

NO. 67818-3-I

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

COLUMBIA RECOVERY GROUP,

Appellant,

v.

DEBORAH & RONALD BAILEY,

Respondent.

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STATE OF WASHINGTON
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BRIEF OF RESPONDENT

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I. INTRODUCTION

This appeal arises from an order vacating an order of default and a default judgment, and assessing terms against the plaintiff. The respondent's position is that the trial court did not abuse its discretion in any manner and its order should be affirmed in all regards.

II. STATEMENT OF ISSUES

A. Did the trial court abuse its discretion in vacating an order of default and a default judgment when the plaintiff, before entry of the requested order and judgment, learned that the defendants' counsel did not have notice of the motion yet failed to inform the court of such lack of notice?

B. Did the trial court abuse its discretion in assessing terms against the plaintiff when the plaintiff failed to inform the court considering its motion for an order of default and default judgment that the defendants, who had appeared in the matter through counsel, did not have notice of the motion, and then refused to vacate the judgment it had obtained upon request from the defendants?

III. STATEMENT OF THE CASE

In or around October 2010, the respondents, Deborah Bailey and Ronald Bailey (Bailey), vacated an apartment in Tacoma they had lived in for several years. The term of their lease had not expired, but the Baileys

thought they had their landlord's permission to leave without penalty. (CP 111-112) The landlord, however, sought payment for the balance of the term and assigned its claim to the appellant, Columbia Recovery Group (CRG), a collection agency.

On February 20, 2011, CGR, through its attorney, Peter Schneider (Schneider), served two copies of a summons and complaint upon the Baileys. (CP 112) On February 26, 2011, attorney Jeremiah McCormick (McCormick) mailed a Notice of Appearance to Schneider. (CP 39) On March 7, 2011, McCormick sent Schneider a letter requesting details concerning his clients' alleged indebtedness. (CP 39, 49)

On March 29, 2011, without notice to McCormick, CRG filed the complaint in King County Superior Court. (CP 1, 39) On April 8, 2011, CRG filed a motion for order of default and default judgment. (CP 12) Schneider sent notice of the motion to McCormick via certified mail. Two separate deliveries were unsuccessful, and McCormick did not subsequently pick up the mailing from the post office. (40, 125-126) The Postal Service notified Schneider via paper notice that McCormick had not actually received the certified mailings.¹ (CP 40, 63) The two notices of attempted delivery neither identify the sender nor indicate their content. (CP 65, 67)

¹ The Postal Service's website provided further verification that the default motion was never delivered to McCormick. (CP 43)

On May 6, 2011, the court entered the requested order of default, but not the default judgment. (CP 34-35) On May 11, 2011, without notice to McCormick, CRG moved for, and obtained, the default judgment.² (CP 36-37, 150-151) The court subsequently issued a writ of garnishment. On June 17, 2011, McCormick learned the case had been filed and a default judgment entered when Deborah Bailey notified him her paycheck had been garnished. (CP 40, 81) McCormick subsequently tried to persuade CRG to voluntarily vacate the judgment, but CRG refused to do so. (CP 40, 83, 89)

On August 18, 2011, the Baileys filed a document entitled “Motion and Declaration for Entry of Orders Vacating Order of Default, Default Judgment, and Quashing Writ of Garnishment, and CR 11 Sanctions,” and requested oral argument. (CP 38) They asserted that vacation of the order and judgment was appropriate because their attorney did not receive actual notice of the default motion and that CRG’s attorney knew of the lack of notice when he obtained both the order of default and the default judgment. They further asserted that sanctions against CRG and Schneider were appropriate because they should have known that the court would vacate the order and judgment, but they would not voluntarily agree to vacation. In response, among other things, CRG argued that McCormick “willfully

² The record is unclear whether Schneider personally appeared in court in obtaining either the order of default or the default judgment.

refused” to pick up the certified mailings from the post office and should therefore be deemed to have notice. (CP 128)

On September 16, 2011, the court heard oral argument, which was not transcribed. Following argument, the court granted the Baileys’ requests for relief. The court set aside the order of default and the default judgment, quashed the writ of garnishment, and awarded the Baileys attorney’s fees of \$4,125 to be paid by CRG. (CP 141-143) With regard to the fee award, the court noted that the Baileys sought terms pursuant to CR 11, and stated that terms were awarded to them

. . . for the attorney fees they incurred resulting from their counsel’s investigation of the facts pertaining to the entry of the order of default, judgment and issuance of the Writ of Garnishment, efforts to obtain a voluntary vacation of the foregoing, legal research and preparation of the pleadings and related papers to obtain the order vacating the Order of Default, and Judgment, and order quashing the Writ of Garnishment.

(CP 142-143) In a handwritten note added to the order the court explained some of the reasoning behind the decision:

Columbia and counsel failed to inform the court that the letter to Mr. McCormick containing notice of motion of default had been returned and therefore defendants/counsel had not received notice of the motion of default. Therefore, this court entered a default judgment without knowing that the order of default had been entered without notice. Counsel for Columbia shall read and review RPC 3.3.

(CP 143)³ CRG timely appealed. (CP 146)

³ This transcription may not be entirely accurate because of legibility issues related to the handwriting.

IV. ARGUMENT

A. Standard of Review

A trial court's rulings under CR 11, 55, and 60(b) are all reviewed under an abuse of discretion standard. *McNeil v. Powers*, 123 Wn. App. 577, 590, 97 P.3d 760 (2004); and *Gutz v. Johnson*, 128 Wn. App. 901, 916, 117 P.3d 390 (2005). As stated in *Hous. Auth. of Grant County v. Newbigging*, 105 Wn. App. 178, 185, 19 P.3d 1081 (2001), “[a] trial court abuses its discretion when it exercises it on untenable grounds or for manifestly unreasonable reasons.” As a general matter, “default judgments are not favored as they prevent controversies from being determined on the merits.” *Id.* As a result, an order vacating a default judgment should not be lightly overturned: “The appellate courts have occasionally commented that an order vacating a default judgment will be given considerable deference, while an order refusing to vacate a default judgment will be examined with greater scrutiny.” Tegland, *Washington Practice*, Vol. 4 (5th ed. 2006), 344. In considering a motion to vacate a default judgment, “[e]quitable principles [should] guide the court . . .” *Hous. Auth.*, 105 Wn. App. at 185.

B. The Trial Court did not Abuse its Discretion in Vacating the Order of Default and the Default Judgment.

CR 55(a)(3) provides that “[a]ny party who has appeared in the action for any purpose shall be served with a written notice of the motion for default and the supporting affidavit at least 5 days before the hearing on the motion.” CR 55(c)(1) provides: “For good cause shown and upon such terms as the court deems just, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with rule 60(b).” CR 60(b) provides in part:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) Mistakes, inadvertence, surprise, excusable neglect, or irregularity in obtaining a judgment or order . . .

In its brief,⁴ CRG does not dispute that neither McCormick nor the Baileys received actual notice of the motion for an order of default. CR 55(a)(3) required that they serve such notice on McCormick. CRG could have satisfied the service requirement simply by sending notice via first class mail. *See* CR 5; and *Avgerinon v. First Guar. Bank*, 142 Wn. 73, 78,

⁴ Significant portions of CRG’s brief fail to comply with RAP 10(a)(5): “Reference to the record must be included for each factual statement.” For instance, most of pages 8 and 9 of CRG’s brief are devoted to describing the September 16, 2011 oral argument that was not transcribed. Elsewhere, the brief references Schneider as having “testified at oral argument.” App. Br., 7, 31. The Baileys submit that factual statements in CRG’s brief that contain no reference to the record should not be considered. *See State v. Falling*, 50 Wn. App. 47, 52 n. 3, 747 P.2d 1119 (1987).

252 P. 535 (1927). For unknown reasons, however, CRG attempted service via certified mail and McCormick never received the mailing.

Attempting an end-around the service requirement, CRG argues that but for McCormick's willful refusal to pick up the certified mailing, notice would have been received.⁵ See App. Br., 13-14. Then, without citation to authority, CRG asserts that such willful refusal amounts to "constructive notice." CRG concludes: "Washington case law is clear, willful neglect is not excusable. Because of this, the trial court acted well beyond its discretion in ruling that Mr. McCormick's acts were excusable and thus also abused its discretion in granting the Baileys' motion to vacate. No reasonable person would have drawn that same conclusion." *Id.*, 14.

CRG's attempt to shift blame to McCormick for the lack of notice ignores the basis for the trial court's decision. Plainly, the court's primary motivation for vacating the judgment and awarding terms to the Baileys was Schneider's failure to inform the court before entry of the order of default that actual notice of the motion had not been delivered to McCormick. The court was sufficiently concerned about that failure that it instructed Schneider to read RPC 3.3. RPC 3.3(f) provides: "In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to

⁵ CRG posits that the notices McCormick received had a tracking number on them that would have permitted him to figure out who the sender was. Then CRG posits that knowing who the sender was, McCormick should have figured out that the mailing contained a motion for default. App. Br., 13.

the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.”

In its brief, CRG suggests that RPC 3.3(f) is inapplicable: “CRG’s motion for default was not an ex parte proceeding. Because the rule applies only to ex parte proceedings, issues of service are clearly outside the scope of the rule. Ex parte proceedings, by virtue of being ex parte, never require notice to a party.” App. Br., 17. This tautological claim is entirely without merit. Surely, when one party in a contested matter moves for entry of judgment without notice to the other, the proceeding is properly characterized as ex parte.

CRG also faults the trial court for permitting argument based on RPC 3.3 during the September 16, 2011 hearing, “as CRG was not afforded a proper opportunity to research case law on the matter and formulate a proper rebuttal to the assertions of the trial court and the Baileys.” *Id.* If there were any merit to this claim at all, the proper remedy for CRG would have been to file a motion for reconsideration. CRG did not file such a motion. The trial court properly found that CRG did not provide notice to McCormick and that Schneider should have notified the court of such lack of notice.

1. CRG's Failure to Provide Actual Notice to McCormick of the Motion for Default Entitles the Baileys to Vacation of the Default Judgment as a Matter of Right.

In *Gutz*, the court stated: “. . . if a party has appeared but ‘not given proper notice prior to entry of the order of default, the defendant is *entitled to vacation of the default judgment as a matter of right,*’” 128 Wn. App. at 912, quoting *Prof'l Marine Co. v. Those Certain Underwriters at Lloyd's*, 118 Wn. App. 694, 708, 77 P.3d 658 (2003)(emphasis in original). Similarly, in *Shreve v. Chamberlin*, 66 Wn. App. 728, 832 P.2d 1355 (1992), the court stated:

Under CR 55(a)(3) and CR 55(f)(1), a trial court acts without authority when it purports to enter a default judgment without notice against a party who has previously appeared. As a result, the previously appearing party is entitled as a matter of right to have the judgment set aside.

See also, Tegland, Washington Practice, Vol. 4 (5th ed. 2006), 344 (“A failure to give notice of default proceedings as required by CR 55 itself is an irregularity justifying vacation of the default judgment”).

Again, CRG does not dispute that it failed to provide McCormick with actual notice of the default proceeding. Accordingly, the Baileys are entitled to vacation of the order of default and default judgment as a matter of right. For that reason, CRG's argument that the trial court erred in failing to apply the four-factor test set forth in *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 521 (1968), which would normally apply when a court

considers whether to vacate a default judgment, is beside the point. *See* App. Br., 18-22.⁶

The trial court properly held that CRG’s failure to serve actual notice of the motion for default on McCormick, and Schneider’s failure to notify the court of such failure, requires vacation of the order of default, as well as of the default judgment. At a minimum, the trial court most certainly did not abuse its discretion in vacating the order and judgment.

C. The Court did not Abuse its Discretion in Assessing Terms Against CRG.

In a matter involving the vacation of a default judgment, at least two separate bases may support an award of attorney’s fees to the defaulted party—CR 11 and CR 60(b). CR 11 permits a court to assess attorney’s fees against a party when, among other things, the party submits a “pleading, motion, or legal memorandum” that takes a position that is “warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law” or that is “interposed for [an] improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . .”

⁶ Even if that test were applicable, vacation of the judgment would be appropriate as the record establishes that the Baileys met that test. First, Deborah Bailey’s declaration (CP 110-121) constitutes substantial evidence to support a prima facie defense to CRG’s claim. Second, McCormick acted promptly to overturn the default once he learned of it. Third, the circumstances surrounding the failure to receive the certified mailings constituted excusable neglect. Lastly, the record provides no persuasive evidence that vacating the judgment caused substantial hardship to CRG.

Further, CR 60(b) permits a court to award fees to a defaulted party when vacating a default judgment:

. . . our analysis of CR 60(b) and the applicable case law lead us to believe that a trial court may award terms to either a moving or opposing party when considering a motion to set aside a default judgment. The rule is equitable in nature and gives the trial court liberal discretion to “ ‘preserve substantial rights and do justice between the parties.’ ”

Hous. Auth., 105 Wn. App. at 192, quoting *Pamelin Indus., Inc. v. Sheen-U.S.A., Inc.*, 95 Wn.2d 398, 404, 622 P.2d 1270 (1981), quoting *Haller v. Wallis*, 89 Wn.2d 539, 543, 573 P.2d 1302 (1978).

In the instant case, though the court’s order suggests it acted pursuant to CR 11, the court’s imposition of terms against CRG is justifiable under either CR 11 or CR 60(b). CRG’s counsel obtained an order of default and a default judgment against a party represented by counsel, knowing that actual notice of the default proceeding had not been delivered to counsel, yet failing to so notify the court. The trial court apparently determined that such failure to disclose amounted to a violation of RPC 3.3. After becoming aware of the entry of the judgment, the Baileys offered CRG an opportunity to voluntarily vacate the judgment, but CRG refused to do so. Moreover, in responding to the motion to vacate and in its brief to this court, CRG advances the novel legal theory that the Baileys received “constructive notice” of the proceeding because

McCormick acted with “willful neglect” in not going to the post office to pick up the certified mailing. CRG offers this theory without citation to authority of any sort.

These facts support an award of attorney’s fees to the Baileys. They should not have had to go through all the litigation that has transpired as a result of CRG’s obtaining, then refusing to vacate, the default judgment. Accordingly, the trial court did not abuse its discretion in assessing terms.

CRG also argues that if terms were properly assessed, the amount assessed was excessive. App. Br., 25-28. The court assessed terms in the amount of \$4,125. Given McCormick’s hourly rate of \$275, which must be deemed reasonable given his years of experience, the award represents compensation for just 15 hours of attorney time.⁷ A simple perusal of the record suggests that 15 hours of compensable time was surely expended and that the award is reasonable. The court awarded fees for

. . . counsel’s investigation of the facts pertaining to the entry of the order of default, judgment and issuance of the Writ of Garnishment, efforts to obtain a voluntary vacation of the foregoing, legal research and preparation of the pleadings and related papers to obtain the order vacating the Order of Default, and Judgment, and order quashing the Writ of Garnishment.

⁷ McCormick’s bar number is 3802.

(CP 142-143) Additionally, the court likely factored in time devoted to oral argument on the motion to vacate. Given the apparent effort McCormick expended and the result obtained, the record indicates that the trial court did not abuse its discretion with regard to the amount of the terms assessed.

D. Request for Attorney's Fees

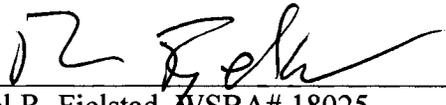
Pursuant to RAP 18.1, the Baileys request an award of attorney's fees for the time devoted to responding to CRG's appeal. An award of fees is appropriate pursuant to CR 11 or CR 60(b), or both.

V. CONCLUSION

For the reasons set forth above, the Baileys submit that the trial court's order be affirmed in its entirety and that they be awarded attorney's fees relating to work performed on the instant appeal.

Respectfully submitted this 5th day of March, 2012.

SCOTT, KINNEY, FJELSTAD & MACK



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ORIGINAL

I certify under penalty of perjury that I sent, this day, a true and correct copy of the BRIEF OF RESPONDENT via facsimile and postage paid, first class mail to:

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DATED this 5th day of March, 2012.



Laura M. Kondo