 60(b) provides in part:

On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

. . .

The motion shall be made within a reasonable time . . . after the judgment, order, or proceeding was entered or taken. CR 60.

Specifically, CR 60(b)(4) authorizes a trial court to vacate a judgment for "[f]raud misrepresentation, or other misconduct of an adverse party." The rule is aimed at judgments that were unfairly obtained. See Dalton v. State, 130 Wn. App. 653, 668, 124 P.3d 305 (2005). A party seeking relief under CR 60(b)(4) must show fraud, misrepresentation, or misconduct by clear, cogent, and convincing evidence. *Id.* at 665.

**1. *The Trial Court Properly Determined There Was No Clear And Convincing Evidence Of Fraud***

CR 60(b)(4) authorizes a trial court to vacate a judgment for "[f]raud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." However, vacation of a judgment is an extraordinary remedy. See Dalton v. State, 130 Wn.App. 653, 665, 124 P.3d 305 (2005). Therefore, there must clear and convincing evidence

of fraud, misrepresentation, or misconduct in order to vacate a judgment. *Id.* Because the standard of proof in CR 60(b)(4) motion is clear and convincing evidence, the substantial evidence must be highly probable. See Dalton, 130 Wn. App. at 666.

**a. Patricia Chatman Was Personally Served And The Default Judgment Was Obtained Properly.**

Patricia Chatman asserts that there is fraud based on the affidavit of personal service of the summons and complaint. She argued to the trial court that she wasn't served personally, and "It's the description that's basically on my driver's license." RP 4.

In order to base vacation of a judgment on fraud, the trial court must make findings of fact and conclusions of law regarding each of the nine elements of common law fraud. In re Marriage of Maddix, 41 Wn.App. 248, 252, 703 P.2d 1062 (1985).

When the trial court makes findings of fact and credibility determinations based on affidavits alone, the court engages in inquiry to determine whether substantial evidence supports those findings and whether the findings support the conclusions of law. In re Marriage of Rideout, 150 Wn.2d 337, 350-51, 77 P.3d 1174 (2003).

In the present case, upon consideration of Patricia Chatman’s position of not being served, the Court explicitly stated that “. . . I can’t find that the court erred when it entered [the default.]” RP 7. “I’ve got . . . ‘I usually go out to dinner. . . I wasn’t served.’” Id. “I do not have clear and convincing evidence from you that you were not served.” Id. Ultimately, there was an affidavit of service of process with a description of Patricia Chatman being served, and nothing was provided by her to determine any differently.

Thus, the Court did not abuse its discretion by finding that Patricia Chatman had not proved by clear and convincing evidence, Beneficial’s fraud, misrepresentation, or misconduct as it related to service of process.

**b. Beneficial Financial Was Entitled To Pursue Foreclosure**

The fraud must cause the entry of the judgment the party seeks to vacate. Lindgren v. Lindgren, 58 Wn. App. 588, 596, 794 P.2d 526 (1990). There must be some connection between the misrepresentation and obtaining the judgment. See Peoples State Bank v. Hickey, 55 Wn. App. 367, 372, 777 P.2d 1056 (1989). The rule is aimed at judgments that were unfairly obtained. See Dalton, 130 Wn. App. at 668. Therefore, the wrongful conduct must have

"prevented a full and fair presentation" of the moving party's case. *Id.* at 665, 668. Fraud or misconduct that is harmless will not support a motion to vacate. *Karl B. Tegland, Washington Practice: Rules Practice* § 8, at 613 (6th ed. 2013).

Importantly, appellate review is limited to the decision on the motion, not the underlying judgment. *Bjurstrom v. Campbell*, 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980).

In order to establish that Beneficial acted fraudulently, or with intentional misrepresentation, Patricia Chatman would have had to prove: (1) Beneficial represented an existing fact, (2) the materiality of that information, (3) its falsity, (4) Beneficial's knowledge of its falsity, (5) that Beneficial had intent that Patricia Chatman act upon the misrepresentation, (6) Patricia Chatman's ignorance of the falsity of the misrepresentation, (7) Patricia Chatman's reliance on the truth of the representation, (8) Patricia Chatman's right to rely upon it, and (9) damages. See *Elcon Constr., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 166, 273 P.3d 965 (2012).

In the present case, Patricia Chatman is not entitled to vacate judgment because the court correctly determined there was no clear and convincing evidence. Patricia Chatman

believes that there is fraud related to the underlying action based on (1) the affidavit of lost promissory note lacks certain language; and (3) that Laura Hescott was a ‘robo-signer’ who signed a document related to early stages of the foreclosure process, and (3) that Beneficial lacks standing. CP 286-87. Based on these three outlined allegations, Patricia Chatman misinterprets the analysis of CR 60 and assert that the default foreclosure judgment was obtained by fraud. CP 287. “That even if the service had not been fraudulent, the papers on which it was based (asserting that Beneficial Finance held the note on my home and had standing to foreclose it), were false, and the bank knew [sic] it was false at the time.” CP 287. Patricia Chatman’s misunderstands the analysis under CR 60, as the court’s inquiry doesn’t extend to the underlying order, and vacating a judgment is only for extraordinary circumstances. See Dalton v. State, 130 Wn.App. 653, 665, 124 P.3d 305 (2005).

Here, the trial court acknowledged Patricia Chatman’s concerns regarding her loan: “The lost note affidavit; why there’s no original note; who this Laura Hescott is, who signed as attorney in fact, and whether indeed this is a real signature or—as she calls it ‘robo-signature.’” RP 6.

The trial court did not abuse its discretion, because the court very clearly understood, and articulated, the burden of Patricia Chatman as clear and convincing evidence, and the concerns she raised in her pleadings and oral argument regarding the underlying judgment. RP 4. The court explained at oral argument that “a CR 60 (b) 4, motion to set aside on grounds for fraud means you have to prove by clear and convincing evidence that the default was entered by fraud. I don’t have that.” RP 6.

Therefore, the trial court could not possibly have abused its discretion and made a decision that was manifestly unreasonable or based on untenable grounds, because the court evaluated the information presented and determined that there was no clear and convincing evidence of fraud. See Dix v. ICT Grp., Inc., 160 Wn.2d 826, 833, 161 P.3d 1016 (2007).

Moreover, there is no connection between the entry of the judgment and the allegations of Patricia Chatman, because this court inquiry is limited to the order vacating, rather than the underlying judgment; the court should uphold the decision of the lower court.

B. The Motion Was Not Brought Within A Reasonable Time

While there is no specific time bar, a motion under CR 60(b)(4), however, must be brought within a reasonable time. "A reasonable time is determined by examining the facts and circumstances; the critical period is the time between when the party becomes aware of the order and when he or she filed the motion to vacate it." Topliff v. Chicago Ins. Co., 130 Wn.App. 301, 305, 122 P.3d 922 (2005). Due diligence after the discovery of a default judgment contemplates the prompt filing of a motion to vacate. Shepard Ambulance, Inc. v. Helsell Fetterman, Martin, Todd & Hokanson, 95 Wn.App. 231, 231, 974 P.2d 1275 (1999).

In the present case, the default supported by personal service was entered over two years before Patricia Chatman brought her motion to vacate. The court explained, "[t]his is two years later." RP 8 and went on to state, "I don't have evidence that is sufficient to set that [default] aside. Because of that, I can't find that you acted diligently in bringing this back before the court. I can't grant relief." RP 11. Moreover, if the court considers the totality of Patricia Chatman's allegations of fraud, she explicitly states that she stopped paying because of her suspicions of fraud. "My case goes way back before 1997. It started back in 1994." RP 8. "And then in January 2007. . . I said, 'okay. Something is wrong. . . I won't be making any more payments. . .'" RP 9. Therefore, Patricia Chatman has been on notice for over twenty years of her concerns, and admittedly purposefully stopped paying her loan over ten years ago because of her

concerns regarding the note. There is nothing reasonable about Patricia Chatman waiting until the sheriff sale is scheduled to raise her concerns in a motion to vacate in 2017.

## **VI. CONCLUSION**

For the reasons set forth above, this court should affirm the lower court decision denying the CR 60 (b) (4) motion to vacate judgment. There is no clear and convincing evidence to overcome the facts that Patricia Chatman was personally served and defaulted, and the information supports Beneficial's standing to foreclose. Therefore, the trial court did not abuse its discretion by finding that Patricia Chatman had not proved Beneficial's fraud by clear and convincing evidence.

Respectfully submitted this 7th day of March, 2018.

*/s/ Kimberly Hood* \_\_\_\_\_  
Kimberly Hood  
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*Attorney for Respondent Beneficial Financial*

**CERTIFICATE OF SERVICE**

I, Kimberly Hood, hereby certify under penalty of perjury under the laws of the State of Washington that the following is true and correct.

On March 7, 2018, I caused to be served the foregoing RESPONDENTS' BRIEF via electronic filing with the appellate courts' portal.

DATED this 7<sup>th</sup> Day of March, 2018

    /s/ Kimberly Hood      
Kimberly Hood

**ROBINSON TAIT PS**

**March 07, 2018 - 4:20 PM**

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