

No. 40142-8-II

COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION II

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STATE OF WASHINGTON
BY

STEVE and DOROTHY FRIETAS, a married couple,

Appellants,

vs.

FARMERS INSURANCE COMPANY, and THE CURE WATER
DAMAGE, INC., d/b/a THE CURE WATER DAMAGE, d/b/a THE
CURE,

Respondents.

On Appeal from the Superior Court

For Mason County

The Honorable Toni A. Sheldon, Judge.

APPELLANT'S BRIEF

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Assignment of Error

The following assignments of error are made:

1. The trial court erred in granting the respondent's motion for order vacating default judgment and for order to cease and desist from attempting to collect on judgment on November 23, 2009.

Issues Pertaining to Assignment of Error

1. Was THE CURE WATER DAMAGE, INC., d/b/a THE CURE WATER DAMAGE, d/b/a THE CURE (hereinafter, "The Cure") properly served?
2. Did The Cure water damage fail to appear or defend following proper service of process?
3. Does an e-mail without verification of receipt constitute a valid notice of appearance for purposes of "appearing" in civil litigation?
4. Is an order of default and default judgment appropriate under these circumstances?

STATEMENT OF THE CASE

This is a legal action brought by plaintiffs, Mr. Steven Freitas and Mrs. Dorothy Freitas against a disaster restoration contractor whose negligent workmanship and breach of contract resulted in permanent damage to the plaintiff's home as a result of toxic mold. CP 217-222.

On approximately September 25, 2002, Dorothy Freitas discovered a water leak in our home. CP 193. They were put in contact with Defendant, a company named The Cure Water Damage (hereinafter "The Cure"), who was hired for the purpose of water infiltration abatement. CP 103-194. The Cure apparently completed their work. CP 194.

Mr. and Mrs. Freitas retained The Cure Water Damage by accessing the website of Cure Disaster Services, Inc., and/or The Cure Water Damage, who share is an address with 1-800-WATERDAMAGE and is the same entity. CP 45. Mrs. Freitas contacted the "1-800" number provided on the website and was put in touch with the Seattle office of The Cure Water Damage and 1-800-WATERDAMAGE. CP 45. The representative of The Cure Water Damage told Ms. Freitas that they had a "representative" in Shelton who would be at her home in 30 minutes. CP 45. At all times during the transaction the "representative" held himself out as a representative of The Cure Water Damage. CP 45.

Unknown to the plaintiffs, however, The Cure negligently punctured a sewer line. CP 194. That puncture caused moisture to accumulate in the walls of plaintiff's home. CP 194. As a result of that moisture, toxic mold began to grow and infiltrate plaintiff's house. CP 194.

While preparing to do remodeling work in August, 2008, Mr. Freitas discovered the black mold behind the walls. CP 194.

The Summons and Complaint in this matter was filed with the Mason County Superior Court on September 24, 2008, by the plaintiff's former counsel, Jany Jacob. CP 217.

Defendants "The Cure Water Damage, Inc., DBA, The Cure Water Damage, DBA The Cure" were served on December 23, 2008, at approximately 11:10 a.m. with the summons and complaint from this action. CP 145. One copy of the Summons and Complaint were served on Joe Demarco, who identified himself as the president of the defendant, at 1167 Mercer Street, Seattle, Washington. CP 145.

Service was accomplished at the request of plaintiff's former attorney, Ms. Jany Jacob. CP 134. On or about February 9, 2009, the undersigned appeared in this action and Ms. Jacob withdrew. CP 134. At that time, the undersigned discussed this matter with Ms. Jacob, and

Ms. Jacob indicated that she had received no response from defendants. CP 134.

The undersigned filed a motion and declaration in support of order of default, which the Court approved and entered on April 14, 2009. CP 208; CP 211.

Subsequently, there still being no attempt on the part of the defendants to appear or defend in this matter, the undersigned filed a motion for default judgment, which was supported by various declarations and other evidence. CP 208-210. The court entered a default judgment on or about June 1, 2007. CP 190-192.

On or about July 9, 2009, the undersigned transmitted to James River Insurance Co., which was the insurance company for defendant, a demand for payment on the judgment. CP 134; CP 147. On July 28, 2009, the undersigned received the letter acknowledging receipt of demand from James River Insurance Group. CP 149-150.

On or about July 30, 2009, Mr. Steven Gibbons wrote a letter to plaintiff's counsel claiming that the plaintiffs and commenced a lawsuit against the incorrect entity. CP 152. Mr. and Mrs. Freitas were not told this until this letter was received. CP 135. Mr. Gibbons also asserted that Ms. Jacob, was "timely notified in writing that service of process had been misdirected to someone with no connection to plaintiffs or to

the work that allegedly gave rise to the causes of action asserted in the above-referenced action." CP 152.

When asked to produce the "writing" in which Ms. Jacobs was allegedly notified, defense counsel produced what purports to be an e-mail from Joe DeMarco, president of 1-800 Water Damage, dated December 23, 2008. CP 155-156.

Subsequent to the receipt of Mr. Gibbons's letter, the undersigned attempted to contact Ms. Jacob determine if she recalled the e-mail, but was unsuccessful. CP 135.

Dorothy Freitas, in fact, received an e-mail from Ms. Jacob on January 23, 2009, from her former counsel, Ms. Jacob, which confirmed their still had been no formal submission from defendant "The Cure". CP 47; CP 51.

The defendants' motion to set aside was not served upon Plaintiffs' counsel until October 26, 2009, 88 days following Mr. Gibbons' appearance in this matter, and 147 days following the entry of the Default Judgment by this Court. CP 190; CP 178.

On November 23, 2009, an order was entered by the court setting aside the order of default and default judgment. CP 9-10.

ARGUMENT

A. Standard of Review.

This Court's standard of review is whether the trial court abused its discretion in granting the motion to set aside the order of default and default judgment. *In re Estate of Stevens*, 94 Wn.App. 20, 29, 971 P.2d 58 (1999). This Court reviews a trial court's ruling on a motion to vacate default judgment for abuse of discretion. *Showalter v. Wild Oats*, 124 Wn. App. 506, 510, 101 P.3d 867 (2004). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Showalter*, 124 Wn. App. at 510.

B. The Trial Court Erred in Granting the Respondent's Motion to Vacate the Order of Default and Default Judgment.

i. The Defendants Were Not Entitled to Notice of the Default Because Its E-Mail Fails to Constitute a Notice of Appearance or an Informal Notice of Appearance.

The respondent will argue that defendants were entitled to notice of the default order under CR 55(a)(3) that would justify the trial court setting aside the default order and default judgment. The Defendants contend that because they believe they "informally appeared" before the court regarding the Freitas lawsuit, they were entitled to notice of the default order under CR 55(a)(3).

Under CR 55(a)(3)5, if a party has 'appeared' before a motion for default has been filed, that party is entitled to notice of the motion before the trial court may enter a valid default order. *Smith ex rel. Smith v. Arnold*, 127 Wn. App. 98, 110 P.3d 257, 260 (2005). Consequently, if a defendant 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.” *Profl Marine Co. v. Those Certain Underwriters at Lloyd's*, 118 Wn. App. 694, 708, 77 P.3d 658 (2003) (citing *Shreve v. Chamberlin*, 66 Wn. App. 728, 832 P.2d 1355 (1992)).

Informal acts may constitute an appearance under CR 55(a)(3). *Lloyd's*, 118 Wn. App. at 708; see also *Arnold*, 110 P.3d at 260. But in *Arnold*, the Court articulated the standard of review for an informal appearance dispute and addressed how a party's actions can constitute an informal appearance under CR 55(a)(3). *Id.* at 260-61.

In *Arnold*, the Court held that informal appearance is a factual question determined by the parties' submitted evidence and is not reviewed for a trial court's abuse of discretion. *Id.* at 260. The Court also follows to the long-standing principle that a trial court's factual finding that a party has appeared informally must also be supported by evidence of actions manifesting an unquestionable intent to appear and defend the matter in court. *Arnold*, 110 P.3d at 260.

Generally the Court will narrowly construe informal appearance under CR 55(a)(3). *Arnold*, 110 P.3d at 261. The Court must make a determination based upon the evidence presented by the defaulting party whether the conduct constitutes a sufficiency of actions that constitute an informal appearance given the inherent factual and circumstantial nature of an informal appearance inquiry. *Arnold*, 110 P.3d at 263.

Whether a party has appeared, so as to require notice of a motion for an order of default is a question of fact that must be reviewed for substantial evidence. *Smith ex rel. Smith v. Arnold*, 127 Wn. App. 98, 106, 110 P.3d 257 (2005). Where a party fails to file a notice of appearance or in some way submit to the trial court's jurisdiction, any finding of an appearance must rest on substantial actions that could leave no reasonable doubt about whether the party intended to defend the matter. *Id.* In contrast, where the Court is asked to review a finding that an "informal" appearance has not occurred, there must be substantial evidence to support a finding that the plaintiff reasonably harbored illusions about whether the opposing party intended to defend the matter. *Id.*

It is a disservice to the legal system to distort the meaning of a concrete term such as "appearance" in order to provide a mechanism to save a party from a default judgment. *Id.* At 107. Efficient court management and reliability of judicial process is enhanced by court

records which disclose the critical procedural actions of the parties--such as the entry of an appearance. *Id.*

In the *Smith* case, the Court found that the defendant had failed to make an informal appearance, or an appearance of any kind for that matter, even though there had been significant communication between the plaintiff and the defendants prior to the commencement of the lawsuit. *Id.* at 112. The Court held, “there is substantial evidence to support a finding that Smith could have reasonably harbored illusions about whether the Arnolds and Allstate intended to defend the matter. Therefore, the Arnolds were not entitled to notice before entry of the default order, and the superior court properly refused to vacate that order.” *Id.*

In the present case, the respondent provided to the lower court no independent verification that the appellants received the e-mail that was allegedly sent my Mr. DeMarco. In fact, the e-mail itself does not exhibit an intent to defend or appear in the lawsuit. Furthermore, when someone is served with a complaint and a summons containing the appropriate statutory language, the appropriate legal response is to, in the very least, file a notice of appearance with the Court. No such notice of appearance was ever filed. Even assuming that the e-mail was sent and received in December, 2008, there was no follow-up action on the part of the

defendants or their counsel for many months. The default judgment was not obtained until June, 2009, six months following service of process.

ii. The Trial Court Erred and Abused Its Discretion Because The Defendants Failed to Make a Showing that They are Entitled to an Order Setting Aside Default.

Although Courts favor resolving cases on their merits, default judgments serve the important purpose of promoting “an organized, responsive, and responsible judicial system where litigants acknowledge the jurisdiction of the court to decide their cases and comply with court rules.” *Little v. King*, 160 Wn.2d 696, 703, 161 P.3d 345 (2007); *see also Showalter*, 124 Wn. App. at 510. When determining whether to grant a motion to vacate default judgment, the trial court examines four factors:

(1) That there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by the opposing party; (2) that the moving party’s failure to timely appear in the action, and answer the opponent’s claim, was occasioned by mistake, inadvertence, surprise or excusable neglect; (3) that the moving party acted with due diligence after notice of entry of the default judgment; and (4) that no substantial hardship will result to the opposing party.

White v. Holm, 73 Wn.2d 348, 352, 438 P.2d 581 (1968). The last two White factors are of secondary importance and cannot overcome the first two factors. *See Little*, 160 Wn.2d at 706.

(a). The Defense Failed to Illustrate a
Prima Facie Defense to the Claim Asserted.

In determining a motion to vacate, the trial court does not make factual determinations; rather, the court evaluates whether the movant, under CR 60(b), has established substantial evidence of a prima facie defense. *Pfaff v. State Farm Mut. Auto. Ins. Co.*, 103 Wn. App. 829, 834, 14 P.3d 837 (2000). Significantly, the court must review the evidence in the light most favorable to the moving party. *Pfaff*, 103 Wn. App. at 834.

In the present case, the respondents allege that their prima facie defense is that the wrong entity was sued. However, the respondents fail to produce substantial evidence supporting that defense.

The substantial evidence before the Trial Court, in fact, showed that The Cure was who the appellants contacted. The evidence also showed that The Cure was hiding behind various corporate shells. It is clear from the information provided by Ms. Frietas that "The Cure", Cure Disaster Services, Inc., and The Cure Water Damage are the names under which 1-800-WATERDAMAGE and Cure Disaster Services, Inc. are operating.

(b). The Trial Court Erred by Finding
Respondent's failure to timely appear was the result of mistake,
inadvertence, surprise or excusable neglect, and the Respondent Failed to
Show Due Diligence in Attempting to Remedy the Default.

There is no allegation of mistake, inadvertence, or surprise, so the only viable justification for the respondent's failure to timely appear would be excusable neglect. "Excusable neglect" is determined on a case by case basis. *Norton v. Brown*, 99 Wn. App. 118, 123, 992 P.2d 1019 (1999).

In the present case, the respondent admits that it was served with a summons and complaint. The summons clearly contained the statutory language regarding the process in which the respondents were required to engage in order to prevent a default and default judgment being entered against them. According to the respondents, they sent one e-mail and attempted to make a couple telephone calls, but never contacted anyone. They took no further action beyond that. They failed to do so much as file a notice of appearance or answer the complaint.

The *Smith* case is instructive for the court in determining whether the respondents satisfied this element. *Smith ex rel. Smith v. Arnold*, 127 Wn. App. 98, 106, 110 P.3d 257 (2005). In that case, the defendant failed to preserve the issue on appeal, but the Court found that even if they had, there was no evidence to support a conclusion there was excusable neglect. *Id.* at 113. The plaintiff's served the defendants more than two months before the default order was obtained. *Id.* Once the claims adjuster for the Defendant learned of the two-month-old lawsuit, the

defense waited another 17 days before filing a notice of appearance. *Id.* The court noted that the defense never proffered an excuse for this lapse of time. *Id.* (citing, *Prest v. Am. Bankers Life Assurance Co.*, 79 Wash.App. 93, 100, 900 P.2d 595 (1995) (finding inexcusable neglect where insurer's failure to respond in the two months between service and the default order was due to the summons and complaint being "mislaidd" and, thus, not forwarded to corporate counsel), *review denied*, 129 Wash.2d 1007, 917 P.2d 129 (1996)). The Court held that not one of these actions suggests that Allstate or the Arnolds' failure to appear was the result of excusable neglect. *Smith*, 127 Wn. App. at 113.

In the present case, the Order of Default was not entered for four months following service. The Default Judgment was not entered for six months following service. Once the defendant's insurer was put on notice of the judgment, Defendants waited 21 more days to get counsel involved. Then, Defendants waited an additional 87 days to file a motion to set aside the Default. This is not excusable neglect.

Furthermore, the conduct reveals that the defendants utterly failed to show any due diligence in attempting to set aside the default. A party must use diligence "in asking for relief following notice of the entry of the default." *Calhoun v. Merritt*, 46 Wn. App. 616, 619, 731 P.2d 1094 (1986). Thus, a party that has received notice of a default judgment and

does nothing for three months has failed to demonstrate due diligence. *In Re Stevens*, 94 Wn. App. 20, 35, 971 P.2d 58 (1999). Conversely, a party that moves to vacate a default judgment within one month of notice satisfies CR 60(b)'s diligence prong. *Johnson v. Cash Store*, 116 Wn. App. 833, 842, 68 P.3d 1099, review denied, 150 Wn.2d 1020 (2003).

(c). The Appellants will Sustain Substantial Hardship if the Default Judgment is Set Aside.

As a result of the black mold infestation, which is the basis upon which this lawsuit is based, the Appellants' home has been rendered uninhabitable. CP 194. The plaintiffs have been forced to incur many costs in order to live. CP 193-195. At the beginning, they resided in a hotel. *Id.* Subsequently, they purchased a fifth wheel trailer, which was their primary residence until they moved to Hawaii due to work. *Id.*

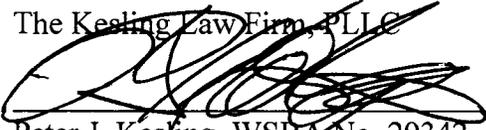
Despite being uninhabitable, the plaintiffs continued to make mortgage payments on their house. *Id.* These are being made despite the fact that they have not resided in the home since August, 2008. *Id.* The defendants recalcitrance is disgusting when considering that a family of four has been evicted from their home as a result of the defendant's conduct.

Conclusion

this court should reverse the ruling of the trial court and order that the order of default and default judgment should not have been set aside for the reasons described above. The respondents in this action failed to make any valid appearance in this lawsuit. The respondents in this matter failed to take any steps to adequately defend against a default and only acted several months after the default judgment was entered.

For these reasons, this court should reverse the trial court's order granting motion to vacate default judgment and order of default.

Respectfully submitted this 17th day of May, 2010.

The Kesling Law Firm, PLLC

Peter J. Kesling, WSBA No. 29342
Attorney for Appellant

Certificate of Service

Peter J. Kesling, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of brief of appellant to which this certificate is attached, by United States Mail, to the following:

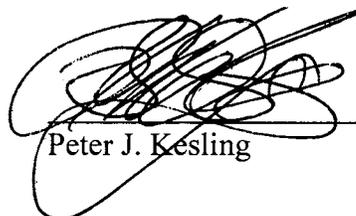
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