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Division II
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No. 52359-1

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

FIRE INSURANCE EXCHANGE,
a corporation,

Appellant,

v.

SUNSET AIR, INC.
a corporation,

Respondent.

**OPENING BRIEF OF APPELLANT
FIRE INSURANCE EXCHANGE**

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A. ASSIGNMENT OF ERROR

1. Assignment of Error

The trial court abused its discretion by entering the order of August 10, 2010, vacating the default judgment against respondent, Sunset Air, Inc. ("Sunset").

2. Issues Pertaining to Assignment of Error

a. Sunset never appeared and, thus, was not entitled to notice of the Motion for Default.

b. Claims representative Pinkerton did not informally appear because i) there were no communications with Evezich in the interim between him being told that the matter would be, ii) neither his pre-litigation nor post-litigation communications can constitute an appearance, and, iii) a claims representative is not entitled to notice of a default.

c. Sunset sought to vacate the Default based on CR 60(b)(1) ("Mistake, Inadvertence, Surprise, Neglect, or Irregularity") and CR 60(b)(11) ("Any other reason justifying relief from the operation of the judgment"). However, Sunset cannot rely upon CR 60(b)(11) because CR 60(b)(1) applies to this situation and there are no irregularities extraneous to this proceeding which would warrant the use of CR 60(b)(11).

d. The trial court abused its discretion in granting Sunset's motion as it was based on CR 60(b)(1) and more than one year had elapsed between the entry of the Order of Default and Sunset's motion;

thus, it was time-barred and the time for bringing such a motion cannot be extended.

e. The trial court abused its discretion as Sunset failed to produce any evidence that the default was obtained as a result of “mistake, inadvertence, surprise, neglect, or irregularity.”

f. Sunset should not be allowed to rely upon CR 60(b)(4)(Fraud or misrepresentation) as a basis for vacating the default as it raised the issue for the first time in its Reply Brief and Fire Insurance moved to strike it.

g. The trial court abused its discretion in granting the motion because Sunset failed to offer any evidence that: i) a fraud or misrepresentation occurred and that it deceived Pinkerton or he relied upon any alleged fraud or misrepresentation, or ii) Sunset was diligent in following-up regarding the status of the lawsuit.

B. STATEMENT OF THE CASE

On December 20, 2015 a fire caused damage to the home owned by Tyler Powell.¹ (CP 002). Fire Insurance insured Powell and paid Powell \$226,793.00² for damage to his home. (CP 047).

On June 1, 2016, an un-filed Summons and Complaint was served on Sunset’s registered agent (CP 001 - 005). The

¹ A timeline of the procedural events in this case is provided at Appendix “A.”

² This includes Mr. Powell’s \$500 deductible. (CP 065).

Summons stated that a default could be taken against Sunset if it did not respond to the Complaint within 20 days. (CP 165).

The Complaint alleged that the fire resulted from Sunset bypassing the safety controls in the brand-new furnace in the home. (CP 002). Sunset's insurer's claims representative, Walter Pinkerton ("Pinkerton") admitted that Sunset "...bypassed a switch that was part of the [furnace's] redundant temperature control." (CP 074 - 075).

On June 15, 2016, Pinkerton and Fire Insurance's counsel, ("Evezich"), exchanged a series of emails. (CP 068, 072 - 076). On that date, Pinkerton acknowledged that the unfiled Summons and Complaint had been served on Sunset and asked "[w]hat was the purpose of the S&C [sic]?" (CP 068).

Evezich responded that same day that "...the unfiled complaint was an attempt to get this matter settled prior to it being filed." (CP 068). Evezich continued that "...[i]f liability is not being accepted, then I will get the matter filed and we will

proceed with litigation.” *Id.*

Eight days later, Fire Insurance filed the Summons and Complaint in the Thurston County Superior Court. (CP 001). On July 12, 2016, the court signed an order declaring Sunset in default (CP 036 - 037).

Between the time that the Summons and Complaint were filed with the trial court and Order of Default was granted, no one appeared for Sunset and neither Sunset nor Pinkerton communicated with Evezich. (CP 132).

On July 26, 2016, two weeks after the Order of Default was granted, Pinkerton wrote to Evezich and denied the claim. (CP 074 - 075). His letter did not acknowledge that the matter had been filed in the trial court. *Id.* On December 23, 2016, Pinkerton again wrote to Evezich. (CP 076). Pinkerton said he would be closing his file but did not acknowledge that the matter had been filed with the trial court. (CP 076).

On February 16, 2017, the Court entered an Order of Default Judgment. (CP 046 - 047).

No pleadings disclosed when Sunset or Pinkerton

learned of the default. (CP 050 – 058). Pinkerton’s declaration in support of the motion only states that he learned of it after his letter of December of 2016. (CP 060).

On April 9, 2017, 1 year and 9 months after the Order of Default was entered by the Court, Evezich received a phone call from Sunset’s counsel, Tom Collins (“Collins”). (CP 132). Collins asked Evezich if Fire Insurance would agree to vacate the Order of Default and Default Judgment. *Id.* Fire Insurance declined. *Id.*

On July 31, 2018, almost four months after the phone call between Collins and Evezich, Sunset filed a Motion to Vacate. (CP 048).

Sunset’s motion sought vacation of the default under two provisions of CR 60 (b):

(1) Mistake, inadvertence, surprise, or excusable neglect; and,

(11) Any other reason justifying relief from the operation of law.

(CP 053).

Pinkerton's declaration was the only evidence submitted by Sunset regarding the alleged mistake, inadvertence, surprise, or excusable neglect. (CP 053, 059 - 060). His declaration included no facts indicating why he, or Sunset, did not respond to the Summons and Complaint or that anything the Fire Insurance did caused him or Sunset to not appear or Answer the Complaint. (CP 059 – 060).

In reply to Fire Insurance's response to the Motion to Vacate, Sunset added a new basis for arguing that the default should be vacated – fraud, pursuant to CR 60(b)(4). (CP 141). At oral argument, Fire Insurance moved to strike this basis for seeking relief as it was raised for the first time in Sunset's reply brief. (RP 10).

The trial court granted Sunset's motion without much explanation, other than an aside, that it's not unusual for the court to receive motions seeking to vacate default. (RP 20).

C. SUMMARY OF ARGUMENT

Sunset presented its motion as though it were a motion to vacate a default that had been taken less than a year earlier. The trial court treated Sunset's motion like any other Motion to Vacate a Default – one that should be freely granted. However, the default that Sunset was seeking to vacate had been granted two years before Sunset filed its motion. Additionally, Sunset had done nothing to appear or defend against the lawsuit. Rather, defendant's insurer's claims representative was the only person involved in the case. The claims adjuster is neither a Sunset representative or an attorney.

These facts, that the default had been taken over a year before the motion was filed and that the defendant's claims representative, not the defendant, were involved in the case, differentiate Sunset's motion from the more-common motion to vacate a default. The time-limitations and procedural requirements for filing a motion based on these facts are much different than a typical motion to vacate. The trial court failed

to account for the differences between a common motion to vacate a default and the time-limitations and procedural requirements applicable to Sunset's motion.

In this case, Sunset did not file a Notice of Appearance. Sunset argues that Pinkerton "informally appeared" in the case, but there were no communications between him and Evezich in the interim between when Evezich told him he would be filing the complaint and the default was granted.

Neither Pinkerton's pre-litigation communications or his communications after the default was granted can constitute an informal notice of appearance as pre-litigation correspondence is not regarded as an appearance and Pinkerton's post-litigation correspondence came after the default was granted and failed to acknowledge that the matter was in court. Further, a claims representative is not entitled to notice of a default.

Sunset brought its motion pursuant to CR 60(b)(1) (mistake or inadvertence) and CR 60(b)(11)(any other reasons). The trial court abused its discretion in granting the

motion because CR 60 (b) bars Sunset's motion as a motion brought pursuant to CR 60(b)(1) must be brought within one-year of the default. Sunset's motion was brought long after the one-year bar had run.

Sunset attempted to circumvent the one-year time limit by alleging relief pursuant to CR 60(b)(11)(any other reason), but CR (b)(11) cannot be used to circumvent the one-year time limit.

Additionally, Sunset failed to produce any evidence that a mistake, inadvertence, surprise, excusable neglect, or irregularity caused it to fail to defend against the lawsuit. Proof of the same is required if a motion is brought pursuant to CR 60(b)(1). Sunset's failure to produce this evidence is fatal to its motion.

Finally, Sunset alleged for the first time its Reply Brief, that it was entitled to relief pursuant to CR 60(b)(4)(fraud). Fire Insurance moved to strike the same based on it being raised for the first time in a reply brief. The trial court abused its discretion in granting the motion as Sunset failed to

produce any evidence of fraud or misrepresentation, that it relied upon such fraud and misrepresentation in failing to respond to the lawsuit, and that it acted with the diligence necessary for relief under CR (b)(4).

D. ARGUMENT

1. Standard of Review

An Appellate Court reviews a ruling on a motion to vacate a default judgment for abuses of discretion. *Morin v. Burris*, 160 Wn.2d 745, 753, 161 P.3d 956 (2007). An abuse of discretion occurs when the trial court exercises its discretion on untenable grounds or for untenable reasons. *Shandola v. Henry*, 198 Wn. App. 889, 895, 396 P.3d 395 (Div. II, 2017). With regard to a CR 60(b) motion, a superior court's decision will be overturned if the court's decision "rests on facts unsupported in the record or was reached by applying the wrong legal standard, or if the superior court applied the correct legal standard but adopted a view that no reasonable person would take." *Mitchell v. Wash. State Inst. of Public Policy*, 153 Wn. App. 803, 822, 225 P.3d 280 (2009)(*citations omitted*).

2. Sunset never appeared and, thus, was not entitled to notice of the Motion for Default.

A defendant has the duty to prove that it has appeared or substantially complied with the requirements of entering a Notice of Appearance pursuant to CR 4(a)(3) and is entitled to notice of the Motion for Default. See, *Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007). Sunset produced no evidence that it appeared in the action or substantially complied with the requirements of CR 4; therefore, it was not entitled to notice of the Motion for Default. See, CR 55(a)(3)(Any party who has not appeared before the motion for default and supporting affidavit are filed is not entitled to a notice of the motion, except as provided in rule 55(f)(2)(A)).

Once the Order of Default is entered, a defendant is not entitled to notice of the motion for Default Judgment. See, *Allison v. Boondocks, et.al.*, 36 Wn. App. 280, 283, 673 P.2d 634 (Div. I, 1983) (“A party who fails to timely appear in an action is not entitled to notice of subsequent proceedings, including the presentation of findings and conclusions and the entry of the default judgment. RCW 4.28.210.”)

3. Claims representative Pinkerton did not informally appear because i) there were no communications with Evezich in the interim between him being told that the matter would be, ii) neither his pre-litigation nor post-litigation communications can constitute an appearance, and, ii) a claims representative is not entitled to notice of a default.

i. Pinkerton had no communications with Evezich in the interim between him being told the matter was being filed and Sunset being deemed in default.

Between the time that Evezich notified Pinkerton that that the Summons and Complaint would be filed in Court, there were no communications between Pinkerton and Evezich. (CP 134 & 132, respectively). Thus, he failed to informally appear between the time that he knew the matter would be in Court and the default being granted.

ii. Neither Pinkerton's pre-litigation nor post-litigation communications can constitute an appearance.

Pre-litigation communications are insufficient to constitute an informal notice of appearance. *Morin v. Burris, supra*, 160 Wn.2d 749. *Morin* held that "merely showing an intent to defend *before a case is filed is not enough to qualify as an appearance in court,*" *Id.* (emphasis supplied). Thus, any

communications by Pinkerton prior to the matter being filed cannot constitute an appearance.

Similarly, Pinkerton's post-filing communication cannot constitute an informal appearance for two reasons. First, Pinkerton's first post-litigation communication occurred on July 26, 2016, *two weeks after* the Order of Default was entered. (CP 074-075 & 036-037, respectively). Thus, Sunset was already in default when Pinkerton wrote his was not entitled to notice of the default judgment.

Second, none of his post-litigation communications acknowledge that the matter had been filed in the trial court or even inquire about its status. The holding in *Morin* was clear that a communication only qualifies as an informal notice of appearance when a defendant goes "...beyond merely acknowledging that a *dispute* exists and acknowledge[s] that a dispute exists *in court*. *Morin, supra*, at 757. Thus, Pinkerton's communications fail to qualify as an appearance.

iii. A claims representative is not entitled to notice of a default.

In *Caouette v. Martinez*, 71 Wn. App. 69, 77, 856 P.2d 725 (Div. II, 1993), the Kitsap County Superior Court vacated a default judgment based on the defendants' argument that its claims representative was entitled to notice of a default prior to it being entered by the court. The defendant argued that its insurer's claims representative was surprised that a default had been taken and sought relief from the default, pursuant to CR 60(b)(1). *Id.*, 77-78. Court of Appeals Division II rejected that argument and held:

We do not believe that a plaintiff's failure to notify a non-party insurer of her intention to obtain a default judgment against an insured is a basis for vacation of a default order and judgment. *Caouette has cited no authority, and our research has revealed none, that stands for the proposition that it is inequitable to enter a default against a defaulting party without first notifying that party's insurer.*

Id., at 78 (*emphasis provided*)(The trial court's vacation of the default was not reversed as there were independent grounds for its decision to vacate the default).

Court of Appeals, Division I reached a similar holding in *Aecon Buildings Inc. v. Vandermolen Construction Co. Inc.*, 155 Wn. App. 733, 230 P.3d 594 (Div. 1, 2009). In *Aecon*, the plaintiff took a default against a defendant without notice to the defendant's claims representative. *Id.*, at 735-736. The defendant argued that its claims representative was entitled to notice of the default and that the default should be vacated on that basis.

Division I disagreed. It reiterated the rule from *Caouette* that plaintiff's counsel had no duty to inform [the insurer] of the details of the litigation and upheld the trial court's refusal to vacate the default. *Aecon, supra*, at 739-741, *citing, Caouette v. Martinez, supra* at 77-78.

These holdings are in accord with the holding in *Little v. King*, 160 Wn.2d 696, 703, 161 P.3d 346 (2007) in which the Washington State Supreme Court held *en banc*, that because defendant's insurer had not appeared in the action, it was not entitled to notice of a default hearing.

Thus, Fire Insurance had no duty to provide claims representative Pinkerton with notice of the Motion for Default.

4. Sunset sought to vacate the Default based on CR 60(b)(1) (“Mistake, Inadvertence, Surprise, Neglect, or Irregularity”) and CR 60(b)(11) (“Any other reason justifying relief from the operation of the judgment”). However, Sunset cannot rely upon CR 60(b)(11) because CR 60(b)(1) applies to this situation and there are no irregularities extraneous to this proceeding which would warrant the use of CR 60(b)(11).

Sunset brought its motion pursuant to CR 60(b)(1) and CR 60(b)(11). (CP 053). CR 60(b)(1) allows relief based on mistake, inadvertence, surprise, excusable neglect, or irregularity in obtaining a judgment or order and CR 60(b)(11) allows relief based on “[a]ny other reason.” While Sunset cited both rules, it’s motion only sought relief based on CR 60(b)(1). (CP 050).

These two rules are mutually exclusive basis for seeking relief. Division II of the Washington State Court of Appeals has specifically held that CR 60(b)(11) is “... a catchall provision intended to serve the ends of justice in extreme, unexpected situations and when no other subsection of CR 60(b) applies.” *Union Bank v. Vanderhoek Assocs., LLC*, 191 Wn.

App. 836, 844, 365 P.3d 223 (Div. II, 2015)(*Citations omitted*).

Thus, CR 60(b)(11) applies only to “... “extraordinary circumstances’ which constitute irregularities extraneous to the proceedings.” *Id.*, 845 (Citations omitted).

In *Friebe v. Supancheck*, 98 Wn. App. 260, 266, 990 P.2d 1014 (Div. I, 1999), the Court held that it was an abuse of discretion to vacate a default judgment based on CR 60(b)(11) when the motion was in reality based on the factors in CR 60(b)(1) – (3). *Id.* at 267. Further, allowing a plaintiff to circumvent the time limitations of CR 60(b)(1) – (3) by arguing a right to relief under CR 60(b)(11) violates “...the spirit of the rule.” *Tamosiatsa v. Bechtel*, 182 Wash. App. 241, 254-255(Div. III, 2014)(holding no abuse of discretion in denying motion for relief pursuant to CR 60(b)(11) when motion was really one for relief pursuant to CR 60(b)(3) and that relief was time-barred).

Since CR 60(b)(1) applies to this situation and there are no allegations that there were any irregularities extraneous to the proceeding, CR 60(b)(11) does not apply and the trial

court abused its discretion in granting Sunset's motion, pursuant to CR 60(b)(1) as more than one-year after the default was granted.

5. The trial court abused its discretion in granting Sunset's motion as it was based on CR 60(b)(1) and more than one year had elapsed between the entry of the Order of Default and Sunset's motion; thus, it was time-barred and the time for bringing such a motion cannot be extended.

CR 6(b)(2) provides that a motion seeking relief from a "judgment or order" which is based on CR 60(b)(1) must be made "not more than 1 year after the judgment, order, or proceeding was entered or taken." CR 6 (b)(2). This time limit is strictly-enforced, and the trial court may not extend the deadline. *Trinity Universal Insurance Company of Kansas v. Ohio Casualty Insurance Company*, 176 Wn. App. 185, 195, 312 P.3d 976 (Div. I, 2013).

In *Trinity*, a default judgment was obtained which the defendant moved to vacate. However, the defendant's motion was not made until 13 months after the default. *Id.*, at 195.

Division I of the Washington State Court of Appeals held that the defendant had the "...responsibility to make a CR

60(b)(1) motion within one year of the default order,” and its failure to do so was fatal to seeking such relief.³ *Id.*, at 196-197

Sunset filed its motion to vacate the default on July 31, 2018, over 2 years after the Order of Default was entered (July 12, 2016) and 17 months after the Default Judgment was entered (February 16, 2017). (CP 001 & 164). Thus, Sunset’s motion was brought after a year had elapsed the trial court abused its discretion in extending the time to hear the motion on the basis of CR 60(b)(1).

6. The trial court abused its discretion as Sunset failed to produce any evidence that the default was obtained as a result of “mistake, inadvertence, surprise, neglect, or irregularity.”

Sunset brought its motion based on CR 60(b)(1) which requires proof of a mistake, inadvertence, surprise, neglect, or irregularity which caused the defendant to not defend against the lawsuit. Sunset bore the burden of proof regarding its

³ If a defendant’s motion is time-barred by CR 60(b)(1), the *White v. Holm* factors are “irrelevant” because the time bar is absolute. *Trinity, supra*, 176 Wash. App. 185, 198, citing, *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968). Thus, Sunset’s defense is irrelevant to determining the right to relief, pursuant to CR 60(b)(1) as more than 1 year had elapsed since the default.

motion. See, *Little v. King, supra*, 160 Wn.2d 704-05 (The moving party bears the burden of proof on a CR 60(b) motion). However, Sunset failed to meet that burden as it provided no evidence that its failure to defend was caused by anything, let alone any of the basis articulated in CR 60(b)(1).

In *Lakewest Condominium Owners Association v. Tokio Marine & Nichido Fire Insurance Company, Ltd.*, 62852-6-1 (Div. I, 2010)(unpublished opinion),⁴ Division I of the Washington State Court of Appeals held that a defendant must first establish that it has a basis for vacating a judgment pursuant to CR 60(b) before the court considers the underlying basis for vacating a default.

Sunset offered no evidence of a mistake, inadvertence, surprise, or neglect. Pinkerton's declaration was the only evi-

⁴ GR 14.1(a) provides "Washington Court of Appeals. Unpublished opinions of the Court of Appeals are those opinions not published in the Washington Appellate Reports. Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate."

dence submitted by Sunset regarding the circumstances of the default. (CP 053, 059 - 060). It is silent regarding why he, or Sunset, did not respond to the Summons and Complaint or that anything Fire Insurance or Evezich did prevented them from appearing in the action. (CP 059 – 060). Thus, Sunset failed to prove it was entitled to relief, pursuant to CR 60(b)(1) and the trial court abused its discretion in granting Sunset's motion as Sunset provided no basis for granting the motion.

7. Sunset should not be allowed to rely upon CR 60(b)(4)(Fraud or misrepresentation) as a basis for vacating the default as it raised the issue for the first time in its Reply Brief and Fire Insurance moved to strike it.

Sunset raised, for the first time, in its reply to Fire Insurance's Response to the Motion to Vacate that it was entitled to relief, pursuant to CR 60(b)(4)(Fraud and misrepresentation). (CP 50-58 & 141). Fire Insurance moved to strike the same at oral argument (RP 10). Raising new issues in a reply brief is improper because the nonmoving party has no opportunity to respond. *White v. Kent Medical Center, Inc.* 60 Wn. App. 163, 168, 810 P.2d 4 (Div. I 1999)(holding it inappro-

prate to raise a basis for granting summary judgment in a reply brief). Thus, CR 60(b)(4) should not serve as a basis for seeking vacation of the default.

8. The trial court abused its discretion in granting the motion because Sunset failed to offer any evidence that: i) a fraud or misrepresentation occurred and that it deceived Pinkerton or he relied upon any alleged fraud or misrepresentation, or ii) Sunset was diligent in following-up regarding the status of the lawsuit.

i. Sunset failed to offer any evidence that a fraud or misrepresentation occurred and that it deceived Pinkerton, or he relied upon any alleged fraud or misrepresentation.

Pinkerton's declaration is the sole evidentiary support offered by Sunset in support of its claim that a fraud or misrepresentation had occurred. However, it is silent as to this issue. (CP 050, 059 – 060). As a result, Sunset failed to offer any evidence that there was some sort of fraud or misrepresentation and that Pinkerton was deceived or relied upon such fraud or misrepresentation in not defending against the lawsuit.

Pinkerton offers no evidence that he was misled or that anything that occurred was even improper. The backbone of Sunset's argument is that Fire Insurance had a duty to advise

Pinkerton of the pending default, but there is no such duty and Pinkerton failed to communicate about the filed lawsuit after he was told it would be filed and before the default was granted.

Further, Pinkerton offers no evidence that the notice that he had received (In the Summons that a default could be taken if Sunset failed to Answer the Complaint and Evezich's email on June 15, 2016, that the Summons and Complaint would be filed) was inadequate or that he thought he would receive additional notice before the default was taken.

Similarly, before a statement or act can be considered a fraud or misrepresentation, there must be evidence that the alleged act deceived Sunset or caused it to rely upon the statement detrimentally. Sunset acknowledged this duty in its Reply Brief. (CP 141)(A misrepresentation is made for the purpose of ...***deceiving, defrauding, or causing another to rely on it detrimentally.***")(emphasis in original). While acknowledging the requirement, it failed to produce any

evidence in support of the requirement. Pinkerton's declaration is silent regarding any of these issues.

Sunset's failure to produce evidence of any fraud or misrepresentation that would warrant relief pursuant to CR 60(b)(4) and its failure to produce any evidence that Pinkerton was deceived or that he relied upon the same in not defending the lawsuit is fatal to its motion.

ii. Sunset failed to offer any evidence that It was diligent in following-up regarding the status of the lawsuit.

A claim for relief based on "equity" under CR 60 requires that the defendant acts with "diligence" to determine the status of the lawsuit. *Aecon, supra*, 155 Wn. App. 740. This is basically a requirement that a defendant cannot simply stick its head in the sand and then complain when a default is taken or a right to relief is barred pursuant to CR 60.⁵

⁵ This "diligence" is analogous to one of the two primary *White v. Holm* factors, that a motion to vacate a default be filed promptly after discovery of a default. "The critical period is between when the moving party became aware of the judgment and when it filed the motion to vacate." *Ha v. Signal Elec. Inc.*, 182 Wn. App. 436, 454, 332 P.3d 991 (2014). In the context of *White v. Holm* factors, the failure to file a motion for 3 months has been deemed to be a lack of due diligence. *In Re Estate of Stevens*, 94 Wn. App. 20, 35, 971 P.2d 58 (1999). Here, Pinkerton fails to identify when he learned of the default other than it occurred after December of 2016 when "...I learned that plaintiff's counsel had filed an action and taken a default order and judgment in the sum of \$226,793.00."

In *Aecon*, the plaintiff told the defendant that suit was going to be filed soon and the pleadings would be sent to the defendant. *Id.* The defendant failed to make any inquiry when the pleadings were not received, and the court held that when an allegation is made that plaintiff's counsel has concealed the existence of litigation, the defendant must act "...with diligence." *Id.*, at 741. Thus, Defense counsel's failure to exercise due diligence by inquiring into the status of the lawsuit after the pleadings were not received, resulted in denial of a right of relief "...under equity or CR 60.") *Id.*, at 741.

In this case, there is no evidence that litigation was concealed; conversely, *Evezich told Pinkerton on June 15, 2016, that the matter was going to be filed in Court.* ((CP 68)(emphasis provided)).

(CP 060). Thus, he could have known of the default anywhere from 3 ½ months (between when Collins called Evezich on April 9, 2018 and the motion was filed on July 31, 2018)(CP 132, 048) to 19 months (between the time Pinkerton discovered the default in December, 2016 and the Motion to Vacate Default was filed on July 31, 2018)(CP 060, 132, 048).

The Order of Default was granted on July 12, 2016 and the Default Judgment was granted on February 16, 2017; thus, when Sunset filed its motion on July 31, 2018, over one-year had elapsed since the Default Judgment and over two-years had elapsed since the Order of Default.

Sunset failed to offer any evidence that it conducted any diligence which would entitle it to relief under CR 60.

Pinkerton's declaration is silent as to whether he, or Sunset, conducted any diligence into the status of the lawsuit during the two-years prior to the motion being filed. (CP 059 - 060).

They could have accessed the court file, or even asked Evezich about its status, but neither was done. Pinkerton only wrote two letters to Evezich *after Evezich told him the Summons and Complaint would be filed with the trial court and the default had been granted* and neither one asked whether the lawsuit had been filed or the status of the lawsuit.

Instead of proving that it conducted any diligence regarding the lawsuit, Sunset argued for the first time, at oral argument, that Fire Insurance had a duty to advise Pinkerton

that the default had been taken and its failure to do so was a fraud or misrepresentation. There is no such duty.

In *Trinity v. Ohio*, *supra*, 176 Wash. App. 193, the plaintiff obtained a Default Judgment for \$764,217 and purposefully waited 1 year and 5 days to begin collecting on the judgment. The defendant moved to vacate the default based on CR 60(b)(1) and CR 60(b)(11). Division I of the Washington State Court of Appeals held that “Washington Courts do not consider it deceptive or unfair for a plaintiff to wait a year to collect on a default judgment.” *Id.*, at 196. The court reasoned that

...Trinity violated no deadline or court rule in waiting a year to collect. Characterizing such conduct as dilatory would encompass a myriad of other strategic decisions attorneys are permitted to make. And, Trinity had no obligation to give Ohio notice of the default judgment, so Ohio could not have reasonably relied on any act or statement by Trinity....Rather, it was Ohio’s responsibility to make a CR 60(b)(1) motion within one year of the default order.

Id., at 197.

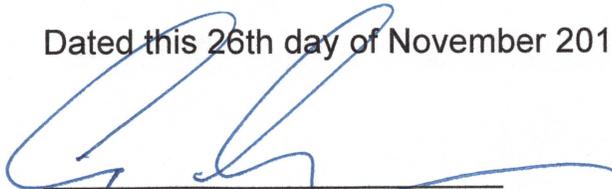
Thus, Fire Insurance had no duty to inform Pinkerton that a default would be taken and, just like the defense

counsel in *Aecon* which failed to inquire about the status of a lawsuit that was known to be filed soon, Sunset did the same thing. The same result should be reached – Sunset’s lack of diligence should result in it being denied relief pursuant to CR 60.

E. CONCLUSION

The Court should reverse the trial court’s Order Vacating the Order of Default and Default Judgment and remand for reinstatement of the Order of Default and Default Judgment.

Dated this 26th day of November 2018



Craig Evezich, WSBA #20957
Evezich Law Offices, P.L.L.C.
Attorney for Fire Insurance Exchange

F. APPENDIX “A” – TIMELINE OF PROCEDURAL EVENTS

| Date | CP | Event | Time Between Events |
|-------------------|-----------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------|
| 6/1/16 | 001-005 | Service of un-filed Summons and Complaint upon Sunset. | |
| 6/15/16 | 068 | Emails between Pinkerton and Evezich. Pinkerton acknowledges service of unfiled Summons and Complaint and Evezich advises that the unfiled Summons and Complaint will be filed with the court. | |
| 6/23/16 | 001 & 164 | Summons and Complaint filed. | |
| 6/15/16 – 7/12/16 | 132 | No contact between Pinkerton and Evezich and no appearance by Sunset. | |
| 7/12/16 | 036-037 | Court signs Order of Default. | |
| 7/26/16 | 074-075 | Pinkerton writes to Evezich and denies the claim but does not acknowledge that the lawsuit has been filed with the Court. | Two weeks after the Order of Default was granted. |

| | | | |
|----------|---------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------|
| 12/23/16 | 076 | Pinkerton writes to Evezich stating that he would not be paying the claim and is closing this file. He does not acknowledge that the lawsuit has been filed with the Court. | Five months after the Order of Default was granted. |
| 12/23/16 | 060 | Sometime after writing his letter of this date, Pinkerton learns that Sunset is in default. | At least five months after the Order of Default was granted and as long as 19 months before Sunset files its motion on 7/31/18 to vacate the default. |
| 2/16/17 | 046-047 | Court signs Order of Default Judgment. | |
| 4/9/18 | 132 | Evezich receives a call from Collins, on behalf of Sunset, regarding vacating the default. Evezich declines request. | |
| 7/31/18 | 048 | Sunset files its Motion to Vacate Default. | Over 3 1/2 months after Sunset's counsel's request to vacate the default. |

G. APPENDIX “B” – SELECTED TEXT OF CITED
WASHINGTON STATE RULES OF CIVIL
PROCEDURE.

CR 6: TIME

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion: ...

(2) upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 50(b), 52(b), 59(b), 59(d), and 60(b).

CR 55: DEFAULT AND JUDGMENT

(a) Entry of Default ...

(3) Notice. Any party who has appeared in the action for any purpose shall be served with a written notice of motion for default and the supporting affidavit at least 5 days before the hearing on the motion. Any party who has not appeared before the motion for default and supporting affidavit are filed is not entitled to a notice of the motion, except as provided in rule 55(f)(2)(A)...

(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)...

(f) How Made After Elapse of Year...

(2) Service. Service of notice of the time and place on the application for the order of default or default judgment shall be made as follows:

(A) by service upon the attorney of record....

CR 60: RELIEF FROM JUDGMENT OR ORDER

(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 the party's 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;
...

(11) Any other reason justifying relief from the operation of the judgment...

The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken. If the party entitled to relief is a minor or a person of unsound mind, the motion shall be made within 1 year after the disability ceases. A motion under this section (b) does not affect the finality of the judgment or suspend its operation.

CERTIFICATE OF FILING AND SERVICE

I, Heather Derenski, hereby state and certify that I filed the Appellant Fire Insurance Exchange's Opening Brief with the above-entitled Court and served the same upon the following counsel, on the date, at the addresses, and via the method of service indicated:

| | | |
|------------------------------------------------------------------------------------------------------------------------------------------------------------|--|-------------------------------------------------------------------------------------------------------------------------------------------------------|
| Thomas J. Collins Merrick, Hoffstedt & Lindsey, P.S. 3101 Western Ave Ste 200 Seattle, WA 98121 Attorney for Respondent Sunset Air, Inc. | | Via First Class U.S. Mail ✓ Via ABC Legal Messenger ✓ Via e-Service through the Court's portal ✓ Via Email to: tcollins@mhlseattle.com |
|------------------------------------------------------------------------------------------------------------------------------------------------------------|--|-------------------------------------------------------------------------------------------------------------------------------------------------------|

Signed under penalty of perjury under the laws of the State of Washington this 26th day of November 2018, in Issaquah, Washington.


Heather Derenski, Legal Assistant
Evezich Law Offices, P.L.L.C.

EVEZICH LAW OFFICES P.L.L.C.

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