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WASHINGTON STATE COURT OF APPEALS, DIVISION II

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ARYA HOLDINGS v. EASTSIDE FUNDING, et al.

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On Appeal From Pierce County Superior Court  
Case No. 15-2-14778-7

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**BRIEF OF RESPONDENT EASTSIDE FUNDING, LLC**

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## I. INTRODUCTION

Plaintiff / Appellant Arya Holdings, LTD (“Arya”) appeals the trial court’s decision to deny its CR 60 motion to set aside an agreed order of dismissal with prejudice of Arya’s lawsuit. The unconditional order of dismissal was an express term of a settlement agreement entered into by Arya.

The lawsuit was essentially a three-party case. Defendant / Respondent Eastside Funding, LLC (“ESF”) is a lender. The other Defendants were Greg Daly and entities controlled by Daly, who were borrowers from ESF (the “Daly Parties”). Greg Daly was a principal of the Arya corporation. Arya sued the Daly Parties alleging Arya has some interest in the properties collateralizing the ESF loans and the proceeds of their resale. Arya named ESF in the lawsuit alleging that ESF had some duty to protect Arya’s interest and recorded a lis pendens preventing the sale of any of the properties. ESF cross claimed against Daly for indemnification. The Daly Parties are not parties to this appeal.

In July of 2016, Arya and the Daly Parties entered into a CR2A agreement. Shortly thereafter, Arya and its shareholders executed in favor of ESF a comprehensive release of claims and a release of the lis pendens. On July 18, 2016, an agreed order of dismissal was entered, dismissing the

entire case with prejudice and without costs to any party. The CR2A agreement between Arya and Daly unequivocally provided that Arya agreed to dismiss the lawsuit with prejudice in exchange for Daly's promise to pay money in the future. Daly later defaulted on the CR2A agreement. ESF was not a party to the CR2A agreement and there are no unfulfilled obligations of ESF under any agreement. In September of 2018, Arya obtained an order to show as to ESF addressing CR 60 for the first time. The trial court denied the motion to vacate the agreed order of dismissal.

## **II. STATEMENT OF THE ISSUE**

1. Was the trial court's denial of Arya's motion to vacate an agreed order of dismissal an abuse of discretion where: (a) the agreed order of dismissal was an express and unconditional term of a settlement agreement entered into by Arya, and (b) Arya waited nearly two years from its initial motion to vacate to properly bring a CR 60 motion before the court; and (c) the motion finally brought did not remotely establish the extraordinary circumstances required to invoke the extraordinary remedy of CR 60(b)(11)?

## **III. STATEMENT OF THE CASE**

A. Three-Party Case. Despite the bilateral characterization of

Plaintiff and Defendant, this is in reality a three-party case. ESF is a Lender; the Daly Parties were borrowers from ESF (or, in the case of 626 West Main Street LLC, the successor in interest to the collateral for a loan originally made to Greg Daly). CP 95-97. Mr. Daly was the control person and beneficial owner of all of the entity borrowers. CP 95-97. Plaintiff Arya was a corporation, with Greg Daly being an officer of the corporation. CP 2. Arya sued the Daly parties alleging that Arya had some interest in the properties collateralizing the ESF loans and the proceeds of their resale. CP 1-24. Arya named ESF in the lawsuit alleging ESF had some duty to protect Arya's alleged interest, and recorded a lis pendens preventing the sale of any of the properties. CP 1-24, CP 95-97. ESF cross claimed against Daly for indemnification, asserting that ESF was a party to the lawsuit solely as a result of alleged conduct of Daly, and that in reality the dispute was between Plaintiff and Greg Daly. CP 29-32. In its answer to the complaint, ESF sought recovery from Arya of its costs of suit and reasonable attorney fees, including fees under CR 11 and RCW 4.84.185. CP 29-32.

B. CR2A Agreement Between Arya and Daly. Arya and the Daly Parties entered into a CR2A Agreement dated July 5, 2016. CP 41-42. In the agreement, Daly promised to pay Arya \$45,000.00 within 120 days of the agreement. CP 41-42. Arya agreed to enter into a stipulated order of

dismissal, dismissing all claims with prejudice and without costs to either party. CP 41-42. The agreement was contingent on Daly entering into a separate settlement agreement with ESF relating to the ESF – Daly loans within 10 days of the agreement. CP 41-42. ESF was not a party to the CR2A Agreement.

C. ESF Workout Agreement with Daly. As contemplated by the CR2A Agreement, ESF negotiated and entered into a comprehensive workout package and settlement agreement with the Daly Parties. CP 72-73, 95-97. This workout package included certain concessions and forbearances from ESF to the benefit of the Daly Parties. CP 72-73, 95-97. ESF would not have entered into this agreement with the Daly Parties but for the dismissal of the Arya lawsuit. CP 72-73, 95-97.

D. Release of Claims from Arya to ESF. As further contemplated by the CR2A Agreement, on or about July 16, 2016, Arya and its shareholders executed in favor of ESF a comprehensive release of claims and a release of its recorded lis pendens. CP 53-56. By agreement, Arya released all its claims as to ESF, which release was “unconditional and immediately effective upon execution”. CP 53-56. In releasing the lis pendens filed in conjunction with the lawsuit, Arya acknowledged, with the signed confirmation of counsel, that “Plaintiffs have dismissed the said Superior Court case with prejudice, and have forever released all claims

set forth therein”. CP 58-59.

E. Agreed Order of Dismissal with Prejudice. An agreed order of dismissal was entered on July 18, 2016 dismissing the entire case with prejudice and without costs to any party. CP 33-35.

F. Default by Daly Parties. Daly did not pay Arya the \$45,000.00 as provided in the CR2A agreement. CP 38-39. The Daly Parties filed Chapter 7 bankruptcies on December 8, 2016. CP 62, 117-119.

G. Arya’s Procedural Steps Prior to CR 60 Motion.

Arya first filed a motion to vacate the dismissal on November 29, 2016, arguing a breach by the Daly Parties of the CR2A Agreement. CP 36-37. This motion was not heard, as the Daly Parties filed bankruptcy petitions. CP 62. On January 25, 2017, Arya filed an Amended Motion to Vacate reiterating the breach of performance as grounds to vacate, but limiting the motion solely to vacating the dismissal in favor of ESF. CP 63-64. At the time the Amended Motion was filed, Arya’s counsel filed a Reply Declaration alleging that ESF was a gratuitous beneficiary of the agreement between Arya and the Daly Parties and paid no consideration for the order of dismissal. CP 65-66. Neither the original motion to vacate nor the amended motion to vacate addressed CR 60. The Amended Motion against ESF was re-noted multiple times through the spring of 2017 and then ultimately abandoned. CP 124-25.

H. CR 60 Motion. On September 28, 2018, Arya secured an Order to Show Cause which brought the matter before the trial court. CP 85-86. The only additional pleading filed by Arya was the motion for the entry of the show cause order, in which Arya stated it was renewing its motion to vacate filed January 25, 2017. CP 81-84. In the show cause order, Arya, for the first time, addressed CR60 as the basis of its motion (citing “CR60(11)” presumably intending CR60(b)(11)). CP 85-86. On November 2, 2018, the trial court entered its order denying Arya’s motion to vacate. CP 109. This appeal followed. CP 110.

#### **IV. LAW AND ARGUMENT**

##### **A. Standard of Review: Abuse of Discretion.**

Appellant and Respondent agree that a trial court’s decision on a CR 60(b) motion is reviewed for abuse of discretion. *Mitchell v. Wash. St. Inst. Of Pub. Policy*, 153 Wn.App 803, 821, 225 P.3d 280 (2009), *review denied*, 169 Wn.2d 1012 (2010). A trial court abuses its discretion when the decision is manifestly unreasonable or rests on untenable grounds or reasons. *Green v. City of Wenatchee*, 148 Wn.App 351, 368, 199 P.3d 1167 (2007).

For the reasons set forth below, it is abundantly clear that the trial court in this case did not abuse its discretion by denying Arya’s motion to vacate its own agreed order of dismissal.

B. Arya's CR 60 Motion Failed to set forth a Concise Statement of Facts or Errors Necessary to Establish the Extraordinary Circumstances required to invoke the Rule.

The relevant portions of CR 60 are as follows:

CR 60

(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:

...

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

The motion shall be made within a reasonable time ...

(e) Procedure on Vacation of Judgment.

(1) Motion. Application shall be made by motion filed in the cause stating the grounds upon which relief is asked, and supported by the affidavit of the applicant or the applicant's attorney setting forth a concise statement of the facts or errors upon which the motion is based ...

The law governing the applicability of CR 60(b)(11) is succinctly summarized as follows. CR 60(b)(11) is to be used sparingly in situations involving extraordinary circumstances not covered by any other section of the rules, which circumstances must relate to irregularities extraneous to the action of the court or questions concerning the regularity of the court's proceedings. (Emphasis Added). *Friebe v. Supancheck* 98 Wn App 260, 992 P.2d 1014 (1999); *In re Marriage of Irwin*, 64 Wash.App.38, 822 P.2d 797 (1992); *Marriage of Yearout*, 41 Wash.App. 897, 707 P.2d 1367

(1985). *State v. Keller*, 32 Wash.App. 135, 647 P.2d 35 (1982).

ESF submits that Arya did not comply with CR 60(e)(1), having failed to file a concise statement of the grounds on which its motion was based. The motion to vacate was insufficient as a matter of law, as Arya offered no analysis under CR60(b)(11) and did not clearly articulate the basis of the motion. Reviewing the original motion to vacate (CP 36-37), the amended motion to vacate (CP 63-64), the declaration of counsel filed concurrently with the original motion (CP 38-45), the reply declaration of counsel supporting motion to vacate order (CP 65-69), and the motion for order to show cause (CP81-84), it appears that Arya's argument was that that relief under CR 60(b)(11) was warranted because: i) the Daly Parties did not perform certain terms of their CR2A Settlement Agreement; ii) ESF is a gratuitous beneficiary of the agreement between Arya and the Daly Parties and they have paid no consideration for the benefits of the dismissal.

Reiterating for emphasis, CR 60(b)(11) is to be used sparingly and only in situations involving extraordinary circumstances. Nothing offered by Arya even suggests extraordinary circumstances. Breach of the CR 2A agreement by Daly is not an extraordinary circumstance. If Arya did not adequately contract to secure Daly's future performance, it did so at its peril, as such an event is patently foreseeable and a common consideration

in contract drafting. Arya accepted in effect an unsecured promissory note in exchange for its dismissal of its claims. The only authority cited by Arya is *Rosen v. Ascentry Technologies Inc.*, 143 Wn.App 364, 177 P.3d 765 (2008). *Rosen* is obviously and fundamentally distinguishable from the case at bar. In *Rosen*, the litigation was not dismissed after the settlement agreement was executed; in fact the settlement agreement provided that “he [Rosen] agrees to execute and file an Order of Dismissal with Prejudice in a form to be provided by Ascentry within three (3) business days of receipt of the Settlement Payment”. *Id.*, at 367. As the Court noted, “Ascentry did not pay Rosen, and Rosen did not seek to have his original lawsuit dismissed.” *Id* at. p.368. Rosen was accordingly permitted to pursue his original claims.

The case at bar is clearly distinguishable just from a reading of the CR2A Agreement, which unequivocally provides, inter alia, for concurrent dismissal with prejudice in exchange for the promise to pay money in the future. Significantly, in no manner was a dismissal against ESF made subject to Daly’s future performance.

The consideration issue first and only arose in the reply declaration filed by Arya’s counsel, which asserted that ESF is a “gratuitous beneficiary” of the CR 2A Agreement, and gave no consideration for the dismissal (CP 65-69). To what extent Arya still relies on this argument is

unclear, as the argument itself is unclear, and Arya offered no legal authority to support it. To the extent Arya suggests there is a consideration issue, the argument has no merit. Arya's pleadings at the trial court level and its opening brief fails to address the comprehensive Release of Claims executed in favor of ESF by Arya and its principals or the interdependence of the respective agreements. CP 53-56. ESF viewed this litigation primarily as a dispute between Arya and the Daly Parties into which ESF was groundlessly drawn. CP 29-32, 95-97. ESF believed Arya's claim against ESF was wholly without merit. CP 29-32, 95-97. In the settlement, ESF gave up its claim for attorney fees and costs against Arya. ESF put the onus on Daly to settle his issues with Arya and get the lawsuit dismissed. The Lis Pendens filed by Arya prevented the Daly Parties' from selling the properties securing the ESF loans and timely paying the loans. CP 95-97. By July 2016, all the loans had matured and were accruing interest at default rates; a property sale was pending which was blocked by the lis pendens. CP 95-97. Arya reached a financial settlement of the lawsuit with Daly (and settlement of some records and personal property issues) as evidenced by the CR2A Agreement, in consideration for which Arya agreed to contemporaneously dismiss the lawsuit including its claims against ESF. Dismissal of the ESF claims was an express requirement of the CR2A Agreement (*See Paragraph 9 of the*

*CR 2A Agreement*) CP 41-42. A settlement between ESF and Daly as required by Paragraph 10 of the CR2A Agreement would not have occurred absent dismissal of the lawsuit. CP 95-97. ESF relied on the dismissal of the lawsuit in making certain concessions to Daly, which in turn induced Daly to agree to pay money to Arya. Arya cannot now withdraw its contribution to the deal (i.e., dismissal of the lawsuit) under the guise of some irregularity because Daly breached.

Arya chose to accept promises of future performance in exchange for immediate dismissal, with full knowledge of the implications and with the assistance of counsel. Further, Arya offers no argument to subvert the independent release of claims it executed in favor of ESF which provides that it is “*unconditional and immediately effective*”; Arya has no claims against ESF to litigate as they have all been released. The Release acknowledges settlement of the lawsuit as a stipulated fact and recognizes the CR2A Agreement. CP 53-56. It is patently evident from all of the documents that the immediate and unconditional dismissal of the lawsuit was contemplated and bargained for. As stated by counsel for Arya: “It is true of course they (ESF) got a dismissal immediately. That was the bargain we struck in exchange for Mr. Daly’s promise to pay and otherwise perform.” CP 65-69. Contrary to Arya’s arguments, it did receive the exact benefit it expressly contracted for: Daly’s promise to

pay in the future. There are no extraordinary circumstances justifying relief under CR 60(b)(11).

C. Arya's CR 60 Motion was not brought within a reasonable time.

A reasonable time under CR 60(b)(11) is determined by examining the circumstances and facts of the case, and major factors that should be considered include prejudice to the nonmoving party and whether the moving party has good reasons for the delay in filing. *In re the Termination of William G.M., Minor Child*, Court of Appeals Div. 3 No. 29071-9-III (2011) UNPUBLISHED; *Luckett v. Boeing Co.*, 98 Wn.App. 307, 312-313, 989 P.2d 1144 (1999), review denied, 140 Wn.2d 1026 (2000).

At the trial court level, Arya addressed the timeliness requirement of CR 60 (b) with a passing reference to the bankruptcy of the Daly Parties and the declaration filed by bankruptcy counsel, David Smith. CP 120-123. Arya obtained its Order to Show on its CR 60 motion to vacate on August 30, 2018. That was 21 months after the initial motion to vacate, 20 months after the bankruptcy filings of the Daly Parties, and 19 months after the amended motion to vacate that was directed to ESF only.

Certainly, the bankruptcy filings were a legitimate reason to exercise some caution to determine the correct course of action. Arya

elected to essentially do nothing. Since it was not pursuing relief against the bankruptcy debtors or the bankruptcy estate, it could have pursued direct action against ESF, which was contemplated by Arya's counsel. CP 138-139. If concerned about the bankruptcy filings, Arya could have made a motion in bankruptcy court requesting relief from the Bankruptcy Code's automatic stay, or it could have sought a "comfort order" confirming the automatic stay was not applicable. Rather, Arya re-noted its motion multiple times, and then abandoned it. Then, nearly two years down the road, Arya resurrected its motion, to the obvious prejudice of ESF. The only evident reason for delay was Arya's unwillingness to do the extra work to confirm its right to proceed while the bankruptcies were pending. This delay was not reasonable, was self-serving to the prejudice of ESF and justifies denying any relief under CR 60(b).

## **V. CONCLUSION**

The trial court did not abuse its discretion in denying Arya's CR 60 motion to vacate the agreed order of dismissal. Arya seeks an extraordinary remedy, to be used sparingly in situations where extraordinary circumstances exist. Through the settlement, Arya received exactly what it bargained for: an unsecured promise by Daly to pay in the future.

Arya's motion was not brought in a reasonable time, and failed,

both factually and legally, to set forth extraordinary circumstances that could justify relief under CR 60 (b)(11). The rule is not a coupon for a do-over of a voluntary settlement about which a party may have regrets. This litigation was resolved between three parties acting of their own free will with the assistance of counsel. Respondent ESF respectfully requests that the Court affirm the trial court's ruling denying the motion to vacate.

Respectfully submitted this 18 day of June, 2019.

REED, LONGYEAR, MALNATI & AHRENS, PLLC



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No. 52955-6-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

ARYA HOLDINGS, LTD,

Plaintiff/Appellant,

v.

EASTSIDE FUNDING, LLC, et al.,

Defendants/Respondents.

CERTIFICATE OF SERVICE

I declare under penalty of perjury, under the laws of the State of Washington, that on June 18<sup>th</sup>, 2019, I caused true and correct copies of the Respondent Eastside Funding, LLC's Responsive Opening Brief, and this Certificate of Service, to be served to the parties and counsel of record as follows:

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DATED this 18<sup>th</sup> day of June, 2019.



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**REED LONGYEAR MALNATI AND AHRENS**

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