

No. 298761

COURT OF APPEALS, DIVISION III OF THE STATE OF WASHINGTON

FILED

Capital One (USA), N.A. RESPONDENT)

Vs.)

James A Green APPELLANT)

DEC 01 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

APPELLANT'S OPENING BRIEF

Appeal from a default judgment of the Superior Court
of the State of Washington in and for the County of Klickitat

The Honorable Tom Reynolds

James Alan Green, pro se

P.O. Box 21

Appleton, WA 98602

Fax 509-365-6852

By: James A Green

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I.

TABLE OF AUTHORITIES

Cases

CAPITAL ONE BANK, N.A. RESPONDANT v. JAMES A GREEN
APPELLANT No. 29498-6-III (2011) [Page 6]

Citibank South Dakota, Respondent V. Tim P. Ryan, Appellant

COA Division I Case # 64159-0-1 [Page 8]

Discover Bank v. Bridges, 154 Wn. App. 722, 226 P.3d 191 (2010) [Page 8]

Marina MARTINEZ, Appellant, v. MIDLAND CREDIT MANAGEMENT,
INC., Appellee.

No.08-07-00031-CV. -- March 13, 2008 [Page 8]

Luke v. Unifund CCR, 2-06-444-CV, 2007 Tex. App. LEXIS 7096 (2d Dist. Ft. Worth Aug. 31, 2007).

Anderson v. Liberty Lobby, 477 U.S. 242 (1986) [Page 8]

Asset Acceptance Corp. v. Proctor, 156 Ohio App. 3d 60; 804 N.E.2d 975 (2004). [Page 8]

Grant v. Forgash, 1995 Ohio App. LEXIS 5900, *13 (Ohio App. 1995).
[Page 8]

Velocity Investments, LLC v. Alston, 2-08-746 (2nd Dist., Jan. 15, 2010).
[Page 8]

II.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Is defendant the James A Green in question.
2. Were there “Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order”
3. Was a Default Judgment appropriate for this case.
4. Is the Plaintiff entitled to defend himself in this case.

III.

STATEMENT OF THE CASE

In early April 2010, I received two separate summons and complaints from Capital One [CP 14-18] (this case), As there was no case's filed or case numbers on either document, I assumed it was a gimmick to extort money. However, just in case, I served a letter to Capital One Bank stating I had no business with them & the debt was not mine [CP 7-8].

I then called the Klickitat County Clerk's office to see if there was a valid case in my name. I was told "no", but to check back in a few days to make sure. I called back for the next couple weeks & the clerk continued to tell me there was no case filed; therefore, it must not be valid.

I called several more times & the clerk continued to tell me there was no case filed on this complaint therefore, it must not be valid.

It is noted that the summons and complaint [CP 14-18] are signed and dated April 7, 2010. The motion for default judgment [CP 22-33] were signed and dated May 24, 2010, yet neither were filed with the court until the day the judgment was entered July 22, 2010 [CP 34-35].

On or about July 26th, I discovered I could look up cases online & promptly performed a name search on myself & discovered that Capital One ALREADY had the present (this case) default judgment against me with a case number this time [CP 22-23]. This is the first time I discovered there were TWO cases against me from Capital One.

On July 29th (seven days later) filed a motion to vacate this newly found default judgment, [CP 1-2] but inadvertently and mistakenly forgot to also file a motion for a show cause hearing. [CP 9].

When I had discovered my mistake, I filed a motion for order to set show cause hearing for the newly discovered case on February 23, 2011 [CP 9]. At the hearing the judge told me he was going to deny my motion to vacate [CP 1-2], and as “he new I was going to appeal“, he would “leave it up to somebody smarter than he was to decide this”.

IV.
ARGUMENT

1. Trial court erred by granting default judgment the same day as the case was filed & motion made [LCR 4, (b)].
2. Trial court erred by not granting defendants motion to vacate judgment due to defendants inadvertent mistake [CR 60, (b)].
3. Trial court erred by not granting defendants motion to vacate judgment as it was filed in a timely manner [CR 60, (b), 11].
4. [CR 60, (b), 11] also states relief from judgment may be granted for “any other reason justifying relief from the operation of the judgment”, leaving the court a very broad brush to ensure justice will prevail.
5. Since there was no case number on either complaint when they were served, it was assumed both complaints were the same case. There was no way of knowing that defendant needed to respond and appear for another case that was filed 3 months after service.
6. As stated in [Rule 60, (b), 11, 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.

7. Appellant concedes the ORDER TO SHOW CAUSE [CP 9] was inadvertently and mistakenly filed at a later date. However, The MOTION TO VACATE JUDGMENT [CP 1-2] was filed 7 days after the default judgment was entered. It should be noted however, that both comply well within the 1 year time frame of CR 60.

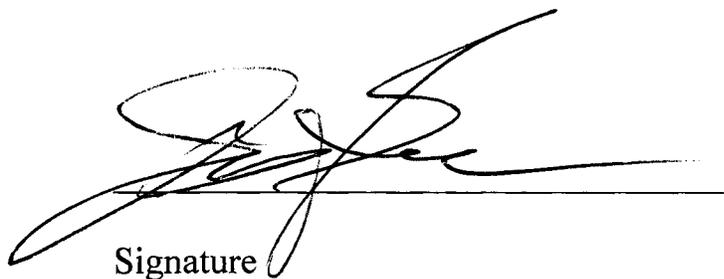
V.

CONCLUSION

Appellant requests the appeal court reverse the order of default judgment so this case may be remanded. Appellant also requests the appeal court to award costs and fees should appellant prevail.

November 29, 2011

Respectfully submitted,



Signature

James Alan Green
P.O. Box 21
Appleton, WA 98602
Fax 509-365-6852

VI.

APPENDIX

LCR 4 (b)

Klickitat County:

A citation or request for placement of any matter on the regularly scheduled motion calendar shall be in writing and filed with the Clerk before noon on the Friday preceding a Tuesday calendar or by noon on the second day preceding any specially scheduled motion calendar. Criminal motions shall be filed with the Clerk before noon on the Thursday preceding a Monday criminal calendar.

C. Matters not regularly noted on the motion calendar will not be heard except by consent of all parties and the Court and then heard only after all matters regularly noted shall be called and disposed of. Nothing in this rule should be interpreted as affecting the notice of Civil Rules for Superior Courts or Criminal Rules for Superior Courts.

CR 60 (b)

RULE 60

RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

(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 his 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;

(2) For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record,

nor the error in the proceedings;

(3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);

(4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(5) The judgment is void;

(6) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

(7) If the defendant was served by publication, relief may be granted as prescribed in RCW 4.28.200;

(8) Death of one of the parties before the judgment in the action;

(9) Unavoidable casualty or misfortune preventing the party from prosecuting or defending;

(10) Error in judgment shown by a minor, within 12 months after arriving at full age; or

(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.

(c) Other Remedies. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding.

(d) Writs Abolished--Procedure. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(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 his attorney setting forth a concise statement of the facts or errors upon which the motion is based, and if the moving party be a defendant, the facts constituting a defense to the action or proceeding.

(2) Notice. Upon the filing of the motion and affidavit, the court shall enter an order fixing the time and place of the hearing thereof and directing all parties to the action or proceeding who may be affected thereby to appear and show cause why the relief asked for should not be granted.

(3) Service. The motion, affidavit, and the order to show cause shall be served upon all parties affected in the same manner as in the case of summons in a civil action at such time before the date fixed for the hearing as the order shall provide; but in case such service cannot be made, the order shall be published in the manner and for such time as may be ordered by the court, and in such case a copy of the motion, affidavit, and order shall be mailed to such parties at their last known post office address and a copy thereof served upon the attorneys of record of such parties in such action or proceeding such time prior to the hearing as the court may direct.

(4) Statutes. Except as modified by this rule, RCW 4.72.010-.090 shall remain in full force and effect.

RCW 62A.2-201

Formal requirements; statute of frauds.

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of five hundred dollars or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

(a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances

which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

(b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted (RCW 62A.2-606).

LCR RULE NO. 11

GENERAL RULES

I. Filing and Endorsement of Papers

A. Every paper presented to a Judge for signature and every paper presented for filing shall bear a designation of what it purports to be, the number and title of the case and the name of counsel presenting or filing the same.

Every order presented to a Judge for signature shall bear the signature of the individual attorney presenting it on the lower left hand corner of the page to be signed by the Judge.

II. Accounting Procedures

A. Before a trial is set in any matter involving an accounting, the party required to account shall submit to opposing parties and the Court a formal statement in detail of cash and other property transactions in a form which will furnish information to enable a party to make a reasonable test of the accuracy and honesty thereof.

The opposing party, by pre-trial discovery procedures, shall test the validity of the accounting statements submitted.

Issues shall be made up for trial only by specific exception to separate and specific transactions shown or not shown in the accounting statement.

Items that are set forth in the accounting statement to which no exception is taken shall be deemed correct.

Rule 56 (e) Form of Affidavits; Further Testimony; Defense Required.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. **Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.**

The court may permit affidavits to be supplemented or opposed by

depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

RULE 806

ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT

When a hearsay statement, or a statement defined in rule 801(d)(2)(iii), (iv), or (v), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been

admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross examination.

RULE ER 405

METHODS OF PROVING CHARACTER

(a) Reputation. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation. On cross examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific Instances of Conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

RULE ER 608

EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS

(a) Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of reputation, but subject to the limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence or otherwise.

(b) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, **be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.**

RULE ER 602

LACK OF PERSONAL KNOWLEDGE

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

RCW 4.44.080

Questions of law to be decided by court. **All questions of law including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it.**

FILED

DEC 01 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

CERTIFICATE OF SERVICE

I hereby certify that I served: APPELLANTS OPENING BRIEF attached to this certificate on:

Nicholas R Filer
C/O Suttell & Hammer P.S.
P.O. Box C-90006
Bellevue, WA 98009

by mailing full, true and correct copy in sealed, first-class postage-paid envelope, addressed to the person(s) listed above, and deposited in the United States Postal Service at Appleton, Washington on the date set forth below.

I hereby declare that the above statement is true to the best of my knowledge and belief, and that that I understand it is made for use as evidence in court and is subject to penalty for perjury.

DATED 11/29/2011

JAMES A GREEN

