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

STANLEY F. ABRAMSKI; KAREN DOLDE; LEE R. HOLT; JANIESE A. LOEKEN; DIANNE M. PRATT; ALMA M. ROLFS; AUDREY TODD; and MARCIA WESLEY,

Respondents,

v.

PRIMARY BEHAVIORAL HEALTH NETWORK, INC.; and PHILIP HIRSCH and JANE DOE HIRSCH,

Appellants.

No. 56763-2-I

MANDATE

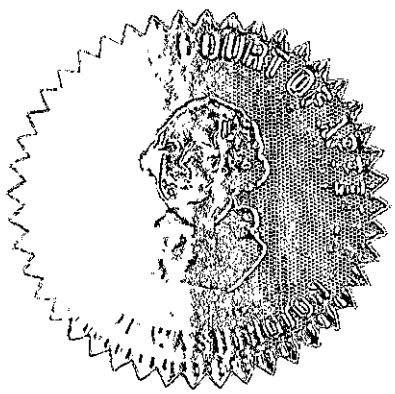
King County

Superior Court No. 04-2-17204-7 SEA

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for King County.

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division I, filed on October 9, 2006, became the decision terminating review of this court in the above entitled case on November 22, 2006. This case is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the decision.

c: Koll Jorgen Jensen
Thomas Leslie Gilman
Audrey Todd
Stanley F. Ambramski
Karen Dolde
Lee R. Holt
Dianne M. Pratt
Alma M. Rolfs
Janies A. Loeken
Hon. Dean S. Lum



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 22nd day of November, 2006.

RICHARD D. JOHNSON
Court Administrator/Clerk of the Court of Appeals,
State of Washington, Division I.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STANLEY F. ABRAMSKI; KAREN DOLDE; LEE R. HOLT; JANIESE A. LOEKEN; DIANNE M. PRATT; ALMA M. ROLFS; AUDREY TODD; and MARCIA WESLEY, Respondents, v. PRIMARY BEHAVIORAL HEALTH NETWORK, INC.; and PHILIP HIRSCH and JANE DOE HIRSCH, Appellants.	No. 56763-2-I DIVISION ONE UNPUBLISHED FILED: October 9, 2006

PER CURIAM -- Philip Hirsch, Jane Doe Hirsch, and Primary Behavioral Health Network, Inc. (PBHN) appeal the King County Superior Court's denial of their motion to vacate a default judgment against them. The appellants, however, did not establish that their failure to timely appear in the action was due to excusable neglect and did not move to vacate the default judgment within a reasonable time. We affirm.

On July 15, 2004, Stanley Abramski, Karen Dolde, Lee Holt, Janiese Loeken, Dianne Pratt, Alma Rolfs, Audrey Todd, and Marcia Wesley filed a complaint against Philip Hirsch, Jane Doe Hirsch, and PBHN for wages the plaintiffs claimed they earned while working for PBHN.[1] On August 9, 2004, plaintiffs moved for an order of default and default judgment, asking for $183,996 plus costs and attorney fees. In support of the default motion, plaintiffs' attorney

[1] We refer to the defendants/appellants collectively as PBHN.

Thomas Richards asserted that a process server, Padraic Mahoney, served Hirsch with the summons and complaint on July 17, 2004, and the defendants failed to appear.

The superior court granted the plaintiffs' motion for a default judgment. One year later, PBHN moved to vacate the default judgment.

In support of the motion to vacate, Hirsch, as owner and president of PBHN, argued that he had never been served with the summons and complaint. He acknowledged, however, that he owed plaintiffs money. He also admitted that he received notice of the default judgment in August 2004, approximately one week after the judgment was entered, but he claimed that he did not believe an actual judgment had been entered.

The plaintiffs responded that the motion to vacate should be denied because Hirsch admitted in his declaration that he: (1) was an officer of PBHN; (2) received notice of the default judgment on August 15, 2004; (3) is knowledgeable of legal proceedings; (4) purposely did not take action after receiving notice of the default judgment; (5) took no action even after receiving writs of garnishment on October 5, 2004; (6) could not meet payroll obligations on some occasions; (7) did not respond to the writs of garnishment, even though he received additional writs on December 23, 2004; (8) owed plaintiffs wages; and (9) retained legal counsel in February 2005 and received another writ of garnishment on April 12, 2005, yet did not move to vacate the default judgment until July 15, 2005. Additionally, the plaintiffs filed declarations from the process server indicating that he personally served the

summons and complaint upon Hirsch, whom the process server claimed he recognized because he had served Hirsch with process in other actions.

The superior court denied the motion to vacate, "finding that vacation of the Judgment would prejudice the Plaintiff & that the delay in bringing this motion was inexcusable." Hirsch filed a notice of appeal, which he served on the plaintiffs' lawyers. The plaintiffs' lawyers then filed a notice of withdrawal and substitution in this court. The lawyer who was named as substitute counsel for the plaintiffs/respondents himself later withdrew. A third lawyer appeared for one of the plaintiff/respondents and filed a motion for an extension of time to file a respondent's brief. That motion was granted, but the lawyer who filed the motion also withdrew. When no one else appeared on the respondents' behalf or filed a response brief, this case was set for hearing without a responsive brief and without oral argument.

Hirsch argues that the trial court erred when it denied his motion to vacate the default judgment. Under Civil Rule 55(c)(1), default judgments may be set aside in accordance with Civil Rule 60(b), which provides:

> [o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
>
> . . .
>
> (5) The judgment is void;
>
> . . .
>
> The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken.

CR 60(b)(1), (5).[2] The trial court's decision on a motion to vacate a default judgment pursuant to CR 60(b) will not be overturned on review absent an abuse of discretion. Hardesty v. Stenchever, 82 Wn. App. 253, 262, 917 P.2d 577 (1996).

Deciding whether to grant a motion to vacate a default judgment requires a court to analyze whether: (1) there is substantial evidence to support, at least prima facie, a defense to the opposing party's claim; (2) the moving party's failure to timely appear in the action and answer the complaint was due to mistake, inadvertence, surprise or excusable neglect; (3) the moving party acted with due diligence after notice of the default judgment; and (4) the opposing party will suffer substantial hardship if the default judgment is vacated. Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson, 95 Wn. App. 231, 238, 974 P.2d 1275 (1999). The first two factors are more significant than the second two. If the moving party cannot show a strong defense, the reasons for the moving party's failure to timely appear in the action, as well as the seasonability of the motion to vacate and the potential hardship on the opposing party, will be scrutinized more carefully. Shepard, 95 Wn. App. at 239. The moving party has the burden to demonstrate that the four factors are satisfied. Luckett v. Boeing Co., 98 Wn. App. 307, 314, 989 P.2d 1144 (1999).

To establish a prima facie defense, the moving party must submit an affidavit in support of the motion to vacate that precisely sets out the facts or errors constituting a defense; the affiant cannot rely upon mere allegations and conclusions. Shepard, 95 Wn. App. at 239. Evidence to support a defense is

[2] The other reasons for which a judgment may be vacated are not relevant to this appeal.

substantial if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise. Shepard, 95 Wn. App. at 242.

Hirsch's declaration did not precisely set out facts that constitute a defense to the plaintiffs' claims. Hirsch acknowledged that PBHN owed the plaintiffs wages and/or independent contractor fees, but the exhibits he submitted with his declaration do not clearly correlate to the amounts that he asserted were owed.

PBHN also claimed that the parties had "a bona fide dispute" over the amounts the plaintiffs were owed and, therefore, the plaintiffs were not entitled to double damages under RCW 42.52.050. Additionally, Hirsch asserted that judgment should not have been entered against him personally or his marital community because plaintiffs could not "pierce the corporate veil."

Hirsch's declaration and exhibits arguably constitute some evidence to support, at least prima facie, a defense to the plaintiffs' claims. The evidence of a defense, however, is not substantial.

PBHN asserted that its failure to timely appear in the action was due to excusable neglect. PBHN explained that Hirsch, the owner and president of PBHN, was not served with the summons and complaint: "Dr. Hirsch did not respond to the summons and complaint because he was never served on July 19, 2004 or on any other date." As will be discussed more fully elsewhere in this opinion, however, PBHN did not present clear and convincing evidence that service was improper.

To show that PBHN acted with due diligence after receiving notice of the default judgment, Hirsch submitted a declaration explaining why he did not respond for approximately a year before moving to vacate:

> First, it did not seem plausible . . . that a judgment could be awarded by a court without a lawsuit being filed to which he would have had the opportunity to respond. . . . Dr. Hirsch had no knowledge of any lawsuit filed by the plaintiffs against him and/or PBHN. He had never received notice of any lawsuit or summons and complaint and therefore, thought it impossible that the notice was a valid judgment.
>
> Second, although some wages and independent contractor fees were owed to certain of the plaintiffs at the time Dr. Hirsch received the notice of default judgment, the dollar amount set forth in the default judgment was approximately five times the dollar amount actually owed. In addition to not seeming possible that a judgment could be entered against PBHN and Dr. Hirsch by a court without Dr. Hirsch having prior knowledge of a lawsuit being filed, it also did not seem possible to Dr. Hirsch that a document claiming five times the actual amount owed could be a bona fide legal document.
>
> Third, in Dr. Hirsch's role as a health care provider and owner of a health care practice, he occasionally received records subpoenas issued by attorneys that did not conform to legal process, such as the requirement that fourteen days notice of intent to subpoena records be provided to a patient before the records are subpoenaed from the patient's health care provider. Similarly, and since it seemed completely impossible to Dr. Hirsch that a default judgment could be entered against his business and him individually without a lawsuit being filed and his having an opportunity to respond, he believed this notice of default judgment to be inconsistent with legal process and, therefore, not a bona fide legal or binding document.
>
> Fourth, Dr. Hirsch was aware of a variety of claims and representations made by several of the listed plaintiffs that were factually incorrect and that were intended to harass or damage Dr. Hirsch and/or PBHN. In addition, he had received from plaintiffs' attorney an earlier letter in which several allegations were set forth, and which were again factually inaccurate, that appeared intended to harass or damage Dr. Hirsch and/or PBHN. As a result, Dr. Hirsch believed that the notice of default judgment was a tactic being used by the plaintiffs and their attorney to harass, intimidate, and attack him and PBHN in furtherance of their claims.

Clerk's Papers at 183–85. Hirsch's declaration does not establish that PBHN acted with due diligence.

PBHN also failed to address the hardship that the plaintiffs would suffer if the default judgment was vacated. The plaintiffs argued, however, that they would suffer substantial hardship because they already had used the garnishment statute to recover money they were owed. The plaintiffs contended that if the motion to vacate were granted, they would be forced to return the garnished funds. As a result, the plaintiffs claimed, the parties who had refused to comply with the law (Hirsch and PBHN) would be rewarded, while those who complied with the law would be penalized.

PBHN argues on appeal that it offered detailed, meritorious defenses, and that plaintiffs did not show what prejudice would result from a trial on the merits. But PBHN had the burden to show that the relevant factors supported setting aside the default judgment. See Luckett, 98 Wn. App. at 314. PBHN did not present substantial evidence of a defense to the plaintiffs' action; did not present convincing proof that his failure to respond to the summons was due to excusable neglect; did not show that it acted within a reasonable time after receiving notice of the judgment; and did not address the potential prejudice to the plaintiffs that would result from vacating the judgment. Therefore, PBHN failed to show that the default judgment should be vacated.

PBHN asserts, however, the trial court did not have in personam jurisdiction over Hirsch or the corporation because Hirsch was not served with process and, therefore, the judgment against PBHN was void. Proper service of the summons and complaint are necessary to invoke the court's jurisdiction over a party. RCW 4.28.020; Lee v. Western Processing Co., 35 Wn. App. 466, 469, 667 P.2d

638 (1983). A judgment entered without jurisdiction over the parties is void. Lee, 35 Wn. App. at 469.

Courts have a nondiscretionary duty to vacate void judgments even without a showing of a meritorious defense. Leen v. Demopolis, 62 Wn. App. 473, 477–78, 815 P.2d 269 (1991). A motion to vacate a void judgment need not be brought within a "reasonable time" under CR 60(b)(1). Allstate Ins. Co. v. Khani, 75 Wn. App. 317, 323-24, 877 P.2d 724 (1994). Because the judgment was void, PBHN contends it could bring its motion to vacate at any time after the judgment was entered.

PBHN, however, had the burden to show that service was improper:

> When a default judgment has been entered based upon an affidavit of service, the judgment should be set aside only upon convincing evidence that the return of service was incorrect. An affidavit of service that is regular in form and substance is presumptively correct. The burden is upon the person attacking the service to show by clear and convincing proof that the service was improper.

Leen, 62 Wn. App. at 478 (citations omitted).

The process server declared that he personally delivered the summons and complaint to Dr. Philip Hirsch, "CORPORATE OFFICER 45 190# 5'10 C/M BLOND HR, GLASSES" at PBHN's business location on July 19, 2004 at 10:48 in the morning. The process server's declaration was regular in form and substance. See Alvarez v. Banach, 153 Wn.2d 834, 840, 109 P.3d 402 (2005) (proof of service is sufficient if it shows the date, manner, and place of service). Moreover, it is presumptively correct. Leen, 62 Wn. App. at 478.

Hirsch responded that July 19, 2004 was a Monday, and he generally did not go to the office on Mondays during the summer months when his children were

out of school. Hirsch declared that both his personal calendar and the PBHN office calendar showed he had no appointments scheduled on July 19, 2004, but he attached only a part of his personal calendar as an exhibit in support of that statement. The excerpt from his personal calendar, in which entries were printed, as opposed to handwritten, indicated that Hirsch was "Out all day" on July 19, 2004.

Hirsch also claimed that the process server's description of the person who received the summons and complaint did not match him. The process server, however, declared in response to the motion to vacate that he recognized Hirsch because he had served Hirsch "on more than one occasion in other actions."

Hirsch did not address the process server's assertion that he recognized Hirsch. Under these circumstances, Hirsch did not show by clear and convincing proof that he was not properly served.

According to PBHN, however, the only proof of service before the court when it granted the default motion was an affidavit from the plaintiffs' attorney stating that "Defendants were served by our process server, Padraic Mahoney, on July 19, 2004 with the summons and complaint in this matter." Without citation to authority, PBHN contends that the attorney's declaration was not sufficient proof of service because the attorney did not attach a declaration from the process server and the attorney had no personal knowledge that Hirsch was served. Because PBHN has not cited relevant authority to support his argument, we need not consider the argument. Furthermore, it is the fact of service, not the return of service, that confers jurisdiction. Jones v. Stebbins, 122 Wn.2d 471, 482, 860 P.2d 1009 (1993).

PBHN did not show that the default judgment entered against it was void. The trial court, therefore, did not abuse its discretion when it denied PBHN's motion to vacate the default judgment.

Even if the court had personal jurisdiction, PBHN argues, the default judgment is unduly harsh and justice demands that it be set aside. PBHN, however, did not move to vacate the judgment within a reasonable time after it was entered. The alleged confusion that Hirsch claimed to have suffered upon seeing the judgment did not excuse PBHN's failure to act.

Finally, PBHN argues that the judgment against Hirsch personally and his marital community is not supported by proof that the defendant corporation failed to observe corporate formalities. By ignoring the lawsuit, however, Hirsch lost his ability to require plaintiffs to prove their allegations.

The trial court did not abuse its discretion when it denied PBHN's motion to vacate the default judgment. PBHN did not precisely set out facts to support even a prima facie defense to plaintiffs' action, establish that it failed to answer the complaint due to excusable neglect, show it acted with due diligence after learning of the default, or that the first three considerations outweighed the prejudice to the plaintiffs. The decision of the trial court is affirmed.

For the Court:

Cox, J.

Dwyer, J.

Baker, J.