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NO. 70565-2-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

STATE FARM FIRE AND CASUALTY COMPANY,

Appellant,

vs.

TRISTAN APPLEBERRY, a single man;

Respondent,

and

DEBRA SULLIVAN, Personal Representative of the Estate of Aaron J. Sullivan,

Defendant.

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Jean Rietschel, Judge

REPLY BRIEF OF APPELLANT

REED McCLURE

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I. ARGUMENT

A. ENTRY OF DEFAULT JUDGMENT WAS NOT “IRREGULAR”.

Appleberry asserts that entry of default judgment was “irregular”, because State Farm did not provide Sullivan with at least five days notice of presentation of the judgment. (Brief of Respondent at 11) Sullivan cites to CR 52(c), but the applicable rule appears to be CR 54(f). Regardless, Appleberry is wrong. State Farm served Sullivan’s attorney with the motion for entry of default judgment, and the proposed judgment. CP 71-72. State Farm then agreed to Sullivan’s attorney’s request to continue the motion two weeks, and served him with notice of the hearing by mail on April 3, 2013. CP 73-76. Service was effective on April 8, more than two weeks before the hearing date. *See* CR 5(b)(2) (service by mail effective third day following mailing). This exceeded the required notice.

Appleberry also complains that he was not served with the case schedule issued by the King County superior court clerk. Appleberry does not explain why such failure would make entry of default judgment irregular. In any event, King County Local Rule 4(c)(1) does not require service of the case schedule on a party until 10 days after service of any response to the initial pleading, whether that response is a notice of

appearance, answer, or CR 12 motion. Appleberry did not file or serve any such response prior to entry of default judgment.

Appleberry complains that findings of fact and conclusions of law were not entered. State Farm has already explained why findings and conclusions were not required¹. (Brief of Appellant at 8-11)

Appleberry asserts that State Farm “[took] full advantage” of his incarceration by moving for default on the 22nd day after service. (Brief of Respondent at 1-2) This was not irregular. A defendant is required to answer the complaint within 20 days of service. CR 12(a). The plaintiff may move for default when a defendant has failed to appear or plead as provided by the civil rules. CR 55(a). Moreover, Appleberry fails to acknowledge, anywhere in his brief, that State Farm continued the motion an additional two weeks at the request of Sullivan’s attorney to allow Appleberry an opportunity to appear and defend. Appleberry did nothing, and the court entered default judgment.

B. APPLEBERRY NEVER INDICATED AN INTENT TO APPEAR.

Appleberry insinuates that he indicated an intent to appear prior to entry of default. This is incorrect. Neither Appleberry nor any person

¹ A recent opinion cited in the Brief of Appellant has now received a Court of Appeals citation. *Trinity Universal Ins. Co. v. Ohio Cas. Ins. Co.*, 176 Wn. App. 185, ___ P.3d ___ (2013).

representing Appleberry contacted State Farm prior to entry of default. The only contact was made by counsel for the Sullivan estate. The Sullivan estate sued Appleberry. The Sullivan estate is Appleberry's adversary. It could not appear for him or speak on his behalf, and its attorney did not attempt to do so.

Further, indicating an intent to defend is not enough to entitle a defendant to notice before default.

Those who are served with a summons must do more than show intent to defend; they must in some way appear and acknowledge the jurisdiction of the court after they are served and litigation commences.

Morin v. Burris, 160 Wn.2d 745, 749, 161 P.3d 956 (2007). Parties served with a summons and complaint must respond by taking action acknowledging that the dispute is in court. *Id.* at 757.

Appleberry took no action. Appleberry did not appear, formally or informally, prior to entry of default. Only Frank Shoichet, counsel for the Sullivan estate, contacted State Farm's attorney prior to entry of default. He said he was working with Appleberry's parents to try to find Appleberry a lawyer. He asked State Farm to continue the motion for default a couple of weeks, and State Farm agreed. On April 5, Shoichet told State Farm's counsel that attorney Patrick LePley was willing to defend Appleberry in the declaratory judgment action. CP 147-48.

But Shoichet represents the Sullivan estate, which sued Appleberry. He could not and did not attempt to appear for Appleberry. LePley never contacted State Farm until April 29, 2013, around 4:30 p.m., after default judgment was entered. Even then, LePley said he did not represent Appleberry. CP 148-49. Even then, LePley did not appear for Appleberry.

State Farm did not agree to strike the motion for default. State Farm agreed to continue the motion two weeks to give Appleberry an additional opportunity to appear and defend. This agreement would be unnecessary if Appleberry had already appeared. Appleberry did not appear during the two-week period. Shoichet's communication of his plan to assist Appleberry's parents to find a lawyer for Appleberry is not equivalent to communication by Appleberry of an intention to appear and defend.

The authorities relied upon by Appleberry do not help him. In *City of Des Moines v. Personal Prop. Identified as \$18,231 in U.S. Currency*, 87 Wn. App. 689, 943 P.2d 669 (1997), the city initially filed a forfeiture action in municipal court. The defendant then filed an independent petition to remove the matter to superior court. Less than 20 days later, the city filed a complaint for forfeiture in superior court. The defendant then moved for default in the removal action he filed. The court held that the

city's filing of the municipal court forfeiture action in the first place, and its filing of the superior court forfeiture action within 20 days after service of the removal petition, showed an intent to pursue forfeiture, and constituted a constructive appearance in the removal action. Therefore, entry of default without notice to the city was improper. *City of Des Moines*, 87 Wn. App at 697-98.

In *Sacotte Const., Inc. v. National Fire & Marine Ins. Co.*, 143 Wn. App. 410, 177 P.3d 1147, *rev. denied*, 164 Wn.2d 1026 (2008), a contractor sued its insurer for failure to defend a lawsuit. The insurer's coverage counsel called the contractor's counsel to enter an informal appearance. However, the attorney confirmed with his client that ultimately he would not represent the insurer due to a conflict of interest. The contractor obtained default judgment without notice to the insurer. The court held that the attorney's informal appearance showed an intent to defend in court, and the insurer was therefore entitled to notice. The court rejected the argument that the attorney's conflict of interest prevented him from appearing because when an attorney appears for the defendant, it is the defendant who has made the appearance, not the attorney. *Sacotte Const.*, 143 Wn. App. at 416.

Unlike these cases, nobody on Appleberry's behalf contacted State Farm. Nobody registered an appearance for him, formal or informal.

Appleberry did nothing that would indicate to State Farm he intended to appear.

Appleberry asserts that the court should scrutinize Appleberry's reasons for failure to timely appear. Unfortunately, we do not know Appleberry's reasons. He did not testify. His parents did not testify. No explanation has ever been provided why Appleberry failed to appear within the additional two week period granted by State Farm. His imprisonment is not an explanation, because he was able to retain counsel to appear after default was entered. CP 81-82. He has not shown that anything changed.

Appleberry never indicated an intent to appear until his attorney appeared after default was entered. There was no appearance, formal or informal, before default was entered.

C. DEFAULT JUDGMENTS ARE PERMITTED IN DECLARATORY JUDGMENT ACTIONS.

Appleberry seems to contend that default judgments are not permitted in declaratory judgment actions. To the contrary, they are permitted. *See e.g., Glandon v. Searle*, 68 Wn.2d 199, 412 P.2d 116 (1966).

It is true that there must be a justiciable controversy for the court to exercise jurisdiction under the Uniform Declaration Judgments Act.

Contrary to Appleberry's argument, permitting default judgment does not somehow eliminate the existence of a justiciable controversy. A justiciable controversy involves 1) an actual, present, and existing dispute; 2) between parties having genuine and opposing interests; 3) which involves direct and substantial interests; and 4) a judicial determination of which will be final and conclusive. *Brown v. Vail*, 169 Wn.2d 318, 334, 237 P.3d 263 (2010). In this case, there was clearly a justiciable controversy between State Farm and Appleberry.

Washington recognizes that a justiciable controversy exists when an insurer defends its insured while reserving rights to challenge coverage for claims asserted against the insured. Washington courts encourage insurers to file declaratory judgment actions under such circumstances.

When an insured is uncertain of its duty to defend, it may defend under a reservation of rights while seeking a declaratory judgment relieving it of its duty. *Woo [v. Fireman's Fund Ins. Co.]*, 161 Wn.2d 43, 54, 164 P.3d 454 (2007)]. Because a reservation of rights defense is fraught with potential conflicts, it implicates an enhanced duty of good faith toward the insured. . . . But we have recognized that the risks of a reservation of rights defense are coupled with benefits:

Although the insurer must bear the expense of defending the insured, by doing so under a reservation of rights and seeking a declaratory judgment, the insurer avoids breaching its duty to defend and incurring the potentially greater expense of defending itself from a claim of breach.

Woo, 161 Wn.2d at 54. Additionally, defending under a reservation of rights enables the insurer to protect its interests without facing claims of waiver or estoppel and to walk away from the defense once a court declares it owes no duty.

National Surety Corp. v. Immunex Corp., 176 Wn.2d 872, 879-80, 297 P.3d 688 (2013).

Given the insurance coverage issues identified by State Farm, and its defense of Appleberry under a reservation of rights, there obviously was a justiciable controversy supporting a declaratory judgment action. *See* RCW 7.24.020. Appleberry, the insured State Farm is defending, is a proper party to the declaratory judgment action. *See* RCW 7.24.110.

A defendant's failure to appear in a declaratory judgment action does not eliminate the justiciable controversy. If a defendant fails to appear and defend in a declaratory judgment action, the plaintiff's remedy is to move for default pursuant to CR 55. Otherwise, the defendant could prevent entry of declaratory judgment simply by failing to appear. Appleberry's contrary argument must be rejected.

D. STANDARD FOR VACATION OF DEFAULT JUDGMENTS.

Appleberry attempts to whittle away the burden he must meet for vacation of a default judgment. However, the factors set forth in the Brief of Appellant at page 12 are correct.

Appleberry asserts he does not have to show excusable neglect. In fact, CR 60(b)(1) expressly requires him to show “Mistakes, inadvertence, surprise, excusable neglect, or irregularity in obtaining a judgment or order”. The authority relied upon by Appleberry reaffirms that a party moving to set aside a default judgment must show his failure to appear and answer was “occasioned by mistake, inadvertence, surprise or excusable neglect”. *Morin v. Burris*, 160 Wn.2d at 755.

As discussed in the Brief of Appellant at pages 22-26, Appleberry has failed to show mistake, inadvertence, surprise, or excusable neglect. He has provided no explanation at all for his failure to appear. He has not testified. His parents have not testified. Therefore, his motion to vacate the default judgment should be reversed.

E. APPLEBERRY FAILED TO PRODUCE SUBSTANTIAL EVIDENCE OF A PRIMA FACIE DEFENSE.

Appleberry fails to make any argument that he produced substantial evidence of a defense to the willful and malicious acts exclusion, other than the conclusory assertion that he did not intend “to harm anyone specifically or engage in malicious conduct”. (Brief of Respondent at 1) Appleberry makes no argument to oppose the argument set forth in the Brief of Appellant at pages 15-21. Since Appleberry failed

to produce substantial evidence of a prima facie defense, the trial court erred in vacating the default judgment.

II. CONCLUSION

Appleberry failed to submit substantial evidence supporting a prima facie defense to application of the willful and malicious acts exclusion in his parents' homeowners policy. Pointing a loaded assault rifle at an occupied car, with a finger on the trigger, to scare its occupants was willful and malicious. Further, Appleberry submitted no evidence explaining why he failed to appear and answer, even after being given an extra two weeks, much less showing excusable neglect. Therefore, the trial court abused its discretion when it vacated the default judgment.

DATED this 12th day of November, 2013.

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