

FILED

MAR 27 2014

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 309983

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

DAN GEBBERS, et. ux.,

Appellants,

v.

DONNA M. ALMA, et. vir., et. al.,

Respondents.

**THE HONORABLE MONICA WASSON
MOTION ON THE MERITS
February 12, 2014
(Pages 1 - 15)**

APPEARANCES:

For the Appellants:

DAVID CREVELING, *Pro Se*

For the Respondents:

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Wednesday, February 12, 2014

THE COURT: Good afternoon, Mr. Creveling and Counsel.

MR. HAMILTON: Good afternoon, Your Honor. This is Henry Hamilton.

THE COURT: Okay. And Mr. Creveling, you're there, too?

MR. CREVELING: (no audible response)

THE COURT: Mr. Creveling?

MR. CREVELING: Yes.

THE COURT: Okay, you're there.

The hearing this afternoon is for argument in *Gebbers v. Alma and Creveling*, it's our number 309983. It's before the Court on the Respondents' motions on the merit -- motion on the merits to affirm. Each side has 15 minutes for argument and, Mr. Hamilton, since it's your motion, you'll go first. If you want to reserve some of your 15 minutes for rebuttal, let me know at the beginning of your argument and I'll keep track of the time for you.

The hearing's being recorded. I've read the record and Counsel's briefs and, Mr. Hamilton, you may proceed.

MR. HAMILTON: Thank you, Your Honor.

For the record, this is Henry Hamilton and I'm here on behalf of the Respondents in this matter, George and Mary Armendariz, Teresa Rebo and Robert and Heather Brunkow. Your Honor, we do request to reserve five minutes for our rebuttal argument.

THE COURT: Alright.

MR. HAMILTON: Thank you.

As the Court is aware, this is a motion on the merits to terminate the, to terminate the appeal so the matter may be returned to Trial Court for determination. This appeal arises out of a June 2012 Trial Court ruling where the Court applied its discretionary authority and granted three procedural motions: a motion to intervene, a motion to shorten time and a motion to set aside a defective default judgment.

Following the Court's granting of the Respondent's three motions, so that the matter could be heard on the merits, Appellant filed his notice of appeal and the matter has been in the Court of Appeals and up to the Supreme Court for the intervening 18 months. We are still awaiting an opportunity to address the merits of the case, and that is why we would like the motion on the merits addressed.

I first want to talk about Appellant's opening brief. Appellant's opening brief fails to show why there is any basis for the appeal. It's devoid of any supported facts and lacks any authority showing why the Trial Court's procedural decision should be reversed. Appellant's opening brief highlights why the appeal is without basis and why this matter should -- why this motion, excuse me, should be granted.

Further highlighting why the motion should be granted is a review of Appellant's opposition to the motion on the merits. Appellant's opposition fails to provide any authority or show why this motion should be denied. The authority cited in the underlying motion is uncontested, and there's no dispute as to the facts. This motion is based upon RAP 18.14 subpart (e)(1), and that appellate rule provides that a motion on the merits to affirm will be granted, in whole or in part, if the appeal or any part of it is determined to be clearly without merit. In making these determinations, the Judge or Commissioner will consider all relevant factors, including whether the issues on review are (a) clearly controlled by settled law, (b) factually -- are factual and supported by the evidence, or, or (c) are matters of judicial discretion and a decision was clearly within the

discretion of the Trial Court. In this case, all three reasons exist for granting this motion so this matter can be returned to Trial Court.

The case law authority that we've provided the Court is uncontested and unchallenged. I, I want to point to the case of *Kaye v. Lowe's* (phonetic), which again is unchallenged by Appellant, and is to highlight the fact that a motion to -- for default, excuse me, is not automatic and it has to be supported. There is no support in the underlying case that would warrant granting a default judgment in this matter. The Court properly applied its discretionary authority to set aside the improper default judgment to preserve the status quo and allow the parties to hear this matter on the merits. And as the *Kaye* Court discussed, a default judgment based upon incomplete, incorrect or conclusory factual information is properly vacated. Appellant's answer and so-called third-party complaint is devoid of any factual allegations and fails to state a cause of action. As such, the Trial Court properly applied its discretionary authority to set it aside because it was unsupported under Civil Rule 55 and, and applying the standard applied in Civil Rule 68.

The Washington Supreme Court decision *White v. Holm* is very instructive in this instance. The opinion in *White v. Holm* is al-

so not challenged here. The Supreme Court in that case made it very clear that the Trial Court is to apply its authority liberally to make sure that matters are properly heard, and to set aside default judgments when they're not well-founded. In this case, it was not well-founded. The Trial Court was well within its authority to apply its discretionary authority to set aside the default judgment to allow this matter to appear -- to be addressed on the merits. It is important, at this point I want to revisit that we're talking about three procedural motions, we have yet to address the merits of the case. All three matters are purely procedural, including the motion to set aside the default judgment, and two precatory motions, the motion to set aside -- or, excuse me, the motion to intervene and the motion to shorten time.

The motion to shorten time was properly granted, again, based on the abuse of discretion standards. There is no authority cited, no basis for Appellant to argue that the Court abused the -- its discretion in setting aside -- excuse me, in allowing this matter to be heard on shortened time. The Supreme Court again, in discussing the Court's authority in *State ex. rel. Citizens Against Tolls v. Murphy*, said the Trial Court had discretion on ruling on a

motion to shorten time and an Appellate Court may only overturn the ruling for manifest abuse of discretion, even higher basis to do that.

At the time of the hearing... Mr. Creveling was, in fact, served prior to this hearing, he appeared and, in fact, had sufficient time to present his own pleadings, not only in opposition, but to reaffirm the default judgment. The Court inquired about whether Mr. Creveling was ready and he said yes. That's contained in the verbatim report of proceedings. Again, on a procedural discretionary ruling, the Court allowed the intervening -- intervenors to proceed forth with their motion and to intervene because of the exigent circumstances of the Appellant proceeding forward to claim title to their real property. Again, the Appellant had absolutely -- or, excuse me, the Respondents had absolutely no dealings directly with the Appellant; they've got no relationship to the Appellant. Appellant's entire claim is based on a nearly 10-year-old pleading that he was allowed to obtain a default judgment after the fact.

The motion to intervene was also properly granted. Again, Civil Rule 24(a) provides that intervention is a matter of right when the applicant, in this case the Respondents, claim a interest

related to the property. Well, that's exactly what they were claiming because there's a question of title to real property and they're the current owners of the real property.

Again, we're talking about the procedural motions, and while the Appellant may have a basis for making further arguments as to why he is, in fact, entitled to, to real property, the fact of the matter is we haven't even gotten to the merits of the case; we've been stuck in procedural review, and we request that this Court grant our motion so that the matter can be summarily returned back to the Trial Court so that we can address the merits of this case.

Your Honor, the motion is unopposed for all intents and purposes, it's unchallenged, the Appellant fails to cite any authority contrary to --

THE COURT: Excuse me, Mr. Hamilton, you've used your 10 minutes --

MR. HAMILTON: Right.

THE COURT: -- if you still want to reserve five.

MR. HAMILTON: Thank you very much, Your Honor.

THE COURT: Okay.

Mr. Creveling?

MR. CREVELING: Yes. I still protest the inter, inter (sic) -- to any intervenors being in the 03-2-00182-3 case whatsoever due to time having run on them to intervene or to file any friends of the Court action. I objected to the intervention in the Court hearing held on -- under my protest on June 6th 2012. The 04 case order left the 0 case 3 (sic) completely intact; the 04 case only dealt with the payoff amount on the purchase and interest. The 04 case never dealt with any of my counterclaims in the 03 case. The 04 case reflects exactly the payoff only and all other words were stricken in the 04 case order. The intervenors are wrongly intervening as the time to intervene ran years ago. The intervenors had years to intervene and chose not to. The intervenors waited over 90 days even from the (unintelligible) judgment, and over 60 days from the default order. People and organizations that put in friends of the Court briefs are limited to a certain period, cannot intervene past a certain date. The time clearly ran out months and years (sic) and the intervenors are groundless to intervene in the 03 case.

On page of the transcript (sic) for the hearing held June 6th 2012 for the 03 case, I object to the intervenors; I still object to the

intervenor. They all had adequate notice by way of the *lis pendens* filed in the 03 case, and it was also filed in the Okanogan County Auditor's office on June 10th 2003 and numbered by the Court Clerk as number 15. The default judgment was filed on April 3rd 2012 and numbered by the Clerk as 136. The time for any intervention had run months and years before the intervenors chose to intervene and their intervention should be denied and the property should be returned to me, according to the default judgment entered on April 3rd 2012, and the intervenors should pursue any grievance against their insurance company that Attorney Hamilton works for as their agent.

The Court also granted part of my motion and denied part of my motion. It wasn't only Henry Hamilton that had motions on the day that they -- he came to Court. No merits need to be addressed. I have contested the intervenors even having any right to intervene. The third-party complaint is of no relevance in this matter. The only matter of any relevance is where the -- whether the intervenors have any right to intervene due to time to intervene having had run. My motions, presented to the Court at the same time as the intervenors intervened, were granted in part and denied in

part. Three days were not sufficient time for me to present the facts from the 04 case, which the Judge would've probably made a different ruling had he had the facts from the 04 case because Hamilton presented that 04 case as having done away with the 03 case, and that's not what it was. And that's shown in the transcript from the 04 case.

Any property interest the intervenors have or may have had all ran out at the time of the orders having run past 90 days, and I'd like to reserve the rest of my time.

THE COURT: Mr. Creveling, you do not have any rebuttal time because you are the Respondent in this motion, so if you want to use additional time now, you should go ahead and do it.

MR. CREVELING: No, I, I, I'm fine.

THE COURT: Okay.

Mr. Hamilton, you have five minutes.

MR. HAMILTON: Thank you, Your Honor.

A few, few corrections. The intervenors did not wait. The Appellant obtained a default judgment, as he indicated, in April 2012. The hearing in this matter was June 2012. The Respondents, the current owners of the real property, did not know about

the default judgment until May 2012 when Appellant commenced activity. This is all set forth in the, the record on appeal in the declarations from the Respondents. The Respondents acted extremely quickly because they needed to once they discovered the default judgment. Mr. Creveling, as provided in the underlying declarations as part of the Court record and cited in our brief, was attempting to remove them from their own property or charge them rent or threatening to take -- remove them, evict them from the, the real property. So to suggest that the intervenors waited is simply untrue.

As to the issue of a *lis pendens*, again, this gets to the whole issue of the merits of the case, ones we have not addressed.

Your Honor, the issue here is strictly limited to three procedural motions that are reviewed under abuse of discretion standards. There's no evidence of abuse of discretion. There's no evidence that the Court did anything improperly. In fact, the contrary. The Trial Court did exactly what it's supposed to do, and that's preserve the status quo and allow the parties to come to the Court and address the merits of the case. We have not had that opportunity yet; 18 months later we are still reviewing procedural motions and have yet to address the merits of the case. Appellant wants to

talk about the merits of the case, I would like to talk about the Appellant -- the merits of the case, but that is to be done at the Trial Court level with a review of the evidence.

This motion, as is this appeal, is limited to three procedural motions and it is time for this appeal to be terminated. The Appellant has failed to provide the Court any evidence of abuse of discretion, any authority contrary to that, that authority cited in Respondents' motion, and fails to provide the Court any basis to deny the motion. The motion, for all intents and purposes, is uncontested. The motion should be summarily granted and this matter returned to the Trial Court so the parties can address the merits of the case. Thank you very much.

THE COURT: Alright.

I decide these kinds of motions by written ruling, and when I prepare my written ruling and have finalized it, I file it with our Clerk's Office, and then they get in touch with you to give you the result. I anticipate I'll be able to file my ruling in this case within the next couple of weeks.

Thank you both for your arguments.

MR. HAMILTON: Thank you very much.

THE COURT: Uh-huh (affirmative). Goodbye.

(END OF HEARING - 18:36 mins)

CERTIFICATE

STATE OF WASHINGTON)
) ss.
County of Douglas)

I, Jo L. Jackson, do hereby certify:

That I was requested to provide the foregoing transcript of digitally-recorded proceedings;

That the foregoing transcript consisting of fourteen (14) pages is a true and correct transcript of all such recorded testimony adduced and proceedings had and of the whole thereof to the best of my ability;

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 24th day of March 2014.



JO L. JACKSON

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

Court of Appeals, Division 3
of the State of Washington

Leibers, et al.,

Appellants

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Alma, et al

Certificate of
mailing

Cause # 309983

A copy by prepaid U.S. postage of the
hearing transcript for Court of Appeals Cause # 309983

hearing held on Wednesday February 12, 2014

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