IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

MARK HOPKINS and GEORGIA HOPKINS, husband and wife, Respondents, v. KIRK and JENNIFER BANKS, as assignees for MRS. BILLIE E. GETSCHMANN SKYLES, Appellants.	No. 77214-7-I DIVISION ONE UNPUBLISHED OPINION FILED: January 22, 2019

LEACH, J. — Kirk and Jennifer Banks,[1] putative assignees of Billie Getschmann Skyles, appeal the denial of their motion to vacate a default judgment in favor of Mark and Georgia Hopkins.[2] Banks contend that Hopkins did not file adequate proof that they served Skyles with their motion for default judgment before the court entered judgment. They also contend that Hopkins's counsel withheld from the court facts material to the default judgment.

Because Hopkins corrected their proof of service error and Banks fail to show that the trial court abused its discretion when it denied the motion to vacate, we affirm.

[1] We refer to Kirk and Jennifer Banks collectively as Banks.
[2] We refer to Mark and Georgia Hopkins collectively as Hopkins.

BACKGROUND

Billie Getschmann Skyles owned 20 acres of land near Gold Bar, Washington. Jennifer and Kirk Banks lived on the property and helped Skyles. In February 2014, Skyles signed a purchase and sale agreement (PSA) to sell half of the property to her neighbors, Mark and Georgia Hopkins. The PSA included an addendum providing for the transfer of .75 acres of the parcel after the parties completed a boundary line adjustment (BLA). Sale of 9.25 acres closed on May 8, 2014. After a surveyor completed the BLA paperwork in June 2014, Skyles refused to sign it.

Hopkins filed a lawsuit to enforce the transfer of the .75 acres in November 2014. They served Skyles on December 18, 2014. Skyles filed a pro se notice of appearance on January 6, 2015. On January 13, 2015, Hopkins served Skyles by mail with notice of a January 27, 2015, default judgment hearing date. Legal assistant Tracy Swanlund signed a certificate of mailing affixed to the calendar note to show service. Skyles did not appear at the hearing, and the superior court entered a default judgment in favor of Hopkins.

In June 2015 the Snohomish County Auditor recorded a quitclaim deed Skyles apparently signed in October 2014 transferring the property to Banks. In July 2015, Skyles filed a motion to vacate the default judgment. She claimed that Hopkins did not properly serve her with the summons or complaint. On appeal,

we concluded that the service of summons and complaint was proper and affirmed the default judgment.[3]

Skyles purportedly assigned her interest in the PSA and this lawsuit to Banks on August 20, 2015.[4] She died on September 26, 2015.

On December 30, 2015, Banks filed a second motion to vacate. They claimed that Hopkins's counsel withheld material facts at the default judgment hearing and failed to properly serve her with their motion for default judgment. The superior court declined to consider the motion because Skyles had died and no party had been substituted for her. This court substituted Banks for Skyles in the first appeal but declined to review issues relating to the second motion because the trial court had never considered the merits of the motion.[5]

After our decision in the first appeal, Banks filed a third motion to vacate in May 2017.[6] They asserted that Hopkins failed to file proper proof of service of the default judgment motion on Skyles before the court entered judgment, making it void. They also claimed that Hopkins had withheld material information from the court. A court commissioner denied the motion. The superior court denied Banks's motion to revise the commissioner's ruling and awarded

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[3] Hopkins v. Banks, No. 74068-7-I (Wash. Ct. App. Apr. 3, 2017) (unpublished), http://www.courts.wa.gov/opinions/pdf/740687.pdf.

[4] On August 26, 2015, Skyles filed suit against Hopkins for several claims, including conversion. The trial court dismissed her claims on summary judgment; she appealed the dismissal of the conversion claim. That appeal is also before this panel. Banks v. Hopkins, No. 77218-0-I.

[5] Hopkins, slip op. at 4, 10.

[6] The motion is titled "Second Motion to Vacate Default Judgment," although it was the third filed in this matter.

judgment to Hopkins for attorney fees and costs. Banks appeal the commissioner's decision and the court's denial of their motion to revise that ruling.

ANALYSIS

Banks appeal the denial of their motion to vacate a default judgment. They claim that the default judgment is void because Hopkins failed to file with the court a proper proof of service of their default judgment motion on Skyles before the court entered the default judgment. They also claim that Hopkins and their attorney failed to disclose information about Skyles's competency. Thus, they contend, the superior court abused its discretion by not granting their motion to vacate the default judgment. Because Hopkins remedied the irregular certificate of service and Banks fail to show that Hopkins withheld material information, we affirm the superior court.

Timeliness

As a preliminary matter, we consider Hopkins's challenge to the timeliness of Banks's May 16, 2017, motion to vacate. Unless a superior court abuses its discretion when it determines that a motion under CR 60(b) was or was not timely, this court will not overturn that court's decision.[7]

[7] Luckett v. Boeing Co., 98 Wn. App. 307, 312-15, 989 P.2d 1144 (1999) (finding that the trial court did not abuse its discretion when it found a motion to vacate a default judgment was untimely despite the court's preference for resolving cases on the merits).

In their motion to vacate, Banks identify, generally, CR 60(b) factors: (4) "[f]raud . . . misrepresentation, or other misconduct of an adverse party," (5) "[t]he judgment is void," and (11) "[a]ny other reason justifying relief from the operation of the judgment" as providing authority for the court to vacate the default judgment. A motion to vacate for these reasons must be filed "within a reasonable time" but, unlike the reasons described in CR 60(b)(1), (2), and (3), CR 60 does not limit that reasonable time to within one year.

During the motion hearing, the superior court noted that issues raised by Banks were probably no longer timely since both had been raised long after Skyles had died. The superior court also stated that it could not make a finding about whether the actual notice of the default judgment hearing was served properly or about Skyles's competency because of the amount of time that had passed. But the superior court did not identify untimeliness as the basis for its denial of the motion to vacate. Thus, we decline to decide the case on this issue and evaluate the substantive questions below.

Motion to Vacate

CR 60(b) authorizes a court to set aside a default judgment upon a showing of circumstances described in the rule.[8] We review a superior court's denial of a motion to vacate a default judgment under CR 60(b) for abuse of discretion.[9] If a superior court bases its decision to deny a motion to vacate

[8] CR 55(c)(1).
[9] Luckett, 98 Wn. App. at 309.

"upon tenable grounds and is within the bounds of reasonableness, it must be upheld."[10]

Because Banks do not show that the superior court abused its discretion by denying their motion to vacate either on the basis that proof of service was irregular or that the Hopkins withheld information material to the proceedings, we affirm.

i. Proof of Service

Banks claim that Hopkins's failure to file proof of service in the form required by CR 55(b)(4) before the default judgment hearing left the superior court without authority to enter a default judgment. They maintain that the judgment the court signed is void and that CR 60(b)(5) requires its vacation.

CR 55(a)(3) requires that a party who has appeared in a lawsuit be served with written notice of a default motion at least five days before a hearing on the motion. CR 5(b)(2)(B) describes how to prove service by mail: "Proof of service of all papers permitted to be mailed may be by written acknowledgment of service, by affidavit of the person who mailed the papers, or by certificate of an attorney."

Here, Hopkins filed a certificate signed by paralegal Swanlund to prove that their motion for default was mailed to Skyles at least five days before the hearing on the motion. Because Swanlund was not an attorney, this certificate did not satisfy the proof requirement of CR 5(b)(2)(B).

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[10] Lindgren v. Lindgren, 58 Wn. App. 588, 595, 794 P.2d 526 (1990).

However, on January 6, 2016, Swanlund filed a sworn declaration of service stating that she served Skyles by mail on January 13, 2015. This declaration remedied the irregularity of the original proof of service filed with the court. As the superior court noted, the declaration reaffirmed that the service was achieved at the proper time, it did not "chang[e] the date [of the service to Skyles] or mail[ ] it later or anything like that."

Banks begin their argument by reminding this court that service of a summons and complaint must occur for a superior court to have personal jurisdiction over a party. RCW 4.28.020 declares that once a superior court acquires personal jurisdiction over a matter, that court has continuing jurisdiction over the controversy from beginning to end.[11] A motion to vacate is part of the original lawsuit; the court "does not require independent jurisdictional grounds."[12] This court found that Hopkins properly served Skyles with the summons and complaint.[13] So Hopkins's failure to file a proper proof of service of the motion before the hearing did not create a jurisdictional issue.

Banks cite Brackman v. City of Lake Forest Park[14] to support their position. But Brackman does not help them here. In Brackman, this court considered whether filing an unsworn certificate signed by a legal assistant satisfied the strict time requirements for service of a trial de novo request

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[11] Lindgren, 58 Wn. App. at 591.
[12] Lindgren, 58 Wn. App. at 591.
[13] Hopkins, slip op. at 1-2.
[14] 163 Wn. App. 889, 262 P.3d 116 (2011).

imposed by MAR 7.1(a).[15] MAR 7.1(a) requires a party to file a request for a trial de novo and proof of service within 20 days of the arbitration award. A failure to strictly comply results in a loss of the right to a trial de novo. Because the certificate did not provide proof of service, this court affirmed the dismissal of Lake Forest Park's request.[16]

But MAR 7.1(a) does not apply here, and its filing requirement differs from that for CR 55(a)(3). Also, the policy reasons for the strict application of MAR 7.1(a) described in Nevers v. Fireside, Inc.[17] are not present in this case.

CR 55(b)'s requirement that proof of service be filed before a default judgment enters refers to proof of service of the summons and complaint. It cannot refer to proof of service of notice of the default motion because the provision applies equally to cases where no defendant has appeared and no notice of the motion is required. Given that Hopkins ultimately provided proper proof of service, Banks provide no persuasive reason for vacating the default judgment on this basis.

Banks also contend that Hopkins did not comply with the original PSA when they mailed the notice directly to Billie Skyles Getschmann instead of in care of Jennifer Wilson (now Banks). The PSA states, "All notices required by this Purchase and Sale Agreement shall be considered properly delivered . . .

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[15] Brockman, 163 Wn. App. at 898 (holding that "[a]n unsworn certificate of mailing that is not under oath or does not contain language 'that it is certified or declared by the person to be true under penalty of perjury' does not constitute 'proof' that a copy has been served under MAR 7.1(a)").

[16] Brockman, 163 Wn. App. at 898.

[17] 133 Wn.2d 804, 812-13, 947 P.2d 721 (1997).

(3) on the second day following mailing, postage prepaid, certified mail, return receipt requested: to Seller: Billie Skyles Getschmann . . . c/o Jennifer Wilson 425-231-6895." But the notice at issue here is not one "required by this Purchase and Sales Agreement." CR 55(b)(3) requires it, and CR 5(b)(1) requires that it be given directly to the party unless represented by counsel. Banks's PSA argument has no merit.

Banks fail to demonstrate that the irregularity of the certificate of service resulted in a void judgment rather than a voidable judgment because the superior court had jurisdiction to enter the default judgment. Because they show no prejudice to Skyles caused by the defective proof of service certificate, they cannot show that the superior court abused its discretion by denying the motion to vacate on this basis.

ii. Disclosure of Material Facts

Banks also challenge the superior court's rejection of their claim that "[t]he Hopkins withheld information about red flags, concerning Skyles' mental competency during the January 2015 default hearing." They assert that evidence regarding Skyles's competency was material because a court cannot enter a default judgment against an incompetent person.

Banks rely in part on the duties imposed on counsel by RPC 3.3(f) but do not provide any authority supporting their claim that the superior court should consider alleged violations of RPC 3.3(f) in a case not involving attorney discipline. Instead, they cite as supporting authority In re Disciplinary Proceeding

Against Carmick[18] and Louisiana State Bar Ass'n v. White.[19] But both of these cases involve review of disciplinary proceedings by bar associations. Since they fail to provide authority or argument supporting their claims under RPC 3.3(f), we decline to review them.[20]

We do consider their assertions under CR 60(b)(4) and (11), each of which authorizes the superior court to vacate a default judgment. To succeed on a CR 60(b)(4) motion, the party asserting that an opposing party obtained the judgment through fraud or other improper means must prove the supporting facts by clear and convincing evidence.[21] The party attacking the judgment must show improper conduct that causes "the entry of the judgment such that the losing party was prevented from fully and fairly presenting its case or defense."[22] CR 60(b)(11) authorizes the superior court to vacate a judgment for "[a]ny other reason justifying relief from the operation of the judgment."

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[18] 146 Wn.2d 582, 48 P.3d 311 (2002).

[19] 539 So.2d 1216, 1220 (1989).

[20] In some cases a court has determined that consideration of an RPC outside of a disciplinary hearing is appropriate. For example, courts have identified RPC 1.8 as being a proper basis for "refus[ing] to enforce fee agreements with attorneys as being against public policy." LK Operating, LLC v. Collection Grp., LLC, 168 Wn. App. 862, 875, 279 P.3d 448 (2012). However, to reach this decision, a court must be provided a basis in fact and law to apply the RPC to the case at hand. Banks provide this court with neither. If an appellant provides no argument supporting an assignment of error, we generally do not consider it. Shelcon Constr. Grp., LLC v. Haymond, 187 Wn. App. 878, 889, 351 P.3d 895 (2015).

[21] Peoples State Bank v. Hickey, 55 Wn. App. 367, 371-72, 777 P.2d 1056 (1989).

[22] Lindgren, 58 Wn. App. at 596.

The record does not contain evidence supporting Banks's claim. They contend that Hopkins withheld from the court information showing issues with Skyles's competency. They support their argument with a hodgepodge of declarations, letters, e-mail messages, and voice-mail transcripts, none of which show that Hopkins withheld material knowledge.

This hodgepodge includes a transcript of a voice-mail message from Georgia Hopkins to Jennifer Banks that indicates both parties discussed Skyles's competency. This transcript shows that Hopkins discussed the issue of competency with Banks and undermines any assertion by Banks that Hopkins hid any question of Skyles's competency from Banks.

As the superior court indicated, the failure of Banks to raise the issue of Skyles's competency earlier further undermines their argument. They "were in [the] best position to determine whether or not [Skyles] was competent and whether this issue should be addressed" and the voice-mail demonstrates that they were aware of the potential issue before the default judgment.

Banks also assert that Hopkins withheld attorney Carleton Knappe's letter indicating that Skyles was probably incompetent. They do not establish that Hopkins's attorney or the escrow company had possession of the letter. Lori O'Neil of Snohomish Escrow, who oversaw the closing, and Hopkins's attorney, Thomas L. Hause of Gourley Law Group, provided declarations stating that neither the escrow company nor the attorney knew of Knappe's letter. Further, the record indicates that neither the Gourley Law Group nor Snohomish Escrow

had a copy of the Knappe letter in their files. B. Craig Gourley asserted in his declaration that he first received the Knappe letter on June 10, 2015, from Banks's attorney, after the default judgment was entered.[23] Without demonstrating that the Hopkins' attorney had notice of the letter before the default judgment, Banks cannot establish that Hopkins withheld this letter from the superior court.

Banks do not establish that the superior court abused its discretion by not vacating the judgment under CR 60(b)(4). They also do not provide any other persuasive reason why the superior court abused its discretion in failing to vacate under CR 60(b)(11).

Attorney Fees

Banks request attorney fees on appeal. Because they do not prevail, we deny this request.

Hopkins also request attorney fees on appeal, citing the PSA and RCW 4.84.330.

The PSA states,

> In the event that any suit or other proceeding is instituted by either party to this [PSA] or that any costs, expenses or attorney fees are incurred or paid by either party in enforcing this [PSA], the substantially prevailing party, as determined by the court or in the proceeding, shall be entitled to recover its reasonable attorneys fees and all costs and expenses incurred relative to such suit or proceeding from the substantially non-prevailing party, in addition to such other relief as may be awarded.

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[23] The letter was copied to Skyles. Presumably this is how it reached Banks's attorney.

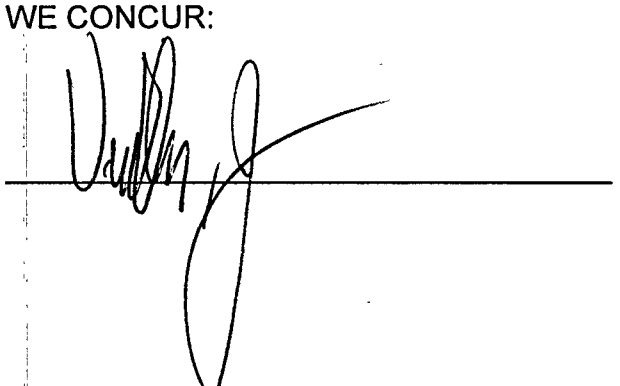
RCW 4.84.330 requires that a court award attorney fees to the prevailing party if the contract provides for an award of reasonable attorney fees in an enforcement action. Hopkins have prevailed. Upon compliance with RAP 18.1, they are entitled to recover attorney fees and costs for this appeal.

CONCLUSION

We affirm. Banks fail to show that the superior court abused its discretion by not vacating the default judgment. They do not establish that irregularities in Hopkins's proof of service of the default motion on Skyles rendered the default judgment void. They also failed to establish that Hopkins hid concerns about Skyles's competence.

Leach, J.

WE CONCUR:



Dwyer, J.