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COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

MICHAEL GRASSMEUCK, INC.,

Appellant/Cross-Respondent,

v.

TIMOTHY McSHANE,

Respondent/Cross-Appellant.

RESPONDENT/CROSS-APPELLANT'S REPLY IN SUPPORT OF CROSS APPEAL

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ORIGINAL

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APPENDIX

Application To Employ Attorney, Attorney Certification, And Order Thereon A-1

Amended Application To Employ Attorney On Contingent Fee Basis; And Order And Notice Thereon A-3

A. Motion

Mr. McShane asks this court to strike the new argument of the Trustee, commencing at page 17 and continuing to the end of his brief, that constitutes some form of federal preemption analysis in support of his assignments of error. It was not argued below or in his first brief. To the extent the Trustee asserts he is offering it in opposition to Mr. McShane's cross-appeal, a reply will be provided below. However, Mr. McShane submits it should not be considered in support of the Trustee's appeal.

B. Overview

That the Trustee does not agree with the conclusion compelled by the evidence does not mean Mr. McShane misrepresents the record by pointing those conclusions out.

While it is understood the Trustee does not like the import of the evidence, not even he can contest Mr. McShane's observation that not a single material piece of evidence was presented below that identified him (McShane) as the person who was allegedly served. On its best day, the only thing demonstrated below was that the process server allegedly served some adult at the address of Mr. McShane. However, that some adult was purportedly served is not the legal test. With two brothers who were also in his apartment, neither one of whom "resided" there, it is speculation to assume it was Mr. McShane that was served in light of the

other evidence below including but not limited to Mr. McShane's denial of service, the secured building, and the nature of his claim he was out supported by point of sale purchases on the date in question, including the Seattle Roanoke Park Place Tavern. (CP 188-189).

Mr. McShane acknowledges the process server's assertion that the person who was served allegedly said they lived there. This court is asked to bear in mind how "easy" it is for a process server, paid upon completing service, to include that pro forma language in a return of service. Even if taken at face value, it is proof of little to nothing.

Whether someone "resides" in an "abode" is a term of art that has been the subject of substantial case law. To assume a lay person knows what it means to reside in an abode, based on the hearsay statement of a process server, and to accept that as proof without more, is suggested to be a perilous rule. As discussed in Mr. McShane's original brief, there are a multitude of reasons why a person might reply in that manner; and while the Trustee may ridicule them as "arguments without support of the record," it would require the suspension of common sense to simply accept the position of the Trustee that a lay person, startled at the door by a stranger, is going to be able to analyze the legal issues of whether they "reside" therein, when even attorneys and judges often struggle with that very same issue.

When even the process server was unable to pick Mr. McShane out of a line-up when presented with a picture of the person he allegedly served, need anything more be said but that the "proof" below is nothing more than speculation and assumption. Not to mention he claimed service on Mrs. McShane, yet the McShanes were divorced and she never resided at that location.

C. Reply

1. THE TRUSTEE'S ARGUMENTS ON THE STANDARD OF REVIEW, STANDING, AND REAL PARTY IN INTEREST ARE OF NO WEIGHT

At page 2 of his brief, the Trustee argues Mr. McShane has misstated the standard of review and cites Brickum Inv. Co. v. Vernham Corp., 46 Wn.App. 517 (1987) as contrary authority. It is not that the Trustee errs in the citation to Brickum, it is that there is a subtly between the standard depending on whether a trial court grants or denies a motion to vacate of which the Trustee's brief fails to account.

To the extent the Trustee argues the standard of review is, essentially, de novo ("error of law") when a trial court denies a motion to vacate a judgment based on want of jurisdiction, Mr. McShane agrees. That was the holding of Brickum. Thus, the correct standard applied to Mr. McShane's cross-appeal of the trial court's denial of his motion to vacate is indeed "error of law."

However, the subtlety the Trustee misses by simply seizing on Brickum is that when a trial court grants a motion to vacate a default judgment, that decision should be reviewed under an abuse of discretion standard. From Morin v. Burris, 160 Wn.2d 745 (2007) – cited in Mr. McShane's original brief:

> Again, we do not favor default judgments. We prefer to give parties their day in court and have controversies determined on their merits. A proceeding to vacate or set aside a default judgment is equitable in its character, and the relief sought or afforded is to be administered in accordance with equitable principles and terms. Thus, for more than a century, it has been the policy of this court to set aside default judgments liberally. ... [W]here there is a showing, not manifestly insufficient, the court should be liberal in the exercise of its discretion in furtherance of justice.

Id. at 754 (internal citations omitted).

Thus, the material difference in determining the correct standard of review on a motion to vacate is the trial court's denial of a motion to vacate versus its granting a motion to vacate. Denying a motion to vacate is reviewed, essentially de novo, because to allow a defective judgment to stand in error even if the trial court did not abuse its discretion per se in doing so, is an injury the appellate process will not tolerate. Whereas, granting a motion to vacate does not deprive the adverse party of the ability to obtain a judgment, does not involve giving effect to a defective

judgment entered without jurisdiction, and furthers Washington's long standing policy to decide cases based on the adversary process.

The Trustee, at pages 15 through 16 of his brief, (as well at page 2) wrongly argues "Mr. McShane has repeatedly failed to understand Washington law recognize (sic) standing and real party in interest as distinct legal doctrines." While not wanting to engage in a tit-for-tat retort, it is respectfully submitted that it is the Trustee that has failed to take account of the distinction. Mr. McShane's brief scrupulously kept the concepts distinct, and never once argued that Ms. Melnik did not have "standing" to bring a claim against Mr. McShane. That is conceded.

Instead, as Mr. McShane briefed in great detail throughout his brief, and more specifically between pages 12 and 16, the default order and judgment were entered in favor of Ms. Melnik who even the Trustee agrees was not the correct "party in interest."

> CR 17 requires that "every action shall be prosecuted in the name of the real party in interest..."

(McShane brief, page 15).

Seen in that light, the remainder of the Trustee's briefing, starting at page 16 and continuing through the end of the brief that a bankruptcy trustee is the correct party in interest, that a debtor's fraud in failing to disclose the cause of action on the schedules does not estoppe the Trustee,

etc., are all red herrings. None of those issues are disputed by Mr. McShane. And none of those have anything to do with the resolution of any issue on appeal.

The Trustee, as far as Mr. McShane can tell, both in the trial court and in this court, has simply viewed this as a question of whether a Bankruptcy trustee is estopped by a debtor's failure to disclose a cause of action. That has never been Mr. McShane's position on this appeal.

By incorrectly casting the legal issue, the Trustee has never materially responded to the clear legal proposition that even though he may resurrect the legal claim of Ms. Melnik - a claim which if she brought on her own she would be judicially estopped from asserting - that he takes the claim subject to all the defenses and in the same condition as though it was in fact being prosecuted by Ms. Melnik. And thus, it is error for the Trustee to simply focus on his own lack of fraud, which is undisputed, and to ignore the misconduct and lack of status of the real party in interest defect of Ms. Melnik. The Trustee stands in her shoes on this appeal.

2. THE TRUSTEE'S ARGUMENTS THAT SERVICE WAS PROVEN ARE OF NO WEIGHT

Between pages 3 and 13 of his brief, the Trustee makes various factual arguments regarding service.

There is nothing to be gained in Mr. McShane restating the facts identified in his original brief. This court will need to consider the content of the return of service, Mr. McShane's filings, and based on what the Trustee rightly observes is an "error of law" standard for the denial of Mr. McShane's motion to vacate, determine if the trial court's denial of his motion on those other grounds may be affirmed.

Instead, Mr. McShane desires to highlight an item of authority cited by the Trustee's brief, starting at the bottom of page 7 and continuing to page 8; the Trustee cited with approval State v. Phillips, 94 Wn.App. 829 (1999):

> Nor does the return of service express the process server's opinion, or reflect the exercise of his or her discretion. Rather, it is a record of service of a particular document ***on the particular individual named*** in the return. It is not accurate to say that the process server is exercising judgment or discretion when he or she believes the information given by the person served as to his or her identity, and records the name of such individual on the return of service. By doing so, the process server is merely documenting the actions taken in the discharge of his or her duties.

Id. at 835. (emphasis added).

It is undisputed that the return of service relied upon by the trial court in entering the original default did not name any individual. And although it was certainly understood by the time the motion to vacate was filed that Mr. McShane was the intended target of service, there was still

no evidence that he was in fact the person served. Instead, the Trustee's best evidence was that the address was Mr. McShane's and the response at the door was that the person lived there, without more.

To assist in narrowing the issues, Mr. McShane acknowledges that Division One has held a return of service may contain hearsay statements. Mr. McShane's argument is not that the trial court erred in considering that hearsay, but that in the face of Mr. McShane's evidence and the rest of the record, that statement was not sufficient to withstand Mr. McShane's motion to vacate.

It is suggested to be a legal impossibility for the Trustee to argue service was properly proven upon the default or the later motion to vacate when the return did not name any "particular individual," while at the same time the Trustee acknowledges Phillips requires exactly that. Naming an anonymous individual cannot be the naming of a "particular individual" and ultimately, that remains the only thing the Trustee's "proof" demonstrates.

For the trial court to have concluded when denying Mr. McShane's motion to vacate that it was Mr. McShane whom was served is indeed the very definition of relying on the process server offering an "opinion" that the person the server handed the summons to was Mr. McShane.

The Trustee's argument, between pages 3 and 4 of his brief, identifying the documents filed in opposition to Mr. McShane's motion to vacate misses the point. Proof of service is not determined by counting the height of the parties' stacks of paper. Proof of service is determined by the trial court deciding whether sufficient facts exist to prove the defendant was indeed served. Nothing in the documents identified by the Trustee do that. It might be "implied" that a person opening a door of a house lives there. And ultimately, that is all the "proof" boils down to. That some man, who purportedly matches a loose physical description of Mr. McShane, allegedly opened the door. That cannot be the rule on proving service even when the pro forma hearsay of the process server is considered.

Rules on service must apply with equal force in all situations, or they may not apply in any situation. If this level of proof is acceptable, it is not objectively enforceable and is grossly susceptible to abuse.

This court may take judicial notice that some individuals – entirely in good faith – simply lack a certain awareness or sensitivity to the subtleties of appearance of some ethnicities. To some, "all" people of the same color, be it yellow, black, or brown, "look alike" to them. It is no large stretch for a process server, upon making anonymous service as occurred here, to assert the person served matched the purported physical

description of a defendant when in fact, what the process server is actually certifying – even if in good faith – is their own lack of sensitivity to the more subtle physical differences presented by the ethnicity of some individuals.

Here, that Mr. McShane is "white" and bald does not lessen the impropriety of such generalizations; indeed, it highlights the error of the Trustee in arguing between page 5 and 7 of his brief that Mr. McShane has shifted his position or contradicted himself about who might have been served. If anything, it heightens it: 'a bald white guy' answered the door; that description could fit a multitude of people ranging from Mr. McShane to Kojack. According to Mr. McShane, his brothers do indeed look like him. That is hardly a startling statement. For there to be a lack of clarity by even him of "which" of his two brothers might more closely match the general physical description given only highlights the need for the return – and ultimately the "proof" – to be able to certify the name of the person actually served.

It is not an appropriate rule that a mere physical description, even when coupled with an address, is sufficient "proof," particularly when the adverse party makes the type of showing made by Mr. McShane here. Thus, ultimately, what the trial court was left with was the process server's hearsay pro forma statement that the person who took the summons said

they lived there. For the reasons discussed above, that is not sufficient in the face of Mr. McShane's evidence.

The next argument offered by the Trustee is that Mr. McShane cannot provide an "alibi." That analysis appears to overstate the standard on several different levels and gives no weight to the evidence.

On the motion to vacate it was Mr. McShane's obligation to present evidence that he was not the person served. It is agreed that if Mr. McShane could produce a video clip from a Mariners game at the time of service – an "alibi" in the words of the Trustee - that would be fairly dispositive. However, no authority could be found for the proposition that a person contesting service must definitively pin down without any equivocation their "whereabouts" when service allegedly took place. But having said that, what was filed below is convincing.

What was in the record – by even the Trustee's admission – were bank records establishing Mr. McShane was out at two different restaurant/taverns on August 22, 2005, the day he was allegedly served. Thus, far from Mr. McShane having no evidence that he was some place else, his evidence – particularly when combined with his declaration – is persuasive that he was not home that night.

To the extent the Trustee implies Mr. McShane needs to nail down his presence while out to the minute, and his failure to provide receipts

from the two places he was at as the proof of precisely when he was at out, is illustrative of the unclean hands of Ms. Melnik as described in the original brief.

Mr. McShane's declaration attests that his first notice of an issue in this matter was receipt of a subpoena for post judgment collection – over a year after the default was taken. It is novel for the Trustee to suggest Mr. McShane should have kept a receipt for $17.00 for over a year, when at the time he had no knowledge the receipt was even something he should keep, and that his failure to do so is evidence he was at home. Had Ms. Melnik not failed to disclose the asset of her claim to the Trustee originally, nor having laid in wait of a year, Mr. McShane would have had notice that keeping such a receipt was something that ought to have been done.

Next the Trustee spends 3 pages, between pages 9 and 11 of his brief, simply setting forth verbatim several of Mr. McShane's arguments as to why the trial court erred in denying the motion to vacate. While Mr. McShane is grateful to the Trustee for setting those issues forth again, they require no reply by Mr. McShane other than to say that the Trustee's assertions that those arguments by Mr. McShane are "fabrication" and "not supported by Phillips" are not well taken.

It is suggested to be very well taken and consistent with Phillips for Mr. McShane to argue, as the Trustee points out at page 9 of his brief, that "on its face the return of service states no facts that establish service on an adult residing therein. At best, it is only a conclusion with no fact or substance." That is, indeed, precisely what a return of service is, that fails to even name the person that was supposedly served. It certainly does not conform to Phillips.

Finally at page 11 of his brief, the Trustee argues Mr. McShane "is now asserting for the first time" the argument that "any adult that might have been in his unit did not reside therein." That is not a "new" argument; that has always been Mr. McShane's position.

3. THE TRUSTEE'S ATTEMPT TO DISTINGUISH MR. McSHANE'S AUTHORITY IS NOT WELL PLACED

At page 12 of his brief, the Trustee attempts to distinguish Allstate Ins. Co v. Khani, 75 Wn.App. 317 (1994). Mr. McShane is unclear why the Trustee believes that case is distinguishable or if it is, why that materially impacts any issue on appeal.

Mr. McShane merely cited Khani for basic legal standards that even the Trustee concedes at page 11 of his brief apply to this case: (1) a judgment obtained without personal service is void for want of jurisdiction and is not subject to a time limit in which it must be vacated; (2) the trial

court has no discretion to not set aside a void judgment; and (3) there is no time limit to set aside a void judgment. Mr. McShane never argued Khani is dispositive of all issues.

But as the Trustee saw fit to call the case out, it is illustrative to point out that its differences actually support Mr. McShane's position. In Kahni, the defendant contested service by demonstrating he did not live at the address when service was allegedly effected. Thus, for the Trustee to point to the various aspects of evidence presented by the defendant in Kahni to challenge service and to argue that their absence here demonstrates Mr. McShane did not sufficiently contest service is comparing apples to oranges: the legal issue was different.

However, that the legal issue was different highlights what type of evidence could ever be available to a person such as Mr. McShane who candidly admits they resided at the residence but against whom service was not perfected.

Thus, the court is asked to consider; how can a person who concedes they lived at the address demonstrate no service took place. Clearly, the law allows such a person to contest service. It is suggested there are really only a few ways: (1) swearing a declaration that they were not at home when service was allegedly made, which he did; (2) offering a compelling explanation as to who might have been present, which he did;

(3) providing an explanation as to where they where, which he did; and perhaps even going an extra step and (4) asking the process server to actually pick him out of line up to see if he can identify him as the person he supposedly served – which he did, and which the process server was unable to do.

As is often said, it is difficult if not impossible to prove a "negative." Here, Mr. McShane provided every reasonable piece of evidence he could. If that is not enough, it would by operation make the return of service an irrefutable presumption provided the defendant lived at the served address. That is clearly not the law.

4. THE TRUSTEE'S ARGUMENTS ON EXCUSABALE NEGLECT AND A MERITORIOUS DEFENSE ARE NOT RESPONSIVE

The Trustee errs that the motion made by Mr. McShane under CR 60 is barred by the one-year limitation; the Trustee calls the arguments "invalid." Because that is his only opposition, he has failed to contest the basis of Mr. McShane's CR 60 request for relief; the Court of Appeals will not consider argument for issues not briefed. RAP 10.3.

Mr. McShane had three separate and independent grounds to vacate the default order and judgment: (1) the orders were entered in the name of a person not the correct party in interest and therefore void; (2) there was no service and therefore the orders were void; and (3) if there

was service, the default order and judgment were voidable and should be set aside.

The Trustee, commencing at page 13 of his brief, acknowledges that the relief requested by Mr. McShane under CR 60 below was based on CR 60(b)(4), (5), and (11). (See May 12, 2009 motion, page 6). However, the Trustee fails to account for the fact that CR 60(b) places a one-year limitation only on relief requested under CR 60(b)(1), (2), or (3).

It is suggested this court may stop here. Mr. McShane did not rely on CR 60(b)(1), (2), or (3) and therefore his arguments that Ms. Melnik obtained her default order and judgment by fraud, CR 60(b)(4), the judgment was void, CR 60(b)(5), and for an "any other reason" justifying relief from the operation of judgment, CR 60(b)(11) are not time bared. As the trustee has provided no opposition as to the merits of Mr. McShane's argument or briefing, the trial court should be reversed.

However, several issues will briefly be noted.

At page 14 of his brief, the Trustee argues that Ms. Melnik's action in concealing the assets of her cause of action in bankruptcy as a means of further concealing her lack of service - which in all certainty would have been discovered inside of one year had she timely disclosed that asset on her bankruptcy schedule - was not a fraud. In support of that proposition, the Trustee cites various case law between pages 14 and 16 of his brief but

none of those authorities indicate that Ms. Melnik's conduct itself was not a fraud. Instead, they simply stand for the legal proposition that even Mr. McShane does not dispute; namely, that the debtor's fraud in failing to disclose an asset will not judicially estoppe a Trustee from pursuing such a claim.

However, that the Trustee is not estopped by the debtor's fraud on her bankruptcy schedule does not mean the debtor did not commit fraud; it simply means the bankruptcy trustee is not estopped by it. The Federal Courts are clear that failing to disclose an asset, particularly a cause of action, is indeed a fraud on the process:

> A debtor may use the judicial system (the bankruptcy process) to free himself or herself from the claims of debtors. As part of that process the bankruptcy court relies on the representations of the debtor with respect to whether he or she has claims or interests arising out of the matters before the court. If the debtor, after receiving a discharge in bankruptcy, turns around and utilizes the judicial system to pursue claims he or she had previously misrepresented or failed to reveal, the debtor commits a fraud upon the courts and will be estopped.

Brassfield v. Jack McLendon Furniture, Inc., 953 F.Supp. 1424, 1432 (M.D.Ala.,1996). That is what Ms. Melnik did.

The fraud at issue was in Ms. Melnik not disclosing the asset of her cause of action on her schedule. In this case and in regard to CR 60, it is the actions of Ms. Melnik that are at issue and must be considered, not

those of the Trustee. The Trustee did not commit any type of fraud; Mr. McShane has never contended that. However, as cited in the original brief, the Trustee takes a cause of action in the condition the debtor left it. See Bank of Marin v. England, 385 U.S. 99, 101, 87 S.Ct. 274, 276 (1966). And thus, if Ms. Melnik obtained her default by fraud, it should be set aside. That fraud does not estoppe the Trustee from pursuing the claim, but it does justify setting aside the default.

For the same reason, the Trustee's arguments that Ms. Melnik's state tort attorney did not commit fraud is not an issue. The Trustee argues at page 15 that Ms. Melnik's attorney "promptly disclosed the information" to counsel for Mr. McShane – after he learned of the early fraud. That Ms. Melnk's attorney, upon discovering his client's antecedent fraud, discharged his ethical obligation to disclose it does not ameliorate the fraud already committed by Ms. Melnik nor the injury done to Mr. McShane by her fraud originally.

Ms. Melnik's fraud is not the only "any other reason" the default should be set aside. If the court examines the actual order, with no authority in law Ms. Melnik represented to the court that her medical bills and future wages were a "sum certain" and obtained post judgment interest at a startling 12 percent arising out of the alleged tort liability, as well as a judgment for general damages in the amount of $375,000 for

what amounted to a broken leg, all based on enormously conclusory declarations with no actual testimony or substantive evidence to support such an award. Mr. McShane also made a showing of a substantial defense on liability as well. All of those are "other reasons" the trial court should have vacated the default order and judgment.

5. THE TRUSTEE'S ARGUMENT THAT THE STATE COURT HAS NO AUTHORITY TO VACATE ITS OWN VOID JUDGMENT IS WITHOUT WEIGHT

If Mr. McShane understands the gist of the Trustee's argument correctly, he asserts that the Bankruptcy court has "exclusive jurisdiction" over this issue, (Trustee brief, pg. 18), and the trial court's rulings constituted "modification of an automatic stay," (Trustee brief, page 19), but that this court may issue a ruling – as long as it grants the Trustee the relief he requests. [1]

Either state court action on this issue is stayed, or it is not. If it is stayed this court may do nothing including granting the relief requested by the Trustee. If not, then this court may rule on the merits of the appeal.

The authority even cited by the Trustee demonstrates it was appropriate for the trial court to make orders on the order and judgment of default the Trustee sought to utilize the state court to enforce.

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[1] It is difficult to not comment on the Trustee's rather novel interpretation of what a "stay" is. Apparently, by the Trustee's logic, there is a stay only if this court is inclined to disagree with the Trustee's arguments.

The fatal flaw in the Trustee's argument that the "bankruptcy court has exclusive jurisdiction" over the default order and judgment is the fact that the bankruptcy Trustee was in state court litigating the very order and judgment he claims only the bankruptcy court has jurisdiction for. This entire process was started when Ms. Melnik attempted supplemental proceedings in state court. Those supplemental proceedings were not initiated by the Trustee. However, once the Trustee learned of them, through motion practice he moved to insert himself into the state court proceedings and has been actively litigating the matter since that time. On September 26, 2008 the Trustee certified the following declaration in State court:

> The Trustee ratifies Ms. Melnik's commencement and maintenance of this lawsuit and now asks the court to substitute it, in its capacity as the Chapter 7 Trustee, as plaintiff herein for the benefit of Ms. Melnik's creditors.

(CP 38, Trustee declaration, page 2)

It is suggested to be fairly disingenuous for the Trustee, after litigating this very issue for nearly a year in the trial court with no objection regarding a stay, to suddenly raise this as a sword in his final brief in opposition to the trial court's orders entered, because of an action he ratified.

Because the Trustee never raised an issue of a "stay" before now, no papers were filed that would be responsive to the issue to even "designate" as Clerk's papers. Therefore, in the appendix hereto are the bankruptcy court's two orders appointing counsel filed in the Oregon Bankruptcy Court. The motion by the Trustee, but not any of the orders, was designated and requested leave to "prosecute the estate's landlord tenant claim for personal injuries." (CP 107-108). That request was granted indicating "that employment of the above named attorney is authorized on the contingent fee basis stated in pt. 2 above..."

It must be conceded that there can be found no order containing the magic words "relief from stay" in the bankruptcy docket, number 03-64832. However, it is submitted to be fatally inconsistent for the Trustee to now urge at the 11th hour, after having sought and been given leave by the bankruptcy court to "prosecute the estate's landlord tenant claim," to claim the trial court was precluded from entering orders on precisely that claim only after the trial court's orders did not suit him.

Although the word choice could have been more clear, it is reasonably beyond dispute that the bankruptcy court was giving the Trustee leave to "prosecute" Ms. Melnik's claims in state court where they were filed which inherently gave relief from the stay. If not, the Trustee

could not go to state court to "prosecute" those claims in the first place. For the Trustee to contend otherwise at this late hour is not well placed.

The foregoing is sufficient. However, for completeness Mr. McShane will respond to the Trustee's other arguments regarding exclusive jurisdiction.

The Trustee cites at page 22 of his brief In re Birting Fisheries, Inc., 300 BR 489 (BAP 9th Cir. 2003) for the proposition that a "bankruptcy court is not bound" to "an erroneous state court ruling as here." A reading of Birting reveals it has no application to this case, involving what the Ninth Circuit found to be a state court's attempting to render an order that affected a chapter 11 reorganization plan. Id. at 500-501. Nothing in this case reaches out to alter an order of the bankruptcy court much less does it effect a "core proceeding." Instead, the trial court simply entered orders upon the "prosecution" of the "landlord-tenant claim for personal injuries" as approved by the bankruptcy court.

Birting also addresses the concepts of core and non-core proceedings. The Trustee argues at page 22 of his brief that what the trial court did constituted a "core proceeding" and that the bankruptcy court has exclusive jurisdiction over core proceedings. Mr. McShane agrees that the bankruptcy court has exclusive jurisdiction over core proceedings. However, the Trustee's argument ignores what Birting clearly said core

proceedings are: issues that invoke "a substantive right provided by title 11 or a proceeding that, by its nature, could arise only in the context of a bankruptcy case." Id. at 499 (internal citations omitted, underline added). The court explained that a bankruptcy court has concurrent jurisdiction, but "not exclusive jurisdiction," over non-core proceedings. Id.

Thus, the Trustee thus errs to the extent he argues at page 22 of his brief that the issues decided by the trial court constitute "core proceedings." The issues of service of a state summons and complaint and the determination of the real party in interest are not issues that "by (their) nature, could arise only in the context of a bankruptcy case." Id. Those are the very nature of a non-core proceeding.

Further, the Trustee's fallback position to characterize these issues as core proceedings because they effect a property interest in bankruptcy was rejected by the Ninth Circuit in Matter of Federal Shopping Way, Inc., 717 F.2d 1264 (CA Wash. 1983), refusing to enjoin a state court from issuing orders in a quiet title action against real property not within the Trustee's estate simply because the outcome would "affect the allocation of assets among claimants in the bankruptcy." Id. at 1274.

The Trustee's argument also places the cart before the horse: the Trustee must first, in the "prosecution of the estate's landlord-tenant claim for personal injuries" which the bankruptcy court order allowed the

Trustee to do, prove he has an entitlement to a judgment, before he may assert the judgment is property of the bankruptcy estate. But whether that cause of action is rightfully a judgment is something that can only be determined in state court.

In light of the foregoing, the remainder of the Trustee's argument and authority between pages 18 and 21 regarding "in rem jurisdiction" is moot. The bankruptcy court has jurisdiction over property of the estate. But what the Trustee ignores is he has already sought and was granted leave to "prosecute the estate's landlord-tenant claim" in state court and having done so cannot be heard to complain that the claim was not what he perhaps originally hoped it was. Leave was not given to "prosecute" the claim only if the Trustee obtained favorable orders in state court. Leave was requested and granted to "prosecute" the claim, and with that, comes the risk that the claim may be lost.

The final issue of reply is the Trustee's argument that Mr. McShane's arguments are barred by "res judicata." Again, the Trustee puts the cart before the horse. No authority need be cited for the proposition that res judicata actually requires a final adjudication which inherently includes resolution of any appeal. Ultimately, at the bottom of page 21 the Trustee appears to be resurrecting the same timeliness/30 day appeal argument he has made elsewhere. For the reasons set forth

elsewhere, that argument is not well placed. Mr. McShane is not limited to 1 year under CR 59 nor the sections relied upon under CR 60. Notice of cross-appeal was taken in a timely fashion. Both the motions in the trial court and Mr. McShane's cross-appeal are timely.

D. Conclusion

The standard of review is clear. There is one standard of review of denying a motion to vacate and another for vacating an order of default. The trial court took appropriate action when it granted Mr. McShane's Motion for Reconsideration Vacating an Order of Default as Mrs. Melnik was not the real party in interest.

The underlying record illustrates the original default was based on service that did not name any individual. As such, it is impossible to meet the burden placed on the Trustee without relying on the "opinion" testimony of the process server. As no service took place on Mr. McShane additional grounds exist to vacate the Order and Judgment at issue.

DATED this 21st day of January, 2010.

McGAUGHEY BRIDGES DUNLAP, PLLC

Dan'L W. Bridges, WSBA #24179
Shellie McGaughey, WSBA #16809
Attorneys for McShane

APPENDIX

U.S. BANKRUPTCY COURT
DISTRICT OF OREGON
FILED
May 13, 2008
Clerk, U.S. Bankruptcy Court

Below is an Order of the Court.

ALBERT E. RADCLIFFE
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
DISTRICT OF OREGON

In re **Joan M. Melnik**	)	Case No. **03-64832-aer7**
	)	APPLICATION TO EMPLOY ATTORNEY,
	)	ATTORNEY CERTIFICATION,
Debtor(s)	)	**AND ORDER THEREON**

The undersigned trustee applies to employ **David B. Mills and the firm of Hammons and Mills**, OSB# **77281**, whose address is **115 W. 8th Ave., Suite 280, Eugene, OR 97401**, as attorney to assist in the estate's administration, and certifies that:

(1) The proposed method of compensation (e.g., hourly rate) and, if relevant, the attorney's present rate of compensation is:
Compensation is at an hourly rate plus expenses. The present hourly rate is $220.00. This rate is subject to change by notice of the Trustee and is subject to Court review.

(2) The trustee estimates that the total legal fees for all of the services to the estate will be $ **5,000.00**. If the estimate is $15,000 or greater the trustee represents that proposals to provide the services were solicited from at least two different firms and such proposals were considered in view of the trustee's fiduciary duty to economically administer the estate.

(3) The trustee will require the assistance of said attorney to provide the following legal services:

(A) Discrete Matters (for each matter describe the matter and the potential benefit to the estate).
Review of previously unscheduled asset to prosecute for estate recovery.

*** SEE NEXT PAGE ***

(B) To provide incidental legal services to the trustee regarding the administration of the estate. Fees for said services shall not exceed the greater of $1,000 or 10% of the total compensation requested by said attorney.

(4) The trustee selected said attorney because:
of his experience and expertise.

(5) To the best of the trustee's knowledge said attorney has no connections with the entities listed in the verification below, except as described therein.

(6) This application was either sent to, or filed with, the court on the date shown in the certification below.

DATE: 05/12/08

/s/ Michael A. Grassmueck
Trustee

I, the attorney named above, verify that I will be the trustee's attorney of record; I have read 11 U.S.C. §101(14) and §327, and FRBP 2014(a); and my firm has no connections with the debtor(s), creditors, U.S. Trustee, Asst. U.S. Trustee, any employee of either the U.S. Trustee or Asst. U.S. Trustee, any District of Oregon Bankruptcy Judge, any other party in interest, or their respective attorneys or accountants, except as follows:

DATE: 05/12/08

/s/ David B. Mills
Attorney at Law

David B. Mills 77281
Type or Print Name/OSB #

THE UNDERSIGNED, Laura Liverman **, CERTIFIES THAT ON** 05/12/08 **THIS APPLICATION WAS EITHER SENT TO, OR FILED WITH, THE COURT.**

/s/ Laura Liverman
SIGNATURE

IT IS ORDERED that employment of the above named attorney is authorized retroactively to the date in the certification above upon which the application was either sent to, or filed with the court, as certified above; that compensation of said attorney shall be authorized upon compliance with local procedures and subject to review pursuant to 11 U.S.C. §330.

###

U.S. BANKRUPTCY COURT
DISTRICT OF OREGON
FILED
June 23, 2008
Clerk, U.S. Bankruptcy Court

Below is an Order of the Court.

ALBERT E. RADCLIFFE
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
DISTRICT OF OREGON

In re:	)	Case No. 03-64832-aer7
Joan M. Melnik	)	AMENDED
	)	APPLICATION TO EMPLOY ATTORNEY
	)	***ON CONTINGENT FEE BASIS***;
Debtor(s)	)	**AND ORDER AND NOTICE THEREON**

1. The trustee applies to employ **Timothy Neal Callahan**, OSB# **WSB-18490**, whose address is **600 1st Ave., Suite 414, Seattle WA 98104-2237**, to provide the following services:
Prosecute the estate's landlord-tenant claim for personal injuires.

2. The terms of the attorney's contingent fee agreement are:
1/3 of recovery, if settled, and 40% if tried or appealed.

3. The contingent fee is appropriate because:
The estate has no funds

4. The details of any settlement offers to date are:
None.

*** SEE NEXT PAGE ***

5. To the best of the trustee's knowledge said attorney has no connections with the entities listed in the verification below, except as described therein.

DATE: 06/17/08

/s/ Michael A. Grassmueck
Trustee

I, the attorney named above, verify that I will be the trustee's attorney of record; I have read 11 U.S.C. §101(14) and §327, and FRBP 2014(a); and my firm has no connections with the debtor(s), creditors, U.S. Trustee, Asst. U.S. Trustee, any employee of either the U.S. Trustee or Asst. U.S. Trustee, any District of Oregon Bankruptcy Judge, any other party in interest, or their respective attorneys or accountants, except as follows:

/s/ Timothy Neal Callan
Attorney Signature

IT IS ORDERED AND NOTICE IS GIVEN that employment of the above named attorney is authorized on the contingent fee basis stated in pt. 2 above, unless within 22 days of the date in the "FILED" stamp on page 1 an interested party BOTH (1) files a written objection to such employment on the above terms, setting forth the specific grounds for such objection, with the Clerk of Court (i.e., if the 5-digit portion of the Case No. begins with "3" or "4", mail to 1001 SW 5th Ave. #700, Portland OR 97204; OR if it begins with "6" or "7", mail to 405 E 8th Ave #2600, Eugene OR 97401); AND (2) serves a copy on the trustee at POB 5248, Portland, OR 97208.

###

BAE SYSTEMS
Bankruptcy Noticing Center
2525 Network Place, 3rd Floor
Herndon, Virginia 20171-3514

CERTIFICATE OF SERVICE

District/off: 0979-6 User: kimq Page 1 of 1 Date Rcvd: Jun 23, 2008
Case: 03-64832 Form ID: pdf018 Total Served: 15

The following entities were served by first class mail on Jun 25, 2008.
db +Joan M. Melnik, 3429 Gulfport St NE, Salem, OR 97305-1515
aty TIMOTHY N CALLAHAN, 600 1st Ave #414, Seattle, WA 98104-2237
ust +US Trustee, Eugene, 405 E 8th Ave #1100, Eugene, OR 97401-2728
4676103 Bank of America, P.O. Box 53132, Phoenix AZ 85072-3132
4676104 +Bank of America, c/o Genesys Credit, P.O. Box 3570, Everett WA 98213-8570
4676105 +Dorothy Wilson, 4159 Ward Drive NE, Salem OR 97305-2188
4676106 +Fleet, P.O. Box 15480, Wilmington DE 19850-5480
4676107 +Ford Motor Credit, P.O. Box 239801 Dept. A, Las Vegas NV 89105-9801
4676108 +Health South, P.O. Box 120001 Dept. 0955, Dallas TX 75312-0001
4676110 +Meier and Frank, P.O. Box 94546, Cleveland OH 44101-4546
4676111 Pacific Gynecology, P.O. Box 50150, Bellevue WA 98015-0150
4676113 +Salem Hospital, P.O.Box 14001, Salem OR 97309-5014
4676114 +Swedish Medical, P.O. Box 34440, Seattle WA 98124-1440
4676112 ++TD BANKNORTH NA, PO BOX 9547, ME 100-39, PORTLAND ME 04112-9547
(address filed with court: Peoples Heritage Bank, P.O. Box 101, Lewiston ME 04243)

The following entities were served by electronic transmission on Jun 24, 2008.
4676109 +E-mail/PDF: gecsedi@recoverycorp.com Jun 24 2008 07:30:49 JC Penney, P.O.Box 960001, Orlando FL 32896-0001

TOTAL: 1

***** BYPASSED RECIPIENTS (undeliverable, * duplicate) *****
cr FMCC

TOTALS: 1, * 0

Addresses marked '+' were corrected by inserting the ZIP or replacing an incorrect ZIP.
USPS regulations require that automation-compatible mail display the correct ZIP.

Addresses marked '++' were redirected to the recipient's preferred mailing address pursuant to 11 U.S.C. 342(f)/Fed.R.Bank.PR.2002(g)(4).

I, Joseph Speetjens, declare under the penalty of perjury that I have served the attached document on the above listed entities in the manner shown, and prepared the Certificate of Service and that it is true and correct to the best of my information and belief.

Meeting of Creditor Notices only (Official Form 9): Pursuant to Fed. R. Bank. P. 2002(a)(1), a notice containing the complete Social Security Number (SSN) of the debtor(s) was furnished to all parties listed. This official court copy contains the redacted SSN as required by the bankruptcy rules and the Judiciary's privacy policies.

Date: Jun 25, 2008 **Signature:** Joseph Speetjens