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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 322513-III

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON
DIVISION III**

**INTELLIGENT WIRELESS PRODUCTS, INC., a Washington
corporation; CYFRE, LLC, a California limited liability
company; and LAWRENCE KOVAC and JANE DOE KOVAC,
husband and wife, and the marital community composed
therein,**

Appellants,

v.

SERV A TRON, INC.,

Respondent.

**APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
Case No.: 11-2-05197-2
Honorable Tari S. Eitzen**

BRIEF OF APPELLANT

**Newman Du Wors LLP
By: Keith Scully
1201 Third Avenue, Suite 1600
Seattle, Washington 98101
Telephone: (206) 274-2800
Fax: (206) 274-2801**

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I. INTRODUCTION

The trial court denied Defendant Lawrence Kovac and his wife's motion to set aside the default judgment against them. A default judgment must be set aside as a matter of right when it is obtained without proper service of the motion for default as long as the Kovacs can demonstrate that substantial evidence supports their defenses.

Plaintiff Servatron never served the motions for default and default judgment even though Servatron knew the Kovacs were represented by counsel and intended to defend the matter. And the Kovacs have strong defenses to Servatron's claims: Servatron alleges that a corporation—Defendant Intelligent Wireless—failed to purchase parts under an agreement. But the Kovacs were never parties to the contract, and Servatron's conclusory claims that the corporate veil should be pierced have no factual basis.

Finally, this Court does not have personal jurisdiction over Mrs. Kovac. She is a California resident who married Lawrence Kovac in 2011—long after Intelligent Wireless allegedly breached. She had no involvement with any of the parties before that.

This Court should reverse the trial court's order and strike the default judgment.

II. ASSIGNMENTS OF ERROR AND ISSUES

A. Assignments of Error

- 1. The trial court erred in denying the Kovacs' motion to set aside default judgment where the Kovacs were never served with the motion for default despite informally appearing in the case.**
- 2. The trial court erred in denying the Kovacs' motion to set aside default judgment where the Kovacs have strong defenses to Servatron's frivolous claims.**
- 3. In the alternative, the trial court erred in denying the Kovacs' motion to set aside default judgment against Mrs. Kovac where the default judgment was void because the Court lacks personal jurisdiction over her.**

B. Issues Pertaining to Assignments of Error

1. A default judgment is void and must be set aside where the motion for default was not served despite a party's informal appearance. Servatron failed to serve the motion for default on the Kovacs, even though Servatron exchanged 17 emails and engaged in settlement communications with the Kovacs's counsel. Did the trial court err in denying the Kovacs' motion to set aside default judgment?
2. Washington law provides that if a defendant presents evidence of a prima facie defense to plaintiff's claims, a motion to vacate default judgment should be granted. The Kovacs presented evidence to establish that Servatron could not pierce Intelligent Wireless's corporate veil and hold them individually liable. Did the trial court err in denying the Kovacs' motion to set aside default judgment?

3. Civil Rule 60(b) provides that a party must bring a motion to set aside default judgment judgment within a reasonable time period. Upon discovering that a default judgment had been entered against them, the Kovacs promptly hired counsel and asked the trial court to set aside the default judgment. Did the trial court err in denying the Kovacs' motion to set aside default judgment?
4. A default judgment must be set aside when a Court lacks personal jurisdiction over a defendant. The trial court lacked personal jurisdiction over Mrs. Kovac, who did not transact business, act tortiously, or was otherwise engaged in any conduct within Washington. Did the trial court err in denying the Kovacs's motion to set aside default judgment?

III. STATEMENT OF THE CASE

A. Servatron's claims against the Kovacs are frivolous.

Servatron alleges that Intelligent Wireless breached a contract under which Intelligent Wireless was required to purchase parts from Servatron. (Clerk Papers ("CP") at 11-13.) Lawrence Kovac was Intelligent Wireless's CEO. (*Id.* at 130, ¶ 2.) Mr. Kovac never guaranteed Intelligent Wireless's payments to Servatron, nor was he a party to Servatron's agreement to manufacture parts for Intelligent Wireless. (*Id.* at 130, ¶ 4 and *id.* at 132-41.) Intelligent Wireless was adequately capitalized at the time it ordered parts from Servatron, and Intelligent Wireless advised Servatron that it would only need the parts if a joint venture agreement it was pursuing was successful. (*Id.* at 131, ¶ 5.) Intelligent Wireless was not used improperly by Mr.

Kovac: it was a business venture that was formed, successfully operated, and then unfortunately failed. Intelligent Wireless observed all of the required corporate formalities, and Mr. Kovac did not co-mingle personal and corporate funds or otherwise misuse the corporate form. (*Id.* at 131, ¶ 6.)

Mr. Kovac married his current wife on April 4, 2011. (CP at 131, ¶ 7.) Mrs. Kovac is a California resident. She had no involvement with defendants Intelligent Wireless and Cyfre LLC, or plaintiff Servatron. (*Id.* at 131, ¶ 8.) She has no contacts with Washington. (*Id.*)

B. After being served with Servatron’s lawsuit in California, Lawrence Kovac hired California counsel who made an appearance and was negotiating a resolution with Servatron.

Shortly after this matter was filed in 2011 and served on Lawrence Kovac in California, California attorney Faraz Mobassernia began representing defendants. (CP at 131, ¶ 9; *id.* at 143, ¶ 2.) Mobassernia contacted Servatron’s counsel and stated that he was representing the Kovacs and Intelligent Wireless. (*Id.* at 145-47; *see also id.* at 36-37.) Servatron acknowledged that Mobassernia was representing the Kovacs, and the parties began negotiating a potential settlement. *Id.* at 36-37. Over the next three months, Mobassernia and Servatron’s lawyer Michael Atkins exchanged a total of 17 email messages, including detailed communications on settlement and case status. (*Id.* at 145-206.) Mobassernia told Atkins

that he had “emailed the court in Washington and I have to get a response from them regarding the filing of this complaint.” (*Id.* at 146.) Court staff told Mobassernia that they did not have a record of the case. (*Id.* at 143-44, ¶ 4.)

On June 5, 2012, Mobassernia informed Servatron that Lawrence Kovac’s mother was dying and that they needed more time to evaluate Servatron’s settlement proposal. (CP at 154.) Servatron offered a one-week extension, but threatened that they would “go into litigation mode” if Kovac’s mother’s death “drag[s] things out any longer than that.” (*Id.*)

C. Servatron never served the Kovacs with the motion for default, and the Kovacs did not know of the default judgment until Servatron commenced a collection action in California.

Despite knowing that Mobassernia represented the Kovacs, on July 11, 2012 Servatron moved for entry of default without serving Mobassernia or the Kovacs. (CP at 26; *id.* at 144, ¶ 5.) On October 15, 2012, Servatron moved for entry of a default judgment. (CP at 42.) Servatron did not serve the motions for default and judgment on any party, and did not notify Mobassernia about those filings. (*Id.* at 144, ¶ 5.) During the hearing on the motion to vacate the default judgment, Servatron’s counsel stated that the reason he did not bother serving the motion for entry of default was because he believed the Kovacs had no viable defense and “[w]e thought it would be futile” to serve the motion. (January 24, 2014 Transcript of

Oral Argument (“Tr.”) at 11:24-25.) Servatron offers no other explanation for its failure to serve the Kovacs. (*Id.*)

In January, 2013, Servatron domesticated the judgment against Intelligent Wireless in California. On October 31, 2013, Servatron served the California collection action on the Kovacs, and on November 18, 2013, Servatron moved to amend the California judgment to add the Kovacs. (CP at 131, ¶ 10.)

Before receiving service of the California action, the Kovacs did not know that this case was active. (CP at 131, ¶ 11.) Rather, the Kovacs believed that Servatron was either still negotiating a resolution with Mobassernia or had simply decided not to pursue the matter given Intelligent Wireless’s administrative dissolution and lack of remaining assets. (*Id.*) On December 11, 2013, the Kovacs hired Washington counsel. (*Id.* at 131, ¶ 12.) Defendants Lawrence and Jane Doe Kovac promptly filed their motion to set aside default judgment on December 20, 2013. (*Id.* at 120.)

D. The Superior Court erred in denying the Kovacs’ motion to set aside default.

On January 24, 2014, the Kovacs’ motion to set aside default was heard in Spokane County Superior Court. During the hearing, Servatron’s counsel acknowledged that Servatron had extensive contact with the Kovacs’ counsel and failed to serve either him or the Kovacs prior to moving for default, asserting that Servatron “thought it would be futile” to do so. (Tr. at 11:24-25.) The trial

judge was the same judge who entered the notice of default, and claimed that “if there was an error, it was most probably on my part.... Because I knew at the time [the default was entered] that there had been e-mail contact, but no formal notice.” (Tr. at 13:19-23.) The trial judge went on to say, “If I was careless and I shouldn’t have signed [the judgment], then that’s on me.” (*Id.* at 23:12-15.)

But despite this ruling, the trial court inexplicably denied the Kovacs’ motion to set aside default, dismissing the Kovacs’ viable defenses by stating “I don’t think that’s a good way to analyze this,” (*Id.* at 24:2), and appearing to mistakenly believe that the Kovacs were required to bring their motion within one year of the entry of default. (*id.* at 23:15-17, 24:3-9). The Kovacs timely appealed.

IV. ARGUMENT

A. Standard of Review

Although a trial court’s decision on a motion to set aside default judgment is generally reviewed for abuse of discretion, questions of law, “including whether on undisputed facts an appearance has been established as a matter of law”, are reviewed de novo. *Meade v. Nelson*, 174 Wn. App. 740, 750 (2013); *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9 (2002). A trial court’s denial of a motion to vacate a default judgment for lack of jurisdiction is also reviewed de novo. *Ralph’s Concrete Pumping, Inc. v. Concord Concrete Pumps, Inc.*, 154 Wn. App. 581, 585

(2010). Here, this Court applies the de novo standard when analyzing whether the trial court erred in failing to vacate the default judgment where 1) Servatron failed to serve the Kovacs after their informal appearance and 2) the Court lacks jurisdiction over Mrs. Kovac.

B. Default judgments are disfavored, and Washington law favors setting aside judgments obtained through a technicality.

Default judgments are disfavored. *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 581 (1979). Washington has a “long-standing preference that controversies be determined on the merits rather than by default.” *Dlouhy v. Dlouhy*, 55 Wn.2d 718, 721 (1960). CR 60 sets forth the bases for setting aside either an order of default or a default judgment, and provides that a party must move within one year of the entry of default judgment only if the party is asserting mistake, inadvertence, erroneous proceedings against a minor, or newly discovered evidence. CR 60(b). For all other grounds, the party must move within a reasonable time. *Id.*

A proceeding to vacate a default judgment is equitable in character and relief is to be afforded in accordance with equitable principles. *Dlouhy*, 55 Wn.2d at 721. Washington’s Supreme Court notes that:

The reason for the failure to appear is of far less importance than the fact that the default, if allowed to stand, will work an injustice. The purpose of the

courts, whether their judgments be entered by default or after a trial, is always to do justice as nearly as may be, and no technical failure to appear in time, if that failure be not wilful, would justify a court in permitting to stand a judgment which it is satisfied is unjust.

Yeck v. Dep't of Labor & Indus., 27 Wn.2d 92, 95 (1947) (citation omitted).

C. Washington law mandates that default be set aside because the Kovacs were never served with the motion for default, despite appearing within the meaning of CR 5.

Washington Superior Court Civil Rule 5 requires that every motion must be served when a party has appeared. A default judgment must be set aside “as a matter of right” when it is obtained without proper service of the motion for default. *Housing Auth. v. Newbigging*, 105 Wn. App. 178, 190 (2001).

A defendant has appeared and must be served when a defendant “apprise[s] the plaintiffs of the defendants’ intent to litigate the cases.” *Morin v. Burris*, 160 Wn.2d 745, 755-56 (2007). Washington requires only substantial compliance with the requirement that a party must appear before it is entitled to notice of a motion for default. *Morin*, 160 Wn.2d at 755-756. A party need not file a formal notice of appearance, but instead is entitled to notice when its conduct “was designed to and, in fact, did apprise the plaintiffs of the defendants’ intent to litigate the cases.” *Id.* In *Morin*, an insurance adjuster communicated with a personal-injury plaintiff

about settlement after a lawsuit was filed. The plaintiff then obtained a default judgment without serving the motion for entry of default. Noting that Washington does not favor default judgments, the Court set aside the default, confirming that a formal notice of appearance is not required and holding that a defendant must merely “take some action acknowledging that the dispute is in court” in order to be entitled to notice. *Id.* at 757.

This court recently applied *Morin* to facts virtually identical to this case. In *Meade v. Nelson*, 174 Wn. App. 740 (2013), the defendant’s attorney corresponded with the plaintiff before the case was filed and sent an additional settlement communication after filing noting that it was “in connection with this case” even though the defendant never entered a formal notice of appearance or filed anything with the court. The *Meade* court held that a later default judgment entered without notice must be set aside because the defendant acknowledged the case was in court and demonstrated an intent to defend by engaging in settlement negotiations.

Similarly, in *State ex rel. Trickel v. Superior Court of Clallam County*, 52 Wash. 13, 14 (1909), the Washington Supreme Court found that serving interrogatories on the plaintiff sufficed as a notice of appearance even though they were not filed with court and did not expressly state that the defendant was appearing through counsel. And, this Court extended the “informal appearance” doctrine in

Ellison v. Process Sys. Constr. Co., 112 Wn. App. 636, 644 (2002), upholding the trial court’s decision to set aside a default judgment where the defendant employer only sent two pre-litigation letters to an employee, but later failed to formally appear when the employee filed suit.

The trial court erred by failing to properly apply *Morin*, *Meade*, *Trickel*, and *Ellison* to this case. The Kovacs were represented by Mobassernia. Mobassernia and Servatron’s counsel exchanged 17 emails discussing the litigation and attempted to resolve the case without needing to file an answer. (CP at 143, ¶ 3, and *id.* at 145-206.) Mobassernia told Servatron that he had “emailed the court in Washington and I have to get a response from them regarding the filing of this complaint.” (*Id.* at 146.) As late as June 22, 2012—right before Servatron filed its motion—the parties were discussing settlement. (*Id.* at 145-206.) But despite this knowledge, Servatron moved for default without serving a copy of its motion on either Mobassernia or the Kovacs. (CP at 144, ¶ 5.) And Servatron shockingly admitted its reasoning for doing so: Servatron’s lawyer believed the Kovacs did not have a viable defense, and so decided not to bother serving them. (Tr. at 11:24-25.) Had Servatron properly served its motion, the Kovacs would have filed an answer. (CP at 131, ¶ 13.)

Servatron relied on inapposite authority to support its claim to the trial court that Mobassernia’s appearance for the Kovacs did not

meet the standard of Civil Rule 55(a)(c) because Mobassernia wasn't admitted to practice law in Washington. Misrepresenting *Old Republic Nat'l Title Ins. Co. v. Law Office of Robert E. Brandt, PLLC*, 142 Wn. App. 71, 75 (2007), Servatron argued that Mobassernia was required to be admitted to Washington before the Kovacs were entitled to notice. In *Old Republic*, a Washington attorney telephoned the plaintiff and told the plaintiff that he was representing defendants. But *Old Republic* does not hold that the attorney must be admitted in Washington: it simply does not address that issue, even in dicta. Similarly, *Seek Sys. v. Lincoln Moving/Global Van Lines*, 63 Wn. App. 266, 270 (1991) does not aid Servatron's argument. In *Seek*, a non-attorney employee of the defendant called the plaintiff once, did not acknowledge that the dispute was in court, and did not indicate that the defendant intended to defend the lawsuit. *Seek* simply does not stand for the proposition that an attorney must be admitted in Washington before the defendant is entitled to notice.

Instead, Mobassernia provided notice that he was an attorney representing the Kovacs, was able to defend the Kovacs if he moved for pro hac vice admission pursuant to APR 8, indicated an intent to defend the case, and stated that he had checked with the court in Washington regarding the case status – only to hear that, at least at the time Mobassernia called, the court had no record of the matter. *See* CP at 143-47.

The Kovacs were entitled to notice of the motion for default, and Servatron's failure to provide this notice requires that the default judgment be set aside. The trial court erred in not granting the Kovacs' motion.

D. The Kovacs have strong defenses to Servatron's frivolous claims.

In order to avoid setting aside a default judgment in a matter that does not involve any real controversy, before setting aside the default judgment the Court must also evaluate whether substantial evidence exists to support the Kovacs' defense to Servatron's claims. *Suburban Janitorial Servs. v. Clarke Am.*, 72 Wn. App. 302, 305 (1993). Any prima facie defense to Servatron's claims, even if it is tenuous, is sufficient to support a motion to vacate a default judgment. *Id.* And "a strong defense requires less of a showing of excuse, provided the failure to appear was not willful." *Calhoun v. Merritt*, 46 Wn. App. 616, 619 (1986).

The Kovacs have strong defenses. Servatron's dispute is with Intelligent Wireless, based on a verbal contract with Intelligent Wireless for the purchase of parts and allegations that Intelligent Wireless failed to pay. Its only claim against the Kovacs is based on allegations that Intelligent Wireless's corporate veil must be pierced.

But where the "shareholders of a corporation, who are also the corporation's officers and directors, conscientiously keep the affairs of the corporation separate from their personal affairs, and no

fraud or manifest injustice is perpetrated upon third persons who deal with the corporation, the corporation's separate entity must be respected.” *Grayson v. Nordic Constr. Co.*, 92 Wn.2d 548, 553 (1979). In order to pierce the corporate veil, Servatron must prove that 1) the Kovacs intentionally used the corporate form to evade a duty, and 2) that disregarding the corporate veil is necessary and required to prevent an unjustified loss to the injured party. *Dickens v. Alliance Analytical Labs.*, 127 Wn. App. 433, 440-441 (2005). Alternatively, Servatron could prove that Kovac so misused the corporate form that the corporation was Kovac’s alter ego. *Grayson*, 92 Wn.2d at 553. Under any theory, Servatron bears the burden of proving that “exceptional circumstances” exist and that piercing the corporate veil is the only way to avoid perpetrating a fraud or that failing to do so would result in a manifest injustice. *Truckweld Equip. Co. v. Olson*, 26 Wn. App. 638, 644 (1980).

None of these factors are present here. Kovac did not misuse the corporate form. Intelligent Wireless followed all formalities to maintain its corporate existence. (CP at 131, ¶ 6.) Kovac did not commingle funds or otherwise disregard the corporate form. (*Id.*) Instead, Intelligent Wireless was successfully operated as a going concern, and only failed when plans for a merger fell through and Servatron then demanded immediate payment but refused to supply parts, scaring off any other potential investors and making it impossible for Intelligent Wireless to survive.

Further, Servatron identifies no unjustified loss. The fact that Intelligent Wireless was unable to pay a debt is insufficient. *Truckweld*, 26 Wn. App. at 644-645. Instead, Servatron must prove some fraud, misrepresentation, or manipulation of the corporate form by Kovac. *Id.* For example, in *Truckweld*, the sole shareholder of a corporation failed to follow corporate formalities and offered personal checks to settle corporate debts. The corporation had virtually no capital, and was unable to pay for equipment it ordered from a truck manufacturer. The *Truckweld* Court found that the corporate veil should not be pierced, noting that there was no evidence the defendant intended to disregard the corporate form, that the plaintiffs knew that they were negotiating with a corporation and not an individual, and that the plaintiff could have demanded a personal guaranty prior to extending credit.

Like *Truckweld*, there is no injustice here. Servatron knew that it was Intelligent Wireless—and not Kovac—purchasing parts. (CP at 42-44.) Servatron can claim neither surprise nor fraud when Intelligent Wireless was ultimately unable to purchase the parts. Servatron could have, but did not, require Kovac to execute a personal guaranty before it manufactured the parts.

E. The Kovacs moved to set aside the default judgment within a reasonable time.

A motion under CR 60(b)(4-11) must be brought within a reasonable time. A reasonable time is “determined by examining the

facts and circumstances; the critical period is the time between when the party becomes aware of the order and when he or she filed the motion to vacate it.” *Topliff v. Chicago Ins. Co.*, 130 Wn. App. 301, 305, (2005). Where a party has exercised due diligence after the discovery of a default judgment, CR 60’s reasonable time requirement is met. *Shepard Ambulance, Inc. v. Helsell Fetterman, Martin, Todd & Hokanson*, 95 Wn. App. 231, 231 (1999).

The Kovacs exercised due diligence. They did not learn of the default judgment against Intelligent Wireless until October 31, 2013. (CP at 131, ¶ 10.) They promptly hired counsel, and brought this motion to vacate.

F. In the alternative, default should be set aside because the judgment is void against Mrs. Kovac.

Where a Court lacks personal jurisdiction, a default judgment must be set aside. CR 60(b)(5); *Leen v. Demopolis*, 62 Wn. App. 473, 478 (1991.) Servatron’s judgment is against both the marital community and Mrs. Kovac personally. But the judgment is void as to Mrs. Kovac. A court only has personal jurisdiction over a non-resident defendant where the defendant has transacted business, committed a tort, or otherwise engaged in the conduct that is the basis of the lawsuit within Washington. *See* RCW 4.28.165. Mrs. Kovac did not marry Lawrence Kovac until 2011, and had no involvement with Intelligent Wireless, Cyfre LLC, Servatron, or the facts alleged in the complaint. (CP at 131, ¶ 8.)

V. CONCLUSION

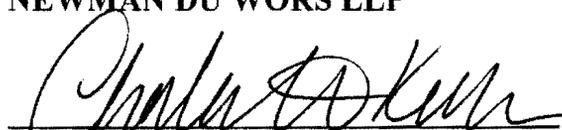
Servatron failed to provide notice of its motion for default and obtained a void default judgment. The Kovacs have meritorious defenses, and moved promptly to set aside the default as soon as they discovered it. This Court should reverse the trial court's order, strike the default judgment, and allow the Kovacs to defend the case.

DATED this 22nd day of May, 2014.

Respectfully Submitted,

NEWMAN DU WORS LLP

By:



Charlotte C. Kuhn, WSBA No. 42864

Keith Scully, WSBA No. 28677

1201 Third Avenue, Suite 1600

Seattle, Washington 98101

Telephone Number (206) 274-2800

Facsimile Number (206) 274-2801

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7 **SUPERIOR COURT OF THE STATE OF WASHINGTON**
8 **IN AND FOR THE COUNTY OF SPOKANE**

9 SERVATRON, INC. a Washington
10 corporation,

11 Plaintiff,

12 vs.

13 INTELLIGENT WIRELESS
14 PRODUCTS, INC., a Washington
15 corporation; CYFRE, LLC, a California
16 limited liability company; and
17 LAWRENCE KOVAC and JANE DOE
18 KOVAC, husband and wife, and the
19 marital community composed therein,

20 Defendants.

Superior Court Case No. 11-2-05197-2

Court of Appeals Case No. 322513-III

CERTIFICATE OF SERVICE

21 The undersigned hereby certifies that on May 22, 2014, I caused the foregoing

- 22
- 23 • **BRIEF OF APPELLANT**

24 to be served via the method(s) listed below on the following parties:

25 **Via U.S. Mail and email to:**

26 Michael Atkins
27 Atkins IP
28 93 South Jackson Street
18483
Seattle, WA 98104-2818
mike@atkinsip.com

1 I certify under penalty of perjury under the laws of the United States and the State
2 of Washington that the foregoing is true and correct and that this certificate was executed
3 on May 22, 2014 at Seattle, Washington.



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5 Sarah Skaggs
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