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NO. 636448

IN THE COURT OF APPEALS

DIVISION I

STATE OF WASHINGTON

MICHAEL A. GRASSMUECK, INC. AS CHAPTER 7 TRUSTEE FOR BANKRUPTCY ESTATE OF JOAN MELNIK, Appellant

vs.

TIMOTHY C. MCSHANE AND JULIE S. MCSHANE, HUSBAND AND WIFE, AND THE MARITAL COMMUNITY COMPOSED THEREOF, Respondents

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 AUG 13 PM 4:01

BRIEF OF APPELLANT

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ASSIGNMENT OF ERRORS

1. The trial court erred when it granted respondent's CR 59 motion for reconsideration after denying respondent's CR 60(b) motion to vacate the default judgment of August 4, 2006.

2. The Superior Court erred when it granted respondent's motion to dismiss.

STATEMENT OF THE CASE

Appellant Michael A. Grassmueck, Inc. is the Chapter 7 Trustee for the Bankruptcy Estate of Joan Melnik, U.S. Bankruptcy Court for the District of Oregon, #03-64832-aer7. CP 104-108. Melnik filed a Chapter 7 petition on June 11 2003; she was granted a discharge on October 3, 2003. CP 70-85.

Appellant filed a motion to reopen Melnik's bankruptcy on May 6, 2008 after identifying assets and believing it in the best interests of the creditors to administer assets that may be sufficient to provide a meaningful distribution. CP 104-111. Melnik's bankruptcy was reopened and the Chapter 7 Trustee reappointed by the U.S. Bankruptcy Court, District of Oregon per order of May 9, 2008. CP 167.

On October 13, 2008, the trial court granted the substitution of Melnik's Chapter 7 Trustee as the real party in interest. CP 21.

On April 8, 2009, the respondent filed his second CR 60(b)(4) and (5) motion to vacate the default judgment asserting: (1) the judgment was obtained by fraud or misrepresentation; (2) the

judgment was obtained by someone other than the real party in interest and was void for want of jurisdiction; and (3) the judgment was void for lack of personal service. CP 125

On April 15, 2009, in his reply to the appellant response, the respondent stated:

(1) Melnik was not the real party in interest;

(2) Melnik did not have standing;

(3) the court did not have jurisdiction since Melnik lacked standing; and

(4) the judgment was obtained without jurisdiction and was void and subject to non-discretionary vacation. CP 207. The respondent also stated that service of process was:

> [w]hile Tim McShane disputes plaintiff's allegation that service occurred, plaintiff's briefing is quite frankly, irrelevant. Because as a matter of law, the court could not have jurisdiction over a claim brought by a party with no standing, it does not matter whether Mr. McShane was ever served. Even if facially correct service were conceded, which it is not, the default judgment would still necessarily have to be vacated.

CP 207.

On April 24, 2009, the trial court denied respondent's CR 60(b) motion to vacate the August 4, 2006 default judgment. CP 1-3.

On May 4, 2009, respondent then filed a CR 59 motion for reconsideration of the order denying his CR 60(b) motion to vacate the default judgment arguing that once the final judgment was entered in 2006, the Chapter 7 Trustee's substitution was impermissible since it occurred after the entry of the 2006 final judgment. CP 7-20.

The appellant argued in response the CR 59 motion should be denied. CP 21-26.

On May 22, 2009, the trial court granted respondent's CR 59 motion vacating the order denying respondent's CR 60(b) motion with the court then vacating the 2006 default judgment; however, order cited no basis for the ruling. CP 34-36.

On June 9, 2009, appellant Grassmueck filed his notice of appeal of the May 22, 2009 CR 59 order vacating the April 24, 2009 CR 60(b) order, which had denied the motion to vacate the default judgment of August 4, 2006. CP 36-38. An amended notice of appeal was filed July 7, 2009 after the trial court dismissed appellant's case.

ARGUMENT

1. Did the trial court err in granting the respondent's CR 59 motion for reconsideration after

denying respondent's CR 60(b) motion to vacate the August 4, 2006 default judgment?

Yes. The trial court erred when it granted the motion for reconsideration on May 22, 2009 vacating the April 24, 2009 order denying the CR 60(b) motion to vacate the 2006 default judgment.

The respondent's CR 60(b) motion was based on his assertion he was never served with a summons and a complaint and the default judgment was void as a matter of law. CP 42-103. The respondent also asserted Melnik obtained the judgment by fraud or misrepresentation because she failed to list the claim in her bankruptcy; however, the respondent never submitted any specific or concrete evidence to support either allegation. CP 42-103 and 112-118.

The trial court denied respondent's motion to vacate on April 24, 2009 but cited no basis for denying respondent's motion. CP 1-3. However, the fundamental issue is whether the respondent had been served. Further, all discovery conducted during the CR 60(b) proceedings were contested be it to compel, to quash discovery or for a protective order as well as the depositions, and interrogatories and the

requests for production of documents and the issuance of subpoenas and subpoena duces tecums to respondent's wireless phone carriers, former employer and bank records were exclusively directed to his assertion that "he was never served with a summons and complaint." CP 167-8, 39-103 and 112-212.

The respondent failed to meet his burden of proof under the clear and convincing evidence standard and service of process was upheld. CR 60 (b)(5). See Woodruff v. Spence, 88 Wn. App. 565, 571, 945 P.2d 745 (1997), RCW 4.28.080(15), CR 4(g)(7) and Karl B. Tegland, Washington Practice: Civil Procedure, Section 4.40 at 108 (2004). CP 160-205.

The respondent then filed a CR 59 motion for reconsideration on May 4, 2009 arguing a new theory of the case: the Chapter 7 Trustee's substitution as real party in interest came too late and "cannot be fixed" because the substitution came after entry of the 2006 default judgment as set forth in Rose v. Fritz, 104 Wn. App. 116 (2001); therefore the judgment was void. CP 11. A careful reading of Rose does not support such an argument.

In Rose, the decedent died on October 6, 1995 and her husband, Arne Rose, sued his late wife's

doctors for negligence on August 8, 1996 alleging he was the personal representative of her estate. On October 3, 1997, the court clerk mailed a "notice for dismissal for want of prosecution" but Rose requested a postponement of the dismissal; however, in early October 1998 - a year later - defendants learned Rose was not the personal representative of his late wife's estate and moved for summary judgment setting a hearing for November 13, 1998. Rose, even after being given 5 weeks to submit his late wife's will to probate to seek appointment as personal representative, acknowledged at the hearing he failed to do so. The trial court entered a final written order on November 13th dismissing Rose's claims on behalf of the estate "without prejudice." On November 20th, Rose finally submitted the will to probate, obtained an order of appointment and filed a motion to amend the complaint and set aside the written judgment of dismissal. Mr. Rose cited CR 59(a)(3), CR 60(b)(1) and CR 60(b)(11) as the basis for his motion. On December 4, 2001, the trial court set aside the judgment, reinstated the action but concluded Rose "had not" satisfied either CR 59 or CR 60. The court certified the case for in-

terlocutory review and the appellate court accepted certification.

According to the Rose appellate court, the only question was "whether a plaintiff in a wrongful death action may tardily obtain an order appointing himself personal representative after a final judgment has been entered?" 104 Wn. App at 120.

According to Rose, a final judgment is an order that adjudicates all the claims, rights and liabilities of the parties; it must be in writing, signed by the judge and filed forthwith. And, once a judgment is final, a court may only reopen if authorized by statute or court rule, which in most cases is either CR 59 or CR 60. Id.

While the trial court specifically found Rose had failed to satisfy the requirements of CR 59 or CR 60 it "erred" by setting aside the judgment.

> Once a final judgment was entered, Rose could have it set aside only if he complied with CR 59 and CR 60. The trial court found he had not done that when it announced that it "specifically [did] not find that there was excusable neglect here." (footnote omitted). It did not find, and we do not perceive, any other fact that would support a set-aside under CR 59 or CR 60. Rose did not satisfy either rule, and the trial

> court erred by setting aside the final judgment.

Id. at 121.

Here, like Rose, the respondent could only have the 2006 judgment set aside if he complied with the requirements of CR 60(b); he did not and the trial court erred when it vacated the CR 60(b) denial by permitting the respondent to file a CR 59 motion based upon a new theory of the case that Rose does not even consider. If Rose or the respondent had satisfied the requirements of CR 60 the court could have granted such a request; however, the respondent, like Rose, did not satsify the requirements of CR 60(b), and in Rose's case his actions were deemed not excusable neglect and therefore the appellate court reversed:

> [i]n conclusion, we hold the trial court lacked discretion to set aside its final judgment on the showing made here.

Rose, at 122.

The respondent also argued:

> Civil Rule 59 provides that the trial court should reconsider and vacate any order when "'there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law." CR 59 (a)(7). The court may also vacate its order where "substantial justice has not been done." CR 59(a)(9). Here, the evidence and the law do not support

> the Court's decision. The judgment does not achieve justice because it allows an inflated default judgment to stand and denied Mr. McShane his day in court. The Court should reconsider its prior order and the default judgment should be vacated.

CP 10.

The nine categories of grounds listed in CR 59 (a) relate to the granting of a new trial and do not apply; while a motion to alter or amend a judgment under CR 59(h) shall be filed not later than 10 days after the entry of the judgment.

In addition, the respondent then argued for the first time in his motion for reconsideration: "the judgment is simply void and procedural deficiencies cannot be cured by amending the complaint after the entry of final judgment. The law is clear that after entry of a final judgment the complaint cannot be amended even if only to change a party's representational capacity." CP 11.

> As a result, the default judgment obtained by Ms. Melnik cannot be fixed by substituting the real party in interest. It is simply too late. (citing Rose v. Fritz, 104 Wn. App. 116 (2001)).

CP 7-18.

The respondent did not oppose substitution of the Chapter 7 Trustee when granted by the trial court

on October 13, 2009. CP 24-25.

However, the respondent then argued in his motion for reconsideration: "[t]he Trustee is limited to the same rights held by Melnik; Rose is clear Melnik could not amend the complaint after entry of judgment. The Trustee is no less bound."

> When this Court entered its order allowing the Trustee to substitute into the case, it did so merely in recognition of the fact that Melnik could not argue the case, only the Trustee could.

CP 14.

The respondent never made such an argument when his counsel appeared before the court in October 2008 on appellant's motion to substitute the Trustee as the real party in interest. And, therefore the respondent should have been estopped from asserting such a position in his CR 59 motion. CP 24-5. See Arkison v. Ethan Allen Inc., 160 Wn.2d 535, ___, 160 P.3d 13, ___ (2007), concurring opinion regarding judicial estoppel.

The August 4, 2006 default judgment was a final judgment. RAP 2.2(a)(1). Under RAP 2.2(a)(10), an order denying a motion to vacate a judgment is subject to the time limits of RAP 5.2(a) and (e). And, under RAP 5.2(a), a notice of appeal must be

filed in the trial court within the longer of: (1) 30 days after entry of the trial court decision, which the party wants reviewed or (2) the time provided in 5.2(e). Under RAP 5.2(e), a notice of appeal of orders deciding certain "timely" motions designated in 5.2(e) must be filed in the trial court within 30 days after entry of the order. The motions to which RAP 5.2(e) includes a motion for reconsideration.

However, under CR 59(b) a motion for reconsideration must be filed no later than 10 days after entry of the final judgment, which would have been 10 days after August 4, 2006.

Here, the order denying the CR 60(b) motion to vacate the default judgment was entered on April 24, 2009; therefore, respondent's appeal of the denial of his CR 60(b) motion to vacate should have been filed with the Court of Appeals within 30 days or no later than May 25, 2009. RAP 2.2(a)(10).

The respondent then filed a notice of cross-appeal of the April 24, 2009 order denying his motion to vacate the default judgment on June 22, 2009, which is 59 days after the April 24th order.

Furthermore, the respondent has neither sought an extension of the time period for filing a notice of appeal from the original judgment nor shown any extraordinary circumstance that would warrant a favorable disposition of such a motion should one have been brought. Bjurstrom v Campbell, 27 Wn. App. 449, 452, 618 P.2d 533 (1980) (citing Jones v. Canyon Ranch Assocs. 19 Wn. App. 271 274, 574 P.2d (1978)).

The respondent's cross notice of appeal should be dismissed. RAP 18.9(b).

The respondent will argue his motion to reconsider was timely and complied with the 10 day requirement of CR 59 and RAP 5.2(a) and (e).

In Bjurstrom v. Campbell, the Campbells conveyed real property to Bjurstrom but falsely represented owning the land while possessing no interest in it. Bjurstrom obtained a favorable oral opinion on October 8, 1970 but the judgment was not entered until December 21, 1978 - over 8 years later. The Campbells never appealed this judgment.

On August 10, 1979, the Campbells filed a CR 60(b)(1) motion to vacate the judgment, which was

denied. On appeal, the Campbells' argued the judgment was improperly entered due to a lapse of 8 years.

The appellate court - while noting the "probable judicial error" - affirmed the denial of the Campbell motion when it held:

> An appeal from denial of a CR 60(b) motion is limited to the propriety of the denial not the impropriety of the underlying judgment. The exclusive procedure to attack an allegedly defective judgment is by appeal from the judgment not by appeal from a denial of a CR 60(b) motion.
>
> 27 Wn. App. 449, 450-1, 618 P.2d 533 (1980), citing De Filippis v. United States, 567 F.2d 342, (7th Cir. 1977).

The Bjurstrom court cited with approval in footnote 2, the U.S. Supreme Court opinion of Browder v. Director, 434 U.S. 257, 262-3, n. 7, 54 L.Ed. 2d 521, 98 SCt. 556 (1978), wherein the Supreme Court noted that Rule 59 contains a 10-day time limit while Rule 60(b) does not; however, a motion for relief from a judgment under CR 60(b) does not toll the time for appeal from or affect the finality of the original judgment.

Under Bjurstrom and Browder, it is argued, the trial court lost jurisdiction 10 days after entry of the August 4, 2006 judgment to grant

relief under CR 59.

However, the trial court's power to grant relief under CR 60(b) still existed on April 24, 2009 when it denied the motion to vacate the default judgment.

A timely appeal from that denial could only have been undertaken by filing an appeal within 30 days of the April 24, 2009 denial of the motion to vacate the default judgment as required by RAP 2.2(a)(10) and RAP 5.2(a).

Furthermore, an appeal from a CR 60(b) denial is "limited to the propriety of the denial not any impropriety of the underlying judgment." Bjurstrom at 451, Browder at 263.

And, a CR 60(b)(5) order denying the motion to vacate is reviewed as a matter of law. CP 1-3.

A judgment is the "final determination" of the rights of the parties and includes any decree and order from which an appeal lies. CR 54(a)

And, according to Bjurstrom:

> [v]ery early in the history of this court in Kuhn v. Mason, 24 Wash. 94, 64 Pac. 182, it was decided that errors of law could not be corrected on a motion to vacate a judgment. . . . More recently, in Kern v. Kern, 28 Wn.(2d) 617, 183 P. (2d) 811, the following statement of rule in 1 Black on Judgments (2d ed.)

506, Section 329 was approved:

> "'The power to vacate judgments, on motion, is confined to cases in which the ground alleged is something extraneous to the action of the court or goes only to the regularity of its proceedings. It is not intended to be used as a means for the court to review or revise its own final judgments, or to correct any errors of law into which it may have fallen. That a judgment is erroneous as a matter of law is ground for an appeal, writ of error, or certiorari according to the case, but it is no ground for setting aside the judgment on motion.'"

Id.

See also, Port of Port Angeles v. CMC Real Estate Corp., 114 Wn.2d 670, 676-77, 790 P.2d 145 (1990).

When a judgment disposes of all claims and parties it is appealable and preclusive and remains appealable for 30 days and a motion for reconsideration must be filed within 10 days. Kemmer v. Keiski, 116 Wn. App. 924, 932, 68 P.3d 1138 (2003). While CR 59(b) has been modified since Schaefco v. Columbia River Gorge Comm., 121 Wn. 2d 366, 367-68, the motion is still required to be filed within 10 days of entry of the judgment.

Respondent asserted he was never served and the default judgment was void for lack of jurisdiction pursuant to CR 60(b)(5) or Melnik obtained judgment by fraud or misrepresentation pursuant to CR60(b)(4) or any other reason set forth in

CR60(b)(11). CP 128. Respondent's motion was denied and he failed to appeal within 30 days. CP 1-3.

Further, respondent asserted Melnik's lack of standing made the default judgment void and subject to non-discretionary vacation. CP 133.

In Sprague v. Sysco Corp., this court permitted the substitution and relation back under CR 17(a) of a bankruptcy trustee when the defendant was not prejudiced. 97 Wn. App. 169, 179-180, 982 P.2d 1202 (1990), rev. denied 140 Wn.2d 1004, 999 P.2d 1262 (2000). And, according to Sprague, other jurisdictions allow substitution of a bankruptcy trustee for a plaintiff-debtor with relation back under the Federal Rule of Civil Procedure 17(a) or state counterparts, citing Hammes v. Brumley, 659 N.E. 2d 1021, 1030 (Ind. 1995) wherein the Indiana Supreme Court concluded substitution of bankruptcy trustees with relation back to original filing was sound public policy protecting innocent creditors of plaintiff-debtors who otherwise would be deprived of access to a potential asset and should not suffer accordingly. Furthermore, under Sprague, "standing" and "real party in interest" are distinct doctrines.

A person has standing if they can demonstrate an injury to a legally protected right while a real party in interest is the person who possesses the right sought to be enforced. Id. at 176, footnote 2, citing 6A Charles Alan Wright et al., Federal Practice and Procedure Section 1552 (2d. ed. 1990).

Melnik had standing to sue; she was the injured party. The Chapter 7 Trustee had the legal right to enforce and defend the judgment in the CR 60(b) proceeding and prosecute this appeal for the benefit of the bankruptcy estate and its creditors.

Any respondent argument that judicial estoppel prohibits the trustee from asserting his claim also has no application. The bankruptcy trustee is a separate entity and represents the bankruptcy estate not the debtor. The trustee was substituted as the real party in interest on October 13, 2008 per court order. CP 168.

The respondent never appealed the October 2008 order; nor did the respondent oppose the substitution of the trustee as the real party in interest. CP 24 and 168.

In Arkison v. Ethan Allen, Inc., 160 Wn.2d

535, 160 P.3d 13 (2007), Michelle Carter suffered an alleged eye injury on August 10, 2002 when furniture was delivered by employees of Ethan Allen. Carter, later in August, filed a Chapter 7 bankruptcy petition but failed to list the personal injury claim. Arkison, the chapter 7 bankruptcy trustee, filed a no asset report and in December 2002 the bankruptcy court granted an order of discharge and the case was closed. In June 2005, Carter filed suit against Ethan Allen in King County Superior Court. Ethan Allen thereafter filed a motion for summary judgment arguing judicial estoppel barred Carter because she failed to disclose the claim as an asset in her bankruptcy. In October 2005, Arkison learned of the lawsuit and an ex parte motion was filed by the U.S. Trustee's Office to reopen her bankruptcy case.

Arkison cited Bartley-Williams v. Kendall, 134 Wn. App. 95, 101, 138 P.3d 1103 (2006) that a bankruptcy trustee occupies a different position than a bankrupt and under the bankruptcy code property neither abandoned or administered remains property of the estate, citing 11 U.S.C. Section 554(d) of the bankruptcy code. 160 Wn. 2d at 535,

___, 160 P.3d (2007). Here, the property of the bankruptcy estate is the August 2006 default judgment; it was neither abandoned or administered by the Trustee.

And, further according to Arkison, prohibiting a bankruptcy trustee from pursuing a claim on behalf of the estate ignores the role of the trustee in the bankruptcy proceeding and could create a windfall to the party seeking to invoke judicial estoppel at the expense of bankruptcy creditors, 160 Wn.2d at ___, 160 P.3d 13 (2007), citing Bartley-Williams, 134 Wn. App. at 102.

The appellant Chapter 7 Trustee is the real party in interest and had the right to prosecute and defend the CR 60(b) motion to vacate; the Trustee, herein, is not barred by judicial estoppel and the default judgment is property of the bankruptcy estate.

Even if for sake of argument, respondent's CR 59 was timely, CR 59 does not permit a party finding a judgment unsatisfactory to suddenly propose a new theory of the case. Wilcox v.Lexington Eye Institute, 130 Wn. App. 234, 122 P.3d 729, rev. denied 157 Wn. 2d 1022, 142 P.3d 609 (2005).

2. Did the trial court err when it granted granted respondent's motion to dismiss?

Yes, the trial court made no ruling whatsoever in granting the CR 59 motion thereby reversing the CR 60(b) order denying respondent's motion. The court made no findings of fact or conclusions of law leaving the parties to speculate as to the basis and reason for such a ruling. The respondent's motion to dismiss should have been denied.

CONCLUSION

The appellate court should reverse the trial court order vacating the default judgment and reinstate the judgment against the respondent for the reasons set forth herein.

The trial court's denial of the respondent's CR 60(b)(5) motion to vacate for lack of jurisdic- is reviewed as a matter of law and no exercise of discretion is involved. Brickham Investment Co. v. Vernham Corp. 46 Wn. App. 517, 731 P.2d 533 (1987).

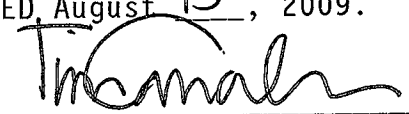
The respondent failed to meet his burden of proof under the rule set forth in Woodruff v. Spence, 88 Wn. App. 565, 945 P.2d 745 (1997) and service of process was valid.

The trial erred when it vacated its CR 60(b)

(5) ruling upon respondent's CR 59 motion.

The appellate court should vacate the order of dismissal and direct the trial court to reinstate the denial of the CR 60(b) motion to vacate and further direct the Clerk of the King County Superior Court to reinstate the August 4, 2006 judgment.

RESPECTFULLY SUBMITTED August 13, 2009.



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