

FILED

JAN 27 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Appeal No. 298761-III

**IN THE COURT OF APPEALS FOR THE STATE
OF WASHINGTON, DIVISION III**

CAPITAL ONE BANK (USA), N.A.

Respondent

V.

JAMES A GREEN

Appellant

APPEAL FROM KLICKITAT CASE NO. 10-2-00243-5

RESPONDENT'S BRIEF

CAPITAL ONE BANK (USA), N.A.
c/o Suttell & Hammer, P.S.
P.O. Box C-90006
Bellevue, WA 98009
425-455-8220
888-788-8355
425-454-7884 FAX
nick@suttelllaw.com

FILED

JAN 27 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Appeal No. 298761-III

**IN THE COURT OF APPEALS FOR THE STATE
OF WASHINGTON, DIVISION III**

CAPITAL ONE BANK (USA), N.A.

Respondent

V.

JAMES A GREEN

Appellant

APPEAL FROM KLICKITAT CASE NO. 10-2-00243-5

RESPONDENT'S BRIEF

CAPITAL ONE BANK (USA), N.A.
c/o Suttell & Hammer, P.S.
P.O. Box C-90006
Bellevue, WA 98009
425-455-8220
888-788-8355
425-454-7884 FAX
nick@suttelllaw.com

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. STATEMENT OF
CASE.....1

III. ARGUMENT.....3

 A. STANDARD FOR REVIEW.....3

 B. THE COURT WAS WITHIN IT’S DISCRETION IN
 DENYING GREEN’S MOTION TO
 VACATE.....4

 1. The Record Supports that Green Failure to
 Timely Appear in the Action and Answer the
 Claim was not Occasioned by Mistake,
 Inadvertence, Surprise or Excusable
 Neglect.....5

 2. The Record Supports that Green did not Act
 with Due Diligence in Bringing his Motion to
 Vacate.....6

IV. CONCLUSION.....8

TABLE OF AUTHORITIES

CASES

Boguch v. Landover Corp., 153 Wn, App. 595, 224 P.3d 795 (2009).....3

Carle v. McChord Credit Union, 65 Wn.App. 93, 827 P.2d 1070 (1992).....3

Estate of Stevens, 94 Wn.App. 20, 971 P.2d 58 (1999).....7

Griggs v. Averbek Realty, Inc., 92 Wn.2d 576, 599 P.2d 1289 (1979).....4

In re Marriage of Olson, 69 Wn.App. 621, 850 P.2d 527 (1993).....6

Little v. King, 160 Wn.2d 696, 161 P.3d 345 (2007).....4

Luckett v. Boeing, 98 Wn.App. 307, 989 P. 2d 1144 (1999).....7

Morin v. Burris, 160 Wn.2d 745, 161 P.3d 956 (2007).....4, 6

Stanley v. Cole, 157 Wn.App. 873, 239 P.3d 611 (2010)3

State v. Santos, 104 Wn.2d, 142, 702 P.2d 1179 (1985).....3

White v. Holm, 73 Wn.2d 348, 438 P.2d 581 (1968).....5

RULES

CR 55.....6

CR 60(b).....3

CR 60(b)(1).....4

CR 60(b)(11).....4

I. INTRODUCTION

This is a simple collection case in which the defendant-appellant James Green (hereinafter “Green”) seeks to avoid paying his credit card debt. Green was served with a summons and complaint and never responded to it. Green failed to respond to the matter with either an answer or a notice of appearance and a Motion for Default Judgment was granted by the lower court ex parte. After being on notice of the Judgment entered against him for almost six months, Green finally noted a Motion to Vacate Default Judgment which was denied by the trial court. Green asserts that the trial court erred in denying his Motion to Vacate Default Judgment. The issue was briefed for the trial court, oral argument heard, and the trial court reviewing the pertinent facts denied Green’s Motion to Vacate. Accordingly, Capital One respectfully requests that this Court affirm the trial judge’s ruling denying the Motion and keep it’s judgment in place.

II. STATEMENT OF THE CASE

Capital One issued Green a credit card account numbered XXXXXXXXXXXXX3373. CP 16, 25. Green used the credit card account making purchases and payments. CP 16-17, 25. Green breached the contract by not paying periodic payments as required by the Customer Agreement, CP 17, 26, and was, as of January 20, 2010,

indebted to Capital One in the amount of \$2576.03 with prejudgment interest continuing to accrue. CP 26.

On April 26, 2010, Green was personally served with a summons and complaint for the monies owed to Capital One on XXXXXXXXXXXXX3373. CP 21. Capital One did not receive either answer or a notice of appearance from Green as to the Summons and Complaint served on him on April 26, 2010. On July 22, 2010, Capital One filed the case with the Klickitat County Superior Court. CP 13. As Green had failed to make a notice of appearance on this matter, Capital One submitted a Motion for Default Judgment, CP 22-33, ex parte. On July 22, 2010, the Klickitat Count Superior Court entered default judgment against Mr. Green. CP 34-35.

Green filed with the lower court on July 29, 2010 a Motion to Vacate Default Judgment, Declaration, and Response. CP 1-8. Green did not note his Motion on that date. Capital One continued to check with the lower court to see if Green ever noted his Motion. Finally on February 10, 2011, Green had an Order to Set Show Cause Hearing on his Motion to Vacate Default Judgment for February 23, 2011 entered. CP 9. Capital One filed a Response in Opposition to Defendant's Motion to Vacate Default Judgment. CP 36-44.

On February 23, 2011, the Court heard oral argument on the Motion and the Court denied Green's Motion to Vacate Judgment orally on that date. On March 22, 2011, the Court entered a written order denying Green's Motion to Vacate. CP 11-12. This appeal ensued.

III. ARGUMENT

A. STANDARD FOR REVIEW

Green brings one issue for review before this court, whether the trial court was correct in denying his Motion to Vacate pursuant to CR 60(b). A trial court's denial of a CR 60(b) motion is reviewed for an abuse of discretion. *State v. Santos*, 104 Wn.2d, 142, 702 P.2d 1179(1985), *see also Stanley v. Cole*, 157 Wn.App. 873, 879, 239 P.3d 611 (2010). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. *Boguch v. Landover Corp.*, 153 Wn, App. 595, 619, 224 P .3d 795 (2009); *see also Carle v. McChord Credit Union*, 65 Wn.App. 93, 111, 827 P.2d 1070 (1992)("Discretion is abused only where no reasonable person would have taken the view adopted by the trial court.").

B. THE COURT WAS WITHIN IT'S DISCRETION IN DENYING GREEN'S MOTION TO VACATE

The only issue before this Court is whether the trial court was within it's discretion in denying Green's Motion to Vacate. Green argues that the trial court erred under by not granting his Motion pursuant to CR 60(b)(1)(" Mistakes, inadvertence, surprise, excusable neglect or irregularity) and CR 60(b)(11)("Any other reason justifying relief").

The Court "values an organized, responsive, and responsible judicial system where litigants acknowledge the jurisdiction of the court to decide their cases and comply with court rules." *Little v. King*, 160 Wn.2d 696, 703, 161 P.3d 345 (2007); *see also Morin v. Burris*, 160 Wn.2d 745, 757 161 P.3d 956 (2007)("Litigation is inherently formal. All parties are burdened by formal time limits and procedures."). "This system is flexible because `[w]hat is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome.'" *Little* at 696 (quoting *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 582, 599 P.2d 1289 (1979)).

The Court takes four factors into consideration in determining whether a defendant is entitled to vacation of a default judgment as

first articulated in *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968):

The discretion which the trial court is called upon to exercise in passing upon an appropriate application to set aside a default judgment concerns itself with and revolves about two primary and two secondary factors which must be shown by the moving party. These factors are: (1) That there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by the opposing party; (2) that the moving party's failure to timely appear in the action, and answer the opponent's claim, was occasioned by mistake, inadvertence, surprise or excusable neglect; (3) that the moving party acted with due diligence after notice of entry of the default judgment; and (4) that no substantial hardship will result to the opposing party.

In his Brief, Green primary arguments focus on the belief that the Court erred in denying his Motion based off of prongs (2) and (3) of the *White* test. Capital One feels the records reflects the trial was within it's discretion in denying Green's Motion to Vacate.

1. The Record Supports that Green Failure to Timely Appear in the Action and Answer the Claim was not Occasioned by Mistake, Inadvertence, Surprise or Excusable Neglect.

The facts before the trial court in relation to the second prong of *White* are uncontested: Green was served with the Summons and Complaint for this case on April 26, 2010 and at no time after being served did Green appear in this litigation, not by serving an answer, a

notice of appearance, or even sending a letter regarding this matter. The first time Green had any correspondence at all with Capital One on this case was after judgment had been entered. “Parties formerly served by a Summons and Complaint must respond to the Summons and Complaint or suffer the consequences of a default judgment.” *Morin* at 757.

In his Motion, Green claimed to his “inferior knowledge of the law” and in his Brief submitted to this Court makes similar claims that there was no way of knowing that he needed to respond and appear for a case. A party appearing *pro se* is held to the same standard as a licensed attorney. *In re Marriage of Olson*, 69 Wn.App. 621, 626, 850 P.2d 527 (1993). Defendant’s “inferior knowledge of the law” does not preclude Defendant from having to “appear, plead, or otherwise defend” as required by CR 55. There is no evidence that trial court abused its discretion by finding the actions (or lack of) taken by Green were not caused by mistake, inadvertence, surprise or excusable neglect.

2. The Record Supports that Green did not Act with Due Diligence in Bringing his Motion to Vacate

When looking at the third prong of the *White* test, it is clear that Green did not act with due diligence in moving to vacate the

Default Judgment in a timely manner. A motion to vacate must be made within a “reasonable” amount of time which depends on the facts and circumstances of each case. *Luckett v. Boeing*, 98 Wn.App. 307, 989 P. 2d 1144 (1999)(holding that the Defendant’s attorney, who delayed from August until December to bring a Motion to Vacate a Default Judgment, had not acted in a timely manner and reinstated a Default Judgment), *Estate of Stevens*, 94 Wn.App. 20, 35-36, 971 P.2d 58 (1999)(holding that a failure to respond to an Order of Default until nearly three months after entry of the Order did not constitute due diligence and denied the motion to vacate).

The record clearly shows that Green was aware of the Default Judgment shortly after it was entered. Yet Green did not note his Motion to Vacate Default Judgment until February 10, 2011, six and a half months after Judgment was entered. It is unclear how this could be considered acting within a “reasonable” amount time. A reasonable amount of time as previously referenced prior by the Court of Appeals has been found to be as little as three months, not six and a half months. There is nothing in the record to show that the trial court abused its discretion by finding Green’s actions constituted a lack of due diligence.

IV. CONCLUSION

Green brought a Motion to Vacate and the trial court upon review of the facts denied the Motion. There is no evidence in the record or any authority provided by Green which shows that the trial court abused its discretion in making this ruling. Capital One respectfully requests that the Court affirm the trial court's ruling denying Green's Motion to Vacate.

RESPECTFULLY SUBMITTED this 25th day of January, 2012.

Suttell & Hammer P.S.
Attorneys for Respondent
Capital One Bank (USA), N.A.

By: 

Nicholas R. Filer
WSBA #39536
P.O. Box C-90006
Bellevue, WA 98009
Telephone: (425) 455-8220
Fax: (425) 454-7884

