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No. 53763-0-II

**WASHINGTON STATE COURT OF APPEALS
DIVISION TWO**

Appeal of Pierce County Superior Court Summary Judgment
(Case Number 16-2-13145-5)

KENNETH AND VICTORIA ZIMMERMAN (husband and wife)

Plaintiffs / Appellants

V.

**WILMINGTON SAVINGS FUND SOCIETY FSB, AS TRUSTEE FOR
STANWICH MORTGAGE LOAN TRUST A,**

Defendants.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

Appellants Kenneth and Victoria Zimmerman, submit this brief in support of their motion to appeal a Pierce County Superior Court order (on a motion to vacate), whereby the court denied the Defendant's CR 60 motion, but still modified the effectiveness of the original order in the Defendant's favor.

The primary issue before this court deals with the finality of judgments, specifically a default judgement and subsequent final court order. In the underlying case, the Defendant, Wilmington Savings Fund Society FSB, as Trustee for Stanwich Mortgage Loan Trust A (hereinafter "Wilmington"), failed to respond to a complaint after proper service. Appellants (Zimmerman) moved and received an order of default. Zimmerman then received a final order, consistent with the complaint; the order quieted title to the deed of trust pursuant to RCW 7.28.300. Defendant-Wilmington, years later, challenged the validity of the original service claiming that Appellants failed to meet RCW 4.28.185(4). The Superior court ultimately denied

Wilmington's motion, agreeing that service on the Defendant was valid, but the court still reduced the effectiveness of the original final order in Wilmington's favor. The Appellants then filed this appeal.

II. Assignment of Error

Error #1: The superior court erred by modifying the effect of the original final order after the court fully denied the Defendant's CR 60 motion to vacate.

Issues pertaining to Assignment of Error

1. Service on an out-of-state defendant is valid when the Plaintiff substantially complied with RCW 4.28.185(4).
2. A final order cannot be vacated when there are no grounds plead under CR 60 accepted by the court.
3. A defaulted party cannot belatedly argue the factual merits of a defense when it was unable to set aside the original default and final order.

III. Statement of the Facts

In 2010 Zimmerman could no longer afford to make their monthly home payments and went into default. In 2015, the Christina Trust, as Trustee for the ARLP Trust 3, claimed it was the beneficiary and sent a notice of default

to the Zimmerman. Zimmerman sent a letter to the loan servicer for Christina disputing that Christina was the alleged beneficiary, that it never legally acquired the debt, and that it did not have the right to serve as the beneficiary in accordance with the Supreme Court ruling in Bain v. Metropolitan. Shortly thereafter, on November 24, 2015 (according to the loan servicer) the note was sold to Defendant Wilmington. Despite the note allegedly being sold, Christina Trust had its foreclosure trustee, North Cascade Trustee Services, initiate a non-judicial foreclosure against Zimmerman. North Cascade initiated the foreclosure, but later concluded that such action was improper because Christina was not the legal beneficiary. North Cascade then cancelled the matter and rescinded the notice of trustee's sale. Thereafter, no subsequent trustee's sale was ever initiated by the newly alleged beneficiary, Defendant-Wilmington.

On November 29, 2016, Zimmerman filed the underlying action in the Pierce County Superior Court (CP 1 - 12). In the complaint, Zimmerman noted that their

default from July 2010 exceeded the statutory limitations period of six years and that the Appellants were seeking an order declaring the debt outlawed under the statute of limitations and quieting title over the deed of trust in their favor pursuant to RCW 7.28.300. (CP 1 - 12).

Zimmerman initially served Wilmington's "corporate service agent" at the address noted on Wilmington's corporate registration documents recorded with the State of Delaware. This location was also consistent with the address supplied by Wilmington's loan servicer (Covington). Wilmington's corporate service agent re-directed the service processor to provide service at a different address in Wilmington, Delaware. The requirement to serve Wilmington at the secondary address was because Wilmington was being served in its capacity as a Trustee for a financial trust. Zimmerman's Service processor filed an affidavit of attempted service explaining the facts that required the subsequent service. (CP 15). The Affidavit reads in part as follows:

Service [was] rejected by Debbie Green, Legal Administrator as [she was] not authorized to

accept [service] at this location. All documents related to a trust must be served on their trust division at 501 Carr Road, Wilmington, DE 19809.

Zimmerman paid for the second service to be made at the re-directed address. (CP 16)

Despite being properly served at the both addresses, Wilmington failed to appear or respond to the complaint. On February 17, 2017 Wilmington was found in default. (CP 35-37). On March 3, 2017, Zimmerman received a final court order whereby the court found that the debt was outlawed by the statute of limitations and title to the deed of trust was to be quieted in Zimmerman's favor. (CP 63-64)

On December 21, 2018, Defendant-Wilmington filed a motion to vacate the default order under CR 60(b)(5). (CP 65-72). Wilmington claimed the order was void on the grounds that Appellant failed to perfect proper service in accordance with RCW 4.28.125(4):

Personal service outside the state shall be valid only when an affidavit is made and filed to the effect that service cannot be made within the state.

Wilmington did not seek to vacate the order on any other grounds. Wilmington's motion did not include matters such

as excusable neglect (CR 60(b)(1)), discovery of new evidence (CR 60 (b)(2)), or any other general reason (CR 60 (b)(11)).

On March 15, 2019, the motion to vacate was denied. After a series of reconsideration hearings, the trial court eventually again held on August 2, 2019 that service on the Defendant was valid. (CP 186-187). However, despite this determination, the court never-the-less modified the effectiveness of its original order to only apply to monthly payments that were outside of the six-year statute of limitations period. (CP 186-187).

Appellants then filed this appeal.

IV. ARGUMENT

FIRST Issue Under Assignment of Error:

Appellants substantially complied with RCW 4.28.185(4) to justify not vacating the order on grounds of invalid service.

RCW 4.28.185(4) requires that when the defendant is served out of state, an affidavit must be filed (prior to a final order) that verifies the out of state service, as opposed to in-state service, was required. Although failure to comply with

RCW 4.28.185(4) cannot be considered as a harmless error, even when the defendant actually receives service, case law is consistent that the statute can be satisfied through substantial compliance, Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp., 66 Wn.2d 469 , 472, 403 P.2d 351 (1965).

In the present case, the facts make it clear that Appellants substantially complied with the statute. When the Appellant's Service Processor filed its affidavit stating it was directed by the Defendant's service agent to specifically perform the service at the secondary Delaware address, (CP 15) the affidavit constituted substantial compliance with RCW 4.28.185(4). The affidavit documented under oath that valid service (according to Wilmington's own agent) had to be made at an out-of-state location. Additionally, Judge Nelson noted on the record that she personally researched the matter to verify the second service was proper. (Report of Proceedings, March 3, 2017, Lines 12 – 17.) As such, Judge Nelson (in lieu of the affidavit coupled with her own additional research), made certain she was adequately

informed that the service on the defendant had to be made at the out-of-state address. These factors, establish that Zimmerman substantially complied with RCW 4.28.185(4) and service on the defendant was lawful.

Lastly, the burden of proof for an appeal on this matter is abuse of discretion, Griggs v. Averbek Realty, Inc., 92 Wash.2d 576, 599 P.2d 1289 (1979)). An abuse of discretion exists only when no reasonable person would take the position adopted by the trial court. Morgan v. Burks, 17 Wn.App. 193, 198, 563 P.2d 1260 (1977). Here an informed judge, aware of service actions as set out in affidavit, exercised her equitable discretion and determined that the out-of-state service was valid. This is evident from the findings of fact included in the last (August 2, 2019) order: “Plaintiffs substantially complied with RCW 4.28.185 and service was valid on the Defendants in Delaware.” (CP 186-187). Therefore, there was no abuse of discretion. Furthermore, the judge’s determination decrees that the original order could not be deemed void due to improper

service. As such, the only foundation upon which Wilmington attempted to invoke CR 60 was factually denied.

Second Issue Under Assignment of Error:

The court improperly modified the effect of the final order after the defaulted party failed to vacate the order under CR 60.

Appellants understand that default judgments are not favored in Washington; “it is the policy that controversies be determined on the merits rather than by default.” *Dlouhy*.

Dlouhy, 55 Wn.2d 718, 721, 349 p.2d 1073 (1960).

However, according to the State Supreme Court, this policy needs to be balanced against the necessity of having a responsive and responsible system which mandates compliance with the judicial summons. *Griggs v. Auerbeck Realty, Inc.*, 92 Wn.2d 576, 599 P.2d 1289 (1979). In the State of Washington, default judgments are supported by the policy that an orderly system of justice requires compliance with judicial process and finality to judicial proceedings.

Ellison v. Process Systems Inc. Const. Co., 112 Wash. App. 636, 50 P.3d 658 (Div. 3 2002) (quoting Griggs v. Averbeck Reality, Inc., 92 Wash.2d 576, 581, 599 P.2d 1289 (1979)).

Although relief from a final judgment is allowed under specific exceptions, such exceptions are limited to the allowances set forth in CR 60. Furthermore, the grounds for such exceptions have to be plead by the moving party with particularity. According to CR 60:

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 his attorney setting forth a concise statement of the facts or errors upon which the motion is based.” (CR 60 (e)(1)).

In Wilmington’s motion to vacate, Wilmington only plead one ground to justify vacating the order; that the order was void because service was invalid due to violation of RCW 4.28.185(4). (CP 65 – 72.) If Wilmington wanted to plead additional grounds, such as excusable neglect (CR 60(b)(1), new evidence (CR 60(b)(3), or any other general reason justifying relief (CR 60(b)(11), then Wilmington had a duty to particularly identify those other grounds and supply concise statements of facts to support those subsections.

Wilmington did not do this. Thus, the only grounds the court could consider was whether the order was void due to invalid out-of-state service; courts may not consider grounds not stated in the motion. Orsi v. Aetna Ins. Co., 41 Wn. App. 233, 703 P.2d 1053 (1985). Because the only asserted basis was invalid service, and because such basis was wholly defeated per the court's direct findings, there was no legal basis upon which the court could relieve Wilmington from the effect of the initial order. Yet, that is what the court did; modifying the effectiveness of the original order violated the finality of that order without any legal justification. This is especially true since there never was a motion to modify that order – only a motion to vacate the entirety of the order for invalid of service. As such, the modification portion of the ruling constitutes an abuse of judicial discretion because such actions were taken without any proper legal justification.

THIRD Issue under Assignment of Error:

Wilmington cannot rely on newly presented facts when it fails to initially meet the threshold required under CR 60.

In Wilmington's lengthy motion to vacate, Wilmington attacks application of the law to the facts as presented by Zimmerman in the complaint. In short Wilmington tries to apply a defense that negates the statute of limitations to certain monthly installments of the note. Wilmington, however, did not first meet the threshold under CR 60(b) to justify this attack. Although CR 60 requires the moving party to provide "the facts constituting a defense to the action or proceeding" (CR 60(e)(1), this procedural requirement does not supersede the substantive requirement to first meet one of the thresholds set forth under CR 60(b). The prime purpose of articulating a defense is to avoid a useless subsequent trial if the defaulted defendant cannot to prove to the court that there exists, at least prima facie, a defense to the claim. White v. Holm, 73 Wn.2d 348, 352, 438 P.2d 581 (1968).

In this action, there is no contest that Wilmington was validly served with the summons and complaint. As such, Wilmington had the right, and duty, to appear and deny the

Appellants' averments, and/or challenge the law applied to the causes of action. Wilmington failed to afford itself of this right. That is why the default and final order were granted. Wilmington thus cannot re-argue the factual merits of the case as if the matter was already open for litigation. Wilmington first has to establish why its failure to appear should have been excused and why Wilmington should then have been allowed to set the original order aside. Wilmington does not attempt to undertake this approach (most likely because it was time-barred by the one-year limitation set up in CR 60(b)(11)).

Instead of pleading the required grounds for excusable neglect, Wilmington improperly bootstraps its legal insufficiency argument to its unsuccessful "invalid service" argument. This type of bootstrapping is improper because the Defendant is using a rejected procedural claim as the vehicle for introducing its belated substantive factual claims. This format is backwards; unless Wilmington first pleads valid grounds under CR 60, which gives it the right to

challenge the finality of the original order, it cannot ask the court to re-evaluate a new factual disposition of that order.

Defendant may wish to shout from the rooftops that the original order was improper based on the Defendant's updated view of the law, but that argument is a stale and muted argument; it cannot be entertained by the court without first verifying proper justification to vacate the underlying final order in accordance with CR 60. "In the conflict between the principles of finality in judgment and the validity of judgments, modern judicial development has been to favor finality rather than validity. In *Re Marriage of Brown*, 98 Wn. 2d 46, 49, 653 P.2d 602 (1982). *Brown* was also cited by this court in the division II case of *Baker v. Pennymac Loan Services, LLC*, No 47395-0-II, May 10, 2016, unpublished opinion, where this court noted that "Washington courts emphasize the value of finality in judgments." "We believe the doctrine of finality of judgments is of great importance, and must be considered in any analysis of the retroactive application to final decrees. "We

emphasize the importance of finality and the limited nature of our deviation from the doctrine.”

Wrongfully arguing invalid service does not provide Wilmington with adequate justification for relitigating the finality of the original final. Service of process is a procedural engagement that establishes personal jurisdiction over the party; it cannot not later get bifurcated against separate parts of a court order just so the defaulted party can belatedly develop a potential defense. This is especially true when that Defendant fails to provide any explanation (or justification) as to why it did not initially appear and defend its position inf the first place.

V. CONCLUSION

Appellants understand that there has been a recent evolution to the legal interpretation of how limitation is applied to promissory notes with periodic monthly payments. Whether or not the Plaintiffs would have still prevailed on their complaint is not the current question before this court. Despite receiving valid service, Wilmington never appeared,

never responded, and never promoted a single defense to contest Zimmerman's claim that the 2010 default of the debt exceeded the six-year statutory limitation period. As such, the order of default was granted and based on that order, the debt was found as being wholly outlawed, and the Deed of Trust was quieted in favor of the Plaintiffs under RCW 7.28.300.

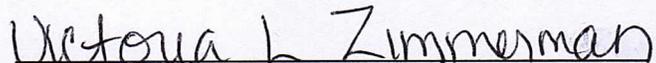
Wilmington eventually showed up two years after-the-fact and did nothing more than muddy the waters. Wilmington didn't plead any accurate grounds under which it could invoke CR 60. As such, the court was wrong to ultimately grant Wilmington its relief anyway -- which directly undermined the integrity of the original court order. Simply put, the court ignored the requirement of CR 60, excused Wilmington from its prior failure to appear, and granted it a belated final (and complete) victory on its defense. That is simply not the equitable application law consistent with Washington precedent. "The need for a responsive and responsible legal system mandates that parties comply with a judicial summons." *Griggs* at 599.

There were no grounds approved by the underlying court that would justify setting aside the original final order. As such, the finality of that order should remain fully intact.

VI. REQUEST FOR RULING

This court should uphold the trial court's recent determination that service was proper, but then reverse the court's ruling only allowed for a partial judgment of the original order. Instead, the court should reinstate the original order from March 3, 2017, in full. Simply put, that order was the final decree, and it was never legally vacated or appealed. What was final, should remain final.

Respectfully submitted this 14th day of April, 2020.


Victoria L. Zimmerman, Pro Se, Appellant.

NOTICE OF SERVICE:

VICTORIA ZIMMERMAN swears under the penalty of perjury that on this date, she provided a copy of the above opening brief to counsel for Defendant as follows:

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Submitted this 14th day of April, 2020, Pierce County,
Washington.

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