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Appellate Court No. 66738-6-1
Skagit County Superior Court No. 09-2-02483-1

IN THE COURT OF APPEALS - STATE OF WASHINGTON
DIVISION ONE

SOREN AND JANICE JENSEN,

Plaintiffs-Appellants,

v.

DAVE LUECKE AND DIANE VAN ACKEREN, husband and wife,
ROBERT LUECKE AND JANE DOE LUECKE, husband and wife,
dba **SHOPPROP, INC.**, a Washington corporation, and **TERESA A.**
WEAVER AND JOHN DOE WEAVER, husband and wife,

Defendants-Respondents.

APPELLANT'S BRIEF

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ORIGINAL

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I. ASSIGNMENTS OF ERROR

It was error for the trial court to vacate a judgment a year after its entry when the moving party failed to meet its burden of establishing 1) a defense, 2) excusable neglect, 3) due diligence after notice of the default judgment, and 4) lack of hardship to the opposing party.

It was error for the trial court to fail to strike pleadings filed in violation of a prior Court order.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Did the trial court error when it vacated a default judgment without adjudging that there was a prima facie defense to the action?

Did the trial court abuse its discretion when it vacated a default judgment without considering or make findings as to excusable neglect, due diligence after notice of the default judgment, or lack of hardship to the opposing party?

Should the trial court have considered pleadings filed in violation of a prior Court order? Is it clear that the trial court did consider the pleadings when no findings were entered by the trial court?

When the trial court fails to make findings on an element on which the moving party bore the burden, is the lack of a finding equivalent to a

finding against the moving party?

III. INTRODUCTION

Judgment Debtors Luecke (Luecke) intentionally waited a year from entry of judgment before filing a motion to set it aside. Before the trial court, Luecke offered no excuse or reason for the failure to bring the motion within a reasonable time. Instead, Luecke argued that CR 60 should be read to permit the bringing of a motion to set aside up to the last day of the one year cutoff without any showing of diligence. Under this reading, CR 60 becomes a grant of permission for delay rather than an expression of the absolute outer limit of delay. It becomes a weapon to inflict prejudice upon the opposing party through delay rather than equitable path to relief for those found in default despite an intent to act diligently.

IV. STATEMENT OF THE CASE

The Summons and Complaint in this case were served October 22, 2009. CP 9. Neither a notice of appearance nor an answer were filed. Luecke was found to be in default and an Order of Default was entered. CP 10-11. A Default Judgment was entered January 7, 2010. CP 12-14.

A copy of the judgment was sent to Luecke on January 19, 2010.

CP 40. After receiving the copy of the Default Judgment, Luecke obtained (but failed to serve) an order for a Show Cause Hearing.¹ On February 26, 2010, the hearing requested by Luecke was held before Judge Cook. Luecke's motion to set aside the default judgment was denied. Judge Cook also struck all pleadings Luecke filed after entry of the default.² Plaintiffs, Soren and Janice Jensen (Jensen) were awarded \$500 in attorney fees.

Luecke asserted before Judge Cook that he had a Mr. Cox mail an answer to the Compliant to Jensen's attorney before the Complaint was served on him. Jensen's counsel filed a declaration reciting his contacts with Mr. Luecke, and stated that no answer was served on his office prior to entry of the default. CP 39-40.

Jensen requested that the Court grant the pro se Luecke leave to properly file a motion to set aside the default. CP 35, RP (2-26-2010), 3.³ Judge Cook then granted Luecke the necessary leave to properly file a motion to set aside the default judgment, but only after the imposed attorney fees were paid to Jensen. CP 38.

1 Despite lack of service, counsel for Jensen found out about the hearing. CP 39-40, RP (2-26-2010) 6-7.

2 A party that has been found in default may not file pleadings in the action without leave of court. CR 55(a)(2).

3 The Verbatim Report is neither labeled by volume nor continuously numbered. Citation is therefor to the date and page.

Luecke violated the Court order eight days latter by filing a motion to modify without paying the attorney fee award. CP 45-48. He did not set his motion to modify for hearing, and did not file an answer to the Complaint.

Luecke did nothing more for nearly a year. He waited 364 days from entry of the judgment, until January 6, 2011, when he returned to court and obtained a second Ex Parte Show Cause Order. He did so without paying the fee award.⁴ Jensen was forced to respond to this second motion without receiving the previously ordered fee award.

Jensen moved to strike Luecke's pleadings because the Court had previously ordered that a motion for relief from judgment “may not be filed or heard until the fee and cost award made herein is paid.” CP 38. If these pleadings were stricken, Luecke could not argue his motion was filed within a year of the judgment.

The motions were heard on January 21, 2011 by Judge Meyer.⁵ Luecke argued that the judgment should be set aside because his motion was filed 364 days after entry of the default, and was therefor within a year. He also asserted, as he had before Judge Cook, that an answer to the

⁴ A note on the order indicates the prior fee award of \$500 was paid into court registry.

⁵ Despite the motion to strike, the pleadings filed in violation of Judge Cook's order were not stricken.

Complaint had been served on Jensen's counsel before the Complaint was served on him.

Jensen argued that Luecke had not established (or even alleged) due diligence in bringing the motion a year after the judgment, had not set forth grounds for setting aside the judgment, had not established a meritorious defense to support setting aside the judgment, and had therefore failed to meet his burden. Jensen relied on his counsel's declaration denying that an answer to the Complaint was ever received prior to the default judgment, but stressed that waiting a year after receiving a copy of the default judgment constituted a lack of due diligence regardless of the claim an answer was served prior to the case being filed. RP (1-21-2011), 12-13.

The Court set aside the judgment, conditioned on payment to Jensen of additional attorney fees of \$1,250. The order does not set forth any findings of fact, but states that “good cause exists to grant relief from judgment”. CP 108-109. The Court made no oral findings of fact, merely announcing, “Okay, here is what I'm going to do,” and then imposing attorney fees and setting aside the default. RP (1-21-2011), 133.

V. STANDARD OF REVIEW

The Standard of Review applicable to a trial ruling on a motion to

vacate is abuse of discretion. A trial court abuses its discretion in ruling on a motion to vacate if it fails to require that the moving party establish that 1) there is substantial evidence to support, at least, a prima facie defense to the claim asserted by the opposing party, and 2) 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, and 3) the moving party acted with due diligence after notice of entry of the default judgment, and 4) no substantial hardship will result to the opposing party. Prest v. Amercian Bankers Life Assur. Co., 79 Wn.App. 93, 900 P.2d 595 (1995).

VI. ARGUMENT

1 MOTION TO STRIKE

A party that has been found in default may not file pleadings in the action without leave of court. CR 55(a)(2). At the first hearing in February of 2010, the Court granted Luecke leave to file a motion for relief from judgment but specifically provided that “such motion may not be filed or heard until the fee and cost award made herein is paid.” CP 38. Pleadings filed in violation of the condition should have been stricken by

the trial court.⁶

Luecke may argue that payment into the court registry was as good as payment to the opposing party. Payment to the court registry may be appropriate when the right to funds is disputed; but in this case the Court order is clear, Luecke was required to pay the award before filing pleadings. He failed to follow the Court's order, the trial court should have stricken all pleadings filed in violation of the order.

The pleadings of Luecke should have been stricken because they were filed in violation of the Court's explicit order that Luecke could file additional pleadings only after he had paid the attorney fees imposed to opposing counsel.

2 LUECKE FAILED TO MEET HIS BURDEN

Luecke bore the burden of establishing a valid defense to the action before the judgment could be set aside. RCW 4.72.050. The moving party's burden is much less if it establishes a strong or virtually conclusive defense. No attempt was made to do so here. Therefore, if Luecke established a prima facie defense, the trial court was required to make a careful analysis of whether the moving party established excusable

⁶ Because improperly filed pleadings were stricken by Judge Cook at the hearing a year before, the only pleadings Luecke had to rely on at the second hearing were those filed in violation of the payment order.

neglect, due diligence after notice of the default judgment, and lack of hardship to the opposing party. TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc., 140 Wn.App. 191, 165 P.3d 1271 (Wash.App. Div. 1 2007).

The civil rule basis for setting aside a default judgment are set forth in CR 60(b). Although Luecke set forth the rule in his trial court briefing, he did not discuss, or attempt to explain, which, if any, criteria in the rule he was proposing he had met.

The Court's discretion, and the burden Luecke bore, in attempting to get the default judgment set aside is succinctly set forth in Prest v. American Bankers Life Assur. Co., 79 Wn.App. 93, 900 P.2d 595 (1995):

A motion to vacate or set aside a default judgment is addressed to the sound discretion of the trial court. *Leen v. Demopolis*, 62 Wash.App. 473, 478, 815 P.2d 269 (1991), review denied, 118 Wash.2d 1022, 827 P.2d 1393 (1992) (citing *White v. Holm*, 73 Wash.2d 348, 438 P.2d 581 (1968)). A trial court's decision in this regard will not be disturbed on appeal unless the trial court has abused its discretion. *Leen*, 62 Wash.App. at 478, 815 P.2d 269. Abuse of discretion means that the trial court exercised its discretion on untenable grounds or for untenable reasons, or that the discretionary act was manifestly unreasonable. *Lindgren v. Lindgren*, 58 Wash.App. 588, 595, 794 P.2d 526 (1990), review denied, 116 Wash.2d 1009, 805 P.2d 813 (1991); see also *Davis v. Globe Mach. Mfg. Co.*, 102 Wash.2d 68, 77, 684 P.2d 692 (1984).

The Court goes on to hold that in exercising its discretion, the trial court is

called upon to consider whether the moving party has met its burden of showing that:

- (1) there is substantial evidence to support, at least, a prima facie defense to the claim asserted by the opposing party;
- (2) 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) the moving party acted with due diligence after notice of entry of the default judgment; and
- (4) no substantial hardship will result to the opposing party.

The trial court failed to make findings of fact on any of the required elements despite Luecke's burden of proof. Lack of a finding on an element on which Luecke bore the burden is equivalent to a finding against Luecke. Taplett v. Khela, 60 Wn.App. 751, 807 P.2d 885 (1991).

Because Luecke failed to set forth a specific ground under CR 60, it is difficult to discuss its factors. The lack of findings by the trial court prevent assignment of error or meaningful discussion, which may be why the lack of a finding is construed against Luecke, the party with the burden of proof.

However, Luecke never offered any explanation for waiting a year to bring the motion to vacate. He had notice, he had been told by the Court what he should do, yet it appears he intentionally waited a year,

planning to file a motion on the very last day. His absolute failure to act with due diligence, even after notice of entry of the default and leave to file a motion for relief, should be dispositive.

Luecke was served on October 22, 2009. Jensen's counsel spoke with him on November 2, 2009, November 12, 2009, November 13, 2009, and November 18, 2009 attempting to get an answer to the Complaint. In January of 2010, having received neither an answer nor a Notice of Appearance, a default order and judgment was obtained and a copy sent to Luecke. CP 39-40.

After receiving a copy of the default judgment, Luecke improperly filed a Motion to Set Aside without first receiving leave of court. On February 26, 2010 the Court struck his improper pleadings but granted leave to file a proper motion. Yet Luecke delayed a year before doing anything more.⁷ He knew of the judgment; he knew he had to pay \$500 to return to court, and chose to delay until the last possible moment. His conduct is the direct opposite of due diligence. He has forfeited any possibility of relief.

Luecke can not point to excusable neglect when he has

⁷ Even then he did not file a motion. He obtained a Show Cause Order on January 6, 2011, and filed a Note for Calendar on January 7, 2011, exactly one year after the default. He never did file a motion to vacate.

intentionally waited a year to file his motion. He does not claim mistake. He does not proffer an excuse. He merely claims that due diligence is satisfied if he files the motion within a year of the default judgment. Such a rule would allow any defendant to inflict a year of delay on the plaintiff by allowing a default judgement to be entered, waiting a year, and then having the judgment set aside by filing a motion on the last day.

3 LUECKE'S ASSERTION THAT AN ANSWER WAS SERVED PRIOR TO THE FINDING OF DEFAULT IS NOT TENNABLE

Luecke's claim that he is entitled to sleep on his rights for a year is based on assertions made in pleadings that should have been stricken. CP 61-78, 100-101, 79-81. In these pleadings he claims that an answer was served on opposing counsel by a Mr. Cox before he (Luecke) was served with the lawsuit. Luecke asserts that a true and correct copy of what he had Mr. Cox serve is attached to his January 6, 2011 declaration. CP 71-78. But it could not be a true copy of something that was allegedly served in the summer of 2009. It bears a court file stamp of February 1, 2010. It bears the Superior Court filing number, but the case was not filed until December of 2009. CP 3. Nothing served in August of 2009 could have these marks. In addition, it is identical in form (even as to the crossing out

“DISTRICT” in the header) with other pleadings prepared by Luecke (or Mr. Cox) after the default judgment was entered. CP 41-42. Luecke made no credible showing that the alleged answer even existed in the summer of 2009.

John-Paul Cox, who Luecke claims served the answer, is the same person that was representing him previously even though he is not a lawyer. CP 40, RP (2-26-2010), 5. Mr. Cox offers no documents supporting his assertion of mailing an answer.⁸ It is apparent that whatever the role of Mr. Cox, he is not unbiased.

There is no credible evidence that an answer was served on Jensen's counsel prior to the default judgment.

4 LUECKE DID NOT MEET HIS BURDEN OF ESTABLISHING DUE DILIGENCE AND LACK OF PREJUDICE

Even if Luecke's assertion that Mr. Cox sent an answer to Jensen's counsel is considered, and given some credence, the assertion fails to explain or justify the wait of a year before filing his motion. That delay is simply unreasonable and inexcusable. It is also prejudicial.

The delay of a year is long in any case. Here discovery had not

⁸ He also can't seem to keep his dates straight as they differ on his declarations. CP 100.

taken place because the judgment was in place. The judgment had long been a lien against real property owned by Luecke. RP (1-21-2011), 10. The vacation of the judgment would free his real property for sale clear of the judgment. Interest had accumulated on the judgment. Witnesses, if still available, will have diminished memories. The case has not pursued against co-defendants because a secured judgment was in place against the principal defendant. Luecke failed to show that vacation of the judgment would not prejudice Jensen.

Luecke's delay was in every way intentional. He filed a new Show Cause Order one day before the one-year period ran because he believed he could get away with that much delay. Such intentional delay prevents vacation of a default judgment. TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc., 140 Wn.App. 191, 165 P.3d 1271 (Wash.App. Div. 1 2007).

By delaying until the last possible minute, he may have believed that the Court was required to go along with him. He is wrong. CR 60 requires that the motion be brought "within a reasonable time". It is not reasonable to intentionally wait a year with full knowledge of the judgment, hoping the Court will read the one-year cutoff as an expression of reasonable due diligence rather than an absolute limit.

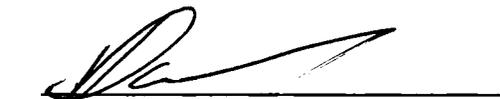
VII. ATTORNEY FEES AND COSTS

The underlying contract between the parties, concerning the purchase and sale of the house, includes an attorney fee provision. CP 7. It is Luecke's intentional, or at least extreme, lack of diligence that causes this issue to be before the Court. Jensen should be awarded attorney fees on appeal.

VIII. CONCLUSION

The trial court abused its discretion in setting aside the judgment. It failed to make findings on the required elements and failed to hold the moving party to its burden of proof. The trial court should be reversed and the judgment reinstated, and attorney fees awarded to Jensen.

RESPECTFULLY SUBMITTED this 13th day of June, 2011.


X. GARL LONG, WSBA #13569
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