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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Div. III COA No. 313280

COURT OF APPEALS DIVISION III
OF THE STATE OF WASHINGTON

CRAIG FROST, REBECCA FROST and AIR CHARTER
PROFESSIONALS, INC., Respondent,

v.

MARK H. BROOKS, JANE DOE BROOKS and JOHN AND JANE DOE
1-10, Appellants

REPLY BRIEF OF APPELLANT

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I. RESTATEMENT OF THE CASE

In response to appellants brief, respondents set forth the procedural history of the case, make admissions supporting appellant's position, and have otherwise presented nothing to advance their position in this matter.

Respondents admit that during the tolling period between service and default, the attorney for respondent was actively communicating with an out of state attorney representing the appellant in this action. (Response brief p. 5), that the defendant expressed an intent to defend, (*Id.*) and, that, at the time of entry of judgment respondent's attorney, under penalty of perjury informed the court simply "The other party has failed to appear" (CP 13).

II. ARGUMENT

A. It was error for the court to allow the default to stand

1. The Court's refusal to vacate the order of default was improper as defendant's attorney had informally appeared and expressed an intent to defend.

Washington state courts do not recognize the doctrine of informal

appearance. However, *Morin* specifically states that “substantial compliance” does satisfy the appearance requirement. “We do not exalt form over substance, and appearance *may be accomplished informally*”. *Morin v. Burris*, 160 Wn. 2d 745, 760, 161 P. 3d 956 (2007), *emphasis added*.

In this matter, there was a dialogue that took place between the attorneys for the parties. (CP 115-116, 118-119, 121-22). During this discussion by correspondence, Brooks’ attorney twice asked for a “yes or no” answer to the question of whether Respondent ‘intend[s] to pursue this claim’ prior to the time respondent’s moved the court for default. (CP 121). Respondent’s reply to this request was equivocal. (CP 123-124).

The last comment by respondent’s attorney was that appellant Brooks “should consider how he is going to pay for the Bike and limit his exposure”. (CP 123). Which appears to be more an offer to negotiate than an intent to enter judgment.

Recently, the Division II Court of Appeals considered a similar issue in the case, *Meade v. Nelson*, 2013 Wash. App. LEXIS 998, COA No. 42685-4-II (Div. II, 2013).

In *Meade*, the plaintiff filed suit against her former attorney for

malpractice. Nelson, the defendant, hired Tompkins to defend the claim. During this time, the attorneys for both plaintiff and defendant had engaged in discussion over the nature and value of the claim. Plaintiff's attorney requested defendant's attorney accept service of process for his client. Defendant's attorney claimed by e-mail that he was not authorized to accept service on his client's behalf. Subsequently, plaintiff's filed suit and served defendant. The parties then engaged in settlement discussions, however, while the defendant's attorney corresponded multiple times with plaintiff's attorney, defendants never filed a notice of appearance. After the period to answer passed, plaintiffs entered judgment for an amount exceeding three million dollars.

The trial court in *Meade* held that the defendants had substantially complied with the appearance requirements and the order of default was vacated. Plaintiff's appealed. On appeal, the Court of Appeals, in a *de novo* review on the question of law, stated:

Here, the record clearly indicates that Tompkins failed to file a notice of appearance or explicitly notify KLF of his notice of appearance in writing as required by RCW 4.28.210 and CR 4(a)(3). But the record also clearly indicates that despite these procedural deficiencies, KLF had actual knowledge that Tompkins was defending Nelson and Nelson Law Firm, PLLC against the lawsuit: after filing suit, KLF continued to discuss settlement with Tompkins (an action rendered unintelligible if KLF believed

Tompkins did not represent Nelson) and in a settlement offer from October 28, Tompkins referenced the case and potential evidentiary issues Meade would face at trial.

In the aftermath of Morin, whether a plaintiff is "reasonably harbor[ing] illusions about whether the opposing party intends to defend" is not dispositive. 160 Wn.2d at 762 (Bridge J., concurring in part/dissenting in part). Instead, in light of the fact that "litigation is inherently formal," *a party must convey that it intends to defend the suit and perform some act, formal or informal, acknowledging the jurisdiction of the court after litigation has commenced.* Morin, 160 Wn.2d at 757. Tompkins's unanswered offer of settlement referencing the case and potential evidentiary issues satisfies this requirement. *Accordingly, we hold that Tompkins was entitled to notice of the default hearing.*

Meade, Id. At 16-17, *emphasis added.*

This matter proceeded in an almost identical fashion as *Meade*.

The respondent's were advised appellant was represented by counsel, there was discussion of an attempt to resolve the matter by respondent's attorney, and appellants evidenced a clear intent to defend and "seek damages" for attorney fees and costs incurred in defending the matter. (CP 114-115). There was continuing communication between the attorneys, there was an acknowledgment that a dispute existed in court, and there was an equivocal response by respondents' trial counsel appellants request for a response.

In this circumstance, the appellant "substantially complied" with

the appearance requirement and default should be vacated.

2. The appellant made a showing of excuseable neglect and due diligence.

Respondent's have argued extensively concerning the *White v. Holm* [73 Wn. 2d 348, 438 P. 2d 581 (1968)] factors. However, this matter involves an *order* of default, not a default *judgment*. Review is made per CR 55(c)(1)'s requirement of a showing of good cause. The showing necessary under this rule is "a showing of excusable neglect and due diligence". *Brooks v. Univ. City, Inc.*, 154 Wn. App. 474, 479, 225 P.3d 489 (Div. III, 2010).

The record clearly demonstrates due diligence. The appellant filed motions to dismiss/vacate within five (5) days of the entry of default. (CP 20-50).

The only issue then remaining is whether the appellant made a showing of excuseable neglect. "In *Canam*, the court explained that, '[i]n contrast with CR 60(e), which requires that a defendant seeking to vacate a default judgment show a meritorious defense to the action, a party seeking to set aside an order of default under CR 55© prior to the entry of the judgment need only show good cause'." *Estate of Stevens*, 94 Wn. App. 20, 30 (Div. II, 1999), *citing*, *Canam Hambro Sys., Inc. v. Horbach*, 33

Wn. App. 452, 453, 655 P.2d 1182 (Div. I, 1982).

In *Showalter v. Wild Oats*, 124 Wn. App. 506, 101 P.3d 867 (Div. II, 2004), the court of appeals considered a motion to vacate a default judgment. The defendant's presented evidence that a paralegal who was requested to forward a summons and complaint to a claims administrator misunderstood the directions and failed to do so. The court held that unrebutted evidence presented by defendants provided a reasonable basis to vacate the default.

Similarly, in this matter, Brooks relied on his attorney acting as his agent. Multiple requests were made to respondent's attorney, asking for a simple yes or no answer. Respondent's response was equivocal, and twenty one days later, respondent's entered a default.

It was a reasonable error for appellants attorney to wait before spending hundreds, but more likely, thousands of dollars to obtain local counsel prior to receiving a confirmed intent to proceed by the respondents. The only response that appellant did receive appeared to invite negotiation over the dispute.

The appellants have presented evidence of reasonable neglect and this court should reverse the trial court's ruling to the contrary.

3. The appellant presented substantial and compelling evidence of a *prima facie* defense.

While this matter involves an order of default, rather than a default judgment, the evidence presented to the court by the appellant at the time of the motion establishes a strong, one could say, a conclusive defense of true ownership.

Respondents argue that documents submitted by appellant at the trial court were inadmissible. Yet the court states in the respondent's drafted "Findings of fact and conclusions of law" (CP 191-194) that "no hearsay objections were raised". In response to the motions and exhibits, respondents submitted nothing. The basis for the inadmissibility is not explained in the record. Further, based on the unexplained inadmissibility, respondents argue that "taken in a whole" the documents did not amount to a *prima facie* defense.

The documents at issue include a title issued by the state of Louisiana in 2004 (CP 34, 81, 112), an Arizona Assignment of Title (CP 35, 82, 113), an Arizona tile (CP 96, 114), and, an affidavit of the purported seller to respondent (CP 132-138) with attachments (CP 139-144) identifying alterations to the alleged bill of sale by respondent, refuting his claim to ownership, and confirming appellant's true

ownership.

The ruling by the court failed to identify the basis for inadmissibility, and was objected to by appellant (CP 166-168). Further, the court never provided appellants the opportunity to submit an offer of proof pursuant to ER 103. The evidentiary ruling was an abuse of discretion.

B. The Court's Exercise of Personal Jurisdiction was Improper

1. The court erred by holding that there was a sufficient basis to find personal jurisdiction over the Arizona resident appellant.

Respondent's correctly note that it is "the plaintiff's burden of establishing jurisdiction" (Respondent's brief p. 31).

There are three factors that the court reviews in matters of specific personal jurisdiction. *Schute v. Carnival Cruise Lines*, 113 Wn. 2d 763, 767, 783 P. 2d 78 (1989). The first, argued by respondents, is purposeful availment. Respondent's claim Brook's phone call caused him to 'purposefully avail' himself to jurisdiction in Washington State courts. However, this argument is problematic for several reasons.

Those reasons are: 1). Respondent states that he initiated the solicitation of bids for the motorcycle, (CP 1-9) appellant agrees; 2).

Respondent solicited bids via a Florida area telephone number (CP 146); and, 3). The motorcycle was delivered in Arizona where appellant resides. (CP 147).

These facts, submitted by respondents create a strong presumption that it was **respondent's solicitation of the bids**, not any telephone communication, that was the "but for" or "purposeful action" that initiated this alleged transaction. It is further noteworthy that Frost states he received "a message on my cell phone which has a Florida area code", was "out of town for a couple days", and called Brooks back stating he "volunteered . . . to take it [the motorcycle] to . . . Lake Havasu, Arizona". (CP 146-47).

The appellant's contacts with this jurisdiction, if any, are entirely *de minimis*. "It is the quality and nature of the activities which determine if the contact is sufficient, not the number of acts or mechanical standards. Each case's facts must be weighed to determine whether sufficient 'minimum contacts' have been shown". *Freestone Capital Partners, LP v. MKA Real Estate Opportunity Fund I, LLC*, 155 Wn. App. 643, 653, 230 P. 3d 625 (Div. I, 2010).

The Supreme Court has explained: "This purposeful availment requirement ensures that a defendant will not be haled into a

jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or third person.’ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985). The Ninth Circuit has further explained that ‘the purposeful availment analysis turns upon whether the *defendant’s contacts are attributable to* actions by the *defendant himself, or conversely to the unilateral activity of another party.*’ *Roth v. Garcia Marquez*, 942 F.2d 617, 621 (9th Cir. 1991) (quoting *Hirsch*, 800 F.2d at 1478).
Weyerhaeuser Co. v. Keating Fibre Int’l, Inc., 416 F. Supp. 2d 1041, 1045-1046 (W.D. Wash. 2006), *emphasis added*.

“The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. . . . [It] is essential in each case that there be some act by which the defendant purposefully avails [himself] of the privilege of conducting activities within the forum State” *Kulko v. Superior Court of Cal.*, 436 U.S. 84, 93-94 (U.S. 1978), *cited with approval by Freestone Capital, Id.*, *emphasis added*.

The appellant asserts that no specific information connecting this transaction was revealed to him during the course of this contact, except that respondent was in Florida (during the month of February) and would transport the vehicle to Arizona after stopping by his home in Washington. (CP 52).

Prior to this contact, respondent unilaterally initiated a solicitation

of bids to purchase the motorcycle online nation-wide, with no particular connection to the state of Washington. In fact, prior to the contact by Brooks, the motorcycle was not even registered as a Washington state vehicle and appears to have been unregistered for a period of more than 8 years. (CP 1-9).

The respondents further characterize this telephone call as “consummating a transaction”. However, simply engaging in one, or more, telephone conversations for purposes of sale does not meet the requirements of “consummation”.

[I]n contract cases, we typically inquire whether a defendant 'purposefully avails itself of the privilege of conducting activities' or 'consummate[s] [a] transaction' in the forum, focusing on activities such as delivering goods or executing a contract."

Bautista v. Park West Gallery, 2008 U.S. Dist. LEXIS 77689, 6-7 (C.D. Cal. Sept. 2, 2008), *citing*, *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006).

In this matter, a discussion was had between the parties. No money changed hands after the phone call, and only when respondent unilaterally decided to drive to Arizona, did the parties even approach reaching an agreement.

Given the geographical separation of the parties, the lack of any express terms other than the offer to sell by respondent, there is no

evidence of the formation of such an agreement. No transaction had been consummated in this matter. Respondents admit as much in their brief when they state “The cause of action did not mature until after Brooks took the motorcycle from Craig Frost in Arizona . . .”. (Respondent’s brief p. 38).

Applying *either* the “consummated transaction” test, or the “minimum contacts” test, it is clear that respondent’s have failed to demonstrate adequate cause for specific personal jurisdiction over the non-resident defendant in this matter.

The unilateral activities of respondent are insufficient to grant this court jurisdiction over the non-resident appellant. The facts submitted by plaintiffs do not meet the *prima facie* elements of sufficient contacts for this court to exercise jurisdiction. Even if taken as true, the factual basis submitted by respondents fails to meet the standards set out in *Freestone Capital, Kulko, and Baustista. (Id.)*.

2. There was no waiver of the objection to personal jurisdiction over the appellant, the court erred by denying the motion to dismiss for lack of personal jurisdiction.

Respondent’s brief disingenuously argues that Brooks waived the defense of personal jurisdiction, asserting that it was not raised in the

initial pleading. Respondents have chosen to simply ignore the fact that the first filing by appellant in the underlying action was a 12 page motion to dismiss (CP 20-32) including a bolded specific request for dismissal based on lack of personal jurisdiction (CP 24-27). By way of further argument, the respondent's assert that defendant's failure to file an answer prior to the time for response somehow equates to a waiver. No case law has been identified to support this novel legal argument.

III. CONCLUSION

Given the foregoing, appellant respectfully requests that this court reverse the trial court's denial of the motion to vacate default, reverse the trial court's denial of motion to dismiss based on lack of specific personal jurisdiction, and remand to the trial court for entry of an order of dismissal in this matter. By way of further relief, appellants requests that the court award fees and costs pursuant to RAP 14.2.

Respectfully submitted this 14th day of June, 2013.



F. Dayle Andersen, WSBA 22966
For Appellant

CERTIFICATE OF SERVICE

I, F. Dayle Andersen, under penalty of perjury under the laws of the state of Washington state that on June 19th, 2013, the following documents were submitted to the following individuals in the manner indicated below:

Mark Conlin, Attorney
421 W. Riverside Ave., Ste. 911
Spokane, WA 99201

First class mail
 Facsimile
 Hand Delivered

Signed in Spokane, Washington on June 19th, 2013.



F. Dayle Andersen