IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

COLUMBIA RECOVERY GROUP, LLC, a Washington limited liability company,	)	No. 67818-3-I
Appellant,	)	DIVISION ONE
v.	)	UNPUBLISHED OPINION
DEBORAH A. BAILEY and RONALD BAILEY, each individually and the marital community comprised thereof,	)	
Respondents.	)	FILED: January 14, 2013

Appelwick, J. — Where a party entitled to notice does not receive notice of a default hearing, that party is entitled to have a default order and judgment set aside as a matter of right without further inquiry. Here, the trial court properly vacated the default order and judgment and exercised its discretion to award terms under CR 55(c)(1) and CR 60(b). Because Columbia Recovery Group fails to demonstrate any error or abuse of discretion, we affirm. We also award attorney fees under RAP 18.9(a) based on our finding that the appeal is frivolous.

FACTS

On February 20, 2011, Columbia Recovery Group (CRG), a collection agency, served a summons and complaint on Deborah and Ronald Bailey (Bailey), seeking $5,415.73 plus interest, allegedly owing for an apartment rental. Bailey's attorney sent a notice of appearance to CRG's counsel on February 26, 2011. CRG filed the summons and complaint in superior court on

March 29, 2011.

On April 8, 2011, CRG filed a motion for default and entry of judgment, noting a hearing date without oral argument for Friday, April 29, 2011. Also on April 8, CRG filed a copy of Bailey's attorney's original notice of appearance. On April 19, CRG filed an affidavit stating that copies of the default motion and related documents "were certified mailed" to Bailey's attorney on April 8, 2011.

The trial court entered an order of default on May 6, 2011, and re-noted presentation of the judgment to May 16. But CRG requested entry of a judgment at the ex parte department and a commissioner entered the judgment on May 11, 2011.

On August 18, 2011, Bailey filed a motion to vacate the default order and judgment, quash a writ of garnishment issued on June 2, and impose sanctions on CRG and its counsel. With supporting documentation, Bailey's attorney claimed that (1) he had not received notice of CRG's motion for default; (2) the post office returned a certified package addressed to him to CRG's attorney as undeliverable on May 3, 2011; (3) he first discovered the case had been filed when Bailey reported to him on June 17, 2011, that her paycheck had been garnished; and (4) CRG refused his request to voluntarily vacate the default judgment. Bailey requested $8,250 in fees as a sanction. CRG responded, arguing that Bailey failed to establish good cause to vacate the default order and judgment and that counsel's failure to pick up the certified package at the post office was not excusable neglect.

After a hearing on September 16, 2011, the trial court vacated the default

order and judgment, quashed the writ of garnishment, and ordered CRG to pay Bailey $4,125 in terms.[1] The trial court found:

> Columbia and counsel failed to inform the court that the letter to [Bailey's attorney] containing notice of motion of default had been returned and therefore defendant/counsel had not received notice of the motion of default. Therefore this court entered a default judgment without knowing that the order of default had been entered without notice. Counsel for Columbia shall read and review RPC 3.3.

CRG appeals.

Discussion

CRG contends that the trial court abused its discretion by vacating the default order and judgment without considering the factors relevant to a CR 60(b)(1) analysis as set out in White v. Holm, 73 Wn.2d 348, 352, 438 P.2d 581 (1968) (moving party's defense on the merits, reason for failure to appear, and due diligence after learning of default, as well as hardship to the opposing party). Relying on authority addressing the second of the White factors, whether a party's failure to timely appear was due to mistake, inadvertence, surprise, or excusable neglect, CRG argues that it was Bailey's burden to justify their failure to *receive* notice of the motion for default. See, e.g., Johnson v. Cash Store, 116 Wn. App. 833, 847-49, 68 P.3d 1099 (2003) (examining reasons for defendant's failure to appear and answer); Prest v. Am. Bankers Life Assurance Co., 79 Wn. App. 93, 99-100, 900 P.2d 595 (1995) (defendant's failure to answer complaint was not excusable neglect); TMT Bear Creek Shopping Ctr., Inc. v. PETCO

[1] No transcript of the September 16 hearing appears in the record before this court.

Animal Supplies, Inc., 140 Wn. App. 191, 212-13, 165 P.3d 1271 (2007) (break-down in internal office management and procedure does not constitute excusable neglect justifying failure to respond to properly served summons and complaint).

But Washington courts have treated the failure to provide notice to which a defendant was entitled as a procedural defect requiring that a default action be vacated, not as one factor to be weighed by the trial court in determining whether a judgment should be vacated under CR 60(b)(1). See, e.g., Ware v. Phillips, 77 Wn.2d 879, 888, 468 P.2d 444 (1970) (due process violated by entry of order without notice to party entitled to notice); Shreve v. Chamberlin, 66 Wn. App. 728, 731-32, 832 P.2d 1355 (1992) (trial court acts without authority by entering default judgment without notice against party who as previously appeared); Tiffin v. Hendricks, 44 Wn.2d 837, 847, 271 P.2d 683 (1954) (where court has entered default judgment without authority, judgment must be set aside as matter of right without showing of meritorious defense); Tacoma Recycling, Inc. v. Capitol Material Handling Co., 34 Wn. App. 392, 396, 661 P.2d 609 (1983) (failure to give notice to party entitled to notice was error requiring judgment to be vacated).

CR 55(a)(3) provides in pertinent part: "*Notice*. Any party who has appeared in the action for any purpose shall be served with a written notice of motion for default and the supporting affidavit at least 5 days before the hearing on the motion." A party who has appeared in an action is entitled to notice of a default judgment hearing. Morin v. Burris, 160 Wn.2d 745, 754, 161 P.3d 956

(2007). If a party appeared, but did not receive notice of a default hearing, that party is entitled to have the default judgment set aside as a matter of right without further inquiry. Id.; Tiffin, 44 Wn.2d at 847.

It is undisputed that Bailey appeared in the action and was therefore entitled to notice. It is undisputed that Bailey did not receive notice of the motion for default before the hearing. CRG elected service by certified mail that required signature at acceptance. It is not entitled to prove service by mere certificate of mailing. Not only did CRG not file the written acknowledgment of service prior to seeking the default, it also had actual knowledge that the notice had been returned to it by the post office before seeking entry of the judgment.[2] Under these circumstances, Bailey was entitled to have the default order and judgment set aside as a matter of right without further inquiry. CRG fails to establish any error in the trial court's order vacating the default order and judgment and quashing the writ of garnishment.

CRG next contends that the fee award must be reversed because the trial court did not make a finding of bad faith or wantoness, failed to make a record demonstrating use of the lodestar method to calculate the amount of fees, and failed to require proper documentation to support Bailey's claimed expenditures. But CRG fails to cite any authority requiring any particular written findings before a trial court may order terms under CR 55(c)(1) and CR 60(b).

[2] CRG claims it did not have actual knowledge that the certified package had been returned until June, claiming that the package was returned to a "satellite" office. But, CRG does not claim that the post office returned the certified mail on May 3 to an address other than that supplied by the sender.

CR 55(c)(1) and CR 60(b) allow the trial court to impose terms it considers just on either a moving party or opposing party to a motion to set aside a default order or judgment. CR 55(c)(1) ("For good cause shown and upon such terms as the court deems just, the court may set aside an entry of default"); CR 60(b) ("On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment"); Housing Auth. of Grant County v. Newbigging, 105 Wn. App. 178, 192, 19 P.3d 1081 (2001) (equitable circumstances may support granting terms to the moving party); Pamelin Indus., Inc. v. Sheen–U.S.A., Inc., 95 Wn.2d 398, 403, 622 P.2d 1270 (1981). "The decision to impose terms as a condition on an order setting aside a judgment lies within the discretion of the court." Knapp v. S.L. Savidge, Inc., 32 Wn. App. 754, 756, 649 P.2d 175 (1982). The trial court has liberal discretion to do justice between the parties with regard to awarding terms when deciding a motion to vacate a default order or judgment. Newbigging, 105 Wn. App. at 192.

Here, Bailey's counsel reported that he spent more than 30 hours at $275 per hour on investigation, research, negotiation, and litigation to obtain relief from the default order and judgment. Accordingly, Bailey claimed to have spent $8,250 in successfully vacating a default order that CRG admittedly obtained without providing the notice of the default motion to which Bailey was entitled under CR 55(a)(3). Moreover, the trial court found that when requesting entry of the default judgment on May 11, CRG did not inform the ex parte commissioner that the certified package sent to Bailey containing notice of CRG's motion for default had been returned as undeliverable on May 3, causing the court to enter

a default judgment without knowing that Bailey had not had notice of the motion for default.[3] Also, the record reveals that Bailey's attorney notified CRG in June 2011 that he had not received notice of the motion for default and requested CRG to voluntarily vacate the default order and judgment. Given Bailey's right to have the default vacated due to lack of actual notice, it was unreasonable for CRG to refuse. CRG's refusal necessitated all Bailey's subsequent legal expenses. Under the circumstances here, we cannot say the trial court abused its discretion in awarding Bailey half their requested amount, for a total of $4,125, in terms. Newbigging, 105 Wn. App. 192-93 (trial court did not abuse discretion by awarding terms in amount equal to half the attorney fees spent in successfully vacating default judgment obtained under highly questionable circumstances).

Both Bailey and CRG request an award of attorney fees on appeal under RAP 18.1. CRG also requests fees under the parties' lease agreement, while Bailey additionally cites CR 11 and/or CR 60(b).

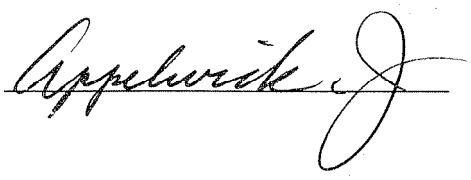
RAP 18.9(a) allows the appellate court on its own initiative to order a party who files a frivolous appeal to pay terms to another party. An appeal is frivolous if, considering the entire record, and resolving all doubts in favor of the appellant, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of

[3] CRG does not assign error to this finding but argues that CRG had no duty to inform the court that Bailey's counsel failed to accept or pick up his mail, and that CRG did not receive notice that the certified mail was returned until June 17. Unchallenged findings are verities on appeal. Cowiche Canyon Conservatory v. Bosley, 118 Wn.2d 801, 808, 828 P.2d 549 (1992)

merit that there is no possibility of reversal. Tiffany Family Trust Corp. v. City of Kent, 155 Wn.2d 225, 241, 119 P.3d 325 (2005).

We award attorney fees on appeal to Bailey against CRG. Given the fact that Bailey was entitled to relief under well-settled law as expressed in Tiffin and Tacoma Recycling, and the fact that CRG refused to voluntarily vacate the judgment, thereby compounding Bailey's legal expenses this appeal is frivolous.

Affirmed.



WE CONCUR: