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No. 70018-9-I

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

OWL TRANSFER BUILDING LP,
a Washington limited partnership,

Respondent,

v.

HUA YUEN INTERNATIONAL TRADING GROUP, INC.
a Washington corporation, and
WAH LOUIE and his marital community

Appellant.

RESPONDENT'S AMENDED OPENING BRIEF

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I. STANDARD OF REVIEW

A. Conclusions of law are reviewed de novo. *Sunnyside Valley Irrigation District v. Dickie*, 149 Wn. 2d 873, 880, 73 P.3d 369, 372 (2003).

B. A trial court may be affirmed on any basis supported by the record and the law. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989), cert. denied, 493 U.S. 814 (1989).

II. STATEMENT OF THE CASE

A. Breach of Commercial Lease.

This appeal arises out of a breach of five-year lease for a warehouse. On November 1, 2004, Respondent Owl Transfer Building LP (“Owl Transfer” or “Respondent”) as landlord, entered into a lease for commercial premises with Hua Yuen International Trading Group, Inc. as tenant (“Hua Yuen”)(the “Lease”). CP 14. Mr. Kwong Louie was president of Hua Yuen. His wife, Wah Louie (“Mrs. Louie” or “Appellant”), is the personal guarantor under the Lease. CP 14.¹

It is uncontested that Hua Yuen failed to pay rent due under the Lease for the period November 2006 to May 2007. Hua Yuen vacated the

¹Appellant’s accounting about the Hua Yuen corporation, its registered agent and names (Appellant’s Brief at 7-9) is superfluous and bears no relevance on this appeal.

premises in March 2007, prior to the end of the Lease term.² As well, Hua Yuen damaged the roof on the premises; under the Lease, Hua Yuen was obligated to reimburse Owl Transfer for roof repair costs. Hua Yuen's breaches of the Lease gave rise to Owl Transfer's claims for contractual damages.

B. Commencement of Action.

Complaint. Owl Transfer filed its Summons and Complaint for Breach of Contract on June 11, 2007. CP 1. Owl Transfer made extensive efforts to personally serve both defendants but was unable to personally serve them. On August 28, 2007, Owl Transfer filed a Motion for Order Allowing Service by Publication under CR 4 and RCW 4.28.100. CP 6. The particulars of the service attempts were fully detailed in the motion. *Id.* The court granted the motion and entered the Order Granting Plaintiff Service by Publication on September 7, 2007 (the "Order for Publication"). CP 7. Notice of the Summons by Publication was published six times in The Daily Journal of Commerce from September 21, 2007 to October 26, 2007. CP 8. The Order for Publication has never been appealed, or even contested.

Neither defendant filed an answer.

²Appellant does not contest that Hua Yuen vacated the premises as alleged, that Owl Transfer duly mitigated its damages by finding a new tenant or that the term for damages for unpaid rent was not appropriate.

Entry of Order of Default and Default Judgment. On December 18, 2007, Owl Transfer moved for an order of default and default judgment against Appellant. CP 13, 14, 15. On January 14, 2008, the court entered the Order of Default and Default Judgment in the principal amount of \$79,088.12, bearing interest at 12%, against both Hua Yuen and Mrs. Louie, jointly and severally. CP 12.

Garnishment Proceedings. On August 29, 2012, Owl Transfer obtained a post-judgment writ of garnishment against Mrs. Louie. CP 20, 21. It garnished funds from two accounts totaling \$76,078.94 (the “Funds”). Mrs. Louie never objected to the garnishment proceeding. The Funds were deposited in a trust account held by Keller Rohrback LLP. Nothing happened for over two months.

Appellant’s Motion to Vacate. Over four years and ten months after the entry of the Default Judgment, on November 1, 2012, Mrs. Louie filed a Motion to Vacate the Judgment. CP 35. Owl Transfer vigorously objected to the motion on four grounds: first, that Mrs. Louie did not seek to vacate the Order for Publication; second, the time period for relief under RCW 4.28.200 expired on January 15, 2009, one year after entry of the Default Judgment so, the motion to vacate is untimely; third, Defendants did not contest the factual allegations underlying the Complaint, and fourth, Mrs. Louie did not follow the statutory procedure

under RCW 6.27.220 to controvert or quash the writ of garnishment, which must be taken within 20 days from the garnishment. CP 38.

Without entering findings or resolving any of the issues raised by the Owl Transfer's objection, the court, without oral argument, granted Mrs. Louie's motion to vacate on November 14, 2012.³ CP 43.

Approximately one month later, on December 14, 2012, the Superior Court, sua sponte, directed the parties to brief the issue of timeliness under RCW 4.28.200. Mrs. Louie and Owl Transfer duly complied. CP 68 and 69. On February 6, 2013, the Superior Court vacated its earlier order, vacating the judgment. CP 76.

Mrs. Louie appealed.

III. ARGUMENT

A. The Superior Court Properly Ruled that the Appellant's Motion to Vacate was time-barred under RCW 4.28.200.

The procedural analysis requires construction of three authorities: CR 55, CR 60(b)(7), and RCW 4.28.200. The proper starting point is CR 55(c)(1), which applies to default judgments generally. CR 55(c)(1), which is permissive, provides:

Generally. For good cause shown and upon such terms as the court

³ That order was silent as to what should happen to the Funds garnished under the writ. The Funds remained in trust with Keller Rohrback until released by subsequent court order.

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)*. (emphasis added)

The next step in the analysis is CR 60(b) which is invoked by the last clause of CR 55(c)(1). CR 60(b)(7) is expressly limited to those actions in which the defendant was served by publication. It states: “If the defendant was served by publication, relief may be granted as prescribed in RCW 4.28.200.”

CR 60(b)(7) does not permit an *alternative* procedure. RCW 4.28.200 is triggered and must be followed. Under that statute, Mrs. Louie had a one-year limitation period to vacate a the default judgment:

If the summons is not served personally on the defendant in the cases provided in RCW 4.28.110 and 4.28.180, he or she or his or her representatives, on application and sufficient cause shown, at any time before judgment, shall be allowed to defend the action and, except in an action for divorce, the defendant or his or her representative may in like manner be allowed to defend after judgment, and within one year after the rendition of such judgment, on such terms as may be just; and if the defense is successful, and the judgment, or any part thereof, has been collected or otherwise enforced, such restitution may thereupon be compelled as the court directs.

Mrs. Louie’s argument (at pp. 20-21 of her brief) that “may” in CR 60(b)(7) is permissive is unavailing. That interpretation is not correct in this context and is lacking in any authority. The word “may” allows the court discretion whether to grant relief, but cannot be interpreted to mean

either that the discretion is held by the *defendant*, or that the one year period is discretionary. RCW 4.28.200 is not discretionary.

“A CR 60(b) motion must be brought within one year after the default order or judgment is entered. This one year time limit is strictly enforced and the trial court may not extend the deadline. See CR 6(b).” *Trinity Universal Ins. Co. of Kansas v. Ohio Casualty Ins. Co.*, 298 P. 3d 99, 104 (Wash. App. Div. 1 2013).

The court also addressed the issue recently in *Friebe v. Supancheck*, 992 P.2d 1014, 98 Wn.App. 260 (Wash.App. Div. 1 1999), as amended (Sept. 27, 1999). There, the court held that the defendant’s motion to vacate a default judgment under CR 60(b)(11) was untimely; that motion was based on upon a claim of excusable neglect); *see also Caouette v. Martinez*, 71 Wn.App. 69, 856 P.2d 725 (1993), and *Bruhn v. Pasco Land Co.*, 67 Wash 490, 495 121 Pac. 981 (1912)(applying the Rem & Bal. Code, §§464 and 235).

The applicable time period for relief under RCW 4.28.200 is one year. That period expired, at the latest, on January 15, 2009. Mrs. Louie’s motion was not filed until November 1, 2012. Her motion to vacate was untimely, so the Superior Court’s order vacating the order vacating the default judgment was proper.

B. Timing of Owl Transfer’s Garnishment Proceedings does not Extend the Limitation Period in RCW 4.28.200

Mrs. Louie attempts to raise a new argument that Owl Transfer’s “delay” affords her some equitable consideration.

First, this issue was not raised below, and should not be considered on appeal. An appellate court “may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5(a); *Roberson v. Perez*, 156 Wash.2d 33, 39, 123 P.3d 844 (2005).

Second, Owl Transfer was under no duty to execute on its judgment in any particular time frame. RCW 6.27.020, which governs garnishment proceedings, prescribes no time frame. This issue was specifically addressed by this court approximately three months ago in *Trinity Universal*, which Mrs. Louie did not cite. “Washington courts do not consider it deceptive or unfair for a plaintiff to wait a year to collect on a default judgment” *Id.* at 104, citing *Friebe v. Supancheck*, 98 Wash.App. 260, 264, 267, 992 P.2d 1014 (1999) (refusing to characterize the Friebes’ ‘legal sleight-of-hand’ in waiting a year and two days to collect on a default judgment “as unfair or deceptive”); *Allison v. Boondock's, Sundecker's & Greenthumb's, Inc.*, 36 Wash.App. 280, 285-86, 673 P.2d 634 (1983). Mrs. Louie implies some sort of wrongdoing associated with the delay; there is no such finding. And, unlike the *Trinity*

Universal case, there is not even a finding here that Owl Transfer's delay was deliberate.

C. The Issue of Whether the Order for Publication is Proper is Not before this Court

Appellant attempts to challenge the propriety of Order for Publication (Appellant's Brief at 7) and identifies it as one of the errors below. (*Id.* at 2). Mrs. Louie concedes she learned of the garnishment from her bank on September 17, 2012 (*id.* at 4), and though she does not state when she learned of the Order for Publication, she has never sought leave to appeal that order on any ground. Accordingly, that order is final, the time for appeal has expired, and is not before this court for review.⁴

IV. REQUEST FOR ATTORNEYS FEES AND COSTS

Pursuant to RAP 18.1(b), Owl Transfer hereby requests an award of attorneys' fees and costs for this appeal assuming it prevails.

V. CONCLUSION

For the reasons stated above, the Superior Court's Order Vacating the Order Vacating Default Judgment should be affirmed.

RESPECTFULLY SUBMITTED this 1st day of July 2013.

⁴ Nor has Mrs. Louie ever argued that Owl Transfer failed to adhere to the terms of the Order by Publication.

KELLER ROHRBACK L.L.P.

By 
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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2013, I filed the foregoing document with the Clerk of the Court for the Court of Appeals Division I of the State of Washington. On July 1, 2013, I caused a true and correct copy of the foregoing Respondent's Amended Opening Brief to be mailed as follows:

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DATED this 1st day of July, 2013.


Darla Marshall
Legal Assistant