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Law Office of Evan L. Loeffler PLLC

Court Of Appeals, Division 1 Of The State Of Washington

One Der Works LLC II, Respondent,

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COURT OF APPEALS
DIVISION ONE

MAR 20 2013

v.

James K Duncan, Appellant,

Appeal From The Superior Court For King County

Cause No. 12-214807-4 SEA

Answer to Reply Brief Of Respondant

Dated, March 20, 2013

James K Duncan, Pro Se.

James K Duncan - Appellant

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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 MAR 20 PM 4: 13

The appellant [judgment defendant], James Duncan, is hereinafter referred to as "the tenant"

The respondant [judgment plaintiff], One Der Works II LLC, is hereinafter referred to as "the Landlord" and / or Landlord's counsel.

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II. Statement of Issues in reply to brief: [answered in the noted pages]

A. Whether any aspect of the June 5, 2012 judgment is properly before this court on appeal [p4, 5, 6]

B. Whether the June 05, 2012 Findings of fact and conclusions of law are verities on appeal. [p 7]

C. Whether CR 2A bars challenge to the judgment [p 7, 8, 9, 10, 11]

D. Whether the trial court properly denied the Appellant's motion at the hearing on June 12, 2012. [p 10]

E. Whether the Court should award attorney's fees on appeal. [p 11, 12]

III. Statements and arguments in Answer to issues raised in the landlord's Reply to Brief :

A. The June 05, 2012 judgment and findings of Fact are properly before the court of appeals according to CR 60.C.1,4,9,11 (1,2,3,c) and CR 59.A.1-9

1] Due to the Ex Parte Court's supression of the tenant's arguments and evidence on June 12, 2012; the same issues that might have been argued in Superior Court should be heard by the Court of Appeals, Or the case should be remanded to King County Superior Court and be heard with proper decorum. [CP 44, 45 and CP 46; audio log w325-3 transcript]

2] The June 05, 2012 Findings of fact and conclusions of law are evidence and constitute the basis of the appeal; Due to the Ex Parte Court's supression of the tenant's arguments and evidence on June 12, 2012; the same issues that might have been argued in Superior Court should be heard by the Court of Appeals.

[CP 44, 45 and CP 46; audio log w325-3 transcript], [CP 37-43; ex A,B]

The previous court records and especially the June 05, 2012 Findings of fact and conclusions of law are essential to the case, and contain the issues which are appealed. Herein is the cause of the motion to stay and dismiss the June 05, 2012 judgment and writ. [CP 37-43; ex A,B]

June 05, 2012 judgment was sought and heard without notice to the tenant and after the tenant was assured verbally by landlord's counsel that a judgment would not be sought; Then, subsequently, the judgment was actively concealed from the tenant by the landlord's counsel during subsequent phone contacts. The Landlord's counsel had given verbal permission to the tenant to recover items not mentioned in the contract, however, when the tenant visited the property [not the buildings] on June 04, the gate was locked and posted with do not enter signs.

<u>The Landlord had, by that act, concluded the contract and taken possession of the entire premises</u>, leaving the disputed items not mentioned in the contract remaining upon the lot.

The tenant no longer had access to the property, no keys to the buildings or gates and had no possessions covered by the contract upon the lot or within any buildings, as of June 01, 2012.

When the Landlord subsequently violated the contract on June 05, 2012 by obtaining a judgment and writ, stating that the contract had not been fulfilled, the lockout became an illegal act since it was done prior to obtaining a writ, and appears to be a fraudulent manuever designed to deprive the tenant of the property not mentioned in the contract by circumventing due process.

The tenant receieved telephone notice from the sheriff on June 11, 2012 that a writ had been issued and posted. The sheriff said that the locks had been removed from the gate upon his request, and verbally guaranteed that the premises would remain unlocked. so the tenant forthwith made a service of notice to store; at the property and to the landlord's counsel to preserve and store any property not covered by the settlement contract. [CP 37-43; ex A,B] The "do not enter" signs remained and served as an effective bar to any further visits by the tenant. There was nothing at the premises that was covered by the contract. The sheriff did not actually evict anyone, nor place any personal property outside the premises, since the property was empty, and no tenant was there since May 20, 2012

The tenant then, with all haste appeared the next day, June 12, 2012

in the Ex Parte court to contest the judgment and other issues such as illegal lockout and invalid contract. [CP 44,45,46]

B] The substance of the motion on June 12, 2102 [CP 44,45,46] was never heard by the court. The tenant was improperly denied the opportunity to complete his argument, present evidence and testimony, thus, the trial court did not hear most of the issues, testimony, and evidence pertaining to the motion. The Court of Appeals was then the only alternative for the tenant to present the case as intended.

C] CR 2A does not bar a challenge to the judgment entered on June 05, 2012; [CP 37-43; ex A,B] but allows such a challenge in the instant case. The technical delay in appealing that judgment was reasonable due to the fact that the tenant was not served notice of that hearing and was not a party to the proceedings, and being taken by surprise and deciet, was forced to contest all of the issues now under appeal; to the ex-parte court on June 12, 2012 [CP 44,45,46] in order to comply with the 10 day limit for a rehearing and when denied that hearing; subsquently appealed that hearing timely. CR 60.C.1,4,9,11 (1,2,3,c)

In LUCKETT v. BOEING CO.:

"What constitutes a reasonable time depends on the facts and circumstances of each case. *See In re Marriage of Thurston,* 92 Wn.App.

494, 500, 963 P.2d 947 (1998), in relevant part::

"Thurston first argues that Mandel failed to bring the motion within a "reasonable time" as required by CR 60(b). We cannot agree.Courts have observed that what constitutes a reasonable time depends on the facts of the case.[14] The mere passage of time between the entry of the judgment and the motion to set it aside is not controlling. Rather, a triggering event for the motion may arise well after entry of the judgment that the moving party seeks to vacate.[15] Major considerations that may be relevant in determining timeliness are whether the nonmoving party is prejudiced by the delay and whether the moving party has a good reason for failing to take action sooner.[16]
"Mandel did not learn of Thurston's new statement of position regarding the transfer of the units until shortly before she brought her CR 60(b)(11) motion.
Here, the trial court noted both in its oral and written decisions[19] that it was exercising its equitable power under the rule to grant the motion. There was no prejudice to Thurston by virtue of the delay between his new statement of position and the motion.

"CR 60(b) provides, in relevant 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;
4,Fraud (whether heretofore denominated intrinsic or extrinsic),misrepresentation, or other misconduct of an adverse party;
9]Unavoidable casualty or misfortune preventing the party fromprosecuting or defending;
(11) Any other reason justifying relief from the operation of the judgment.
On June 12, 2012 [CP 44,45,46]

The Tenant reasonably expected HJP Attorney to defend the contract they had promoted authored and signed in consultation with the landlord's counsel, however, the HJP Attorney refused to assist the tenant in any manner. This was an act of professional misconduct, and a complete

surprise to the tenant, then forced to appear without counsel.

Cite: White V. Holm, 73 Wn.2d 348, 438 P.2d 581 (1968) In relevant part:

…."concerning the accident and the plaintiff's claim, executed the "nonwaiver" agreement with the advice of the attorney he had consulted, and justifiably entertained a bona fide belief that the insurer would provide counsel to defend the action at least until such time as the extent of coverage was determined. The fact that Mr. Holm did not persistently pursue the adjuster with inquiries relative to the progress of the matter, if such failure be a significant factor in other circumstances, is mitigated somewhat in the instant case by the alacrity with which the default was claimed and the judgment entered, as well as by the promptness with which the motion to set aside the default was submitted. Under these circumstances we would be most reluctant to hold that Mr. Holm tendered the defense of the action to the insurer at his peril. .."
It is, therefore, our view that defendants have established that the failure to timely respond to plaintiff's claim for relief was not due to inexcusable neglect upon their part but, rather, was due to bona fide mistake, inadvertence, and surprise within the contemplation of RCW 4.32.240. This approach and conclusion is well within the spirit of several prior decisions of this court under somewhat analogous circumstances.
In Reitmeir v. Siegmund, 13 Wn. 624, 43 Pac. 878 (1896), a defendant entrusted a summons to his attorney who, through mistake, failed to timely file an answer. A default judgment was entered which the trial court set aside at the instance of the defendant. In sustaining the action of the trial court, we stated it would have been a great abuse of discretion for that court to have done otherwise."
"Suburban Janitorial Servs The critical period in the determination of whether a motion to vacate is brought within a reasonable time is the period between when the moving party became aware of the judgment and the filing of the motion. *See. v. Clarke American,* 72 Wn.App. 302, 308, 863 P.2d 1377 (1993). Major considerations in determining a motion's timeliness are: (1) prejudice to the nonmoving party due to the delay; and (2) whether the moving party has good reasons for failing to take appropriate action sooner. *See Thurston,* 92 Wash.App. at 500, 963 P.2d 947. *See also Kagan,* 795 F.2d at 610 (in determining what constitutes a reasonable time the court should consider the facts of each case, the interest in finality, the reason for the delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties).

The 30 day limit for Appeal should be clocked from the last Court action in the case, June 12, 2012; wherein the tenant's arguments and evidence were improperly denied a fair hearing. [CP 44,45,46] Since the tenant had long since vacated the Buildings and kept the agreement, the tenant was unaware of the writ, or the sheriff's posting until mid day June 11, 2012. Then; the tenant forthwith appeared in court June 12, 2012 at 9:30 am to contest the writ and judgment, personally served a copy of the motion upon the Landlord's counsel at the Court, and filed a copy with the court by delivering a copy to the Court Clerk at the Ex Parte Court. [CP 44, 45 and CP 46] "The tenant had learned of the writ of restitution by means of a telephone call on June 11, 2012 from the sheriff.

The portions of CR 60 material to this appeal are as follows:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. 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:

D] The denial of the motion was improper due to the refusal of the trial court Judge to allow more time to hear the tenant, or to set a hearing date.

The Judge improperly ignored evidence of illegal lock out and / or evidence of contract fraud on the part of the landlord and landlord's counsel. A reasonable and just trier of fact, when faced with an encroached lunch break, would have set the matter for a time when the case could be heard with decorum. [CP 44, 45 and CP 46; audio log w325-3 transcript]

E]. Request For Attorney Fees Should Be Denied.

Assuming arguendo that the tenant is not successful on appeal, the landlord should not be awarded her attorney fees under RAP 18.9(a) regarding a frivolous appeal. As pointed out in the landlord's response brief

(1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal. Streater v. White, 26 Wn. App. 430,435,613 P.2d 187 (1980). The tenant's legal and factual arguments are supported by the undisputed factual record. Moreover, where the appeal concerns vacation of a default judgment, which is

equitable in nature and decided on a case by case basis, the appeal can hardly be said to be devoid of any merit. Specifically, the fact remains that this was a significant default judgment procured without notice and deliberately in spite of the tenant's diligent efforts to be available to communications from the courts and the landlord's counsel.

This is not a frivolous appeal.

IV Arguments:

On page 3 of the landlord's reply the statement concerning the terms of the contract is in error. The contract did not define the word "premises" in terms of a RCW 59 tenancy. *The contract failed to include the fixtures and emblements attached to the ground at the premises; These items being the only possessions left at the premises as of May 31, 2012; subjected to lockout, and subsequent failure to store.

[CP 37-43; ex A, B]

Also on page 3 of the landlord's reply is the contention that the tenant remained in possession of the premises after June 01, 2012. This is impossible due to the fact that the tenant no longer had the keys to the buildings, and the landlord had locked the gates to the entire lot, also posting it with do not enter signs [ex 1,2; answer to reply brief]

The sheriff, on June 11 2012; informed the tenant that he had caused the

premises to be unlocked so the tenant could view the posted notice of of eviction.

On page 6 of the landlord's reply the contention that issues covered by the contract are being raised for the first time on appeal is invalid.

The contract was voided by the failure to perform by the landlord, and the contract itself was void or voidable for reasons stated in the appelant's brief [Brief of appellant p 18 thru 23, 26, 34]

On page 8 of the landlord's reply, the statement concerning "lack of Knowledge" is invalid and contradicts the previous pgph on pg 7 where the hearing was characterized as a non evidentiary hearing, and therefore no party was put under oath. The photograph of the lockout was not preserved in the record of the hearing by the court, nor was the conversation between the Judge and the landlord's counsel; then, how are any alleged statements made by the tenant to be regarded as evidence?

On p 10 of the landlord's reply the contention is made again that valid evidence was created at the "non evidentiary " hearing on June 12, 2012 ; However certain other evidence beneficial to the tenant is denied to exist by the landlord's argument, some of which was apparently edited out of the court record. [And, IV arguments; * p12 tenant's answer to reply] [p 7,8, 9, 10, 14 land lord's reply] [CP 44, 45 and CP 46; audio log w325-3 transcript]

V. Conclusion:

The June 05, 2012 Judgment and writ should be Vacated; Or the case should be remanded to King County Superior Court for a trial. [CP 37-43]

That the issues arising from the contract, the June 05, 2012 hearing for judgment and findings of facts; issues of possession, emblements, fixtures, lockout, constructive eviction, loss of use of the rented premises, injuries, other losses and expenses are the subjects under appeal.

If the appeal is limited to the hearing on June 12, 2012, then a new trial should be ordered so that the issues described in the current appeal may be heard at court. [CP 44,45,46]

It was well within the power and authority of the trial court to resolve these issues by granting a trial. Since the trial court refused to allow any completed argument or testimony, the case that would have been made in trial court is now presented to the Court of Appeals.

Dated, January 02, 2013 Respectfully submitted,

James Duncan, pro-se Signature: _____

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