

NO. 70917-8

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JACOB A. BECKWITH,

Respondent/Plaintiff,

v.

SEIL REVELS and SQPUTT, LLC, a Washington limited liability
company,

Appellants/Defendants.

BRIEF OF RESPONDENT

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2018 JUN 29 PM 3:29
 SEIL REVELS & SQPUTT, LLC
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I. INTRODUCTION

On May 28, 2013, a summons and complaint was filed with the King County Superior Court Clerk on behalf of Plaintiff, Jacob A. Beckwith (“Beckwith”), against Defendants Seil Revels (“Revels”) and SQPutt, LLC (“SQPutt”). [CP 1-6] In the Complaint, Beckwith asserted claims against SQPutt for breach of contract by reason of SQPutt’s failure to repay loans made by Beckwith to SQPutt, and against Revels for Revels’ failure and refusal to account to Beckwith for his personal use of funds of SQPutt and for breach of fiduciary duty. [CP 1–6] Beckwith sought relief against SQPutt in the amount of the loaned funds of \$112,811.06 plus interest, and against Revels for an order to provide an accounting and for judgment against Revels for his misuse of company funds in the amount of \$122,811.06 plus interest. [CP 4-6]

Revels and SQPutt failed to timely file and serve an appearance or answer. Beckwith moved for judgment by default against both Revels [CP 12-14] and SQPutt [CP 22-24], and the trial court granted those motions and entered a default judgment against Revels on June 21, 2013 [CP 15-17] and against SQPutt on June 24, 2013 [CP 25-26].

On July 11, 2013, Revels and SQPutt moved to vacate the default judgments. [CP 30-36] The motion was procedurally defective and was

denied. [CP 67-68] Utilizing the correct procedure, Revels and SQPutt resubmitted their motions to the trial court. [CP 69-70; 82-85] By order entered August 19, 2013, the trial court conditionally granted the motions. [CP 140-141] The condition to vacating the default judgments imposed by the trial court was that defendants pay attorney's fees to Beckwith to make him whole, in an amount to be set by the court at a future hearing. [CP 140-141]

Beckwith thereafter submitted to the trial court a declaration by his counsel in support of a fee award. [CP 142-150] On September 3, 2013, the trial court entered an Order Awarding Attorney's Fees and Setting Deadline for Payment/Satisfaction of Conditional Order. [CP 164-165] That order awarded Beckwith attorney's fees in the amount of \$3,468.75, and further provided that the default judgments would be unconditionally vacated if said sum was paid by September 13, 2013, and if not so paid, the judgments would remain in full force and effect, and defendants would be entitled to no further relief from entry of the judgments. [CP 164-165] Neither Revels nor SQPutt paid the \$3,468.75 fee award in accordance with the terms of the order, and Beckwith's counsel then filed a declaration with the court so stating. [CP 166-175]

On September 18, 2013, Revels and SQPutt filed their Notice of Appeal with the trial court. [CP 176-186] On November 13, 2013, Revels

and SQPutt filed their Appellants' Brief. Thereafter, on December 11, 2013, after engaging new counsel, SQPutt moved this Court to dismiss its appeal, and Beckwith joined in that motion. On December 19, 2013, Court Administrator/Clerk Richard D. Johnson issued a notation ruling that "Appellant SQPutt, LLC is dismissed as a party to this appeal." Since the appeal by SQPutt has been dismissed and no longer is before the Court on this appeal, the separate issues raised by SQPutt on its appeal are not addressed in this Brief of Respondent, and the only arguments in the Appellant's Brief still at issue and addressed in this Brief of Respondent are the arguments by Revels in support of his appeal.

In summary, Revels' appeal must be denied because the trial court properly exercised its discretion in conditioning the vacation of the default judgment against Revels on Revels' payment of the attorney's fees and costs incurred by Beckwith in obtaining entry of the default judgment against him and defending that default judgment. CR 60(b), on its face, gives the trial court the authority to condition the vacation of a default judgment "on such terms as are just," and Washington case law specifically recognizes that a condition imposing payment of a plaintiff's attorney's fees qualifies as such a "term."

The alleged negligence on the part of Revels' attorneys was not before the trial court when the trial court exercised its discretion, and it is

not a relevant consideration on this appeal, and does not in any manner vitiate the trial court's right to condition vacating the default judgment on the payment of attorney's fees. At most, Revels makes a case for legal malpractice, which he certainly may pursue if he so wishes. However, the alleged negligence on the part of his attorneys is not a basis to overrule the trial court's exercise of its discretion in conditioning the vacation of the default judgment against Revels on the payment of attorney's fees.

II. STATEMENT OF THE CASE

After filing the summons and complaint in the trial court, Beckwith's counsel engaged the services of PaperPushers Process Service to serve the summons and complaint on the individual and corporate defendants. PaperPushers was instructed to first serve the individual defendant, Seil Revels, at his place of residence, and to confirm when service had been effected, and then to proceed with Service on the registered agent for SQPutt, LLC once Mr. Revels had been served. [CP 60-61]

On Friday morning, May 31, 2013, PaperPushers confirmed that Mr. Revels had been served the prior evening at his place of residence. [CP 61; 69] The process server then proceeded to serve the registered agent for SQPutt, LLC on Monday, June 3, 2013. [CP 71]

As described above in the Introduction, Revels failed to appear or answer within twenty days of being served (he was served on May 30, 2013, so June 19 was the 20th day; Beckwith moved for default on June 21, 2013, and a default judgment against Revels was entered that day). [CP 15-17] Revels filed his answer on the June 24th [CP 18-21] (although he did not serve it on Beckwith's counsel until July 11, 2013), by which time the default judgment already had been entered.

On July 12, 2013, Revels moved to vacate the default judgment against him [CP 30-36], and submitted Declarations by Revels [CP 39-40] and of his counsel, Ryan Hogaboom [CP 37-38], in support thereof. The sole explanation provided by Revels in his declaration for Revels' failure to timely appear and answer was an allegation that he "was not served with the summons and complaint . . . until Sunday, June 2, 2013." [CP 39] As explained in the Declaration of Michael E. Gossler presented to the trial court [CP 50-63], this statement was demonstrably false (Revels unqualifiedly was served on Thursday, May 30th, 2013, as shown by the affidavit of service and ensuing email correspondence between the process server and Beckwith's counsel) [CP 50-63]).

Revels' motion was procedurally defective (he noted it as a regular motion, and failed to comply with the "order to show cause" procedure required by CR 60(b)) [CP 48-49], and the trial court therefore denied

Revels' initial motion. [CP 67-68] Revels thereafter resubmitted the identical motion [CP 71-77] and identical declarations of Revels [CP 78-79] and of his counsel [CP 80-81], and this time also obtained an order to show cause [CP 82-85]. Beckwith filed opposition papers [CP 87-90; 91-95; 103-110; 127-139].

The trial court conditionally granted the motion [CP 140-141], and thereafter entered an order awarding fees and imposing a deadline for paying them. [CP 164-165] Revels failed to satisfy the trial court's condition by not paying Beckwith the attorney's fees awarded to Beckwith in accordance with the terms of the order [CP 166-175], and the judgment then became final by its terms. [CP 164-165] This appeal followed.

III. LAW AND ARGUMENT

A. The Trial Court Properly Entered Judgment By Default Against Revels.

Revels does not contest the trial court's authority to enter a default judgment against him, and there is no basis for any such contention. As noted above, more than 20 days passed from the date of service and entry of the default judgment. Entry of a default judgment therefore was proper. CR 12(a)(1); CR 55(a)(1) and (b)(1). Notably, Revels has elected not to

renew, in this appeal, his ill-advised contention that he was not served until June 2, 2013. [CP 39-40]¹

B. The Trial Court Had the Legal Authority and Discretion to Condition the Vacation of the Default Judgment on the Payment of Fees.

1. The Applicable Standard of Review is Abuse of Discretion.

As Revels acknowledges in Appellants' Brief (page 6), with respect to issues over which the trial court has discretion, the standard of review is "abuse of discretion," citing *Morin v. Burriss*, 160 Wn.2d 745, 161 P.3d 956 (2007). The court in *Morin* further explains that "[D]iscretion is abused if it is exercised on untenable grounds or for untenable reasons." *Id.* at 753. A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). In this case, the trial court appropriately exercised its discretion, as CR 60(b) expressly allows the

¹ Indeed, at pages 16-17 of Appellants' Brief, Revels admits that Beckwith was within his rights to enter the default judgment against Revels.

court to impose terms as a condition of vacating a default judgment, and given the allegation of “mistake” and the dubious basis for that alleged mistake, the requirement that Revel make Beckwith whole by compensating him the attorney’s fees he incurred was an acceptable condition approved by reported decisions.

2. Chapter 4.72 RCW and CR 1 Are Not Applicable.

Revels argues that Chapter 4.72 RCW does not authorize a trial court to impose attorney’s fees as a condition of vacating a default judgment, and that neither do CR 55(c)(1) or CR 60(b). Chapter 4.72 RCW is not applicable. That statute was superseded by CR 60(b). *State v. Scott*, 20 Wn. App. 382, 386-87, 580 P.2d 1099, 1102 (1978), *aff’d* by 92 Wn.2d 209, 595 P.2d 549 (holding the “Supreme Court intended CR 60(b) to be the *exclusive basis* for modifying or vacating final judgments”) (emphasis added). No legal basis exists for Revels’ Chapter 4.72 RCW argument. CR 60(b) controls here, and under CR 60(b), a trial court may relieve a party from a final judgment “upon such terms as are just.” CR 60(b).² CR 55, cited by Revels, is not applicable as it applies to vacating “orders” of default, as distinguished from “judgments” by default

² As discussed in section III.B.3, *infra*, these “terms” including a condition that attorney’s fees be paid.

(although on its face, CR 55(c)(1) expressly gives the trial court the right to condition such relief on “such terms as the court deems just”).

Revels further argues that the combination of CR 1 and Chapter 4.72 RCW prohibit the imposition of an obligation to pay attorney’s fees as a condition of vacating a default judgment.³ CR 1 says no such thing, and as noted above, *State v. Scott*, 92 Wn.2d 209, 595 P.2d 549, is dispositive of this issue (CR 60(b) controls).

3. The Trial Court Had the Express Discretion Under CR 60(b) to Impose Terms on the Vacation of the Default Judgment, and It Appropriately Exercised Its Discretion in Doing So.

Revels argues that neither CR 55(c)(1) nor CR 60(b) authorize a trial court to condition the vacation of a default judgment on the **payment** of fees. To the contrary, CR 60(b) is broad in its language, and authorizes the imposition of any terms that are just. Revels cites not a single case for the proposition that the imposition of an obligation to **pay** fees as a condition of vacating a default judgment is outside the scope of the “terms” a trial court may impose under CR 60(b). Of course, he cites no such case law because there is none, and, to the contrary, the case law in Washington specifically allows a trial court to condition the vacating of a default judgment on the **payment** of fees. *Hendrix v. Hendrix*, 101 Wash.

535, 538, 172 P. 819 (1918) (upholding conditions imposed in an order vacating judgment that included an obligation to comply with a prior order of the court which included an award of attorneys' fees); *Pamelin Industries, Inc. v. Sheen-U.S.A., Inc.*, 95 Wn.2d 398, 622 P.2d 1270 (1981) (motion to vacate default judgment "was granted on condition that defendants **pay** plaintiffs' attorneys' fees and post a \$50,000 performance bond, *id.* at 400; "the trial judge had sufficient justification to impose conditions on the order setting aside the default judgment", *id.* at 404); *see also Friebe v. Supancheck*, 98 Wash. App. 260, 269, 992 P.2d 1014, 1018 (1999) (where the trial court conditioned order vacating default judgment upon an award of \$3,500 in attorneys' fees to the plaintiffs). Indeed, if the language in CR 60(b) "upon such **terms** as are just" is to have any meaning, it must be read to give the trial court the discretion to condition the vacation of a default judgment on compensating a plaintiff for the fees the plaintiff incurred as a result of a defaulted party having failed to comply with the court rules.

The *Knapp* case, cited by Revels, further acknowledges the authority of a trial court to impose the payment of attorney's fees as a condition of vacating an order of the court (*Knapp v. S.L. Savidge*, 32 Wn.

³ Appellants' Brief, pages 13-15.

App. 754, 757, 649 P.2d 175, 177 (1982)). Nonetheless, Revels argues that based upon the reasoning and result in *Knapp*, it was an abuse of discretion for the trial court in this case to have imposed payment of fees as a condition of vacating the default judgment.

Knapp is inapposite and plainly distinguishable from this case. In *Knapp*, the trial court conditioned the vacation of an order of dismissal on payment of \$2,000 in attorney's fees. In the *Knapp* case, the plaintiff's claims were dismissed the morning the case was set to be assigned to a judge for trial because the attorney for the plaintiff was 35 minutes late to court for the trial assignment. Unbeknownst to the judge who entered the dismissal order, counsel for the defendant and for the plaintiff had talked the day before, and the defendant's attorney, who requested the default, knew based upon the prior day's conversation that the plaintiff's attorney was prepared for trial and intended to be in court with witnesses the following day. In reversing the imposition of terms as a condition of vacating the dismissal order, the court of appeals noted that there was no indication in the record that defendant's counsel, in requesting the default, had informed the trial court of his discussion with plaintiff's counsel the prior day, and no phone call had been made to determine the plaintiff's counsel's intentions and why he was not present in court. *Knapp*, 32 Wn. App. at 757. By contrast, in this case Revels had not appeared or

answered within the allowed 20 days, and had initiated no contact with Beckwith's counsel, and otherwise did nothing to communicate to Beckwith's counsel that Revels had retained counsel and intended to defend the claims. Under the Civil Rules, Beckwith had every right to move for an order and judgment by default. Given the total silence and absence of any communication from Revels whatsoever, Beckwith had no obligation or reason to wait beyond the required 20 days to enter a default judgment.

Given this record, the trial court did not abuse its discretion in imposing terms in the form of the payment of attorney's fees as a condition of vacating the default judgment. Beckwith, the plaintiff here, was totally blameless and acted in conformance with the Civil Rules. Beckwith waited the requisite twenty days, and when Revels filed and served no appearance or answer on counsel for Beckwith, Beckwith moved for judgment by default. In doing so, Beckwith incurred attorney's fees.

Likewise, Beckwith had the right to defend the motion to vacate, particularly when the sole basis for the alleged "mistake" was Revels' contention that he "thought" he was served on Sunday, June 2nd, when the record unequivocally establishes that he was served the prior week – on Thursday, May 30th – making his contention appear to be nothing more

than a manufactured excuse and a fraud on the court, which would negate any basis for finding a mistake. While the trial court may have decided to give Revels the benefit of the doubt, under these circumstances it certainly was not an abuse of discretion to condition that relief on making Beckwith whole through the payment to Beckwith of the attorney's fees he incurred.

As for the argument that no date should have been imposed for the payment of the fee award, and that the trial court only should have entered a judgment for fees,⁴ that simply is contrary to common sense and to the requirement that the terms be meaningful. Revels claims that he is broke and had no funds, and could not pay the modest terms imposed on him.⁵ How is the plaintiff to be compensated and made whole if actual payment is not the condition of being allowed to proceed with the case? It was not an abuse of discretion to impose a deadline for payment of the fees awarded – which fees, measured by modern day litigation, were in a relatively modest amount (\$3,468.75). As discussed above, the “payment” condition is one that has been expressly approved by our appellate courts on multiple occasions.

⁴ See Appellants' Brief, pages 10-11.

⁵ See Appellants' Brief, page 5.

Finally, Revels argues that he should not have been ordered to pay attorney's fees that arose due to the "sins of his lawyers."⁶ To the contrary, clients routinely are bound by the acts and omissions of their attorneys – with the failure to timely file claims within the statute of limitations being perhaps the most common example. Moreover, the only "fact" before the trial court in support of the motion to vacate was the allegation that Revels was served on a Sunday, and not the prior Thursday. The trial court had no knowledge of any alleged negligence by Revels' counsel. Given the record, as discussed above, it was not an abuse of discretion to condition the vacation of the default judgment on the payment of attorney's fees. If Revels has a grievance against his former counsel, he has recourse in the form of a malpractice action.

IV. CONCLUSION

Revels' appeal presents a simple case of not timely appearing and answering, with a default judgment following that failure to timely appear and answer. Although Revels' explanation for his failure to timely appear and answer was dubious, at best, the trial court gave him the benefit of the doubt, but determined that Beckwith should be made whole and paid his attorney's fees as a condition of vacating the default judgment. The trial

⁶ See Appellants' Brief, page 17.

court was well within its discretion in so conditioning the order to vacate – discretion that is vested in the trial court by CR 60(b) and Washington case law. Revels failed to comply with the condition, and in doing so the judgment against him became final. Revels’ appeal should be denied and the trial court’s ruling affirmed.

RESPECTFULLY SUBMITTED this 23rd day of January, 2014.

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

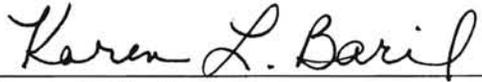
On the date given below, I caused to be served by legal messenger a copy of this document on the following attorney as follows:

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Karen L. Baril