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

BELLEVUE SQUARE, LLC, Appellant, v. WELLS FARGO BANK, NA, Respondent, JIMI LOU STEAMBARGE, d/b/a ALLUSIA, Judgment Debtor.	)	No. 67335-1-I UNPUBLISHED OPINION FILED: November 5, 2012

Ellington, J. — The mistaken belief that a motion for default judgment will be denied does not establish excusable neglect, and unsubstantiated hearsay claims of improper service do not establish an irregularity in obtaining judgment. Wells Fargo Bank failed to answer a writ of garnishment, deliberately disregarded the motion for default, and declined to invoke its statutory right to reduce the ensuing judgment to the amount it held for the judgment debtor. Because there is no legitimate basis to relieve Wells Fargo of the default judgment, we reverse the trial court's vacation of the judgment and remand for its reinstatement.

BACKGROUND

Bellevue Square obtained a judgment against its former tenant, Jimi Lou Steambarge. Bellevue Square served the tenant's bank, Wells Fargo, with certified copies of a writ of garnishment and other documents required by statute.[1] The writ warned that failure to answer could result in a judgment against the bank itself for the full amount of Bellevue Square's claim against Steambarge ($71,272.38), plus interest, costs, and attorney fees.[2] Bellevue Square retained a copy of the documents, including the $20 check for its required answer fee payment.

Wells Fargo's legal order processing department confirmed receipt of the writ, giving no indication that anything was amiss. Several days later, however, the bank returned all original garnishment documents, except the check, to Bellevue Square's attorneys. A form cover letter advised that Wells Fargo objected to the documents because of an "Invalid Payment Fee Amount."[3]

Bellevue Square's attorney contacted Wells Fargo and was told that no check in

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[1] RCW 6.27.110(1) provides: "Service of the writ of garnishment, including a writ for continuing lien on earnings, on the garnishee is invalid unless the writ is served together with: (a) An answer form as prescribed in RCW 6.27.190; and (b) a check or money order made payable to the garnishee in the amount of twenty dollars for the answer fee if the writ of garnishment is not a writ for a continuing lien on earnings."

[2] The writ contained the following warning: "IF YOU FAIL TO ANSWER THIS WRIT AS COMMANDED, A JUDGMENT MAY BE ENTERED AGAINST YOU FOR THE FULL AMOUNT OF THE PLAINTIFF'S CLAIM AGAINST THE DEFENDANTS WITH ACCRUING INTEREST, ATTORNEY FEES, AND COSTS WHETHER OR NOT YOU OWE ANYTHING TO THE DEFENDANTS. IF YOU PROPERLY ANSWER THIS WRIT, ANY JUDGMENT AGAINST YOU WILL NOT EXCEED THE AMOUNT OF ANY NONEXEMPT DEBT OR THE VALUE OF ANY NONEXEMPT PROPERTY OR EFFECTS IN YOUR POSSESSION OR CONTROL. JUDGMENT MAY ALSO BE ENTERED AGAINST THE DEFENDANTS FOR COSTS AND FEES INCURRED BY THE PLAINTIFF." Clerk's Papers at 19-20.

[3] Clerk's Papers at 24.

any amount had been received with the writ. Although the bank employee admitted the bank might have lost the check, he insisted that Bellevue Square could not simply reissue the lost check because "the garnishment had not even been entered into Wells Fargo's 'system,'" so Bellevue Square must begin the garnishment process anew.[4] Bellevue Square responded that it would seek a default if Wells Fargo did not answer the writ.

Wells Fargo did not answer. Bellevue Square served Wells Fargo with notice of its motion for default and default judgment. The motion and supporting declaration informed the court that Wells Fargo disputed having received proper payment and attached Wells Fargo's letter to that effect.

Again, Wells Fargo took no action. With no response to the motion, no appearance at the hearing, and "it appearing that garnishee was properly served with a Writ of Garnishment," the court entered a default judgment against Wells Fargo for $72,749.18.[5]

Three months later, Wells Fargo moved to vacate the default judgment. It argued (1) there was an irregularity in obtaining the judgment because the writ was never validly served; (2) the default resulted in a windfall for Bellevue Square that constituted extraordinary circumstances; and (3) Bellevue Square's failure to advise the court that the answer fee check had never been cashed amounted to "fraud, misrepresentation, or other misconduct."[6]

[4] Clerk's Papers at 81.

[5] Clerk's Papers at 30-31.

The court granted Wells Fargo's motion to vacate, but ordered Wells Fargo to "pay for every single penny that [Bellevue Square had] put into this ridiculous situation."[7]

DISCUSSION

Bellevue Square contends the court erred in granting the motion to vacate the default judgment. We review the matter for abuse of discretion.[8]

Irregularity

A court may vacate a judgment for "irregularity in obtaining a judgment or order."[9] Wells Fargo maintains that Bellevue Square failed to include an answer fee payment with the writ of garnishment and this failure constitutes such an irregularity. Because the answer fee is a statutorily required component of service of the writ, Wells Fargo's argument presents a postjudgment attack on service.[10] Accordingly, it must prove by clear and convincing evidence that service was improper.[11] This it has failed

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[6] Clerk's Papers at 39.

[7] Report of Proceedings (RP) (May 31, 2011) at 10.

[8] Jones v. Home Care of Washington, Inc., 152 Wn. App. 674, 679, 216 P.3d 1106 (2009), review denied, 169 Wn.2d 1002, 236 P.3d 205 (2010).

[9] CR 60(b)(1).

[10] See RCW 6.27.110 ("Service of the writ of garnishment . . . is invalid unless the writ is served together with . . . a check or money order . . . for the answer fee.").

[11] Farmer v. Davis, 161 Wn. App. 420, 428-29, 250 P.3d 138 (2011) (clear and convincing standard applies "where a party seeks to vacate an existing judgment"), review denied, 172 Wn.2d 1019, 262 P.3d 64 (2011) (citing Allen v. Starr, 104 Wash. 246, 247, 176 P. 2 (1918); Vukich v. Anderson, 97 Wn. App. 684, 687, 985 P.2d 952 (1999); In re Dependency of A.G., 93 Wn. App. 268, 277, 968 P.2d 424 (1998); Woodruff v. Spence, 88 Wn. App. 565, 571, 945 P.2d 745 (1997); Leen v. Demopolis, 62 Wn. App. 473, 478, 815 P.2d 269 (1991) ("[a]n affidavit of service that is regular in form and substance is presumptively correct," and "[t]he burden is upon the person attacking service to show by clear and convincing proof that the service was

to do.

The only evidence Wells Fargo produced to prove Bellevue Square submitted no answer fee payment is the declaration of its paralegal, Chere Oliver. Oliver's declaration states that her testimony is "based upon my knowledge of the associated business records and their contents as well as my personal knowledge regarding this specific case."[12] She asserts:

> I am familiar with the process by which Wells Fargo receives, tracks and responds to writs of garnishment, including records kept and maintained regarding the receipt of answer fees associated with such writs (the "Fee Records"). I personally know that the records at issue, including the Fee Records, are kept in the course of regularly conducted business and are a matter of the business routine.[13]

Oliver concludes, "The documents served upon Wells Fargo did not include a check for the answer fee of $20 . . . . I have confirmed this by review of the Fee Records maintained by Wells Fargo Bank."[14]

Bellevue Square contends Oliver's testimony is inadmissible hearsay for which Wells Fargo has established no exception.[15] We agree.

Wells Fargo argues Oliver's testimony was admissible under the business records exception and relies on Discover Bank v. Bridges.[16] Discover Bank is

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improper.").

[12] Clerk's Papers at 44.

[13] Id.

[14] Clerk's Papers at 45.

[15] Wells Fargo argues Bellevue Square cannot challenge admissibility of the declaration for the first time on appeal. But Bellevue Square did challenge this evidence below as "blatant hearsay" that was not grounded in personal knowledge. See RP (May 31, 2011) at 8; Clerk's Papers at 57-58. The issue is not waived.

[16] 154 Wn. App. 722, 226 P.3d 191 (2010).

inapposite. The issue there was not whether the affidavits at issue contained hearsay, but whether they "contain[e]d sworn testimony by competent fact witnesses" under CR 56.[17] Further, the affiants in Discover Bank attached "true and correct copies" of the business records about which they testified.[18] Oliver did not.

The business records rule, ER 803(a)(7), allows the court to admit:

> Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of RCW 5.45, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

Although Oliver testified she was familiar with the records kept by Wells Fargo, including records of answer fees, she did not testify that receipt of the answer fee was a matter "of which a . . . record . . . was regularly made and preserved."[19] Nor did she provide the necessary foundation to show the records to which she referred were "kept in accordance with RCW 5.45."[20]

In contrast, Bellevue Square produced strong evidence of proper service, including its original declaration of service, a copy of the check dated December 16, 2011, and paralegal Jodi Graham's declaration stating, "I specifically remember attaching the check for $20 to the very top of the documents, placing the documents

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[17] Id. at 725-26.

[18] Id. at 726.

[19] ER 803(a)(7).

[20] Under RCW 5.45.020, a qualified witness must "testif[y] to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event."

with the check in the envelope, sealing the envelope and placing the envelope in the mailbox to be mailed to Wells Fargo, as is my usual procedure."[21] Graham also testified that Wells Fargo's legal order processing department said nothing about a missing check when it confirmed receipt of the writ. Against this evidence, Oliver's declaration, even if admissible, does not satisfy Wells Fargo's burden to prove by clear and convincing evidence that no check was served.[22]

Excusable Neglect

Wells Fargo next argues, for the first time on appeal,[23] that its failure to respond to the default was due to excusable neglect. A party moving to vacate a default judgment on that basis must show (1) substantial evidence of a prima facie defense to the claim against it, (2) failure to timely appear and answer was due to excusable neglect, (3) defendant acted with due diligence after notice of the default judgment, and (4) plaintiff will not suffer substantial hardship if default is vacated.[24]

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[21] Clerk's Papers at 95-96.

[22] Interestingly, Wells Fargo also claimed no fee was attached to Bellevue Square's second writ of garnishment (to collect its judgment against Wells Fargo itself). The bank then confirmed the fee was indeed received. Thereafter however, Wells Fargo's counsel made the same assertion (that no check was received) in an e-mail to counsel for Bellevue Square, only to withdraw the assertion as unfounded soon thereafter. (The trial court refused to consider the e-mail because it carried a caption invoking ER 408, but its contents had nothing to do with settlement.) This series of errors does little to suggest confidence in the garnishment recordkeeping.

[23] Though Wells Fargo expressly declined to argue excusable neglect below, it mentioned the theory in its motion, and its argument here relies only on evidence presented to the trial court. "A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground." RAP 2.5(a).

[24] Little v. King, 160 Wn.2d 696, 703-04, 161 P.3d 345 (2007).

Wells Fargo contends its failure to answer the writ was excusable because it believed the missing check rendered service invalid and it promptly notified Bellevue Square of the omission.[25] But the issue here is not the reasonableness of the bank's failure to answer the *writ*, however debatable that may be. Rather, the issue is Wells Fargo's failure to respond to the *motion for default*, which was a deliberate decision based on the mistaken assumption that the court would not enter a default judgment under these circumstances. This is not neglect.[26] The judgment should not have been vacated on these grounds.

Equity

In general, courts prefer to decide cases on the merits, and default judgments are disfavored.[27] "A proceeding to vacate or set aside a default judgment is equitable in its character, and the relief sought or afforded is to be administered in accordance with equitable principles and terms."[28] Thus, "where there is a showing, not manifestly insufficient, the court should be liberal in the exercise of its discretion in furtherance of justice."[29]

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[25] In its motion to vacate, Wells Fargo explains: "Wells Fargo admittedly did not respond to Default Motion, in part because it considered the First Writ to be invalid on its face due to the omission of the Required Payment." Clerk's Papers at 34.

[26] See Bishop v. Illman, 14 Wn.2d 13, 126 P.2d 582 (1942) (where garnishee defendant refused to answer the writ on grounds that it had no account and no money belonging to judgment debtors and failed to respond to motion for default judgment, "it appears to us that the evidence conclusively establishes a willful disregard of the writ on the part of the garnishee defendant. This, the court will not tolerate.").

[27] Morin v. Burris, 160 Wn.2d 745, 754, 161 P.3d 956 (2007).

[28] Id.

[29] Id. (internal quotation marks and citation omitted).

Wells Fargo contends that it was equitable to vacate the default judgment because Bellevue Square should not be able to recover several thousand times the $202 Wells Fargo actually held for the judgment debtor, and Wells Fargo made Bellevue Square whole by paying all attorney fees and costs associated with obtaining and defending the default judgment.

But "[w]here a party fails to provide evidence of a prima facie defense and fails to show that its failure to appear was occasioned by mistake, inadvertence, surprise, or excusable neglect, there is no equitable basis for vacating judgment. It is thus an abuse of discretion."[30]

Here, Wells Fargo had no defense on the merits to the garnishment – it admitted it held funds of the judgment debtor. The writ of garnishment warned that failure to respond could result in a judgment against Wells Fargo for more than $71,000. If Wells Fargo believed service was improper, it could have entered a special appearance to argue that point in opposition to the default. Or it could have exercised its statutory right to reduce the judgment to the amount in the judgment debtor's accounts at the time it received the writ, plus attorney fees.[31] Wells Fargo pursued

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[30] Little, 160 Wn.2d at 706.

[31] RCW 6.27.200 provides, in pertinent part: "[U]pon motion by the garnishee at any time within seven days following service on, or mailing to, the garnishee of a copy of the first writ of execution or writ of garnishment under such judgment, the judgment against the garnishee shall be reduced to the amount of any nonexempt funds or property which was actually in the possession of the garnishee at the time the writ was served, plus the cumulative amount of the nonexempt earnings subject to the lien provided for in RCW 6.27.350, or the sum of one hundred dollars, whichever is more, but in no event to exceed the full amount claimed by the plaintiff or the amount of the unpaid judgment against the principal defendant with all accruing interest and costs and attorney's fees as prescribed in RCW 6.27.090, plus the accruing interest and

none of these options and instead simply chose to do nothing. Under these circumstances, the equities do not weigh in favor of vacating the default.

Reversed and remanded for reinstatement of the judgment.[32]

WE CONCUR:

costs and attorneys' fees as prescribed in RCW 6.27.090 for any garnishment on the judgment against the garnishee, and in addition the plaintiff shall be entitled to a reasonable attorney's fee for the plaintiff's response to the garnishee's motion to reduce said judgment against the garnishee under this proviso and the court may allow additional attorney's fees for other actions taken because of the garnishee's failure to answer.

[32] Given this disposition, we do not address Bellevue Square's argument that the court also erred by striking the emails between the parties' counsel.