IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

WARREN WESTLUND BUICK-GMC TRUCK, INC., a Delaware corporation,	)	DIVISION ONE
Appellant,	)	No. 63877-7-I
v.	)	UNPUBLISHED OPINION
CROW ROOFING & SHEET METAL, INC., a Washington corporation,	)	
Respondent.	)	FILED: July 26, 2010

Dwyer, C.J. — We must determine whether the trial court abused its discretion in vacating a default judgment pursuant to CR 60(b)(1). Finding no error, we affirm.

I

In 2004, Warren Westlund Buick-GMC Truck, Inc. hired Crow Roofing & Sheet Metal, Inc. to install a roofing system. Crow's five-year warranty on the roofing system excluded damages caused by "foundation settlement, failure or cracking of roof deck, faulty building design or construction."

In 2006, two years after the roof was constructed, Westlund complained to Crow about water intrusion into Westlund's building. Crow attempted to repair

the roof, but those attempts were unsuccessful. Crow requested that the roofing materials manufacturer investigate Westlund's claims of product and workmanship defects. After reviewing photographs of the building, an employee of the manufacturer concluded that the damage was caused by "excessive movement in the structure."

In November 2008, Crow received a demand letter from Westlund stating that Westlund would take legal action to enforce the contract and the warranty if Crow would not fund the necessary repairs to the roof. The next day, Crow contacted its insurance broker, requesting that he forward the demand letter to Crow's insurer, CNA. Crow was soon contacted by a CNA claims representative, Thomas Howell, through a letter acknowledging receipt of Crow's newly filed claim. This letter informed Crow that "[a]ll correspondence should be faxed to [a specific fax number]." Crow sent a number of documents to CNA by dialing the fax number listed in Howell's letter. Shortly thereafter, Sarah Rapolas—an insurance claims adjuster within CNA's construction defects unit—contacted Crow, informing the company that she would be handling the claim. Rapolas did not inform Crow that it should send correspondence to a fax number different from the one previously provided.

Rapolas then exchanged multiple telephone calls and items of correspondence with Westlund's attorney. Rapolas attempted to collect more information about the claim, both from Westlund's attorney and from CNA's own

investigation. To this end, CNA hired a consultant to inspect Westlund's building. The consultant opined that Westlund's damages were the result of "a weakened concrete structure (likely due to seismic activity) that allows the building to shift and move and continue to crack."

In early 2009, Westlund filed suit against Crow. Westlund sent a "courtesy copy" of the summons and complaint to Rapolas, informing her that the complaint had been filed. Rapolas contacted Westlund's attorney to acknowledge receipt of the documents. At this time, she notified Westlund's attorney that CNA was denying the claim "due to a lack of liability on the part of Crow Roofing."

The next day, Westlund served Crow with the summons and complaint. Two days later, Crow faxed the summons and complaint to CNA using the fax number to which Howell's letter had stated Crow should send all correspondence. However, Rapolas never received the faxed summons and complaint from Crow because she did not work in the same division as Howell. Consequently, CNA did not cause an attorney to enter an appearance on behalf of Crow.

Westlund subsequently moved for entry of an order of default and for a default judgment. The trial court granted both motions and awarded Westlund $172,611.75 in damages.

One month later, Westlund contacted Crow to collect on the judgment. A

week later, Crow, through an attorney, entered an appearance and moved to set aside the default judgment pursuant to CR 55(c)(1) and CR 60(b)(1). In a supporting declaration, Crow's president stated that, "[i]t [wa]s Crow's understanding that CNA insurance would retain defense counsel and otherwise defend against this action." In addition, Rapolas provided a supporting declaration stating that, "[i]f I had known about the service of the complaint and summons upon Crow . . ., I would have retained counsel to appear and defend this action. . . . It appears that there was miscommunication between departments at CNA regarding service of the summons and complaint on Crow Roofing." The trial court granted the motion to vacate.

Westlund appeals.[1]

II

Westlund contends that the trial court erred in vacating the default judgment entered against Crow. We disagree.

We review for an abuse of discretion a trial court's ruling on a motion to vacate a default judgment.[2] Little v. King, 160 Wn.2d 696, 703, 161 P.3d 345

[1] Within its response brief, Crow moves to strike portions of Westlund's statement of the case, asserting that it is not a fair statement of the case as required by RAP 10.3(a)(5). However, Crow fails to comply with RAP 10.4(d), which provides that a party may include a motion within a brief only where the motion, if granted, "would preclude hearing the case on the merits." Thus, Crow's motion is itself improper. Moreover, such motions to strike are not favored. The panel has the ability to review the record designated on appeal and to determine the facts relevant to a fair resolution of the issues presented.

[2] Westlund contends that we must review de novo the trial court's determination that Crow's failure to timely appear was occasioned by mistake, inadvertence, surprise, or excusable neglect. For this proposition, Westlund cites only to non-Washington authority. These sources are unpersuasive, given the numerous Washington decisions holding that we review for an abuse of discretion a trial court's decision to vacate a default judgment pursuant to CR 60(b)(1).

(2007). A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable grounds or untenable reasons. Luckett v. Boeing Co., 98 Wn. App. 307, 309-10, 989 P.2d 1144 (1999) (quoting Lane v. Brown & Haley, 81 Wn. App. 102, 105, 912 P.2d 1040 (1996)). "Abuse of discretion is less likely to be found if the default judgment is set aside." Griggs v. Averbeck Realty, Inc., 92 Wn.2d 576, 582, 599 P.2d 1289 (1979).

Default judgments are generally disfavored in Washington. "We prefer to give parties their day in court and have controversies determined on their merits." Morin v. Burris, 160 Wn.2d 745, 754, 161 P.3d 956 (2007). "But we also value an organized, responsive, and responsible judicial system where litigants acknowledge the jurisdiction of the court to decide their cases and comply with court rules." Little, 160 Wn.2d at 703. "Our primary concern in reviewing a trial court's decision on a motion to vacate is whether that decision is just and equitable." TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc., 140 Wn. App. 191, 200, 165 P.3d 1271 (2007). "'What is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome.'" Griggs, 92 Wn.2d at 582 (quoting Widucus v. Sw. Elec. Coop., Inc., 26 Ill.App.2d 102, 109, 167 N.E.2d 799 (1960)).

A default judgment may be set aside in accordance with CR 60(b). CR 55(c)(1). Crow moved to vacate pursuant to CR 60(b)(1), which states, in

relevant part:

> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.** On 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;
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> . . .
>
> 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.

The party seeking to vacate a default judgment pursuant to CR 60(b)(1) must establish:

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

White v. Holm, 73 Wn.2d 348, 352, 438 P.2d 581 (1968). Here, Westlund contends that Crow cannot satisfy the first and second factors. There is no dispute that the third and fourth factors are met.

With regard to the first White factor, Crow established a prima facie defense. Westlund's complaint alleged breach of contract for deficient work and breach of the roofing warranty. Crow's motion to vacate the default judgment contended that the defects and water intrusion causing Westlund's damage were not the result of product or workmanship defects but rather were caused by

building movement. Crow provided an expert declaration, photographs, and a letter from the manufacturer supporting this assertion. Such damage appears to be excluded from the roofing warranty. A trial on the merits in this instance would not be useless. TMT Bear Creek, 140 Wn. App. at 204. Such a prima facie defense is all that Crow need demonstrate to satisfy the first White factor.

As to the second factor, there is no black letter rule for determining whether a movant has established mistake, inadvertence, surprise, or excusable neglect. Griggs, 92 Wn.2d at 582. This is because "[e]ach case of excusable neglect must rest on its own facts." Pybas v. Paolino, 73 Wn. App. 393, 402, 869 P.2d 427 (1994) (quoting City of Goldendale v. Graves, 88 Wn.2d 417, 423, 562 P.2s 1272 (1977)). Thus, whether mistake, inadvertence, surprise, and excusable neglect occurred is determined on a case by case basis. Norton v. Brown, 99 Wn. App. 118, 123, 992 P.2d 1019, 3 P.3d 207 (1999). Even where a defendant was aware of the lawsuit against him or her and failed to respond, "[a] genuine misunderstanding between an insured and his insurer as to who is responsible for answering the summons and complaint will constitute a mistake for purposes of vacating a default judgment." Norton, 99 Wn. App. at 124; see also White, 73 Wn.2d 348; Berger v. Dishman Dodge, Inc., 50 Wn. App. 309, 748 P.2d 241 (1987); Calhoun v. Merritt, 46 Wn. App. 616, 731 P.2d 1094 (1986).[3]

[3] Westlund argues that Crow's actions are inexcusable for CR 60(b)(1) purposes. In support of this contention, Westlund attempts to distinguish relevant Washington authority and cites to several decisions from other state and federal courts. Given that several Washington decisions discuss questions of mistake, inadvertence, surprise, and excusable neglect in the

In White, our Supreme Court held that the trial court abused its discretion in denying the defendant's motion to vacate the default judgment entered against him. 73 Wn.2d at 357. The defendant failed to appear because of a misunderstanding: the defendant had thought his insurer's attorney would appear for him but his insurer had thought that the defendant's personal attorney would appear and defend until coverage was determined. White, 73 Wn.2d at 349–50. The Supreme Court held that the defendant's failure to timely appear resulted from a "bona fide mistake, inadvertence, and surprise," White, 73 Wn.2d at 355, and that vacation of the default judgment was warranted.

In Calhoun, the court held that the trial court improperly denied a motion to vacate a default judgment regarding damages. 46 Wn. App. at 622. The defendant had not answered the summons and complaint because he believed that his insurer was already involved in the case. Calhoun, 46 Wn. App. at 618. The defendant had been advised by his insurer to expect service, but the insurer had not informed the insured about what to do once service occurred. Calhoun, 46 Wn. App. at 621. The court held that the defendant's mistaken belief that his insurer knew of and would respond to the lawsuit was a bona fide mistake satisfying the second White factor. Calhoun, 46 Wn. App. at 621

In Berger, the defendant did not appear because the insurance company's claims manager sent the wrong case file to the assigned law firm.

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context of an insured believing that his or her insurance company will be defending a lawsuit, the authorities to which Westlund cites are unpersuasive. Moreover, these authorities, when carefully reviewed, do not support Westlund's contentions.

Although this mistake was not discovered until after entry of the default judgment, it was held that the trial court properly vacated the default judgment because the "insured had no reason to believe that his interests were not being protected after promptly forwarding the documents to the insurer." Berger, 50 Wn. App. at 311–12.

Similarly, the Norton court held that the trial court therein had improperly denied a motion to vacate a default judgment. 99 Wn. App. at 125. In that case, the defendant informed his insurer about an automobile collision in which he had been involved, the insurer began settlement negotiations with the plaintiff's attorney, the insurer did not warn the defendant that a lawsuit was being commenced, and the defendant did not notify the insurer of receipt of the summons and complaint "because he thought his insurer was already handling the claim on his behalf." Norton, 99 Wn. App. at 120. The court held that "[t]his was a mistake on the part of the insurer and excusable neglect on the part of [the defendant]." Norton, 99 Wn. App. at 124.

Westlund argues that these appellate decisions are inconsistent with White and with Unigard Ins. Co. v. Leven, 97 Wn. App. 417, 983 P.2d 1155 (1999). We disagree. Although the defendant in White was more actively involved in discussions with his insurance company than were the Norton, Berger, and Calhoun defendants, there is no requirement that the defendant demonstrate an express assurance by the insurance company or by his or her

own lawyer that the insurance company would respond to the plaintiff's complaint in order for the defendant to successfully establish mistake, inadvertence, surprise, or excusable neglect.

Nor do these decisions conflict with Leven. That case's holding—that an insurer is under no legal obligation to retain counsel absent an affirmative request for a defense from the insured—arose in the context of a coverage dispute and a declaratory judgment action between the insured and the insurer. Leven, 97 Wn. App. at 419–20, 427. It does not purport to contradict decisions resolving motions to vacate default judgments.

Upon being served with Westlund's complaint, Crow promptly forwarded the summons and complaint to CNA. CNA was already handling Westlund's insurance claim against Crow and had been in contact with Westlund's attorney. It was reasonable for Crow to forward the summons and complaint to CNA through the same channels it had used previously. CNA's claims adjuster never received Crow's fax, but this is because Crow mistakenly believed that sending important correspondence to the fax number that it had been given earlier would result in the paperwork reaching the claims adjuster working on Westlund's claim and would, ultimately, result in a defense being provided. In addition, CNA did not know that Westlund's lawsuit had been properly commenced because it was unaware that Crow had been served. These facts demonstrate a misunderstanding between Crow and CNA. Crow believed that CNA was

handling the litigation but CNA was unaware that the litigation had begun. Crow and CNA had a contractual relationship, by which CNA was obligated to defend Crow. Crow believed in good faith that CNA would respond to the lawsuit on Crow's behalf.

Crow's failure to respond to Westlund's lawsuit was not purposeful. As with the defendants in White, Norton, Berger, and Calhoun, Crow had a genuine mistaken understanding about its need to take action to defend the lawsuit rather than leaving its insurance company to implement the necessary response. Crow demonstrated the existence of an excusable mistake: Crow was mistaken that sending the summons and complaint to CNA by the same means as earlier utilized would result in CNA providing Crow a defense in the lawsuit. The trial court did not err in finding this element of the White test satisfied.[4]

Westlund does not dispute that the third and fourth White factors are satisfied. The third factor is met because Crow, through an attorney retained by CNA, promptly moved for vacatur after learning of the default judgment. Moreover, nothing indicates that granting the motion to vacate would pose an undue hardship to Westlund, in satisfaction of the fourth factor. As all of the White factors are satisfied, the trial court did not err by vacating the default judgment.

Affirmed.

[4] Both Westlund and Crow contend that CNA's actions should not be imputed to Crow. Thus, we need not determine under what circumstances such imputation is appropriate.

Dwyer, C.J.

We concur:

Cox, J.

Becker, J.